ALTERNATIVES TO INCARCERATION FOR HIGH-RISK OFFENDERS IN THE UNITED STATES

by

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The United States has the world's highest incarceration rate. Over time, prison sentences have gotten longer through mandatory minimum sentencing laws, which were motivated by policymakers wanting to seem tough on crime. Since then, scholars and activists have challenged these ineffective mandatory minimums, and in turn, alternatives to incarceration have become available for nonviolent drug offenders. Yet, violent offenders make up a majority of the prison system. Further, violent offenders have distinctly lower recidivism rates than nonviolent offenders. My research aims to shed light on what happens after mandatory minimums for violent (high-risk) offenders. First, I outline the context and the theoretical framework that guides criminal punishment. Next, I examine what alternatives to incarceration (ATIs) exist for low-risk offenders, for juveniles, and in other jurisdictions. Finally, I argue that mandatory minimums should be replaced with a sentencing procedure that fits the victim and offender's needs in each situation, whether that be with a form of probation, restorative justice, or a combination of both. Further, I argue that we can implement ATIs for high-risk offenders by taking the same political route as ATIs for low-risk offenders, which is to reframe the conversation as helping those affected by violence.

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Introduction

The United States has the highest incarceration rate.[1] With only 5% of the world's population, the United States incarcerates 25% of prisoners in the world. Many scholars[2] thoroughly discuss why mass incarceration in this country has gotten so bad (i.e., systemic racism). In the mid and late 20th century, politicians used movements like the War on Crime and the War on Drugs to lengthen prison sentences.[3] This included creating statutory sentencing guidelines that included mandatory minimums (a minimum prison sentence for the given crime) and three strikes laws (a 25-year sentence on the third felony conviction).[4] The Supreme Court has largely declined to overturn extensive prison sentences, thus leaving sentencing guidelines to legislatures and in turn, the democratic will.[5] Without a judicial check on these long prison sentences, criminal justice reform has to strike a balance between implementing evidence based practices while remaining in the confines of what motivates voters, like being seen as tough on crime.

As the United States grapples with its extremely high incarceration rate, advocates are opening the channels to decarcerate nonviolent, low-risk offenders,

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[1] Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2022," *Prison Policy Initiative*, March 14, 2022, https://www.prisonpolicy.org/reports/pie2022.html.
[2] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010); James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (New York: Farrar, Straus, and Giroux, 2017); John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (New York: Basic Books, 2017); Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (New York: One World, 2014).
[3] Michael Tonry, "Racial Politics, Racial Disparities, and the War on Crime," *Crime and Delinquency* 40, no. 4 (October 1994): 475, https://doi.org/10.1177/0011128794040004001.
[4] Dale Parent, Terence Dunworth, Douglas MacDonald, and William Rhodes, "Key Legislative Issues in Criminal Justice: Mandatory Sentencing," *National Institute of Justice Research in Action*, U.S. Department of Justice (January 1997).
[5] Ewing v. California, 538 U.S. 11 (2003).

particularly those convicted of drug crimes.[6] While these changes are a great start in reducing mass incarceration, violent/high-risk offenders still make up a majority of the prison population.[7] Meaning, even if we released all nonviolent offenders, the United States would still be disproportionately incarcerating people based on our population size and disproportionately incarcerating people of color. Moreover, research shows that high-risk offenders actually have lower rates of recidivism than low-risk offenders,[8] which means that decarcerating the group with lower recidivism rates could mean a long-term reduction in the prison population. Decarceration can mean releasing people from incarceration, but it can also be using alternatives to incarceration from the start, so that a person's sentence is tailored to their specific needs and circumstances.

[6] Justin Ling, "America's Brutally Packed Prisons Are Slowly Emptying," *Foreign Policy*, Nov. 2, 2020. And Allen Kim, "Oregon becomes the first state to decriminalize small amounts of heroin and other street drugs," *CNN*, Nov. 9, 2020.
[7] Sawyer and Wagner, "Mass Incarceration."
[8] JJ Prescott, Benjamin Pyle, and Sonja B. Starr, "Understanding Violent-Crime Recidivism," *Notre Dame Law Review* 95, no. 4 (2020): 1643-1698.

Context

Criminal punishment generally relies on several rationales: deterrence, incapacitation, retribution, and rehabilitation. The purpose of these lengthy sentences is largely to achieve incapacitation, deterrence, and retribution.[9] The idea of incapacitation is that if a criminal is locked away, he cannot cause harm to the community. As for deterrence, general deterrence assumes that prospective criminals will choose not to commit crime if the punishment is too large (i.e., mandatory minimums), and specific deterrence supposes that an already-sanctioned offender will decide to stop committing crime because the punishment will increase for him (i.e., three strikes).[10] Lastly, retribution is colloquially known as "an eye for an eye." In essence, when an offender imposes harm on society, society should in turn impose harm on the offender.

