

# REDUCING LOW-LEVEL OFFENDER INCARCERATION AT THE FEDERAL LEVEL

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## Disclaimers

The author conducted this study as part of the program of professional education at the Frank Batten School of Leadership and Public Policy, University of Virginia. This paper is submitted in partial fulfillment of the course requirements for the Master of Public Policy degree. The judgments and conclusions are solely those of the author, and are not necessarily endorsed by the Batten School, by the University of Virginia, by the Department of Justice, or by any other agency.

## Acknowledgments

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Finally, I would like to thank my father. Without him I would not have a passion for criminal justice reform. Nor would I believe so strongly in the need for equitable and meaningful reform to correct systemic injustices that exist in our country. He is a role model for me and inspires me to commit myself to working to make our country live up to its ideals, especially in the criminal justice system.

## Honor Statement

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On my honor as a student, I have neither given nor received aid on this assignment.

- Jordan Sicklick

## Acronyms

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**BOP:** Federal Bureau of Prisons

**DOJ OPL:** Department of Justice, Office of Policy and Legislation

**MHCs:** Mental Health Courts

**NPV:** Net Present Value

**VOM:** Victim-Offender Mediation

## Terms

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**Retributive Justice:** Retributive justice is a system of criminal justice that focuses on punishment rather than rehabilitation.

**Restorative Justice:** Restorative Justice is a process that tries to undo the negative impacts of interpersonal conflict or crime, rehabilitate offenders, and reconstruct relationships between victims, offenders, and their communities. Instead of holding offenders accountable by formal punishment, restorative justice tasks offenders with the responsibility of reconciling the harms they have imposed.

**Restorative Justice Mediation:** The mediation process typically includes a facilitated discussion between victim and offender, a shared dialogue about the effects of the crime, the formulation of an agreement that satisfies all parties involved, and a planned follow-up to ensure compliance.

**Restorative Justice Circles:** Restorative justice circles emphasize community models of justice. Members of a community, including important stakeholders in an offender's life and those affected by their crime, come together to express their feelings and decide on traditional as well as rehabilitative sanctions for an offender.

**Restorative Justice Conferences:** Restorative Justice conferences typically involves the inclusion of stakeholders in a crime, as well as family or support systems to assist in the formulation of offender rehabilitation obligations.

## Table of Contents

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<i>Executive Summary .....</i>	<i>1</i>
<i>Problem Statement .....</i>	<i>4</i>
<i>Client Overview .....</i>	<i>5</i>
<i>Background .....</i>	<i>7</i>
<i>Consequences of Current Approaches.....</i>	<i>9</i>
<i>Literature Review .....</i>	<i>13</i>
Criminal Justice Leaders & Policy.....	13
Alternatives to Retributive Justice .....	14
<i>Proposed Policy Options: .....</i>	<i>19</i>
Option 1: Status Quo .....	19
Option 2: Expand Mental Health Courts .....	19
Option 3: Expand Restorative Justice Circles, Conferences, and Mediation .....	20
Option 4: Increase Funding for Drug Courts .....	20
<i>Criteria:.....</i>	<i>21</i>
Equity (25%) .....	22
Cost (25%) .....	21
Effectiveness (30%).....	21
Feasibility (20%) .....	22
<i>Option Evaluations .....</i>	<i>24</i>
Option 1: Status Quo .....	25
Option 2: Expand Mental Health Courts .....	27
Option 3: Restorative Justice Pilot Programs .....	30
Option 4: Increase Drug Court Funding .....	33
<i>Outcomes Matrix.....</i>	<i>36</i>
<i>Recommendation.....</i>	<i>37</i>
<i>Implementation .....</i>	<i>39</i>

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<i>Conclusion</i> .....	42
<i>Appendices</i> .....	44
<i>References</i> .....	48

## Executive Summary

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Punishment for offenders in the U.S. federal criminal justice is based on retributive forms of justice. The retributive forms of justice provide for an incarceration and punishment-first response to crime. This approach disproportionately targets minority individuals, especially at the federal level where 38.5 percent of federal inmates are Black, yet Black individuals make up just 13.4 percent of the U.S. population (BOP Statistics: Inmate Race, 2021). Evidence suggests that increasing incarceration has only a marginal impact on decreases in crime rate, and nearly zero impact on crime rate since 2000 (Stemen, 2017).

With an emphasis on punishment rather than rehabilitation, we are missing a vital component of offender treatment at the federal level. Long and harsh sentences perpetuate systemic inequities and seem to be less effective at producing better outcomes than offender programs that focus on rehabilitation and reconciliation. These programs work to target the source of criminal action, and in processes that diverts offenders away from incarceration, provide the necessary resources for effective interventions for a better future. High offender and victim (where applicable) experiences and lower long-term recidivism rates provide promising signs that diversion programs create a more equitable and effective system focused on rehabilitative forms of justice over traditional retributive models.

Based on review of relevant literature and consideration of the unique landscape of the federal docket and justice system, I have identified four policy options for evaluation in pursuit of a more equitable and effective justice model for low-level federal offenders:

1. **Status Quo:** Allow present federal systems of incarceration and alternative justice programs to continue
2. **Mental Health Court Expansion:** Implement 50 mental health courts at the federal level over the next five years
3. **Restorative Justice Pilot Programs:** Create and implement 25 community-based restorative justice pilot programs
4. **Drug Court Funding:** Double current federal drug court funding for greater federal offender access

I will evaluate each option based on four criteria: (a) Effectiveness, (b) Cost, (c) Equity, and (d) Overall Feasibility. My analysis suggests that developing **Restorative Justice Pilot Projects** at the federal level provides the most promising approach in working towards a more rehabilitative and equitable federal justice system.

Restorative justice programs will require rigorous planning, community education, and evaluation to ensure success and best practices for expansion. The federal docket is unique – and restorative justice is relatively new to the federal criminal justice system. Effective implementation will pull best practices from existing restorative justice program, while tailoring new pilot programs to unique make-up of the federal docket.

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## *Defining the Problem & Client*

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## Problem Statement

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The federal government continues to rely on retributive forms of justice for low-level offenders. Without substantive policy change for these largely non-violent offenders, mass incarceration will remain the norm, allowing a system that is systemically flawed to continue to operate. I intend to focus in on the problems that exist with mass incarceration that we can work to solve by moving away from retributive models. Mass incarceration is the result of decades of punishment-based justice for low-level offenders – disproportionately black and brown individuals. We can work to improve recidivism rates and the effectiveness of taxpayer dollars by building a system that is just and fair. *The United States incarcerates too many people for low-level offenses due to an overreliance on punishment-based justice models. These models perpetuate unfair, ineffective, and systemically racist practices in the criminal justice system.*

The Brennan Center for Justice issued a report in 2016 analyzing whether we should keep certain inmates behind bars for valid public safety reasons. Using data from 1.46 million inmates in 48 different states, they concluded that for a large subset of crimes, prison is likely not the most effective intervention (Austin et al., 2017). They claim that public safety may even benefit from certain alternatives to mass incarceration. It is important to define what subset of crimes fall into the category of low level – or those crimes where public safety may benefit from less incarceration. “These categories of crimes include those that do not result in serious harm to a victim or substantial destruction of property; where malicious intent may not have been present; and/or where prison may not serve as the most effective penalty to reduce recidivism (Austin et al., 2017).” At the federal level, we will focus on non-violent drug, firearm, and Fraud/Theft/Embezzlement offenders – representing the largest offender groups potentially eligible for alternative justice models. Working to fix these problems with mass incarceration with substantive policy changes and meaningful alternatives to current incarceration practices can help develop a fairer and more equal justice system.

## Client Overview

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My client is Jonathan Wroblewski, Director of the Department of Justice Office of Policy and Legislation (DOJ OPL). The department is very interested in the future of incarceration, including the use of any diversion programs as criminal justice reform becomes more important and relevant in today's social and political climate. Changes in prosecutorial and sentencing practices directly affect my client, as they work with the Federal Sentencing Commission and serve as a liaison for the Justice Department on federal criminal justice legislation (Office of Policy and Legislation, 2015). Additionally, implementation of specific diversion programs at the federal level is part of President Joe Biden's criminal justice platform and will certainly be part of the administration's policy agenda in the coming years (Joe Biden, 2020). There is not a clear plan for practical implementation of such programs, and my client can use this analysis in the future when leaders look to implement retributive alternatives to address the unjust systems of mass incarceration, specifically for low-level offenders.

The DOJ OPL, part of the criminal division, conducts the staff work for the Attorney General's representative on the U.S. Sentencing Commission. The OPL's position provides a unique opportunity to make recommendations to the Sentencing Commission and DOJ leadership on potential changes to Sentencing Guidelines, the Justice Manual, and DOJ policy regarding alternative forms of justice and the implementation of diversion programs.

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## *Background & Literature Review*

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## Background

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From 1960 to 1980, crime in America increased 270% (Eisen & Chettiar, 2016). In 1974, the imprisonment rate in the country was 102 per 100,000. By 2007, imprisonment reached its peak of 506 per 100,000 people. African American and Latino communities experienced most of this rise in crime, and by the late 1970s people of color were victims of crime at a rate 24% higher than white individuals in America (Eisen & Chettiar, 2016). This response from states and the federal government represented a major shift to a retributive, punishment-based form of justice. New laws and policies dramatically lengthened sentences for many crimes and created entirely new crime definitions. New punitive policies such as mandatory minimums, parole abolishment, and a myriad of new criminal laws caused the prison population in the United States to skyrocket.

