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BREAKING THE CYCLE: HOW NEVADA CAN EFFECTUATE MEANINGFUL CRIMINAL JUSTICE REFORM

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INTRODUCTION

“[T]he end of law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom.”¹

The scope and purpose of this paper can be summed up with one simple question: “Why does society punish criminals?” More specifically, this paper will examine what Nevada is attempting to accomplish through enacting and enforcing its criminal laws. However, due to the nuanced and complicated scope of the topic of criminal justice, it is important to establish a common frame of reference to which readers can refer back—namely, that we have decided to evaluate Nevada’s criminal justice system through a utilitarian lens.

There are several theories of criminal justice that attempt to provide explanations for how and when society is justified in depriving individuals of their natural rights to life, liberty, or property. One train of thought is called retributive justice, which—although there are several sub-theories within this school of thought—generally posits that individuals who violate society’s rules or laws *deserve* punishment because they have committed a moral evil.² Every revenge story is based on this idea of retributive justice.³

In contrast, under utilitarian theories punishment is only justified when the overall ‘pain’ it causes is outweighed by the benefits it provides society as a

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¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306 (Peter Laslett ed., Cambridge Univ. Press 2003) (1690).

² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 18 (8th ed. 2018).

³ Think of the character Inigo Montoya in William Goldman’s, “The Princess Bride.” *See generally* THE PRINCESS BRIDE (Act III Communications 1987). *After* witnessing the ‘six-fingered man’ murder his father in cold blood, Inigo spends his entire life seeking to *avenge* his father’s death to (in his eyes) right a moral wrong. *Id.*

whole.⁴ Some of the ‘benefits’ of criminal punishment often used to justify punishments instituted under the law are: deterrence, which is the idea that individuals will not engage in illegal conduct to avoid the prescribed punishment; incapacitation, or removing dangerous individuals from society to prevent them from causing further harm; and rehabilitation, which is the idea that punishment can be used to teach or ‘reform’ individuals so they will not continue to engage in conduct deemed ‘wrong’ by society.⁵

While these two theories of criminal justice are undoubtedly (and often unconsciously) on the minds of both lawmakers and everyday citizens, to create an effective and just criminal justice system, it is paramount to determine the *why* behind our criminal laws. While each theory has its merits, in a society made up of (and arguably becoming more inclusive of) diverse cultures, religions, and philosophies, what is considered a ‘moral wrong’ is often ambiguous at best⁶—which calls the validity and legitimacy of retributive justice in modern society into question.⁷ For purposes of this paper, we chose to examine Nevada’s criminal justice system through the lens of the utilitarian theory of justice. The analyses, critiques, and suggestions in this paper all come back to the fundamental utilitarian calculus of whether Nevada’s criminal laws effectively maximize the “net happiness of society”⁸—and if they don’t—what can be changed to effectively reach that result.

This paper proceeds in two parts. Part I will explore the current state of, as well as the challenges facing, Nevada’s criminal justice system. First, we examine current and projected criminal statistics and trends in Nevada, including the State’s ever-increasing incarceration rate, recidivism, and fiscal costs associated with imprisonment. We then turn to the most recent piece of criminal legislation passed by the 2019 Nevada Legislature, Assembly Bill 236 (AB 236), which attempted to address some of these issues. Specifically, we identify the

⁴ DRESSLER, *supra* note 2, at 16–17.

⁵ *Id.* at 17.

⁶ By way of illustration, think of the moral stances and beliefs of the devout evangelical Christian as opposed to the staunch atheist. While the two would undoubtedly share some ‘moral’ commonalities (e.g., it is ‘wrong’ to kill another human being without provocation) their *reasoning* and *justification* for their respective stances will likely be at odds (i.e., killing is a violation of God’s natural law vs. the notion that human beings’ shared (and unique) abilities to reason purports that “the mass of mankind has not been born, with saddles on their backs”). See Letter from Thomas Jefferson to Roger Chew Weightman (June 24, 1826) (reprinted in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-6179> [https://perma.cc/A7J8-KVJ8] (last visited Mar. 25, 2020)). Therefore, basing the validity and legitimacy of society’s criminal laws on the unlikely consensus of these two hypothetical individuals is inefficient at best—and impossible at worst. In an infinitely more complex modern society with—not two—but thousands of moral belief sets, it is more practical to measure the efficacy of a criminal justice system using an objective utilitarian calculus.

⁷ We admit that a discussion on the merits of retributive justice in modern society deserves a more in-depth conversation, which cannot adequately be explored in this paper.

⁸ See DRESSLER, *supra* note 2, at 16.

important first steps that AB 236 took toward making Nevada's criminal justice system more utilitarian.

Part II of this paper identifies and proposes certain solutions to reduce both recidivism and the financial burden that incarceration imposes on the state by looking to best practices in other states, as well as certain mechanisms and provisions that were, for one reason or another, removed from AB 236. First, we identify certain crimes whose current statutory structure and application by law enforcement and courts suggest they are motivated by retributive justice (i.e., a desire to simply punish), rather than a desire to obtain a favorable result for the offender and society. We then make suggestions of how these crimes could be modified and adjusted to be more consistent with a utilitarian model of justice. Second, we propose certain 'front-end solutions,' such as sentencing diversion programs using specialty courts.