These rationales come with several drawbacks. First, the problem with deterrence as a rationale for punishment is that it relies on the idea that all criminals are logically choosing to commit crime after weighing the alternatives. Committing crime is not an act that is inherently calculated. Further, while the law may assume everyone has notice on what acts are criminal, in reality, people may not research or contemplate how a crime committed with a certain weapon or at a certain location may bring additional penalties. Next, incapacitation as a rationale for punishment assumes two things: the criminal is inherently dangerous and violence in prison is justified. Not every person who commits violence will continue to do so. The counterargument here is that it is hard to know who will continue to commit violence, especially without relying on

[9] Parent, et al., "Key Legislative Issues in Criminal Justice."
[10] Ibid.

questionable risk assessment data (discussed later). For sake of argument, assuming it is true that people who commit violence will continue to be violent, then imprisoning them is only relocating the violence, rather than stopping or preventing it. Finally, looking through a utilitarian lens, retributive justice only leaves society worse off by creating more harm rather than aiming to repair the harm that has already been caused.

These rationales disregard violence as a product of individual circumstance. Treating tough on crime policies as solutions to violence excuses the lack of violence prevention measures in our communities. Rehabilitation as a rationale for punishment seeks to address root of the individual's crime. The drawback to this rationale is that it presumes people are "fixable" and that there is some agreed upon definition of what it means to be rehabilitated. It also operates under the assumption, however, that the response to crime should be individualized. A rehabilitative mindset is not something you can just apply across the board, as with mandatory minimums; you have to tie the punishment to the circumstances at hand.

Mandatory minimums have been the target of criminal justice reform in recent years.[11] Research has shown that mandatory minimums do little to combat recidivism while requiring hefty costs on the government.[12] Mandatory minimums also show racial disparities; although the sentence is mandatory for a given crime, the prosecutor holds the discretion in choosing the charges.[13] White offenders may be dealt down charges

[11] "Mandatory Sentencing was once America's Law-and-Order Panacea. Here's Why it's not Working," *Prison Policy Initiative*, https://www.prisonpolicy.org/scans/famm/Primer.pdf.
[12] "More Imprisonment Does Not Reduce State Drug Problems," *PEW*, March 8, 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems.
[13] M. Marit Rehavi and Sonja B. Starr, "Racial Disparity in Federal Criminal Sentences," *Journal of Political Economy* 122, no. 6 (2014): 1320-54.

that carry lower sentences compared to Black offenders who committed the same crime.[14] The case against mandatory minimums is also founded in fiscal conservatism. During the 2007 recession, some jurisdictions found it more cost effective to invest is recidivism reduction programs rather than paying to house offenders in prisons and jails.[15] The difficulty with rolling back on these policies is that policymakers risk looking soft on crime. The image of being tough on crime has been politically advantageous not only in the 1980s with the war on drugs, but even now in 2022 with New York Mayor Eric Adams promising to crack down on crime following recent violent crime spikes during the pandemic.[16]

[14] Ibid.
[15] Hadar Aviram, "The Financial Crisis of 2007 and the Birth of Humonetarianism," in *Cheap on Crime: Recession-Era Politics and the Transformation of American Punishment* (Berkeley: University of California Press, 2015), 53-43.
[16] Astead W. Herndon, "They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged," *New York Times*, Feb. 18, 2022.

Research Questions and Methods

Given the fear of looking soft on crime, repealing or rolling back mandatory minimums is a politically tough sell, particularly if there is nothing to replace them with. The goal of my research is to explore what comes after mandatory minimums and what scholars and activists should consider when framing this discussion.

My research questions are:

1. What alternatives to incarceration exist in the United States for high-risk offenders? For low-risk offenders? For juveniles? In other countries?
2. Why are ATIs not extended to high-risk offenders?
3. How might we overcome the political roadblocks for implementing ATIs for high-risk offenders?