In 1984, Congress created the U.S. Sentencing Commission. There were concerns that judges had too much discretion in sentencing, resulting in disparate treatment of defendants and lenient sentencing practices. Congress tasked the Sentencing Commission with creating guidelines that limited judicial discretion and handed down stronger penalties to offenders. The Crime Bill of 1994 was part of the “war on drugs”, a policy that disproportionately targeted and arrested African Americans, and increased prison stays dramatically. The average length of stay in state prisons from 1993 to 2009 increased by 33 percent. In the federal prison system during that time, the average length of stay more than doubled (Eisen & Chettiar, 2016).

States received incentives to build more jails and prisons and pass truth-in-sentencing along with other punitive measures. These laws increased the length and number of prison terms for inmates while simultaneously reducing the chances of early release. Under the guise of public safety, the Crime Bill led to staggering taxpayer dollars invested into the enforcement of these new initiatives which led to the disproportionate incarceration of African American men in America (Chung et al., 2019). Today, America incarcerates an estimated 2.2 million people in our jails and prisons. African Americans make up roughly 13.4 percent of the U.S. population but 38.5 percent of the nation’s prison population.

State and federal leaders in politics and in the criminal justice system turned to retributive prison-based models of punishment in order to deter crime and keep dangerous criminals off the streets. With incarcerations at all-time high in the late 2000s and early 2010s, there were widespread calls for reductions in mass incarceration across the country. President Obama presided over the first reduction in the federal prison population since President Carter (Gramlich, 2017). President Obama made criminal justice reform an important piece of his policy platform from the beginning of his presidency. His Justice Department under Attorney General Eric Holder launched the *Smart on Crime Initiative*. This initiative told federal prosecutors to charge and lock-up fewer low-level drug offenders. The policy changes also emphasized lighter sentences for those convicted of low-level offenses in general (Lopez, 2017). Obama also used his executive clemency power more than any other modern president, commuting the sentences of more than 1,320 inmates. The Sentencing

Commission also made a decision to direct judges to make more lenient sentences for drug crimes, both in the future and retroactively (Lopez, 2017).

Criminal Justice reform saw its first legislative victory in more than a decade at the end of 2018 in the form of the First Step Act. What began as a bipartisan bill in 2015 but died due to election year politics, turned into a Trump Administration criminal justice bill with a lot of compromises. Despite those compromises, the First Step Act takes positive steps in creating a federal justice system that is fairer and more focused on rehabilitation. The law's sentencing reform elements shorten federal sentences and give people chances to avoid mandatory minimums. The law expands the "safety valve" that allows judges to impose sentences that are lower than the statutory minimum on some cases (Grawert, 2020). This allowed judges to immediately begin sentencing people to shorter sentences in cases that came before them and allowed for resentencing for people in federal prison convicted of crack cocaine offenses before 2010. This provided relief from the lack of retroactivity in The Fair Sentencing act of 2010, which only allowed for reduced crack cocaine sentences on a forward-going basis. Thousands have benefitted from resentencing or reduced sentencing from previous mandatory minimums. One year after President Trump signed the First Step Act into law, the federal prison population shrunk by about 5,000, continuing several years of decline (Grawert, 2020).

Another important element of The First Step Act is a focus on rehabilitation in prisons, but there have been issues with follow-through on these policies. This focus shift in prisons, mandatory minimum reductions, and resentencing opportunities for low-level offenders are steps in the right direction. However, the federal government needs to explore alternatives to incarceration for low-level offenders at the federal, as they provide promising signs for increasing public safety, reducing recidivism rates, and addressing economic and racial disparities perpetuated by our current justice system. Today, despite some reduction in levels of incarceration, many recognize the need for widespread alternatives to a system that continues to be based on punitive punishment models. Not only does this system of incarceration disproportionately imprison people and communities of color, but it also has far-reaching effects on the economic mobility of African American families and communities.

Figure 1 is from a 2020 U.S. Sentencing Commission report on the total number of federal offenders sentenced in 2019 by crime type. This provides context on the unique nature of the federal docket, and we must consider how the type of criminals prosecuted at the federal level contributes to the effectiveness of any policy intervention. 38.4 percent of all federal offense in 2019 were immigration related. These individuals will not be eligible for any proposed alternatives.

Figure 1: (U.S. Sentencing Commission, 2020)

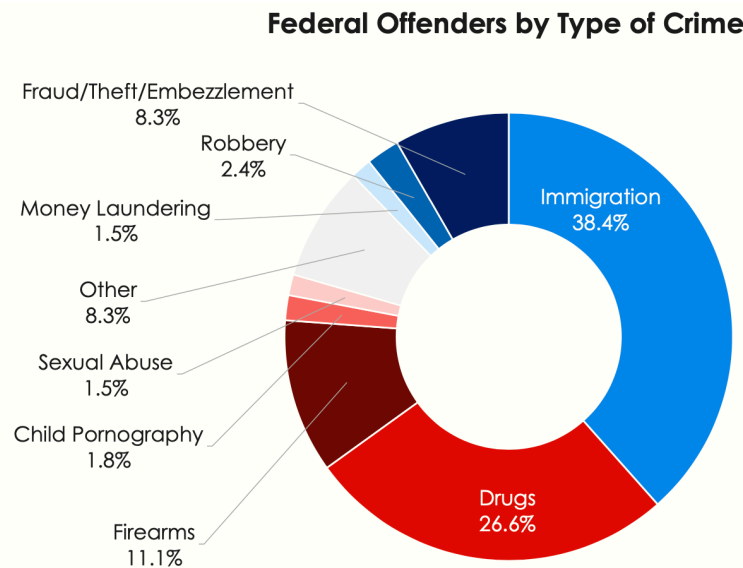


Figure 2 provides a breakdown by race from the 2019 federal sentencing data. Hispanic offenders made up 96.4 percent of all immigration offenders. White and Black offenders made up most of the drug offenses (33.1 percent and 35.4 percent, respectively). Not accounting for high levels of immigration offenses, we still see disproportionately high rates of arrest and sentencing for Black and minority Americans.

Figure 2: (U.S. Sentencing Commission, 2020)

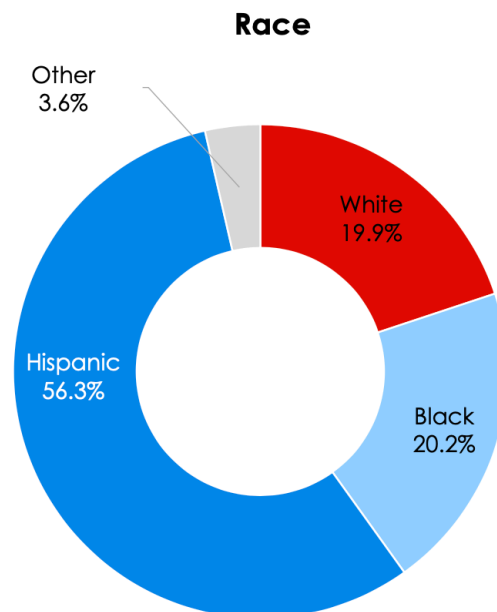
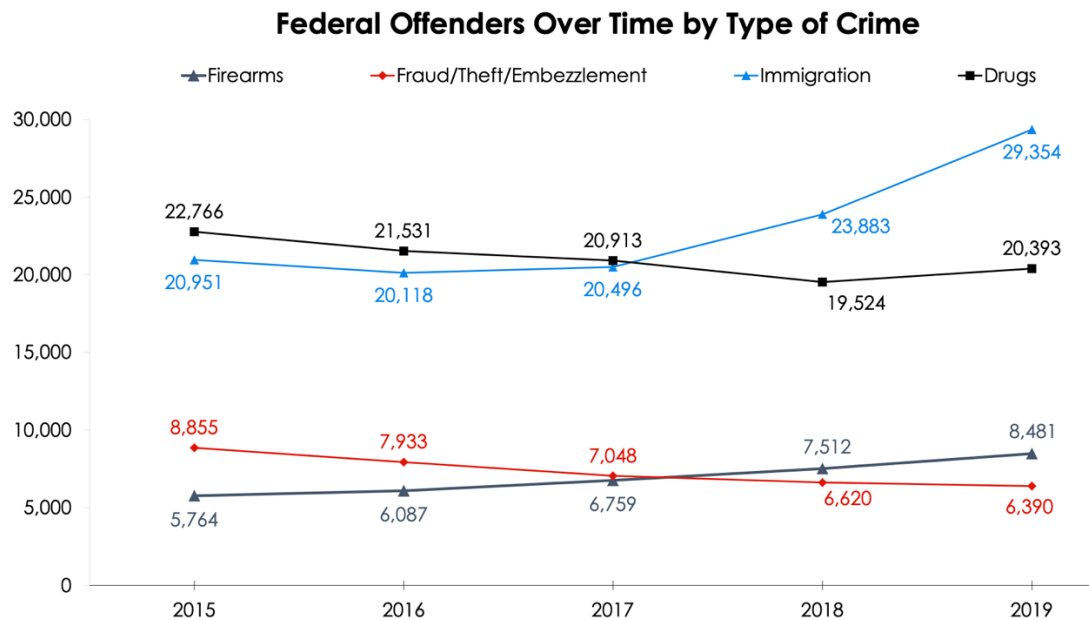


Figure 3 shows the trends in federal offenders over time by type of crime. Drug offenses have decreased gradually but increased in 2019. Firearm offenses have steadily increased over the past 5 years. It is important to understand trends in these crime types in developing and evaluating policy options.