I. CHALLENGES FACING NEVADA'S CRIMINAL JUSTICE SYSTEM

A. *Problems Facing Nevada*

Nevada is currently amid a prison population boom. From 1980 to 2016, Nevada's prison population grew from about 2,000 inmates to nearly 14,000, a staggering 648 percent increase.⁹ During this same period, Nevada's population only grew by 255 percent.¹⁰ From 1980 to the mid 2000s, rising prison populations were the norm for the rest of the country, but over the last decade states have started to adopt policies to reverse this trend.¹¹ But not in Nevada. Since 2009, Nevada's prison population has grown by 7 percent, leaving the state with the fifteenth highest incarceration rate in the country.¹²

As a result of these disturbing trends, then-Governor Sandoval, then-Senate Majority Leader Ford, Speaker Frierson, and then-Chief Justice Douglas directed the Advisory Commission on the Administration of Justice (ACAJ) to review the state's criminal justice system.¹³ The ACAJ analyzed "Nevada's sentencing and community supervision data, compared the state's policies and procedures with nationally recognized best practices, and reviewed the latest research on reducing recidivism and improving public safety."¹⁴ The ACAJ found that these figures were largely driven by increases in (1) the number of people failing on community supervision, and (2) the average length of time

⁹ NEV. ADVISORY COMM'N ON THE ADMIN. OF JUSTICE, JUSTICE REINVESTMENT INITIATIVE: FINAL REPORT 9 (2019) [hereinafter FINAL REPORT].

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² *Id.* at 9.

¹³ Press Release, Len Engel, Dir. of Policy & Campaigns, Crime & Justice Inst., Nevada Legislature Advances Major Criminal Justice Reform (June 3, 2019) (available at <http://www.crj.org/assets/2019/06/Crime-and-Justice-Institute-Statement-on-AB236.pdf> [<https://perma.cc/5Q59-ZXL7>]).

¹⁴ *Id.*

served.¹⁵ In 2017, 39 percent of prison admissions resulted from an individual failing on community supervision.¹⁶ Of these community supervision failures, 34 percent of these offenders were admitted to prison on technical violations.¹⁷ A technical violation could be failing a drug test, missing a meeting with a probation officer, or any other supervision violation that does not rise to the level of new criminal conduct or absconding.¹⁸ The number of individuals admitted to prison for probation violations has increased by 15 percent over the past decade despite an overall decline in the state's probation population.¹⁹ Additionally, the average length of a prisoner's sentence increased 20 percent during this same time.²⁰ The ACAJ found that prisoners released from direct prison sentences in 2017 had "served[,] on average, nearly seven months longer than [prisoners] released in 2012."²¹

Another important factor that increased the size of Nevada's prison population is the state's high rate of incarceration versus community supervision. In 2016 in Nevada, 52 percent of individuals serving their sentences were incarcerated while 48 percent were on some form of community supervision.²² Significantly higher percentages of offenders are incarcerated in Nevada than across the country. Nationally, only 31 percent of offenders are incarcerated, and 69 percent are on community supervision.²³ Additionally, more offenders entering the prison system are non-violent and first-time offenders. According to the ACAJ's statistical research, in 2017, 66 percent of the offenders admitted to Nevada prisons committed non-person offenses.²⁴ Non-person offenses traditionally include non-violent offenses such as property crimes and drug crimes like simple possession of a controlled substance.²⁵ Conversely, the Nevada Department of Corrections (NDOC) defines person offenses as violent or sexual crimes, or as offenses that "involve[e] harm or injury."²⁶ Of these non-person offenders entering Nevada prisons, 40 percent had no prior felony record.²⁷ Based on these figures it is clear that a significant portion of Nevada's prison population is made up of non-violent first-time offenders.

¹⁵ FINAL REPORT, *supra* note 9, at 13.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 4, 13.

¹⁸ *Id.* at 13.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (looking at figures for offenders sent directly to prison, as opposed to offenders sent to prison for violations of probation or other terms of community supervision).

²² *Id.* at 10.

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* Within this bucket of non-offenders, 37 percent were property offenders, and 41 percent were drug offenders. *Id.*

The incarceration of so many non-violent, first-time felons obviously raises questions about how so many of these people end up in prison. One of the driving factors is the lack of alternatives to incarceration available in Nevada.²⁸ For most felony offenders the only two options available are incarceration or probation.²⁹ One reason for Nevada's high incarceration rate is that Nevada currently does not have any pre-prosecution diversion programs for felony offenders.³⁰ Instead, the only other option available to felony offenders is through the state's specialty court system.³¹ These limited options, combined with Nevada's high rate of incarceration versus community supervision, continue to drive the state's growing prison population up.³²

In addition to the growing prison population, the number of inmates being admitted to prison with identified mental health needs has grown significantly.³³ Over the past decade, Nevada has seen a 35 percent increase in offenders entering prison with an identified mental health need.³⁴ This problem is not unique to Nevada; it is estimated that anywhere from 37 percent to over half of all inmates have mental health problems, including drug dependence and abuse.³⁵ Individuals with mental health needs present unique problems for the correctional system because they tend to "serve time in segregation, and to incur disciplinary problems at higher rates than others with similar charges and criminal history."³⁶ As a result, offenders are often not getting the mental health services they need, and taxpayers are paying to continually incarcerate these individuals.³⁷

In order to accommodate the growing prison population, the NDOC's budget has grown by 14 percent over the last ten years, coming in at \$347 million for 2019.³⁸ Even with the increased budget, Nevada's prisons are overcrowded and operating beyond their intended capacities.³⁹ This leaves fewer resources and reduced space for much-needed rehabilitation services.⁴⁰ In response to these growing pressures, the state had to contract with a private cor-

²⁸ *See id.* at 12.

²⁹ *See id.*

³⁰ *Id.*

³¹ *Id.* Specialty courts are discussed in more detail *infra* Section II.C.

³² *See id.* at 13.

³³ *Id.* at 15.

³⁴ *Id.*

³⁵ Beverly D. Frazier et al., *The Impact of Prison Deinstitutionalization on Community Treatment Services*, 3 HEALTH & JUST. 1, 2 (2015); Heather Stringer, *Improving Mental Health for Inmates*, 50 AM. PSYCHOL. ASS'N 46, 46 (2019).