Definitions

The definition of what constitutes a "high-risk" or "low-risk" offender varies based on whether you are looking at legislation, policy, implementation, or the media.[17] In legislation, risk is based on the type of crime the person committed.[18] Person-to-person or violent crime (including burglary) is deemed "high-risk" while nonviolent crime is deemed "low-risk." In terms of policy, risk can be categorized by one of the goals of criminal justice: rehabilitation. In that, it asks how likely is this person going to be reformed. In practice, this looks like the National Probation Service's Offender Assessment System which takes into consideration how difficult recovery will be from the harm caused. In the realm of implementation, police may define risk based on their policing priorities and prisons may define risk based on the person's likelihood of

[17] Hazel Kemshall, *Understanding the Management of High Risk Offenders* (Maidenhead: Open University Press: 2008): 6-7.
[18] Ibid., 6.

escape.[19] Finally, media depictions of risk are highly contextual and are often used to spur political anxiety.[20]

These various metrics are just one reason risk assessments are an imperfect way to categorize criminals. Because "risk" is inherently subjective, the term implies that the assessment is tailored to the offender's situation, rather than referring to categories of people. With that said, since the relevant scholarship uses these terms of art, I will be using the categorization of risk used in legislation. Since many ATIs categorically exclude high-risk offenders, using the same language here seems logical. Violent crime is considered "high-risk" and nonviolent crime is considered "low-risk." A person convicted of both a violent crime and a nonviolent crime is still considered high-risk because of the presence of the violent crime. Note that I use high-risk/violent crime and low-risk/nonviolent crime interchangeably.

Next, "recidivism" is a term that people in this field use frequently but define differently. There are two main ways to define recidivism: rearrest or reoffend. When measuring recidivism through rearrest rates, the statistic asks what is the likelihood that an offender will be arrested for any crime within three years following their incarceration. Reoffend rates, on the other hand, ask what is the likelihood that the offender will be charged with the same crime that they were originally convicted of. Rearrest rates can inflate the appearance of recidivism because they take into account minor infractions like parole violations. Conversely, reoffend rates can diminish the appearance of recidivism because they only look at one (or a few) area(s) of crime.

[19] Ibid., 6-7.
[20] Ibid., 7.

In this paper, I use "recidivism" measured by rearrest rates, even if they are overinclusive, because reoffend rates are likely to be higher for nonviolent offenders (particularly those convicted of drug crime) rather than violent offenders (who may "age out"[21] of violence).

[21] Alexi Jones, "Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms," *Prison Policy Initiative* (April 2020).

Alternatives to Incarceration

ATIs generally fall into one of two categories: probation and restorative justice. Probationary ATIs emphasize keeping track of the participants in various aspects of their lives, for example testing for drugs, requiring employment, and/or logging their physical location. In this sense, the probation type of ATI is meant to serve as incarceration within the community. On the other hand, restorative justice focuses on the therapeutic elements of ATIs. This could mean participating in drug rehabilitation or participating in group conferencing to mend the relationship between victim and offender.

Probation

Probation was intended to be the original alternative to incarceration where offenders would utilize rehabilitative services to "facilitate positive contributions to their communities."[22] Now, of the 7 million people involved with the criminal justice system, nearly 5 million are on parole or probation.[23] With this number of people on probation and the inadequate funding for it, rehabilitative measures fall to the wayside and probation becomes community incarceration, thus cutting out one of the rationales for criminal punishment.

The majority of probationary ATIs throughout the country utilize increased supervision with swift consequences for non-compliance modeled after Hawaii's HOPE

[22] Matthew Epperson and Carrie Pettus-Davis, "Smart Decarceration: Guiding Concepts for an Era of Criminal Justice Transformation," in Smart Decarceration: Achieving Criminal Justice Transformation in the 21st Century, Oxford University Press (2017).
[23] Ibid.

program.[24] About one third of offenders on probation are non-compliant.[25] Hawaii's theory was that swift sanctions for non-compliance would reduce technical violations. Other states have attempted to emulate Hawaii's model, but have not implemented a therapeutic element which causes decreased success with the ATI.[26] Current ATI programs mirror standard probation supervision with extra requirements. When implemented, these increased supervision ATIs are paid for by the same funds as regular probation and handled by existing probation personnel.[27] Since there is no difference between standard parole/probation and these ATIs, participants in ATIs are not getting the restorative support they need.

One probation-style ATI has been electronic monitoring (EM) of offenders in their own homes. In Alaska, they have used EM to tackle their particularly high rates of incarceration and to cut costs. While it has accomplished those goals, its drawbacks are similar to those of other ATIs, where it resembles probation with more restrictions rather than a restorative program.[28] In application, EM has been used with low-risk offenders, although scholars speculate it could be just as effective, if not more effective, for high-risk offenders.[29]

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[24] Lorana Bartels, "HOPE-ful bottles: Examining the Potential for Hawaii's Opportunity Probation with Enforcement (HOPE) to Help Mainstream Therapeutic Justice," *International Journal of Law and Psychiatry* 63, (2019): 26-34.
[25] Kristen DeVall, Christina Lanier, David Hartmann, Sarah Williamson, and LaQuana Askew, "Intensive Supervision Programs and Recidivism: How Michigan Successfully Targets High-Risk Offenders," *The Prison Journal* 97, no. 5 (2017): 585-608.
[26] Ibid.
[27] Todd Clear and Carol Shapiro, "Identifying High Risk Probationers for Supervision in the Community: The Oregon Model," *Federal Probation* 50, no. 2 (1986): 42-49.
[28] Natasha Alladina, "The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration," *Alaska Law Review* 28, no. 1 (2011): 148.
[29] Ibid.