Figure 3: (U.S. Sentencing Commission, 2020)



## Consequences of Current Approaches

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America incarcerates over 2 million people. The public spends over \$80 billion a year to maintain the beds, staff, food, and facilities in jails, prisons, and detention centers across the country (Semuels, 2015). Experts say that this total is likely a gross underestimate, as it doesn't take into account the money that family members of incarcerated individuals spend on prisoners which can add up to hundreds of dollars a month (The Hidden Cost of Incarceration, 2019). In order to help feed, clothe, and stay connected to family members or loved ones in prison, families often take money from rent and food for their families, or their own healthcare costs. The Prisons Policy Initiative estimates that families spend around \$2.9 billion a year on commissary accounts and phone calls (Rabuy & Wagner, 2017). The \$80 billion price tag for taxpayers fails to include policing and court costs, and costs paid by families to support incarcerated loved ones. Researchers believe the true cost of mass incarceration is around \$182 billion a year (Mass Incarceration Costs \$182 Billion Every Year, 2017). This is the costs for all prisoners. The cost to society for those low-level offenders who may be better off outside of the incarceration model is more difficult to ascertain.

The Brennan Center for Justice advocates for the release of around 576,000 people from prison. These are mostly low-level offenders, along with higher level offenders who have already served extremely long sentences at all prison levels. They estimate that releasing these individuals will save around \$20 billion and almost \$200 over the next 10 years (Austin et al., 2017). This is certainly more than the low-level offenders that we are focusing on, but it explains how we spend billions of dollars a year on traditional incarceration.

A 2007 report from the Oregon Criminal Justice Commission used research on the economics of prisons to explain how the public safety returns on incarceration declined as inmate populations grew. They found that a dollar spent on prison in 2005 returned \$1.03, whereas in 1994 a dollar spent on prison returned \$3.31 (Hyperakt, 2013). This is as prison populations were steadily increasing. The same report looked at the effectiveness of incarceration and the public safety return on the cost based on the severity of the offense. Each dollar spent in 2005 to incarcerate a violent offender yielded \$4.35 in public safety benefits (Hyperakt, 2013). This reinforces the efficacy of incarcerating violent offenders. There may be validity in releasing long serving high-level offenders as the Brennan Center for Justice believes, however we are focusing on low-level offenders. Each dollar spent in 2005 on incarcerating drug offenders (low-level offenders) yielded \$.35 in public safety benefits – the costs were roughly three times more than the benefits (Hyperakt, 2013). For low level offenders, there are effective alternatives to incarceration that can reduce recidivism and protect the public, while providing for a better use of government and public resources.

Lost wages hurt incarcerated individuals and their families. The opportunity cost of being in prison instead of spending that time making a living and contributing to society is a major loss to GDP and a loss of productivity. Subtracting the cost of production while in prison, the average inmate incurs \$36,304 in productivity losses in 2020 dollars (McLaughlin et al., 2016). This amount, multiplied by



the approximately 360,000 low-level offenders who ought to be out of prison, is an annual production loss of over \$13 billion. These are inmates with families, children, and futures. Incarcerated individuals also face reduced earnings post-incarceration (McLaughlin et al., 2016). This loss of earnings hurts families and former inmates trying to get their lives on track and is a loss of productivity to society as these individuals cannot participate in many job opportunities and contribute to the economy. This loss of productivity is a major externality stemming from the current retributive model. There are certainly many who need to be behind bars, but the externality that arises from our harsh retributive criminal justice model is a detriment to families and our society.

Researchers estimate that the total direct and opportunity cost aggregate burden of incarceration in the U.S. is over \$1 trillion annually. This is nearly 6 percent of GDP and over 11 times the amount of corrections spending by states and the federal government (McLaughlin et al., 2016). The cost to families is enormous, and the opportunity costs of our retributive model compounds each year as more people are in prison, and not contributing to their families and the success of American industry and society. Lawmakers may underestimate the costs of incarceration by only looking at the direct costs to taxpayers, but the true costs lie in the costs to families and their incarcerated loved ones. It is very difficult to truly estimate the aggregate burden of the millions incarcerated, or for only low-level offenders, but the truth is that our retributive model has led to increasingly high burdens on families and incarcerated individuals, many of whom can benefit themselves, their families, and the country if we establish other means of addressing certain crimes in the criminal justice system. I am not arguing for the government to forgo all prison sentences at the federal level. The analysis below will determine whether it is possible to substantially reduce this aggregate burden, and whether we can find a more efficient use of direct incarceration costs.

## Literature Review

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Researchers and advocates alike believe that there are many different possibilities for the future of criminal justice reform. Some focus on electing the right political leaders to ensure the possibility of a progressive criminal justice agenda. Others focus on developing alternative programs to incarceration that put the emphasis on rehabilitation and education rather than punishment and imprisonment. Each state has their own statutes and programs, and the federal government has largely kept its punishment-first model. However, evidence suggests that certain programs may be effective alternatives to traditional incarceration for low-level offenders.

### Criminal Justice Leaders & Policy

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Leaders in the criminal justice reform community highlight the need for a President that is committed to strong criminal justice reform, and who will use the bully pulpit to educate the America public on the reforms necessary to ensure fairness and public safety. Reform minded Attorney Generals, U.S. Attorneys, and sentencing commissioners, along with changes to federal charging and sentencing practices are important first steps in changing the landscape of mass incarceration at the federal and state levels (Sangree, 2020). Advocacy organizations show evidence that leaders who believe in reforming the criminal justice system will be essential to changing policy for the better. The Brennan Center for Justice calls for an end to mandatory minimum sentences and retroactive sentencing relief for those who are serving incredibly long sentences.

Because political actors are so involved in criminal justice reform, public support is important in developing new legislation and programs aimed at reducing mass incarceration. The public is usually hesitant to support new criminal justice reform policies due to fear and misleading rhetoric surrounds these issues. For example, many in the public and even within the federal justice system responded harshly to the reduction in federal drug sentences. In 2007, the U.S. Sentencing Commission reduced federal crack cocaine sentences. The changes were retroactive so people already serving sentences could petition for reduced sentences. The Sentencing Commission studied this decision five years later and found that those who served for shorter periods of time had lower recidivism rates than those who served their full sentences. These findings led the commission to reduce all federal drug sentences retroactively in 2013 (Sangree, 2020). Decisions grounded in evidence for reducing or moving away from our strict retributive criminal justice models work best. But the evidence is sparse for alternative programs to prison models thus far. Reform minded public officials who act on these evidence-based practices is a positive first step to move away from our retributive model. I believe that this is an important element in understanding how to ensure effective criminal justice reform, yet we must look further at what policy options will address the issues in our retributive system.

### Alternatives to Retributive Justice

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The inevitable reaction to rolling back harsh sentences imposed in the late 20th century one of overreaction once violent crime begins to increase over an extended period. Overreactions to increasing crime numbers takes the form of new policy options that are “tough on crime” and those that perpetuate the punishment-based models of justice we have today. violent crime with the need for more policies that are “tough on crime”. Alternatives to retributive justice models start with providing prosecutors with alternatives to incarceration that can keep people out of prison, provide rehabilitation services, and reduce costs to taxpayers while eliminating opportunity costs of prison on wages and productivity. The goals of effective alternatives to incarceration will address the high levels of federal incarceration, as well as the inequitable outcomes for minority individuals. Byproducts of the alternatives will hopefully include reduced recidivism and more cost-efficient outcomes.

Diversion programs encompass all programs developed to steer offenders away from prison, and into rehabilitative settings to improve outcomes. These programs for youth and mentally ill criminals began back in the 1970s and exist today mostly at the state and local level. Many mental health and substance abuse courts and programs are initiatives put in place to divert persons with mental illness and substance abuse issues from the criminal justice system to the mental health care system. “These programs can be understood as two broad interlocking areas of intervention: 1) the diversion mechanism, or the means by which an individual suffering from mental illness is identified and diverted; and 2) the mental health system to which the person is diverted (Draine & Solomon, 1999; Lange et al., 2011).” Only recently have meta-analyses attempted to figure out whether these programs have reduced recidivism rates, therefore reducing the number of individuals incarcerated. One meta-analysis focusing on youth crime that combined the results from 45 diversion evaluation studies concluded that recidivism rates decreased significantly when youth took part in diversion programs versus traditional judicial processing (Wilson & Hoge, 2013). They coded each individual study based on the design quality. This allowed them to ensure random assignment design (no differences between groups found post hoc, follow-up greater than 12 months, diversion sample size greater than 100, loss of follow-up data less than 10 percent) and the ability to determine causal effects. The researchers looked at two types of diversion programs that involve differing levels of intervention. The first were caution or warning programs which served to divert youth out of the system with no further action, aside from a warning. The second were more formal diversion programs which typically involve conditions, including admissions of guilt and agreements to participate in additional programming. The average recidivism rate for youth in either of these diversion programs was 31.5 percent, while the average for youth for traditionally processed youth was 41 percent (Wilson & Hoge, 2013). This was a statistically significance difference in recidivism rates. Although the goal here is to find best practices for reducing recidivism, the product of that goal is a decrease in future mass incarceration, and these youth programs seem to improve upon traditional youth criminal processing practices.

Diversion programs for mentally ill criminals have often taken the form of mental health courts (MHCs) (Landess & Holoyda, 2017). Once accepted into an MHC, participants must give informed consent to the terms of participation in the court. This consent commonly includes engaging in substance/mental health treatment, maintaining sobriety, taking psychotropic medication, or attending court hearings and agreeing to intensive monitoring. Programs require participants to follow a treatment plan formulated by community treatment providers, court staff, or both. Analysis of the existing literature on the effectiveness of MHCs as part of diversionary programs to remove mentally ill criminals from prisons is not overly conclusive. Some studies have found decreases in recidivism rates, such a study by McNiel and Binder in 2007. McNiel and Binder performed a retrospective analysis comparing MHC participants with other adults with mental illness who entered jail during the same time period. They used a matching strategy based on propensity scores to adjust analyses for nonrandom selection into the mental health courts. Their regression also controlled for other confounding variables including demographic characteristics, clinical variables, and criminal history. They found that participants in MHCs were 26% less likely to obtain new charges and 56% less likely to obtain violent charges than individuals in a group that received usual treatment. Despite these findings and similar results from other studies, evidence from other studies suggests no difference between participants in MHCs and those who receive treatment as usual (McNiel & Binder, 2007).