³⁶ FINAL REPORT, *supra* note 9, at 15.

³⁷ *Id.*

³⁸ *Id.* at 10.

³⁹ *Id.* at 9.

⁴⁰ *Id.*

rections corporation in Arizona to house overflow inmates.⁴¹ While the initial agreement was for \$9.2 million over two years, the NDOC forecasted an additional \$5.3 million in third-party housing expenses for fiscal years 2020 and 2021.⁴² Without immediate action, the ACAJ projects Nevada's prison population will grow by an additional 9 percent, "adding nearly 1,200 beds [with] an additional cost of [over] \$770 million."⁴³

Even with more money being spent and prisoners serving longer sentences, the ACAJ found that recidivism rates increased for most offenses over the last decade.⁴⁴ Of the 4,996 released offenders in 2015, 1,375, or 27.52 percent of them, returned to the prison system within thirty-six months of their release.⁴⁵ While this is an improvement of 3.87 percent from the 2014 release cohort, it is still over 7 percent higher than the recidivism rate in 2010.⁴⁶ Based on the NDOC's data, property and drug offenders experienced the highest rates of reincarceration, coming in at 33.8 percent and 27.06 percent respectively.⁴⁷ Not surprisingly, inmates who participated in job or vocational training were 2.7 percent less likely to return to prison than those who did not participate in these programs.⁴⁸ According to the NDOC's data, offenders who completed the entirety of their sentences were significantly less likely to return to the prison system than those who were paroled.⁴⁹ Offenders who discharged their sentences had a recidivism rate of 20.49 percent compared to 32.58 percent for offenders who were paroled.⁵⁰ The NDOC attributes this discrepancy to the fact that more serious offenders need to be placed under community supervision.⁵¹ We believe the NDOC's conclusion is a shallow view of the data, and there are other reasonable alternatives that could explain this discrepancy. The NDOC correctly points out that paroled offenders must comply with the terms of their parole to be released into society.⁵² These limitations on an offender's release are an alternative explanation for why recidivism rates are higher amongst parolees. This alternative conclusion is supported by the ACAJ's finding that 39 percent of new prison admissions in 2017 were due to community supervision viola-

⁴¹ Ben Botkin, *Nevada Officials OK \$9.2M Deal to Ship Inmates to Arizona*, L.V. REV. J. (Oct. 10, 2017), <https://www.reviewjournal.com/crime/nevada-officials-ok-9-2m-deal-to-ship-inmates-to-arizona> [<https://perma.cc/DUB2-23QB>].

⁴² FINAL REPORT, *supra* note 9, at 10; NEV. DEP'T OF CORR., GOVERNOR RECOMMENDS BUDGET: STATE FISCAL YEAR 2020 & 2021 24 (2019).

⁴³ FINAL REPORT, *supra* note 9, at 10.

⁴⁴ *Id.* at 4. Nevada calculates recidivism by looking to the percent of offenders released from custody who return to NDOC custody within thirty-six months. *Id.* at 13.

⁴⁵ NEV. DEP'T OF CORR., PRISON RECIDIVISM ANALYSIS: 2015 RELEASE COHORT 1 (2019).

⁴⁶ *Id.*

⁴⁷ *See id.* at 3.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

tions.⁵³ Additionally, 34 percent of these admissions were for technical violations of the offender's community supervision.⁵⁴ This means that these individuals returning to prison did not necessarily commit a new crime or abscond; they simply were not able to comply with the terms of their release.⁵⁵

B. Overview of Assembly Bill 236

*"[L]aws and institutions must go hand in hand with the progress of the human mind. [A]s that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change with the change of circumstances, institutions must advance, and keep pace with the times."*⁵⁶

AB 236 of the 2019 Nevada Legislative Session was a broad omnibus bill that reformed several areas of the state's criminal justice system.⁵⁷ Three of the major successes of AB 236 were in the areas of: (1) redefining and reclassifying certain crimes, (2) probation and parole reform, and (3) community reentry programs/procedures for inmates.

1. Reclassification of Certain Crimes

If the purpose of criminal laws is to further one of the three utilitarian interests of deterrence, incapacitation, or rehabilitation, the analysis for whether a criminal law is effective becomes relatively straightforward with the availability of certain data. For example, if a state were to change its minimum prison sentence for theft from one to two years, the state could collect data to determine whether the increased minimum sentence has any substantive effect in reducing theft (deterrence) or recidivism (rehabilitation), and balance those benefits with the added costs that longer sentences have on society. This appears to be the type of analysis that Nevada legislators used when drafting AB 236, which made several revisions to the structure and/or definitions of different criminal statutes that were not 'effective.' The crimes that AB 236 revised, which are discussed in detail below, included: burglary, felony theft, "category B" crimes, and several drug-related offenses.

⁵³ FINAL REPORT, *supra* note 9, at 31.

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ Letter from Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval) (July 12, 1816) (*reprinted in Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> [<https://perma.cc/PS5H-NW88>] (last visited Mar. 25, 2020)).