The problems with EM stem from the financial burden being shifted from the state to the offender and their family. First, to even qualify for this ATI, they must live in a place that is equipped with a landline to house the necessary equipment. The offender must pay $12-14 per day for the monitoring on top of any other drug tests as well as the cost of their own room and board.[30] Beyond that, since the restrictions are so tight, it is more likely that the offender will face technical violations, thus increasing the appearance of recidivism rates.[31]

Acknowledging those problems, EM still stands as an effective alternative to incarceration if used to forgo prison time altogether. Incarceration is such an interruption in a person's life that when they reenter society, they have to rebuild their work history, credit history, relationships, etc. meaning they have to work from the ground up in terms of their livelihood. If we utilize EM instead of prison, rather than a post-incarceration program, offenders could continue their lives while still serving their time.

Another type of probation style ATI for low-risk offenders is South Carolina's program that allows fathers who failed to pay child support to forgo incarceration in exchange for their participation in a 24-week fatherhood program. This program included weekly group meetings of participants as well as one on one peer support sessions. Participants were expected to find employment within 30 days of the court order and make child support payments within 45 days. The program assisted participants in finding and maintaining employment. While this program has strong

[30] Ibid., 126.
[31] Ibid., 145.

elements of restorative justice, it still falls into the probation category because of the court's employment and payment requirements. What is interesting about this program compared to other probationary ATIs is that the participants hold each other accountable through the peer support sessions and not just a probation officer. The more even power dynamic between the participants may boost their success, and it furthers the restorative element.

Within the first year, three-fourths of participants were in compliance with the program requirements.[32] In addition, the cost to operate the program was one fifth of what it would have cost to incarcerate the participants.[33] They also found that the men that were making steady child support payments had improved relationships with their child(ren) and with the mother of their child.

In analyzing the reason this particular ATI was implemented, the authors discuss incarceration as a further impediment to employment, but also an impediment to establishing a relationship with the child.[34] The harm to the children as a primary motivation for the creation of this ATI falls in line with Ingram and Schneider's social construction of political power in that policymakers are more likely to act on behalf of dependents (the children) rather than deviants (the criminal fathers). This case study could demonstrate that it is easier to implement an ATI when the politically advantageous groups are affected. I further explore Ingram and Schneider's model in relation to ATIs later.

[32] Irene Luckey and Lisa Potts, "Alternative to incarceration for low-income non-custodial parents," *Child & Family Social Work* 2011, vol. 16: 28.
[33] Ibid.
[34] Ibid., 23.

Other countries have been able to effectively utilize probation style ATIs by working closely with the participants, rather than just keeping track of them. In Australia, community corrections, which is very similar to probation, is an alternative to incarceration that follows a pro-social supervision model. This model emphasizes "the principles of pro-social modelling and reinforcement, problem solving and empathy."[35] Community Corrections Officers are able to reward their clients by reducing the frequency/duration of meetings, by doing positive reports to parole boards, or by meeting in other places such as the client's home. The client receives reward by continually adopting pro-social behaviors like "keeping appointments, being punctual, undertaking community work or other special conditions, attempting to solve problems, accepting responsibility for criminal actions and seeking employment."[36]

This pro-social model used in Community Corrections gives a more well-rounded rehabilitation process that is often lacking in alternatives to incarceration. In Victoria, Canada, this model showed to reduce recidivism rates among high-risk offenders by 50%.[37] While a reduction of recidivism on this level is promising, there is a concern that if we, in the United States, tried to adopt community corrections as a program in lieu of incarceration, a 50% reduction would not be enough for policymakers and citizens to consider it an effective alternative.

Here in the United States, there are still limitations in making probation style ATIs available. The US Sentencing Commission analyzed Federal Alternative-to-Incarceration Court Programs and found that while the number of ATI sentencing

[35] Christopher Trotter, "The Impact of Different Supervision Practices in Community Corrections: Cause for Optimism," *The Australian and New Zealand Journal of Criminology* 29, no. 3 (1996).
[36] Ibid.
[37] Ibid.

options available to judges have increased over the past three decades, the rate in which they have used those sentencing options has fallen steadily.[38] This report seemingly contradicts the sentiment that parole/probation officers (POs) would utilize ATI programs if only they were available. The Sentencing Commission's report highlights the availability of ATIs on both a state and federal level, but scholars have noted that the format of these ATIs is not effective enough to do anything of substance.