“Diversion programs are, ideally, intended to interrupt the traditional criminal justice process, increase access to mental health services, avoid or shorten criminal justice incarceration, and, by linking persons to treatment, reduce or stabilize psychiatric symptomatology, substance use, hospitalization and recidivism, and increase their quality of life (Landess & Holoyda, 2017).” The evidence on diversion programs is quite mixed. However, they certainly provide an alternative to a retributive form of justice for individuals with mental health and/or substance abuse issues. Further developing these programs and including them within a greater framework of programs can be effective at creating a system of alternatives to prison-based punish that can reduce recidivism, and simultaneously increase productivity for society.

Federal and state governments have developed restorative justice initiatives to address high incarceration rates and reduce recidivism. One of the most common uses of restorative justice practices is in trying to address school to prison pipelines – the impact of zero tolerance or other harsh school suspension or expulsion discipline policies that disproportionately affect students of color in America. However, for the purposes of addressing mass incarceration, this discussion will focus on state and federal government restorative justice practices as alternatives to typical incarceration.

In 2015, Hawaii began its Restorative Justice Circle Pilot Project (RJ Circle Pilot Project). The United States Pretrial Services for the District of Hawaii, in partnership with Hawai'i Friends of Restorative Justice (HFRJ) administers the project. “Any person who has pled guilty to or has been sentenced for a federal felony offense in the District of Hawaii is eligible to apply to have a circle

with loved ones moderated by an experienced facilitator (Walker, 2020).” The circles apply “solution focused” and restorative justice approaches that allow individuals to direct their own reentry planning. They focus on the positive contributions that they can make with their families talking alongside them and lead the discussions to cognitively reinforce what their goals are, and what they are committing to. Controlling for self-selection by comparing the test group with those who wanted circle groups but were released prior to receiving them, an independent evaluation of the quantitative research results found that the test group had considerably lower rates of recidivism than the control group. Unfortunately, there is no data publicly available yet on the differences between the control and treatment groups. HFRJ has sponsored 168 circles for men, women, and 10 incarcerated juveniles to date. These circles began in Hawaii but have spread to multiple states around the country including New York, California, Washington D.C., North Carolina, and Vermont (Walker, 2020). Despite the recent development of these programs, researchers have concluded that they offer encouraging signs for human agency, which opens new doors for incarcerated or justice-involved individuals. The programs provide positive steps for reentry and make time spent in prison more productive. The programs might not be direct alternatives to incarceration, but provide opportunities for greatly reduced sentences, and have been able to ensure benefits that greatly outweigh their costs (Walker, 2020).

Restorative justice provides a model that allows for alternative responses to crime rather than a fixed set of practices in our traditional justice processes. A meta-analysis by Sherman et al. found 10 eligible studies that “measured recidivism by 2 years of convictions after random assignment of 1,880 accused or convicted offenders who had consented to meet their consenting victims prior to random assignment, based on “intention-to-treat” analysis (Sherman et al., 2015).” They found that restorative justice conferences (RJCs) between crime victims, their accused or convicted offenders, and their respective kin and communities “cause a modest but highly cost-effective reduction in the frequency of repeat offending by the consenting offenders randomly assigned to participate in such a conference (Sherman et al., 2015).” In the 10 studies, they found an average effect size of .155 standard deviations less repeat offending among the offenders in cases randomly assigned to RJC than among the offenders in cases assigned not to have an RJC. Out of the 10 studies, only one demonstrated a statistically significant effect, yet 9 out of 10 show less crime with RJCs than without them. Most importantly, when they calculated the average effect size across all 10 studies, the researchers wrote that “the pattern of findings can be described as statistically “significant” and favoring the benefits of RJCs (Sherman et al., 2015).” They also conducted a cost-effectiveness estimate from the seven experiments out of the United Kingdom and found a ratio of 3.7–8.1 times more benefit in cost of crimes prevented than the cost of delivering RJCs (Sherman et al., 2015). These are encouraging signs for the future of restorative justice and point towards a need to expand these programs across the country and include them within prosecutorial practices at state and federal levels.

Over the past 10 years, National Institute of Justice has evaluated 21 drug court programs and found that 19 of them produced “promising” or “effective” rating in their goals to reduce recidivism

and substance abuse. The other two courts showed “no effects”. On cost evaluations, for the courts that had available data, they found mixed results (Sacco, 2018). Some of the programs proved to have significant cost savings, yet others showed insignificant results on cost impacts. For example, one court studied over 10 years showed that treatment and other costs invested in the program per offender were \$1,392 less than investments in traditional criminal justice processing. Reduced recidivism rates also provide future cost savings in tradition criminal justice process investments. Over the 10-year period, lowered recidivism rates resulted \$79 million in cost savings (Sacco, 2018). An additional 5-year longitudinal study found a reduction in drug relapses and repeated criminal offenses after drug court programs compared to those not in these programs. These studies are ongoing but provide evidence in the ability for drug courts to lower recidivism rates, provide cost savings, and target racial inequities within our current justice system (Sacco, 2018).

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## *Policy Options & Evaluative Criteria*

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## Proposed Policy Options:

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### Option 1: Status Quo

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Maintaining the status quo in the criminal justice system is the first policy option. The current justice system and traditional justice models are majority punitive. However, in the past few decades we have seen a slow increase in the justice models of rehabilitation that have produced positive results, especially for low-level offenders. Individuals arrested on drug charges or who are mentally ill are beginning to receive more individualized treatment that targets the core issues of their arrest. Restorative justice programs are growing in use and popularity across the country – allowing victims to confront perpetrators or family and community members to confront arrested individuals to work on rehabilitation. Each of these approaches are positive steps towards diverting low-level offenders away from incarceration, and towards programs or institutions that focus on rehabilitation. Rehabilitation efforts reduce recidivism in many cases but unfortunately, a lot of data is inconclusive for certain interventions. Data on the cost of such interventions compared to traditional incarceration is also difficult to find. Different interventions produce different costs per case, and this is difficult to compare to large scale incarceration. “Diversion programs are, ideally, intended to interrupt the traditional criminal justice process, increase access to mental health services, avoid or shorten criminal justice incarceration, and, by linking persons to treatment, reduce or stabilize psychiatric symptomatology, substance use, hospitalization and recidivism, and increase their quality of life (Landess & Holoyda, 2017).” The evidence on diversion programs is quite mixed. However, they certainly provide an alternative to a retributive form of justice for individuals with mental health and/or substance abuse issues. This option will allow these programs to grow or exist as they currently do without any further intervention but might not directly address the inequities in our justice system or provide changes in cost.

### Option 2: Expand Mental Health Courts

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This policy option proposes targeted expansion of MHC services at the federal level around the country. Expansion will take the form of 50 new MHCs focused on federal prisoners in districts around the country most in need over the next 5 years. There are currently 350 MHCs in use around the country, and these 50 new courts focused on the federal level will provide a 14% increase in the number of courts. Diversion programs for mentally ill criminals have often taken the form of mental health courts (Landess & Holoyda, 2017). Researchers estimate that around 45 percent of all federal inmates have a mental illness (Kim, 2015). Typical courts, jails, and prisons are ill-equipped to address the true needs of individuals with a mental illness. MHCs try to break the cycle of courts and jails that many individuals with severe mental illnesses find themselves in. MHCs typically target non-violent offenders with a mental illness. The underlying assumption is that incarceration is not the right remedy for non-violent offenders who commit low-level offenses. The main goals of MHCs are to improve public safety by reducing recidivism, to improve outcomes for the mentally ill by providing treatment that focuses on their needs rather than their incarceration, and to reduce costs from courts and corrections through an alternative to incarceration (Almquist & Todd, 2009).



### Option 3: Expand Restorative Justice Circles, Conferences, and Mediation

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Our third policy alternative focuses on restorative justice initiatives. This policy option proposes the creation of 25 restorative justice pilot programs on the federal level. We will choose these 25 districts based on number of non-violent, low-level offenders in the districts, and the existing restorative justice apparatus in the state. Restorative justice circles exist at the federal level and should expand into federal court systems across the country. The programs can be most effective in a system where 46% of federal offenders in 2019 were drug (26.6%), firearms (11.1%), and Fraud/Theft/Embezzlement (8.3%) offenders (United States Sentencing Commission, 2020). Many drug, firearm, and theft offenders will not qualify for restorative justice as they do not fit into our definition of “low-level”. However, these groups nevertheless provide a large pool of low-level offenders to focus on for potentially beneficial restorative justice programs. These programs address the problem of having too many low-level offenders in prison by diverting them to rehabilitation programs that allow victims of family and community members to confront offenders. In order to hold offenders accountable, typical incarceration uses incapacitation, whereas restorative justice works to create an offender understanding of wrongdoing. This includes action-based and personal ways that help victims and communities affected by crimes find justice in more meaningful ways (Ernest, 2019). Each restorative justice pilot program will include justice circles, mediation, and conferencing. Mediation will serve cases where there is a victim willing to participate, circles can provide the opportunities for rehabilitation of offenders in victimless crimes, and conferencing can work for both. Providing these programs as possible alternatives to incarceration can keep prison levels down and address systemic injustices that the punitive justice system perpetuates. Federal and state governments have developed restorative justice initiatives to address high incarceration rates and reduce recidivism.