⁵⁷ *See* A.B. 236, 80th Sess. (Nev. 2019).

a. Burglary

As of 2017, Burglary—or the act of unlawfully entering or remaining in a dwelling (or vehicle) with the intent to commit a crime (particularly theft)—was the most common crime for which individuals were imprisoned in Nevada.⁵⁸ Recognizing the variance of societal interests in preventing individuals from unlawfully entering, say, a motor vehicle as opposed to a personal residence, the sponsors of AB 236 reclassified burglary into different subtypes with corresponding penalties.⁵⁹ For example, the burglary of a motor vehicle is now classified as a category E felony and carries a penalty of one to four years in prison, while the burglary of a personal residence is classified as a category B felony and carries a penalty of up to twenty years of imprisonment.⁶⁰

b. Felony Theft

AB 236 also changed the language defining what constitutes “felony theft.” The utilitarian justification for having a multi-tiered classification/punishment system for theft-related crimes, instead of treating and punishing all theft equally, is relatively straightforward because theft inherently involves things of monetary value. It wouldn’t make sense to spend hundreds of thousands of taxpayer dollars to convict and imprison an individual for shoplifting a pack of gum. On the other hand, it makes perfect sense (from a utilitarian perspective) to spend such resources to prevent/punish the theft of a multimillion-dollar item. AB 236 simply raises the minimum monetary threshold for when theft constitutes a mere misdemeanor, or a category D, C, or B felony.⁶¹ Specifically, the monetary threshold for a misdemeanor was raised from anything less than \$650 to \$1,200.⁶² Category D felonies, which were not included in the previous version of the statute, were added for thefts of items valued between \$1,200 and \$5,000.⁶³ Category C thresholds were raised for theft of items valued between \$650 and \$3,500 to \$5,000 and \$25,000; and finally, category B thresholds were raised from anything over \$3,500 to anything valued between \$25,000 and \$100,000.⁶⁴

⁵⁸ See NEV. REV. STAT. § 205.060 (2019); ASSEMBLY COMM. ON JUDICIARY, JUSTICE REINVESTMENT INITIATIVE OF DATA FINDINGS AND RECOMMENDATIONS 21 (2019) (on file with author).

⁵⁹ While “society” has the same general interest in preventing and deterring individuals from illegally entering *any* premises to commit a crime such as theft, there are additional interests when the burglary takes place in a person’s home as opposed to a commercial building (e.g., the invasion of privacy or the added likelihood that the residence’s owner will be home at the time of the burglary).

⁶⁰ NEV. REV. STAT. §§ 193.130, 205.060 (2019).

⁶¹ A.B. 236, 80th Sess. § 58 (Nev. 2019).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

c. “Category B” Crimes

In 2017, individuals convicted of “Category B” crimes accounted for nearly half of all prison admissions in Nevada and spent an average of almost ten months longer in prison than the same category of individuals in 2011.⁶⁵ While there are undoubtedly certain “Category B” crimes that require such a punishment, the sponsors of AB 236 also recognized that certain crimes that were classified as “Category B” felonies did not seem to belong together. For example, the non-violent crime of ‘knowingly selling a motor vehicle with an odometer that had been fraudulently altered,’ was placed in the same category as ‘battery resulting in substantial bodily harm.’⁶⁶ While Nevadans undeniably have an interest in preventing and deterring both activities, attempting to eliminate (or at least reduce) violent crimes stands out as a more pressing societal interest. Therefore, AB 236 reclassified certain non-violent crimes that were considered “Category B” felonies and made them “Category C” felonies.⁶⁷

d. Drug-Related Crimes

One of the bill’s major changes included certain modifications to the Nevada Revised Statutes’ (NRS) provisions for drug-related crimes and their associated penalties. There are several utilitarian justifications to support changes to drug-related crimes. First and foremost is the cornerstone utilitarian tenet that “the only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others.”⁶⁸ While it is plain that certain drug-related laws are in place to “prevent harm to others,”⁶⁹ many drug-related crimes punish what some argue is “victimless” conduct.⁷⁰

Furthermore, societal trends generally show that the public is adopting a more accepting attitude toward drug use.⁷¹ Therefore, if the goal of a utilitarian criminal justice system is to institute and enforce laws that cause more societal ‘good’ than ‘harm,’ it makes sense to restructure crimes that prohibit conduct

⁶⁵ FINAL REPORT, *supra* note 9, at 28.

⁶⁶ NEV. REV. STAT. §§ 200.481, 484D.335 (2019).

⁶⁷ A.B. 236, 80th Sess. §§ 84, 111, 125, 130 (Nev. 2019) (reclassifying non-violent crimes including: knowingly selling a motor vehicle with an odometer that had been fraudulently altered, the unlawful use of a scanner, certain gaming crimes, and maintaining a drug house).

⁶⁸ JOHN STUART MILL, ON LIBERTY 13 (Batoche Books Ltd. 2001) (1859).

⁶⁹ For example, NEV. REV. STAT § 484C.110 (2019) contains provisions that prohibit individuals from driving a motor vehicle while under the influence of drugs. Justification for this prohibition is not necessarily a moral condemnation of drug use itself (although it is possible that was certain legislator’s motivation in passing the law), rather, it is the recognition of the increased potential harm that a driver under the influence of drugs poses to others.

⁷⁰ B. Grant Stitt, *Victimless Crime: A Definitional Issue*, 11 J. CRIME & JUST. 87, 88–89 (1988).

⁷¹ Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019) <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization> [<https://perma.cc/J3Z7-FNRW>].

that past generations believed caused societal harm, but which ‘harm’ modern society increasingly calls into question. Finally, there is also evidence that the current structure and prosecution of many drug-related crimes fail in their utilitarian aims—as they are not effective, efficient, or equitable.⁷² For all of these reasons, Nevada’s drug-related crimes deserved (and continue to deserve) a hard look to ensure they are justified.

First, AB 236 changed certain definitions and prescribed punishments for simple drug-possession-related offenses. Shockingly, the number of individuals who were incarcerated for simple drug possession grew by over 53 percent from 2008 to 2017.⁷³ AB 236 revised the penalties for possession of a controlled substance based on the schedule in which the controlled substance is listed *and* the quantity the individual possessed.⁷⁴ For example, AB 236 changed existing law so that individuals who are arrested for the first or second time for possessing less than fourteen grams of a schedule I drug are guilty of a category E felony.⁷⁵ By taking the amount of a drug that an offender possesses into account, the associated penalties become more proportionate to the ‘harm’ caused by the conduct.