Current ATI programs mirror standard probation supervision with extra requirements. This harsher version of probation does not work for the betterment of the participant. In fact, these tighter restrictions make it easier for participants to be arrested for lower-level offences, so this "ATI" only lands the participant back in incarceration. The only difference is that the location of incarceration is not prisons, but instead, county jails.[39] Ultimately, these programs are not reducing the net incarceration time; however, they are shifting the decision-making power from the state level (prisons) to the local level (jails).[40] The problem with ATIs as they currently stand is that policymakers are viewing them solely as a way to decrease the number of people in prison, rather than as a tool to help the people that are participating in them.

Another way policymakers have been doing this is by expanding ATIs for one group while restricting them for another. The Sentencing Reform and Corrections Act of 2015 cuts down on the incarceration of people convicted of lower-level crimes, specifically drug crimes, by establishing treatment as a condition of release. The

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[38] William H. Pryor, Jr. et al., "Federal Alternative-to-Incarceration Court Programs," *U.S. Sentencing Commission*, (September 2017) accessed Oct. 6, 2020.
[39] James Austin and Barry Krisberg, "The Unmet Promise of Alternatives to Incarceration," Crime and Delinquency 28, 1982, 374-409.
[40] Ibid.

specifications of the treatment itself are not listed in the act, but an example of the types of technical violations of the release are how quickly the court must act when the participant is non-compliant with his/her probation officer. This act emphasizes that alternatives to incarceration work to reduce the prison population, but do not aid in the participant's recovery.

This act also strengthens and adds mandatory minimums for higher level offenses. During a hearing in the Senate Judiciary Committee, Senator Chuck Grassley quoted the Sherriff of the District of Colombia saying increased crime rates are due to formerly incarcerated people not serving long enough sentences, and for that reason, "[they] have been very careful to limit the people who gain relief under this bill while imposing tougher sentences on others." Even though, Senator Grassley called this "the biggest criminal justice reform in a generation," it is clear that they are using the relief of lower-level offenders to tighten restriction for higher level offenders in the name of criminal justice.

Restorative Justice

Restorative Justice alternatives to incarceration aim to resolve the underlying issues that led to a crime being committed and/or repair the damage between the victim and the offender. Restorative justice ATIs are still sparce in the United States and are reserved for select groups of offenders, namely juvenile offenders and those associated with Native American tribes.

Family Group Conferencing (FGC) is a restorative justice program used among juvenile offenders in the US. It originated from aboriginal traditions with the Maori in New Zealand. The purpose of this restorative justice program was to deal with crime

within the Maori community, so that Indigenous participants were not forced to leave the community and dealt with in the standardized, Eurocentric criminal justice process. This practice operates under the idea that forcing the offender out of the group as punishment for their actions will only hurt the community even further.[41] FGC is a process of facilitating discussions between victims, offenders, and both of their support groups. The process starts with the offender describing the crime and allowing the victim to share the impact of what happened and what they feel as a consequence of the offender's actions. The process ends with a mutual agreement describing their expectations and requirements going forward.[42]

FGC is used outside the Maori community in countries closer to home like Canada. In Canada, FGC is a pre-charge diversion program run by the Royal Canadian Mounted Police.[43] In the United States, FGC and other victim-offender restorative justice programs are only implemented among juvenile offenders. Research shows a lower risk of re-offending for people who participate in these programs; however, studies on this topic do not differentiate juveniles based on the crime they committed,[44] so the risk level concept used with adult offenders is not applicable to these findings. Although Canada uses FGC with adult offenders, the fact that it is run by their police department would make it hard to implement in the United States. In the US, the police department's role is to catch criminals and deliver them to the justice department.

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[41] Paora Moyle and Juan Tauri, "Maori, Family Group Conferencing and the Mystifications of Restorative Justice," *Victims & Offenders* 11, no. 1 (2016): 1-20.
[42] Seokjin Jeong, Edmund F. McGarrell, and Natalie Kroovand Hipple, "Long-term impact of family group conferences on re-offending: the Indianapolis restorative justice experiment," *Journal of Experimental Criminology* 8 (2012): 369-385.
[43] Richard M. Zubrycki, "Community-Based Alternatives to Incarceration in Canada," From Annual Report for 2002 and Resource Material Series no. 61 (2003): 98-122.
[44] Jeong et al., "Long-term impact of family group conferences."

Rehabilitation and restoration are generally not duties delegated to the police. Further, advocating for more funding towards police departments in the US might be an equally tough political sell.