### Option 4: Increase Funding for Drug Courts

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Our fourth policy alternative is increasing funding for drug courts across the country. In Fiscal Year 2017, the federal government appropriated \$100 million in federal funds for drug courts. I propose that the federal government double this funding in the federal districts that have the highest number of drug arrests (Sacco, 2018). The overall goal of drug courts is to reduce recidivism and substance abuse. Through this process, the justice system typically moves first-time drug offenders out of the tradition justice process post-arrest before pleading to a criminal charge. Some state and federal justice systems use drug courts as conditions of probation, and at the federal level they often use drug courts as re-entry programs. The federal government continuously demonstrates growing support for the planning and development of drug courts primarily through financial support. I believe an increase in funding for drug court research and development will assist in their growth and effectiveness. Systemic injustices in the punitive justice system that unfairly target communities of color are rooted in our treatment of drug offenders. Expansion of drug courts provide the opportunity to address these injustices through rehabilitative methods for offenders rather than lengthy and unjust incarcerations.

## Criteria:

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My client values equity and meaningful reform in the criminal justice system. I believe that incarceration and punishment-based justice models, also known as retributive justice, are not the most effective and reducing crime and providing equitable systems of justice in this country. However, new programs and policies can be expensive. Therefore, cost is an important part of the discussion around any new initiatives or expansion of current policies. It is important to see cost differences between programs that focus on rehabilitation and our current punitive systems of incarceration. Effectiveness criteria will help highlight whether the costs of any policy alternatives are worth the transfer of government and taxpayer resources. My client values the ability for an alternative to effectively address shortcomings in our current justice system that I believe leave low-level offenders unfairly treated and incarcerated. Effectiveness will also address how recidivism can change through new and different policy options, helping its case against traditional incarceration. Ultimately, it is important to my client that any alternative is feasible, both politically and administratively. A proposal that requires congressional approval that has no chance of success is not appropriate. A proposal that is effective in theory but not possible for implementation is also not worth the time of the Department of Justice. Thus, the criteria for evaluation of alternatives for my client will be effectiveness, cost, equity, and feasibility.

### Effectiveness (30%)

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Effectiveness is based on how each alternative addresses the core problem. That is, reducing the number of low-level offenders entering federal prison and altering what I believe to be systemically unjust and unfair practices in the justice system. We can estimate how many federal inmates each alternative will affect, as well as project how each alternatives effectiveness will reduce systemic inequities in the justice system in the future. Foremost is reducing incarceration for low-level offenders. This will be our primary indicator of effectiveness. However, effectiveness for future offenders and their incarceration is also important in understanding the effectiveness of each alternative. Feasibility, costs, and equity all play into how effective each alternative can and will be.

### Cost (25%)

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Cost will evaluate how expensive each alternative will be to plan and implement. We will compare this with the current costs of incarceration and traditional justice system models. Some alternatives, such as expansive diversionary programs will be very expensive. However, each alternative will receive an estimated cost and is compared to the cost of keeping the individuals incarcerated in federal prison. Cost will be important for the government, for taxpayers, and for determining an alternatives effectiveness and feasibility. A plan that costs far beyond what traditional incarceration cost might be effective but will certainly not be feasible. Cost works alongside each of the criteria and will inform us on how expensive an alternative will be, and whether it is worth that cost to pursue.

### Equity (25%)

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We use equity as a criterion to measure how a policy alternative reduces the disproportionate number of minority individuals in prison for low-level offenses. Elements of the punitive justice system inherently target communities of color. A change to a more rehabilitative justice model may provide opportunities to reduce inequities for arrested and incarcerated offenders, as well as opportunities to change systems that put them there. We will not be able to provide exact estimates on the number of incarcerated people of color alternatives will help, nor the long-term implications of systemic changes in the justice system. However, we can project outcomes based on data and literature that can help us form an understanding of the level of equity that each policy option can bring to our justice system, and our country.

### Feasibility (20%)

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Feasibility as a criterion is all about the practicality of an alternative both politically and administratively. Each alternative will require some sort of approval and/or implementation. If political processes stall an alternative, this will make it less feasible. If it will be nearly impossible to implement into our current justice system, this would make an alternative less feasible as well. This does not mean that we will not consider an alternative because of difficulty in garnering political support, or poor prospects of implementation. However, we will judge alternatives based on projected political and administrative possibilities depending on what the alternative requires for its' success. Feasibility will be graded on likelihood of political support and the ability to implement policy to the current federal justice system.

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## *Option Evaluation*

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## Option Evaluation

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I will be evaluating 4 alternatives: maintaining the status quo, expanding mental health courts, expanding restorative justice initiatives, and increasing funding for drug courts – all at the federal level. Each of these alternatives by themselves have potential but must include additional implementation and/or DOJ policy change to codify changes in our everyday federal justice system practices. I will evaluate each alternative on its effectiveness, its cost, its equity, and its feasibility. Effectiveness analysis will assess how well each alternative reduces incarceration levels for low level offenders and addresses main components of an unjust federal criminal justice system. Cost will assess how expensive new or expanded alternatives and programs will be, compared to the current costs of incarceration. Equity will assess how well each alternative addresses the inequitable and components of our justice system and works to change those systems for the better. Finally, feasibility will look at both political and administrative challenges to support and implementation. Political support will be vital for appropriation of funding, and administrative ability will ensure the practicality of expanding or implementing programs into the current federal criminal justice system.

Each criterion for each policy option receives a number 1-10 (1 = performs very poorly, 10 = performs excellent), and is then multiplied by the weight of each criteria for a final score out of 10 to help determine my recommendation.

## Option 1: Status Quo

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### Effectiveness (30%):

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The Status quo option will still allow rehabilitative models of justice to exist and grow in the federal justice system. However, most experimentation and expansion of alternative justice models have taken place at the state level, and the federal system is still mostly punitive. Therefore, deciding to maintain the status quo policy for incarceration and rehabilitation will be relatively ineffective in reducing the number of low-level offenders in and entering federal prison. Without instituting a clear shift in federal focus from punishment based to rehabilitative forms of justice, incarceration levels will remain stagnant and continue to follow current trends. The status quo will thus be ineffective at addressing the unjust and systemically racist practices embedded in our federal criminal justice system, some through these punitive models. Therefore, policy option 1 receives an effectiveness score of 2.

### Cost (25%):

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In FY 2019, the Federal Bureau of Prisons (BOP) requested over \$7 billion for its full program costs. 44 percent of that funding went to institutional security and administration; 38 percent went to inmate care and programs; 14 percent went to contract confinements; 3 percent to management and administration. Inmate care and programs, accounting for \$2.67 billion in the budget, “covers the cost of inmate food, medical care, institutional and release clothing, welfare services, transportation, gratuities, staff salaries (including salaries of Public Health Service commissioned officers), and operational costs of functions directly related to providing inmate care (US DOJ, 2018).” These costs also include inmate programs (Education and Vocational Training, Drug Treatment, Life Connections, Religious and Psychological Services). As of March 2021, there are 124,679 inmates in BOP custody. This comes out to an average inmate cost of around \$21,380 per year (See Appendix A).

Federal prison populations have been decreasing since 2014. Over the past 10 years, the prison population under BOP control has decreased by an average of 4,836 prisoners per year. We assume that the federal prisoner population will continue to decrease over the next 10 years, but not at a constant rate. However, if current trends continue by just half of the average decrease from the past 10 years, the federal prison population in 2030 will be 100,499.

Costs projected out for 10 years with a discount rate of 3 percent without providing for projected prisoner declines provide a total costs of inmate care and programs of around \$25.4 billion over the next ten years. However, with the decreasing number of federal inmates, and an estimated decrease of around 2,400 each year for the next 10 years, the NPV of total inmate care costs over the next 10 years is around \$23 billion. Costs will remain high under the status quo, and this policy option receives a cost score of 4. (See Appendix A)

### Equity (25%):

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The status quo fails to address the systemically unequal elements of the justice system. 38.5 percent of current federal inmates are Black, while Black individuals make up only 13.4 percent of the U.S. population (BOP Statistics: Inmate Race, 2021). This disproportionate incarceration is the result of, among other reasons, decades on of unfair sentencing practices and punitive imprisonment practices. While some alternative programs exist today at the federal level, the status quo will continue the current punitive system of justice for most low-level offenders. The status quo does not provide clear steps to reduce general future prison populations. It does not work to provide equitable outcomes for low-level offenders such as those charged with drug offenses – disproportionately minority individuals. The status quo performs poorly on the criteria of equity. Policy option 1 receives an equity score of 1.

### Feasibility (20%):

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The status quo is the easiest policy option politically. With no action or additional steps required for appropriation of funds or implementation, this option is also the easiest administratively. Some alternative programs will continue at their current levels and others will grow. This will be feasible under the current administration with support for alternative justice models. Under administrations in the future not as supportive of alternative models, these programs might be difficult to maintain. There is no policy change under this option, therefore political and administrative feasibility are high. Policy option 1 receives a feasibility score of 9.

## Option 2: Expand Mental Health Courts

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### Effectiveness (30%)

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A study by McNiel and Binder performed a retrospective analysis comparing MHC participants with other adults with mental illness who entered jail during the same time period. They found that participants in MHCs were 26 percent less likely to obtain new charges and 56% less likely to obtain violent charges than individuals in a group that received usual treatment. Despite these findings and similar results from other studies, the authors indicate that other studies have found no difference between participants in MHCs and those who receive treatment as usual (McNiel & Binder, 2007). Other studies have found no effects on recidivism but found decreases on severity of charges when individual committed another crime. With mixed conclusions and results on the effectiveness of MHCs, this alternative can be a moderately effective approach for reducing the number of low-level offenders in prison and addressing the need to treat individuals with mental health issues in a more rehabilitative forum rather than strict incarceration.