Additionally, AB 236 made certain revisions to Nevada law regarding drug-trafficking statutes. Similar to the provisions discussed above, AB 236 revised the amount (weight) of a controlled substance that an individual must possess to qualify as “drug-trafficking.”⁷⁶ Before AB 236 was passed, evidence that an individual possessed over four grams of any schedule I controlled substance could be used to presumptively establish that the individual was guilty of drug-trafficking, regardless of the type of drug.⁷⁷ AB 236 initially contained provisions that would have abolished this presumption by requiring prosecutors to present additional evidence of an intent to sell.⁷⁸ After several amendments, AB 236 in its final form adjusted the amounts of controlled substances that an individual would have to possess to be guilty of “low-level,” or “high-level” drug trafficking.⁷⁹ Specifically, “low-level” trafficking is possession of 100 to 400 grams of a controlled substance, whereas “high-level” trafficking is possession of anything more than 400 grams.⁸⁰ While there is more that can be

⁷² Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing*, 19 CRIM. JUST. POL’Y REV. 63, 80 (2008). Evidence tends to show that, for a number of reasons, African American individuals are disproportionately prosecuted and convicted of drug-related crimes to a greater degree than white individuals arrested for the same crimes. *Id.* at 64, 72.

⁷³ FINAL REPORT, *supra* note 9, at 25.

⁷⁴ A.B. 236, 80th Sess. § 113 (Nev. 2019).

⁷⁵ *Id.*

⁷⁶ A.B. 236, 80th Sess. § 119 (Nev. 2019).

⁷⁷ See NEV. REV. STAT. § 453.3385 (2019) (prior to 2019 amendment).

⁷⁸ A.B. 236, 80th Sess. § 118 (Nev. 2019) (as introduced).

⁷⁹ A.B. 236, 80th Sess. § 119 (Nev. 2019).

⁸⁰ *Id.*

done to improve upon the drug-related crimes in Nevada, AB 236 made several important steps in the right direction.

2. Probation Reform

One of the major factors responsible for Nevada's ever-increasing prison population is that on average, prisoners are serving longer sentences than they were ten years ago.⁸¹ AB 236 made several changes to Nevada law to reduce the number of individuals in prison, without compromising public safety. Specifically, AB 236 adjusted parole law and procedure in order to (1) establish clear criteria for when prisoners qualify for probation—including presumptive probation, and (2) modify the punishments for certain parole violations so that parolees are not unnecessarily sent back to prison for "technical violations."⁸²

If imprisonment is only justified if it effectively deters certain conduct, prevents individuals from causing further harm, and/or rehabilitates individuals so that they will not cause harm in the future, then criteria determining when offenders qualify for parole, or, "[t]he conditional release of a prisoner from imprisonment before the full sentence has been served," would also be aligned with achieving these goals.⁸³ Prior to the passage of AB 236, Nevada law provided presumptive probation sentencing for certain category E felonies, but there were many exceptions such as if the offender: (1) was on parole at the time he was arrested, (2) had previously had parole revoked, or (3) had previously failed a treatment program.⁸⁴ However, none of these exceptions—in and of themselves—evinced that the offender posed a threat to public safety.⁸⁵ Therefore, AB 236 removed these barriers to a presumptive parole sentence.⁸⁶

Additionally, AB 236 also sought to address the problem of the increasing number of probationers in Nevada who were being sent back to prison. Data indicated that 34 percent of probationers who were sent back to prison were sent back for "technical violations," which are defined as "a violation of supervision conditions not rising to the level of new criminal conduct nor absconding."⁸⁷ In other words, probationers were being sent back to prison for things such as, "missing a meeting with a supervision officer."⁸⁸ AB 236 specified that courts could send probation violators back to prison for offenses including violent or sexual crimes, while outlining the procedure for when probationers committed technical violations.⁸⁹

⁸¹ FINAL REPORT, *supra* note 9, at 13.

⁸² A.B. 236, 80th Sess. § 35 (Nev. 2019).

⁸³ *Parole*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁸⁴ A.B. 236, 80th Sess. § 24 (Nev. 2019).

⁸⁵ FINAL REPORT, *supra* note 9, at 13.

⁸⁶ A.B. 236, 80th Sess. § 24 (Nev. 2019).

⁸⁷ FINAL REPORT, *supra* note 9, at 13.

⁸⁸ *Id.*

⁸⁹ A.B. 236, 80th Sess. §§ 35, 101 (Nev. 2019).

However, simply increasing the number of parolees presents its own set of problems. Data indicates that in the past decade, the number of parolees has increased by 84 percent, while the number of probation officers has *decreased* by 7 percent.⁹⁰ Simply put, the resources available to deal with the increasing number of parolees are becoming increasingly strained. AB 236 sought to rectify this problem in two ways. First, AB 236 reduces parole length by prescribing certain conditions where the Nevada Board of Parole Commissioners would be *required* to review parole eligibility of offenders and make a recommendation for release with or without a hearing.⁹¹ Second, AB 236 requires the Division of Parole and Probation of the Department of Public Safety (the Division) to make individualized assessments of each inmate who is eligible for parole in order to efficiently and effectively allocate Nevada's limited resources to parolees who are considered to be a high risk.⁹²