Native American tribes have been revitalizing their court systems under the federal jurisdiction of the United States. Although, the US Supreme Court has limited the legitimacy of these tribal courts, states are slowly recognizing the benefits of culturally relevant justice as well as the bureaucratic benefits of keeping Native offenders in tribal courts (meaning less people the state must deal with in the non-Native court system).

In California, the Yurok tribe has partnered with Del Norte and Humboldt counties to have concurrent jurisdiction over non-violent Yurok offenders. This means the tribe is able to run Wellness Courts for treatments, provide culturally relevant services, and be in charge of compliance monitoring. Chief Judge of the Yurok Tribal Court, Abby Abinanti, describes the versatility of agreements made in tribal courts. For example, she has signed off on agreements including nonmonetary child support such as manual labor and fishing for salmon. To compare this to South Carolina's probationary ATI where fathers who failed to pay child support participated in a parenting class and one on one group support sessions, this ATI is keeping the parent involved. Instead of making the parent accountable to a PO or support group, the parent is accountable to the family.

The concurrent jurisdiction between the state of California and the Native American courts not only shows good faith from California justice system in allowing Native communities to handle the cases of Native offenders, but also it serves as a

gateway to implement alternatives to incarceration that are available in tribal courts to the general US criminal justice system. If alternative sanctions work in Native courts, presumably they could work in non-Native courts as well.

In terms of what type of offenders are able to benefit from Native American restorative justice programs, these courts do not have jurisdiction over people that would be considered "high-risk," except in one circumstance. Native American courts have jurisdiction of tribe members convicted of domestic violence offenses under the Violence Against Women Act of 1994 (VAWA). When it comes to expanding ATIs, both probation and restorative justice, there is an understandable concern of keeping violent offenders on the streets. This is where the rationale for incapacitation comes in. It is unclear whether Native American courts have used this area of jurisdiction to implement restorative justice ATIs for crimes under VAWA. Even still, tribal use of ATIs demonstrate that ATIs are just as effective, if not more, and still prioritizes the safety and wellbeing of the community. What is important about the use of these programs in Native American communities is that it is happening so close to home. It is not like ATIs are some concept being used on the other side of the world. They have been effectively used here in our backyard.

Turning now to what is included in restorative justice agreements, both academic articles and summaries of Native American peacemaking courts report restorative agreements that were made for juvenile offenders. Because of this, the educational aspect is more prominent than it would likely be for adult offenders. For example, part of the RJ agreement for a 17-year-old who was caught driving with an open alcohol container included a three-page essay on ways alcohol has negatively

affected his life.[45] Stipulations like this make sense for offenders who going through the educational system and regularly learn through essay writing. There could be a patronizing feeling if this same type of stipulation was used for an adult offender who does not normally write reflective essays. While reflection like this may still benefit an adult offender, the feeling of being belittled might inhibit the rehabilitative goal. This is a good example of a restorative agreement that may be effective, but likely would not translate well to adult offenders.

Another common example in RJ agreements is community service in a field that is relevant to the victim. In one case, a group of boys vandalized a store, and after having a mediated meeting with the store owner, the parties agreed that the teenagers would pay for the damage and work at the store for a few months.[46] In a petty theft case, the offender was required to pay restitution for the stolen item as well as complete community service hours in a food bank that was sponsored by the victim's church.[47] One theme of restorative justice peacemaking circles is getting offenders to empathize with the people that they have hurt. Having the kids work in the store increases the sympathy to empathy when they were able to see how the store runs under normal circumstances. Furthermore, community service in fields that are important to the victim bring the rehabilitation closer to home.

Recently, the nonprofit group, Common Justice, created the first alternative to incarceration in the United States geared specifically for those who have committed

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[45] Gordon Bazemore and Mark Umbreit, "A Comparison of Four Restorative Conferencing Models," *Juvenile Justice Bulletin*, Feb. 2001.
[46] Laura Mirsky, "Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One," *International Institute for Restorative Practices*, April 27, 2004.
[47] Bazemore and Umbreit, "A Comparison of Four Restorative Conferencing Models."

violent crimes. The New York program founded in 2008 diverts cases from the criminal legal system to a restorative justice process if all parties agree, including the victim. Participants are adults ages 16-26 involved in violent felony cases like burglary, robbery, or assault. The goal of the program is to "collectively identify and address impacts, needs, and obligations, in order to heal and make things as right as possible."[48] As of 2017, only 8% of program participants had to be sent back to the court system for committing a new crime.[49]

Restorative justice is a way to approach criminal justice in lieu of incarceration. However, some states, like Oregon, use restorative principles for people who are currently incarcerated so that they can chip away at the length of their sentence. Oregon has one "alternative incarceration" program available to some high-risk offenders. This program was created under ORS 421.504 in 1993 and expanded to cover drug treatment in 2003. The Oregon State Legislature designated the Department of Corrections as the administrative authority over this program. Although the title implies participation as a means to forgo incarceration, in reality the program is only available while the participant is in custody and has at least 270 days left on their sentence. The Oregon statute cites the purpose for this legislation is to "[divert] sentenced offenders from a traditional correctional setting" and they wanted to create a program that "instills discipline, enhances self-esteem, and promotes alternatives to criminal behavior." They do this by using "evidence-based practices" to "provide cognitive restructuring" through "intensive self-discipline, physical work, and physical exercise."