The average federal sentencing caseload from FY 2010 through FY 2019 was 76,177. The average number of immigration sentencings from FY 2015 through FY 2019 was 22,960. Removing immigration cases from our pool of federal offenders leaves an estimated 53,217 non-immigration offenders sentenced each year (United States Sentencing Commission, 2020). Federal caseloads decreased from 2011 to 2017, but have begun to increase again, mostly due to an increase in immigration caseloads. If we assume that 45 percent of these offenders have a mental illness, then 26,608 federal offenders each year are eligible for MHC treatment (Kim, 2015). A 10% take up rate among federal offenders approved for MHC treatment each year yields 2,600 offenders each year. This would allow each MHC to treat 52 offenders a year upon implementation. With an estimated 50 percent program completion rate, these MHCs can successfully divert 1,300 federal offenders from incarceration per year.

Tens of thousands of individuals with mental health issues are arrested each year, and this type of pre-trial intervention at the federal can lower incarceration numbers for those deemed to be low-level offenders, and hopefully reduce recidivism as well. Not every single inmate in these categories counts as a low-level offender, but targeted intervention to those who do not represent a risk to society may be effective. Policy option 2 receives an effectiveness score of 5.

### Cost (25%)

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Studies of individual MHCs have found encouraging cost savings when compared to tradition justice models of incarceration. A small evaluation in New York from 2012 found that one year of MHC participation cost \$16,520 for an individual (Rossman, et al., 2012). This included outpatient individual counseling, outpatient group counseling, residential treatment, drug abuse treatment, job readiness classes, and life skills classes. Accounting for inflation, this cost is \$18,821 in 2021 dollars.



If 4,600 offenders enter MHCs each year, this comes out to a cost of \$86,576,600. However, with around half of offenders not completing the program, we will have some sunk costs and overall costs might be lower as we will not use some individual services when participants drop out.

The average prison sentence for federal offenders in 2019 was 42 months, or 3.5 years (United States Sentencing Commission, 2020). The actual sentence for many low-level offenders is likely much lower than this but we will use this average to estimate the cost savings. The average inmate cost of a 3.5-year sentence with a real discount rate of 3 percent is around \$72,000 (See Appendix B). For 4,600 offenders, this cost is \$331.5 million over the next 3.5 years. MHCs typically run their programs for one year, and with average treatment costs today of \$18,821, the cost for 4,600 offenders for one year in the program is around \$86.5 million. Evidence suggest that half of participants will not complete the program, thus they will return to traditional incarceration. However, despite those sunk costs, and the increase in marginal court processing funds needed in MHCs, there is a cost savings of around \$245 million brought on by these MHCs compared to tradition justice models for an average 3.5-year sentence. This is a generalization of cost saving. They would likely be much less upon development and use of the MHCs.

Despite the assumptions, this provides a model for potentially lowered costs compared to incarceration. Another study looked at the outcome costs after incarceration of a MHC program. In a 12-month period, MHC program participants incurred total outcome costs of \$16,964, while those in the compare group who did not participate in the MHC program incurred outcome costs of \$39,870. The differences mostly came in rearrests. This came out to a cost-savings of over \$1 million dollars within a study that included just 105 participants. With 2,300 participants completing the program each year, the cost savings on rearrests can be upwards of \$52 million. This shows the ability for MHCs to reduce costs in the long run after release (Kubiak et al., 2015).

Despite these positive results, evidence is not conclusive. A six-year study on the cost-effectiveness of MHCs found that participants in MHCs cost \$4,000 more a year than a matched group of detainees in jail who received basic psychiatric services (Levin, 2014). This can raise the costs significantly for offenders who would be in jail for short periods of time, such as those charged with drug possession who serve an average of two months (United States Sentencing Commission, 2020). Psychologists claim this extra spending is worth the added public safety of lower recidivism rates, new arrests, time in prison, and violence. Beyond this, very little research exists on the true cost of MHCs compared to traditional incarceration, especially at the federal level. Additionally, starting up MHCs is very expensive which will considerably add to these costs. Policy Option 2 receives a cost score of 6.

### Equity (25%)

MHCs address a major area of concern and inequity in our punitive justice system. Many mentally ill offenders do not receive proper treatment for their illness. MHCs provide opportunities for our justice system to initiate an appropriate response in treating individuals with a mental illness

in a way that can prevent them from committing criminal acts in the future and set them up for success. This policy option can also help with systemic racial issues in the justice system. MHCs create another option for minorities disproportionately sentenced for minor crimes and divert them into a rehabilitative system for those with a mental illness. However, this option only targets those with a mental illness, and with low opt-in numbers, might only enroll around 4,600 participants a year. Hopefully offender participation can grow, and opt-in rates can increase. Policy option 2 receives an equity score of 5.

### Feasibility (20%)

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In recent years, signals from both Republicans and Democrats indicate support for mental health legislation. While this different than providing mental health care to American citizens, this is about providing adequate care, reducing incarceration, and trying to cut long term costs – all areas in which there are bipartisan support. Republicans may oppose this type of criminal justice reform, as they tend to support more tradition forms of incarceration and strict sentencing and prison enforcement. Administratively, expanding caseloads of existing mental health courts and investigating areas in need of new courts and resources will require study and analysis. However, the DOJ is constantly evaluating programs, and this practice will be crucial in determining where expanded resources can be most effective. Policy option 2 receives a feasibility score of 7.

### Option 3: Restorative Justice Pilot Programs

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#### Effectiveness (30%)

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Very little data exists on restorative justice programs at the federal level. However, circle pilot projects out of Hawaii that have expanded across the country show promising signs for reduced recidivism and could prove to be a viable alternative to tradition incarceration. The state and international levels provide greater evidence of effectiveness for restorative justice programs. A meta-analysis of 121 programs found that participants in restorative justice programs that tracked recidivism rates were 41.5 percent less likely to be arrested post-intervention compared to offenders who went through traditional justice processes (Ernest, 2019). Lower recidivism rates lead to lower incarceration numbers in the future with this intervention.

A U.S. sentencing commission report from 2016 used 25,431 offenders released in 2005 to study recidivism. The report found that out of the 10,591 drug offenders released, there was a 49.9 percent recidivism rate. Using this data along with recidivism data from the meta-analysis, restorative justice programs could lower recidivism rates to 29.19 percent of drug offenders. That is a reduction of 2,647 rearrests. While this assumes that every single drug offender goes through a restorative justice program and each offender was eligible, which is not feasible or likely, it highlights how effective these programs might be at reducing recidivism and future offenses. Developing a national restorative justice program at the federal level that targets low-level offenders can provide better opportunities for rehabilitation and reduced levels of recidivism.

With a pilot project that includes 25 programs in 25 different districts around the country, we can expect to refer 100 cases to each program each year through an evaluation process. This provides us with 2,500 restorative justice participants each year. Research into victim-offender mediation (VOM) provides evidence that around 85% of participants completed restitution agreements successfully (Bradshaw & Roseborough, 2005). Although mediation, circles, and conferencing are all slightly different programs, we can assume that around 2,125 participants will complete their programs successfully each year. This is large diversion from tradition criminal justice processes and can greatly reduce our federal prison populations. Policy option 3 receives an effectiveness score of 7.

#### Cost (25%)

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There are two main ways to look at the cost of restorative justice programs. The cost of the program itself compared to incarceration, and the costs beyond the program from additional crimes and rearrests. Without evidence of costs on the federal level, we can look to states and other countries to project the cost effectiveness of restorative justice programs. The Illinois policy institute suggested a pilot program with 500 non-violent property offenders in restorative justice VOM. They estimated that Illinois could save \$780,500 in incarceration costs in one year. That is over \$1,500 per offender

(Jackson-Green, 2015). The Washington State Institute for Public policy estimates \$1,250 in total benefit-cost savings from evaluated restorative justice programs. Averaging the two analysis, \$1,375 in savings for 2,125 participants at the federal level is almost \$3 million in cost savings per year. Over a 10-year period with a discount rate of 3 percent, the net present value of cost savings is around \$28 million (See Appendix C). These are estimates of programs at different levels of government and from different countries but provide signs of possible cost-savings of restorative justice programs at the federal level.

Startup costs for new federal programs will likely be expensive. Additionally, an analysis of restorative justice programs in England found no cost savings on existing programs, and only marginal savings on reconvictions. However, many of these programs were not directly linked to existing criminal justice processes. If we integrate restorative justice programs into our current federal criminal justice model, we might be able to lower costs when compared to traditional incarceration (Shapland, 2008). In the U.S., new federal pilot projects in Hawaii have yet to provide empirical data on cost effectiveness. However, researchers write that initial benefits of the circle pilot projects have far exceeded their costs. This program offers encouraging signs of an alternative program with the chance to save the federal government millions of dollars moving forward. Policy option 3 receives a cost score of 5.

### Equity (25%)

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Restorative justice programs provide a unique opportunity to target all non-violent and/or low-level offenders who enter the federal justice system. Diverting over 2,000 offenders from punitive incarceration and towards a rebuilding process allows for a healing and rehabilitative-based approach to reconciliation with a crime. Current justice models that unfairly sentence individuals for drug, firearm and other offenses disproportionately effect minority individuals. If the federal government expands restorative justice pilot projects to federal court districts around the country, thousands of low-level federal offenders, many of them minorities, can have a chance to participate in an effective rehabilitation process that provides for more equitable outcomes in the long run. Rehabilitation focused programs with friends, family, and community members can be a more equitable experience than long and unjust prison sentences, with little focus on offender rehabilitation. Policy option 3 receives an equity score of 7.

### Feasibility (20%)

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In the criminal justice platform for the Biden administration, there is a focus on building a restorative justice program at the federal level, and incentivizing pilot programs in the states (Biden, 2021). This is very encouraging for political feasibility in the next 4 years. Republicans and conservatives have also voiced support for restorative justice programs, considering important values of personal responsibility and limited government intervention. There is considerably more support from Democrats, but Republicans have also showed considerable support for criminal

justice reform in the past decade providing encouraging signs for this policy option.