3. *Community Reentry Programs and Procedures*

The final area that AB 236 affected concerns the available programs and procedures in Nevada to support prisoners' successful reintegration into society once they have served their sentences. Three of the strongest predictors of recidivism are the availability of (1) employment, (2) housing, and (3) treatment programs for addictions—such as substance abuse addictions.⁹³ While Nevada had certain reentry requirements and procedures prior to the passage of AB 236, those procedures and requirements only focused on housing, and ignored the other barriers of employment and treatment.⁹⁴

AB 236 sought to remedy this by requiring the Department of Corrections to develop a reentry plan for each parole-eligible prisoner six months before the prisoner's parole date.⁹⁵ The reentry plan is required to take the prisoner's needs, limitations, and capabilities into consideration.⁹⁶ Additionally, AB 236 requires the Director to provide offenders being released with a photo identification card (if they do not already possess one), clothing, certain transportation costs, and a thirty-day supply of prescribed medication if the offender was receiving such medication while in prison.⁹⁷ Finally, the passage of AB 236 requires the Director to release the offender to a facility for transitional living (if appropriate), and to complete enrollment application paperwork for Medicaid and Medicare for eligible offenders.⁹⁸

⁹⁰ FINAL REPORT, *supra* note 9, at 17.

⁹¹ A.B. 236, 80th Sess. § 97–99 (Nev. 2019).

⁹² A.B. 236, 80th Sess. § 95 (Nev. 2019).

⁹³ Matthew Makarios et al., *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 CRIM. JUST. & BEHAV. 1377, 1384–85 (2010).

⁹⁴ FINAL REPORT, *supra* note 9, at 33.

⁹⁵ A.B. 236, 80th Sess. § 100 (Nev. 2019).

⁹⁶ *Id.*

⁹⁷ A.B. 236, 80th Sess. § 92 (Nev. 2019).

⁹⁸ *Id.*

II. PROPOSED SOLUTIONS

A. *Pre-Sentence Diversion Programs*

Nevada currently allows certain offenders who are subject to the jurisdiction of a municipal or justice court to participate in a pre-sentence diversion program.⁹⁹ By participating in these court-established programs, qualifying offenders have the opportunity to avoid prosecution by participating instead in a rehabilitation program that is hand-tailored by the presiding judge, the prosecutor, and the offender in order to uniquely address and rectify the offense.¹⁰⁰ However, due to the limited jurisdiction of municipal and justice courts in Nevada, the types of offenses that are eligible for pre-sentence diversion programs are limited to minor offenses such as misdemeanors and city nuisance violations.¹⁰¹

AB 236 in its original form included provisions that would have authorized district courts to establish pre-sentence diversion programs, which would have naturally expanded the types of offenses subject to Nevada's pre-sentencing diversion programs.¹⁰² These provisions were included in response to evidence indicating that four in ten individuals who enter prison in Nevada have no prior felonies, and about two-thirds of inmates are incarcerated for non-violent offenses.¹⁰³ By allowing certain non-violent, first-time offenders to participate in pre-sentence diversion programs, courts would be able to reduce the strain on Nevada's already-overcrowded prisons, without compromising public safety.

However, the proposal to expand the state's existing diversion programs to district courts was met with heavy resistance from several of the District Attorney's offices in Nevada. Several reasons were given to support why they believed extending the authority to create and administer pre-sentence diversion programs to district courts was problematic.¹⁰⁴ As a result of this opposition, the sections that would have granted that authority to Nevada district courts

⁹⁹ NEV. REV. STAT. § 174.031 (2019).

¹⁰⁰ *Id.* § 174.032.

¹⁰¹ *Id.* § 5.050 limits the jurisdiction of municipal courts in Nevada to civil and misdemeanor cases, nuisance abatement cases, and cases involving \$2,500 or less where the plaintiff is the city. Furthermore, NEV. REV. STAT. § 4.370 limits justice courts' jurisdiction to civil matters not exceeding \$15,000 in damages, evictions, misdemeanors, small claims, traffic cases, and other matters.

¹⁰² A.B. 236, 80th Sess. §§ 1–4 (Nev. 2019) (as introduced).

¹⁰³ FINAL REPORT, *supra* note 9, at 21.

¹⁰⁴ See Letter from Stephen B. Rye, Dist. Attorney, Office of the Dist. Attorney Lyon Cty., to Steve Yeager, Chairman, Nev. Assembly Judiciary (Mar. 7, 2019), (available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=37611&fileDownloadName=0308AB236_ryes_ltrinopposition.pdf [<https://perma.cc/9NUS-22HL>]); Clark Cty. Office of the Dist. Attorney, *Proposed Amendment to AB 236* (2019), https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=44389&fileDownloadName=AB%20236_Proposed%20Amendment_Clarke%20County%20District%20Attorneys%20Office.pdf [<https://perma.cc/AL4J-P9CY>].

were removed from the final version of AB 236.¹⁰⁵ We will address each concern in turn to show why Nevada’s future legislative bodies should grant district courts the authority to create and administer pre-sentence diversion programs.

First, several District Attorney’s offices expressed concern that significant difficulties would arise in the event that offenders failed to complete their diversion programs, which would force District Attorneys to prosecute them.¹⁰⁶ This created concern that the lapse in time between when the offense occurred and when the offender failed to complete the diversion program would be an added obstacle in building a case against the offender.¹⁰⁷ But the District Attorneys provided no data showing that their cases would grow weaker with the passage of time. In fact, prosecutors are currently required to perform an initial investigation to help determine whether an offender even qualifies to participate in currently existing pre-sentence diversion programs.¹⁰⁸ Therefore, merely expanding the pool of potential participants for diversion programs should have no effect on the ‘strength’ of prosecutors’ cases—as they would still be required to perform initial investigations. Furthermore, expansion of diversion programs would actually benefit prosecutors, because by removing less serious and non-violent offenses from prosecution, District Attorneys would be able to focus their efforts and resources exclusively on offenders who actually pose a serious risk to public safety.