[48] "Our Work," Common Justice Project, accessed March 28, 2022 https://www.commonjustice.org/our_work.
[49] "Common Justice," Brooklyn Community Foundation, accessed May 6, 2022, https://www.brooklyncommunityfoundation.org/grant-recipients/common-justice-0.

Oregon's Alternative Incarceration Program is not an alternative to incarceration given that people can only participate while they are in custody. Oregon's Administrative Rules for the Department of Corrections also exclude certain high-risk offenders (particularly those convicted of sex crimes and homicide). The Oregon DOC website also states that even if an adult in custody (AIC) qualifies for the program, that does not guarantee their placement in the program, nor does a recommendation from a court/judge.

Despite these restrictions, there are benefits to participating in the program. Participants are housed in separate units than the rest of the general prison population, so they can create a community that focuses on rehabilitation. They are held to a higher hygiene/grooming standard, implying they have more access to these resources. Finally, they have the ability to earn non-cash incentives (NCIs) through the DOC's Performance Recognition and Award System (PRAS) based on their success in the program. These incentives allow them things like more family visitation. Ultimately, the Department of Corrections fulfills "diverting sentenced offenders from a traditional correctional setting" required by ORS 421.504 by changing the correctional setting without releasing participants from custody, but allowing them to chip away at their sentence by participating in rehabilitative measures.

Conclusions

The different types of ATIs, whether probationary or restorative, fulfill the rationales for criminal punishment in different ways. For example, electronic monitoring gets at incapacitation by monitoring offenders before they potentially commit future crimes. Hawaii's HOPE program that provides sanctions for probation

non-compliance gets at specific deterrence. All of the restorative justice programs get at rehabilitation. When implementing ATIs, legislatures do not have to copy exact programs that have already been done. They could mix and match different ATI programs to hit all of the rationales for punishment. Incarceration as it stands now does not hit each rationale, namely rehabilitation. Legislatures could cover more ground by using certain programs in combination with others.

How can the successes of other ATIs be translated to high-risk offenders in the United States?

Extending ATIs to include high-risk offenders is a new concept in the United States given the lack of available programs for this group. Policymakers, particularly in the United States, fear looking "soft on crime." In turn, politicians view ATIs as politically risky.[50] They fear that program failure will cause them to lose support from their constituents.[51] In jurisdictions that have implemented ATIs, these policies have found success when there is political will for reform and when there are strong metrics to monitor program success.[52] In terms of measuring program success, we can look at small scale ATIs, like the Common Justice program in New York, but we can also look towards other areas of criminal justice reform. We can rely on the successes in jurisdictions like Canada and the tribal courts and in other groups like with juveniles. While it may be easy to distinguish those groups and jurisdictions from adult high-risk offenders, it may spark interest in expanding the smaller programs like Common Justice. Beyond measuring program success, policymakers are not going to spearhead this change unprompted; the political will needs to shift.

How you define the affected individuals changes political power. Political scientists, Helen Ingram and Anne Schneider, have developed a 2 by 2 model for analyzing groups' power in politics.[53] On the x-axis are social constructions measured

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[50] Melissa Lovell, Jill Guthrie, Paul Simpson, and Tony Butler, "Navigating the Political Landscape of Australian Criminal Justice Reform: Senior Policy-makers on Alternatives to Incarceration," *Current Issues in Criminal Justice* 29, no. 3 (2018): 227-241.
[51] Ibid.
[52] Ibid.
[53] Anne Schneider and Helen Ingram, "Social Construction of Target Populations: Implications for Politics and Policy," *American Political Science Review* 87, no. 2 (1993): 334-347.

positively and negatively. These constructions are how the groups are portrayed/perceived by the public. On the y-axis is political power measured by how strong or weak of an influence the group has. The "advantaged" is the first category and it consists of people like veterans, scientists, and the elderly. This group is looked on positively and has strong political power. Next are the "contenders," who are made up by the rich, big unions, and the cultural elite. This group is looked on negatively, but still maintains strong political power. Below are the "dependents," who are children, mothers, and the disabled. This group is seen as positive, but lacks strong political power. Lastly are the "deviants," which are criminals, drug addicts, and gangs. This group is viewed negatively and has very weak political power.[54]

Ingram and Schneider's model is important to consider when proposing legislative reforms, particularly those that are new or radical. Even legislation that is grounded in strong research can still be held back if it is directed towards the wrong group. As mentioned above, policymakers want to see political traction in addition to evidence of success before pursuing legislation. When proposing expanding ATIs to high-risk offenders, we can lean on the routes that ATIs for low-risk offenders took and draw insight from how they reframed the target population.