Administratively, expanding these programs to federal districts around the country will be difficult and require a lot of planning, analysis, and funding. Especially because very few federal programs currently exist. However, the DOJ can work with each federal district to develop these programs, provide appropriate analysis, and expand if possible, to promote more equitable outcomes. Policy option 3 receives a feasibility score of 6.

## Option 4: Increase Drug Court Funding

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### Effectiveness

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Over the past 10 years, National Institute of Justice has evaluated 21 drug court programs and found that 19 of them produced “promising” or “effective” ratings in their goals to reduce recidivism and substance abuse. The other two courts showed “no effects” (Sacco, 2018). The BOP currently incarcerates 65,981 drug offenders, the largest block of existing prisoners. Reduced recidivism rates and reductions in substance abuse provide encouraging results for these programs. As of 2012, there were 2,500 drug courts in operation and approximately 120,000 American were receiving treatment and support to lower recidivism and address substance abuse (Drug Courts, 2012). A DOJ study examined re-arrest rates for drug court participants and found that across the U.S., 84 percent of participants have not been re-arrested or charged with a serious crime one year after graduation. 72.5 percent had no arrests at the two-year mark.

In 2019, the federal sentencing commission received 20,393 drug trafficker reports, and 563 of those were for drug possession. Drug courts typically target those with substance abuse; therefore, they might only be applicable to those who were in possession of a controlled substance with the intent to use it. Offenders with substance abuse issues that contributed to a non-drug related crime might also be eligible for expanded drug court use. Expanded funding for drug courts would likely allow federal districts to divert a total of around 500 federal offenders each year. This is an estimate based on the offenders charged with possession, and other offenders likely having drug related problems, along with expanded capacity at current drug courts.

These courts often operate at the local level however, and while federal government funding for expansion may prove useful, it is unclear how effective they can be in federal districts, or how much federal offenders will benefit. They also often operate as reentry programs and can be useful at reducing recidivism but less so as diversions from incarceration. Diverting federal drug offenders to local drug courts with expanded capacity and funding could prove viable for substance abuse treatment and lowering recidivism rates. Policy option 4 receives an effectiveness score of 4.

### Cost

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A cost-effectiveness analysis of drug courts by the Urban Institute found that that drug courts provided \$2.21 in benefits to the justice system for every \$1 spent (Drug Courts, 2012). These savings came in the form of fewer crimes, fewer re-arrests, and fewer days incarcerated. These findings were not statistically significant. They noted that drug courts were likely to save more money if they enrolled serious offenders. Drug courts can cost more than traditional justice services because of large program investments, more drug tests, judicial status hearings, time with case managers, and substance abuse treatment. Upfront costs to this policy option are high, but current evidence shows encouraging signs of long run cost savings. In FY 2017, the federal government appropriated around \$100 million for drug courts. Doubling this funding today would increase that

funding to \$200 million, with the chance to treat more federal drug offenders, reduce incarceration and recidivism, and treat substance abuse. Over the next 10 years, this would result in a NPV of around \$1.9 billion for drug court operations and treatments (See Appendix D). An additional \$100 million to drug courts likely results in \$221 million in benefits to the justice system in a one-year span. This is \$121 million in cost savings per year. Drug offenders from all court levels can enter these courts with greater capacity. However, this does not ensure that federal offenders will benefit from this increase in funding. Policy Option 4 receives a cost score of 5.

### Equity

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Drug courts only target drug offenders, and those with substance abuse problems in the criminal justice system. They therefore do not have as broad of a reach as other policy options that target diversion for all crime types. However, minorities are disproportionately arrested and charged with drug offenses and given lengthy and unjust sentences. Drug courts provide the opportunity to equitably rehabilitate drug offenders, targeting the reasons for their arrest and providing treatment and rehabilitation to reduce recidivism. They also provide supervision and care upon release which can help with inequitable outcomes. Using drug courts instead of long prison sentences for drug offenders can work to reduce the racial inequities in our sentencing practices. Doubling the funding for drug courts can reach more drug offenders and provide for more equitable opportunities for rehabilitation. Policy Option 4 receives an equity score of 6.

### Feasibility

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Both Republicans and Democrats praise drug courts for their ability to reduce prison time and address substance abuse. This issue has had bipartisan support since the Obama administration made drug court expansion a priority (Maron, 2009). Expansion will likely receive support from both sides of the aisle but will likely have stronger support from Democrats. Administratively, drug courts have a large existing footprint throughout the nation. Expanding capacity to treatment more and different types of drug offenders will be easier with a large existing infrastructure of over 2,500 existing courts. The DOJ will need time to determine where it would be most effective to target federal drug offenders for drug court treatment. Policy option 4 receives a feasibility score of 7.

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## *Outcomes Matrix & Recommendation*

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## Outcomes Matrix

Policy Option/Criteria	Status Quo	MHCs	Restorative Justice	Drug Courts
Effectiveness (30%)	$2 \times .3 = .6$	$5 \times .3 = 1.5$	$7 \times .3 = 2.1$	$4 \times .3 = 1.2$
Cost (25%)	$4 \times .25 = 1$	$6 \times .25 = 1.5$	$5 \times .25 = 1.25$	$5 \times .25 = 1.25$
Equity (25%)	$1 \times .25 = .25$	$5 \times .25 = 1.25$	$7 \times .25 = 1.75$	$6 \times .25 = 1.5$
Feasibility (20%)	$9 \times .2 = 1.8$	$7 \times .2 = 1.4$	$6 \times .2 = 1.2$	$7 \times .2 = 1.4$
Total Score:	4.65	5.65	6.3	5.35

**Note:** The outcomes matrix provides a numerical representation of the policy option evaluation process. With a score of 6.3/10, **Restorative justice programs** present the most promising opportunity to address the systemic inequities and reduce incarceration in the federal justice system.

## Recommendation

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I recommend that you choose policy option 3 – develop and implement restorative justice pilot programs at the federal level. This alternative to traditional justice models can be the most effective and equitable option when implemented. Restorative justice programs are not all the same, but the different programs presented provide the opportunity to address the needs of unique composition of offenders across the federal justice system. Its effectiveness at the state level especially for juveniles, and its efficacy in other countries presents promising signs for its ability to be effective in federal districts. Existing pilot programs currently give a beginning blueprint for expanded use across the nation with further evaluation and development. The ability for restorative justice programs to effectively reduce incarceration and recidivism levels presents better opportunities for future success with federal offenders than each of the other policy options. While other alternatives target just mentally ill offenders or just drug offenders, expanding restorative justice provides a more holistic approach to low-level offender rehabilitation and treatment. Diversion into restorative justice programs can increase racial equity and offender opportunity in the criminal justice system. The community-based approach and inclusive model makes restorative justice more equitable than the other policy options. Cost analysis also show that restorative justice programs can be less expensive than the other policy options when compared to incarceration and long-term offender outcomes. However, start-up costs including program development and evaluation for these programs will likely be very high. Feasibility provides some issues because of the lack of existing infrastructure in place for restorative justice at the federal level. Political support will be tricky to navigate, with Congress quite divided despite Democratic majorities. However, this policy option is a priority for the Biden administration, and a DOJ recommendation for expansion and creation of restorative justice pilot projects in federal districts around the country can go a long way in beginning to lower incarceration rates for low-level offenders and creating more equitable outcomes in our criminal justice system.

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## *Implementation & Conclusion*

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## Implementation

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Implementing restorative justice programs at the federal level can be a first step in creating a more equitable and effective federal criminal justice system. However, this will not come without serious challenges and obstacles. Implementation must begin with three important steps: education, integration, and evaluation. While restorative justice is a relatively common phrase in law and judicial circles, we need to a strong educational campaign to bring attorneys, prosecutors, and judges into the process. This includes explaining the restorative justice programs and processes we hope to implement. We can include this in yearly DOJ training for relevant personnel as well bring in outside experts on restorative justice. Victim-offender mediation, conferencing, and circles are all different programs that fall under the umbrella of restorative justice including all 3 keeps our options open to address the unique federal caseload. Educating the people in our federal criminal justice system on each method will be vital to their success. Integration into existing judicial frameworks will allow for pre-sentencing diversion into new restorative justice programs. This presents certain difficulties, especially when proposing to upend tradition justice models and processes with entirely new programs. However, the need to overcome this challenge is why evaluation is vital to this process. We must work with academic institutions and research professionals to develop the most effective way to measure the outcomes of each of these programs. The measurements of participant satisfaction, recidivism, and economic impact are common in restorative justice program evaluations (Gerkin et al., 2017). Economic impact as a measurement is our best way to convince career criminal justice officials that this change is worth evaluation.

Community engagement in these new programs and education on the purpose of restorative justice can help change perceptions that restorative justice is “soft on crime”. The American public often insists on punitive measures for criminals. However, we must work to reconcile “its advocacy of a nonpunitive response to crime with the public’s insistence on deterrence and retribution (London, 2013).” We also want the programs to be sustainable. DOJ leadership on these programs from securing funding for personnel implementation and program evaluation to forming relationships in federal districts with important stakeholders will be vital to the long-term success of these programs and the evaluations. Attorneys, prosecutors, judges, parole officers, and program supervisors need to work together for these programs to be successful. Two-way agreements between offenders and justice department officials will indicate mutual buy-in between each participant and district officials overseeing these programs. Prosecutors and individuals tasked with leading these new restorative justice programs will present these agreements to offenders who meet our low-level offender criteria. This includes strict compliance guidelines for participants in restorative justice programs. If violated, offenders will understand as part of these agreements that they will face incarceration. This will help reassure criminal justice leaders that those who do not comply under these new programs will proceed through tradition incarceration processes. Emphasis will be on non-violent drug, firearm, and fraud/theft/embezzlement offenders. However, I believe drug and firearm offenders should be the focus of these new programs. The DOJ should work to implement each of the 25 pilot programs in federal districts with the highest number of these

offenders, and the DOJ should work with prosecutors in developing processes to determine eligible offenders. These offenders will participate in programs and supervision typically for one year.