Second, some worried that pre-sentence diversion programs would violate certain victims’ rights created by the passage of the recent amendment to the Nevada Constitution known as “Marsy’s Law.”¹⁰⁹ Specifically, the “Rights of victims of crime,” as defined in the Nevada Constitution, guarantees victims, among other things, the right:

To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other postconviction release proceedings, and to be present at all such proceedings . . . [t]o be reasonably heard, upon request, at any public proceeding, including any delinquency proceeding, in any court involving release or sentencing, and at any parole proceeding . . . [and] [t]o provide information to any public officer or employee conducting a presentence investigation concerning the impact of the offense on the victim and the victim’s family and any sentencing recommendations before the sentencing of the defendant.¹¹⁰

¹⁰⁵ A.B. 236, 80th Sess. §§ 1–4 (Nev. 2019) (as introduced).

¹⁰⁶ Letter from Stephen B. Rye, *supra* note 101.

¹⁰⁷ A.B. 236, 80th Sess. §§ 1–4 (Nev. 2019) (as introduced).

¹⁰⁸ NEV. REV. STAT. § 174.032(2) (2019) “[T]he justice or municipal court *must* receive input from the prosecuting attorney, the attorney for the defendant, if any, and the defendant relating to the terms and conditions for the defendant’s participation in the program.” *Id.* (emphasis added).

¹⁰⁹ Letter from Stephen B. Rye, *supra* note 101.

¹¹⁰ NEV. CONST. art. I, § 8A(g)–(h), (j) (West, Westlaw through 2019 amendments).

Nevertheless, Marsy's law has been criticized for undermining the presumption of innocence by allowing victims to be involved in processes prior to conviction, and for infringing on the constitutional rights afforded to accused parties, namely the right to effective assistance of counsel.¹¹¹ In fact, Marsy's law has been challenged in at least four other states where it has been enacted.¹¹² If anything, no state law can trump the constitutional rights afforded to defendants.¹¹³

Third, there was concern that given the current budgetary constraints and limited personnel resources of Nevada's district courts, they would not be able to handle or afford the additional influx of cases that AB 236's diversion program would create.¹¹⁴ While court resources are an important and valid consideration, the idea that diversion programs will 'create' an influx of new cases is flawed. Whether the courts are required to process a case through the traditional route of prosecution, or through the alternative method of diversion programs, the *number* of cases does not change. Furthermore, the language of the statute does not *require* any municipal or justice court to establish a diversion program; it only gives them the authority to do so.¹¹⁵ Therefore, extending this authority to district courts would not force them to establish any program for which there was not enough funding or resources.

Finally, some argued that because Nevada's counties consist of both urban and rural communities, whose resources and needs are significantly different from one another, requiring district courts to establish and administer diversion programs according to one set of uniform standards would be impossible, particularly for the rural counties.¹¹⁶ Again, the statute's language grants courts broad discretion in whether and how they administer pre-sentence diversion programs. This discretionary language allows individual courts (who arguably are best suited to address their jurisdiction's specific needs) to administer diversion programs in a manner appropriate for their jurisdictions.

B. Drug Issues

Drug crimes continue to be a driving force behind Nevada's growing prison population.¹¹⁷ One reason for this is that drug offenders make up a dispro-

¹¹¹ *Marsy's Law Is Bad for Nevada*, ACLU NEV., <https://www.aclunv.org/en/issues/marsys-law> [<https://perma.cc/F4BX-SA73>] (last visited Mar. 23, 2020).

¹¹² *Id.*

¹¹³ U.S. CONST. art. VI, cl. 2.

¹¹⁴ Ryan Black, City of Las Vegas, *AB 236 Official Position: Opposed* (Mar. 8, 2019), https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=43177&fileDownloadName=0308SB236_blar_ltrinopp.pdf [<https://perma.cc/6FDQ-AWPZ>]; Letter from Stephen B. Rye, *supra* note 101.

¹¹⁵ NEV. REV. STAT. § 174.032(1) (2019) ("A justice court or municipal court *may* establish a preprosecution diversion program to which it *may* assign a defendant if he or she is determined to be eligible pursuant to NRS 174.031.") (emphases added).

¹¹⁶ Letter from Stephen B. Rye, *supra* note 101.

¹¹⁷ *See supra* Section I.B.

portionally large portion of community supervision failures.¹¹⁸ Of all offenders admitted to prison for probation violations in 2017, 8 percent were on probation for simple possession offenses.¹¹⁹ In Nevada, simple possession of a controlled substance is still a Category E felony carrying a sentence of one to four years.¹²⁰ Before the passage of AB 236, Nevada law provided for presumptive probation for an individual convicted of a Category E felony unless the offender: (1) was on parole or probation at the time the crime was committed, (2) had previously had parole or probation revoked, (3) had previously failed to complete a court ordered treatment program, or (4) had been convicted of at least two additional felonies.¹²¹ Therefore, if the offender met any of those four criteria the court was not required to grant the offender probation. The ACAJ found that these barriers to presumptive probation were not serving Nevada's correctional goals and were simply putting non-violent drug addicts behind bars.¹²² As a result, the ACAJ recommended that the Nevada legislature abolish all four barriers to presumptive probation for Category E felonies.¹²³ Ultimately, the legislature abolished the first three barriers to presumptive probation for Category E felonies but kept the requirement that an offender not have been convicted of two or more felonies.¹²⁴ While removing barriers to presumptive probation is a positive step in the right direction to ensure that prison resources are being used to best serve the public interest, there is still much more that can be done.