One key example is Oregon's model in decriminalizing drugs. Oregon voters adopted Measure 110 which decriminalized small amounts of certain drugs by way of the initiative process.[55] A crucial aspect of this measure was the way supporters framed addiction as a public health issue rather than a crime issue. Under the new law, when a

[54] Ibid.
[55] "Oregon's Pioneering Drug Decriminalization Experiment Is Now Facing The Hard Test," *Oregon Public Broadcasting*, June 18, 2021.

person is found in possession of small amounts of (previously criminalized) drugs, they are issued a $100 fine, and that fine can be waived if they participate in a health screening.[56] The health screening functions as a way to identify the person's needs and recommend solutions that fit their specific situation. Measure 110 has had critique about its ability to follow through after these health screenings.[57] But the main takeaway is that drug use was once a crime issue that relied on incapacitation by locking up drug users. Measure 110 shows that shifting the conversation away from the "deviants" category made it a public health issue, and in turn, gave it the political traction to create this ATI. Once the target group moved from deviants to dependents, the groups was perceived less negatively and there was political will to help, or rehabilitate, rather than to punish.

Another lesson to take from Measure 110 as a side note is that significant policy change does not have to involve the legislature. Legislators are hesitant to push for reform when it is politically risky. If voters become passionate about restorative justice, not only can they implement change to the criminal justice system, but they can do it quickly. Even if the initiative only starts out in one state, or in one city as is the case with the Common Justice program, the program will provide invaluable data on which other jurisdictions can rely.

Supporters of ATIs can frame violence as a public health issue. Certainly, this is not to say that violence should be decriminalized. In fact, a fundamental purpose of government is to address crime and violence. With that said, we can think of the

[56] Ibid.
[57] Emily Green, "Few Obtain Treatment in First Year of Oregon Drug-Decriminalization Grants," *Oregon Public Broadcasting*, February 14, 2022.

criminal justice system like the health screening designed by Measure 110. Rather than responding to all criminal acts with incarceration, we can individualize punishments for perpetrators of violence by using alternatives that fit the offender's (and the victim's) needs. In some cases, that may mean using Common Justice's model where the victim and offender meet to identify the impacts of the offender's acts and agree on what the offender's obligations are to repair the harm. In other situations, it may mean a combination of the ATIs addressed above like electronic monitoring with probation-style meetings or RJ-inspired community service. In the end, for some offenders, the punishment that fits everyone's needs may still be incarceration. Rehabilitation only works to the extent that the person participating in the program actually wants to participate. Extending ATIs to high-risk offenders does not mean shutting down prisons and letting continually violent people remain in the community. ATIs serve as an opportunity to find a solution that works for the people involved.

Looking to the future, in order to make ATIs possible, we must first repeal policies like mandatory minimums and three-strikes laws. This is no easy task. Especially in Oregon, for example, where Measure 11 (mandatory minimums) was passed by initiative. While plenty of research shows that mandatory minimums and other tough on crime laws do not rehabilitate offenders, repealing these laws alone is not going to help either. We need to replace these laws with programs that allow for alternatives to incarceration.

Conclusion

The roadblocks stem from the way mass incarceration is framed. If we look at the issue from the stance that we need to get bodies out of prisons, then decarcerating low-risk offenders is a quick way to achieve that goal. Thinking long-term, however, low-risk offenders are more likely to find their way back to prison.[58] ATIs, for both low and high-risk offenders, need to focus on rehabilitating and restoring the harm caused by the crime, so that they set the participants up for long term success. The way to overcome these challenges is by framing the issue as helping individuals rather than decreasing the raw prison population numbers.

Thoughts on future research

As I was reading about ATIs, many articles used phrases like "punishment that fits the needs of the situation" and I was left wondering what kinds of punishments fit those needs. Specifically in the restorative justice area, I wanted to see more examples of what solutions come out of victim-offender agreements. I recommend that future research include examples of what the victim and offender's needs were and what solutions addressed those needs.

[58] Warren A. Reich, Sarah Picard-Fritsche, Lenore Cerniglia, and Josephine Wonsun Hahn, "Predictors of Program Compliance and Re-Arrest in the Brooklyn Mental Health Court," Center for Court Innovation (June 2014): 4.

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