The importance of multiple restorative justice programs – mediation, conferencing, and circles is essential in meeting the needs of the federal docket. While victim-offender mediation proves to be an effective restorative justice tool, over half of all federal crimes are victimless, meaning there is no victim to attend a mediation. Therefore, restorative justice circle projects, and community engagement are important elements of this new federal program. Foreign nations have used community-based restorative justice programs to address low-level offense such as drunk driving crimes. Their programs confront offenders with the possible consequences of their actions by family, friends, and community members who have suffered from drunk driving related incidents. The potential consequence of killing or injuring another person in this case can send a powerful message when it comes from those closest to offenders or members of their community (Luna & Poulson, 2006). Drug offenders account for around a third of federal crimes, and restorative justice circle programs can work to emphasize the impacts and source of drug crimes. Family members, friends, neighbors, and the larger community can confront offenders with the negative consequences of their actions and formulate a plan with supervisors on future steps for success. Involving individuals negatively impacted by drugs in the past can also be important elements of these circle groups. I believe that self-affirmation and social psychological interventions integrated into these sessions can help assist family, friends, and community members in empowering offenders to work towards a better future. Certain interventions can assist in confronting the unique nature of the federal docket, including those crimes without a victim.

Social psychologist Timothy Wilson argues that changing behavior with simple psychological interventions may be easier than we think. In his book, *Redirect*, he introduces the concept of story-editing. This takes the approach of changing people's behaviors by understanding how they see the world, including the stories and narratives they tell themselves about why they make the choices that they do, and who they are. More specifically, the interventions of "story-prompting" and self-affirming writing exercises can provide offenders, especially those without victims, the ability to confront their behavior and decision-making. The "story-prompting" approach can provide information, possibly from former offenders, that moves them to alter the way they think about themselves and the causes of their behavior. Writing about past trauma or behaviors can be helpful in giving offenders a third-person perspective on their actions and help them identify the impacts of their crime on family and community members (Weir, 2012). These interventions are seldom used on criminal offenders but may be able to assist in the restorative justice process, especially in cases where there is no victim for mediation.

Working alongside the Biden administration to coordinate outreach, education, and compliance with new programs will be very important. Administration involvement in discussions with district leaders will lend credibility to these programs and underscore the importance they have to the future of our justice system and a more equitable country. Bringing in knowledgeable academics and non-

profit leaders in the area is can help with program development and organization as we develop pilot programs. The power of the federal government can also help with offender reentry. Reentry resources provide support on the back end of restorative justice initiatives. This can reenforce the notion that offenders can be contributing and productive members of society, and that their friends, family, and community believe that they can take the rights steps to improve their future. This is not a direct element of these restorative justice pilot programs but is vital to helping offenders during after program treatment.

The federal Justice Manual serves as a reference for United States Attorneys and other DOJ officials in charge of prosecution of federal offenders. “Pretrial Diversion Programs” in Title 9 Section 22 of the Justice Manual as well as “Non-Criminal Alternative to Prosecution” in Title 9 Section 27.250 both provide DOJ policy foundations for including restorative justice practices within DOJ policy. In a memo from DOJ leadership, we can expand Justice Manual policy to include restorative justice as an alternative to traditional prosecution and incarceration. “In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions or other measures that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests (DOJ, 2021).” These existing guidelines will apply to new restorative justice programs and will provide a baseline for future prosecutorial practices in this area.

New restorative justice programs in federal districts around the country will no doubt face opposition from career officials who view this as an ineffective way to combat crime and incarceration. Their concerns will not be without merit. However, when working to change our federal criminal justice system in meaningful ways that lower incarceration levels, lower recidivism, mitigate costs, and address systemic inequities, difficult and slow change in this form is a tough but necessary endeavor. While rigorous evaluation on effectiveness and impacts will inform future decisions and possible expansion of these initiatives, we must begin to educate criminal justice leaders on these new programs and begin to integrate them into our federal system. By doing this, we take the first step in enacting meaningful and equitable reform in the federal criminal justice system.

## Conclusion

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Retributive forms of justice have long dominated criminal justice systems across the United States. At the federal level, despite decreasing incarceration levels, low-level offenders continue receive long sentences when society may serve their needs and futures more effectively through alternative justice models. The federal system sentences over 70,000 federal offenders each year. While over 20,000 of these individuals are immigration offenders, around 50,000 offenders proceed through tradition justice models, many leading to federal incarceration.

Through examination of the literature and analysis of proposed policy options targeting solutions to low-level offender incarceration, I recommend that the DOJ pursue the implementation of restorative justice pilot programs in 25 federal districts across the country. Restorative justice programs present an immense opportunity for equitable and effective responses to the high incarceration rates and long sentences that low-level federal offenders often face. A progressive administration focused on creating more equitable outcomes, especially in the criminal justice system provides a unique opportunity for the executive branch to take the lead on these pilot programs to ensure proper funding and implementation.

These initial restorative justice programs have the potential to rehabilitate over 2,000 federal offenders each year. If evaluation provides promising results for these programs, then scaling up to each federal district can result in thousands more federal offenders entering this diversion program. Implementation into the Justice Manual provides all prosecutors the discretion to pursue these practices but focusing our efforts on 25 pilot programs in 25 districts across the country can be effective in working towards scaling up these interventions and determining best practices for the future.

I will concede that there are implementation and structuring details missing from this analysis on the execution of restorative justice programs at the federal level. However, in modeling our programs off successful programs from states as well as other countries and taking into account the unique nature of the federal docket, we can begin to develop restorative justice diversion programs that target systemic inequities in our federal justice system. By improving offender experiences, lowering recidivism rates, and further decreasing incarceration rates at the federal level, restorative justice programs can be one of the first of many federal policy shifts to a more equitable and rehabilitative justice system.

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## *Appendices & References*

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## Appendices

### Appendix A: Status Quo Calculations

#### BOP Total Prisoner Costs at Current Levels

Years from now	BOP budget NPV – 3% Discount Rate
0	\$2,665,426,000
1	\$2,587,792,233
2	\$2,512,419,644
3	\$2,439,242,373
4	\$2,368,196,478
5	\$2,299,219,882
6	\$2,232,252,312
7	\$2,167,235,255
8	\$2,104,111,898
9	\$2,042,827,085
10	\$1,983,327,267
<b>Total</b>	<b>\$25,402,050,426</b>

#### Average Inmate Costs

BOP Prisoner Costs:	\$2,665,426,000	
Number of BOP Prisoners:	124,679	÷
Average Cost/Prisoner:	\$21,378	

## REDUCING LOW-LEVEL OFFENDER INCARCERATION AT THE FEDERAL LEVEL

### Average Prisoner Cost and Population

Years from Now	NPV of Average Per Prisoner Cost	Projected Prisoner Change	1/2 of Projected Change
0	21,380.00	124,679.00	124,679.00
1	20,757.28	119,843.00	122,261.00
2	20,152.70	115,007.00	119,843.00
3	19,565.73	110,171.00	117,425.00
4	18,995.85	105,335.00	115,007.00
5	18,442.58	100,499.00	112,589.00
6	17,905.41	95,663.00	110,171.00
7	17,383.90	90,827.00	107,753.00
8	16,877.57	85,991.00	105,335.00
9	16,385.99	81,155.00	102,917.00
10	15,908.73	76,319.00	100,499.00

### BOP Prisoner Costs with Prisoner Reduction

Years from Now	NPV with reduced prisoners
0	\$2,665,637,020.00
1	\$2,537,806,000.00
2	\$2,415,160,090.49
3	\$2,297,505,689.89
4	\$2,184,656,075.68
5	\$2,076,431,167.89
6	\$1,972,657,300.56
7	\$1,873,167,000.91
8	\$1,777,798,775.87
9	\$1,686,396,905.81
10	\$1,598,811,245.27
<b>Total</b>	<b>\$23,086,027,272.38</b>

## Appendix B: Mental Health Court Calculations

### Average 3.5 Year Prison Sentence Cost

Years	Cost Average Prison Sentence of 3.5 years (3% discount Rate)
1	\$21,380.00
2	\$20,757.28
3	\$20,152.70
3.5	\$9,782.86
<b>Total</b>	<b>\$72,072.85</b>

## Appendix C: Restorative Justice Calculations

### 10-Year Restorative Justice Program Cost Savings

Years from Now	NPV Restorative Justice Program Cost savings (3% Discount Rate)
0	\$2,921,875
1	\$2,836,771.845
2	\$2,754,147.422
3	\$2,673,929.536
4	\$2,596,048.093
5	\$2,520,435.042
6	\$2,447,024.312
7	\$2,375,751.76
8	\$2,306,555.107
9	\$2,239,373.89
10	\$2,174,149.408
<b>Total</b>	<b>\$27,846,061.41</b>

## Appendix D: Drug Court Calculations

### 10 Year Drug Court Funding Total

Years from Now	NPV of Yearly Drug Court Funding (3% Discount Rate)
<b>0</b>	\$200,000,000
<b>1</b>	\$194,174,757.3
<b>2</b>	\$188,519,181.8
<b>3</b>	\$183,028,311.9
<b>4</b>	\$177,697,409.6
<b>5</b>	\$172,521,756.9
<b>6</b>	\$167,496,851.3
<b>7</b>	\$162,618,302.3
<b>8</b>	\$157,881,846.9
<b>9</b>	\$153,283,346.5
<b>10</b>	\$148,818,783
<b>Total</b>	<b>\$1,906,040,567</b>

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