Even though first-and second-time drug offenders are not going to prison in Nevada, they still must live with the felony conviction. In addition to the risk of incarceration, felony offenders face a number of collateral consequences as a result of their conviction status.¹²⁵ Convicted felons face a number of extrajudicial punishments including social stigma, limitations on employment, barriers to affordable housing, and disenfranchisement.¹²⁶ It is estimated that up to one in four Americans are locked out of the labor market due to a criminal conviction.¹²⁷ Some studies estimate that this loss of production costs the United

¹¹⁸ FINAL REPORT, *supra* note 9, at 25.

¹¹⁹ *Id.*

¹²⁰ NEV. REV. STAT. §§ 193.130, 453.336 (2019).

¹²¹ *Id.* § 176A.100.

¹²² *See* FINAL REPORT, *supra* note 9, at 25.

¹²³ *Id.*

¹²⁴ A.B. 236, 80th Sess. § 24(b) (Nev. 2019).

¹²⁵ Brian Elderbroom & Julia Durnan, *Reclassified: State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances*, URBAN INST. 1, 2 (2018).

¹²⁶ U.S. COMM'N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 35 (2019) [hereinafter COLLATERAL CONSEQUENCES]; Elderbroom & Durnan, *supra* note, 122 at 2–3. In Nevada, felons have their rights to vote restored upon completion of their sentences or release from prison. NEV. REV. STAT. § 213.157(1)(b) (2019). However, several states still restrict felons' voting rights even after completion of their sentences. Elderbroom & Durnan *supra* note 122, at 3.

¹²⁷ COLLATERAL CONSEQUENCES, *supra* note 123, at 35.

States GDP between \$50 billion and \$87 billion every year.¹²⁸ Regardless of the exact figure, it is clear that felony convictions have a significant impact on individuals trying to enter the job market.

In order to reduce the collateral consequences on drug offenders, a number of states have moved towards defelonizing simple possession of a controlled substance.¹²⁹ In these states, simple possession was reclassified from a felony to a misdemeanor.¹³⁰ The goal behind reclassification is to reduce prison populations for low-level offenders and focus correctional resources on society's most dangerous offenders.¹³¹ The reclassification movement is supported by the growing body of evidence that incarceration is not the most effective response to combating drug abuse.¹³² Instead, research shows that drug abusers are better treated in the community, and treatment approaches produce better public safety results.¹³³

Several states that have moved towards defelonization are already realizing positive effects.¹³⁴ California, Utah, and Connecticut have defelonized simple possession and have already experienced decreases in the number of people in prison for drug possession.¹³⁵ In 2014, nearly 60 percent of California voters approved Proposition 47, which generally reclassified drug possession from a felony to a misdemeanor and generally prohibited prison sentences for possession convictions.¹³⁶ Additionally, the California law applied retroactively, allowing offenders serving jail time for low-level drug offenses to petition for their release.¹³⁷ In the first year Proposition 47 went into effect, bookings for drug possession offenses decreased 68 percent.¹³⁸ This translated into an estimated savings of over \$150 million for the state and another \$200 million for local governments in the first year Proposition 47 was enacted.¹³⁹ California's reclassification of simple possession also had a positive effect on rearrests and reconvictions of low-level drug offenders.¹⁴⁰ In the two years after implementa-

¹²⁸ *Id.*; Elderbroom & Durnan, *supra* note 122, at 2.

¹²⁹ FINAL REPORT, *supra* note 9, at 25; Elderbroom & Durnan, *supra* note 122, at 4.

¹³⁰ Elderbroom & Durnan, *supra* note 122, at 4.

¹³¹ *See id.* at 6.

¹³² *Id.* at 7.

¹³³ *Id.*

¹³⁴ *Id.* at 6.

¹³⁵ *Id.*

¹³⁶ MIA BIRD ET AL., PUB. POLICY INST. CAL., THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM 4 (2018), https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf [<https://perma.cc/T5DL-APUC>] (Proposition 47 also reclassified a number of additional crimes including: check forgery, receiving stolen property, shoplifting, theft under \$950, and writing bad checks).

¹³⁷ *Id.*

¹³⁸ Elderbroom & Durnan, *supra* note 122, at 14.

¹³⁹ *Id.*; Stanford Justice Advocacy Project, *Proposition 47 Progress Report: Year One Implementation*, STANFORD L. SCH. I (2015).

¹⁴⁰ BIRD ET AL., *supra* note 133, at 17.

tion of Proposition 47, rearrests for drug offenses fell by 11 percent, and convictions fell by nearly 8 percent.¹⁴¹

Experts in other states like Oklahoma, Connecticut, Utah, and Alaska have predicted equally successful reductions as a result of reclassification.¹⁴² Similar to California, in 2016, nearly 60 percent of Oklahoma voters approved State Question 780 (S.Q. 780), which reclassified simple possession to a misdemeanor.¹⁴³ The state predicted approximately \$137 million in averted costs in the five years following implementation, with a significant portion of those savings coming from a decrease in incarceration.¹⁴⁴ The money saved by S.Q. 780 is to be deposited into a Community Safety Investment Fund that can help fund mental health and substance abuse programs in the state.¹⁴⁵

Building off of these early successes, the ACAJ recommended Nevada reclassify simple possession of a controlled substance from a Category E felony to a misdemeanor for the first two offenses.¹⁴⁶ The ACAJ recommended reserving the felony conviction for an individual's third and subsequent possession convictions.¹⁴⁷ The ACAJ's recommendation would fall in line with other states that have sought to reduce prison populations through reclassification of drug offenses.¹⁴⁸ According to the ACAJ, reclassifying simple possession would reduce prison populations, allowing corrections dollars to be better spent on violent offenders, allow for better supervision and treatment of drug offenders, and remove the "adverse collateral consequences of a felony conviction."¹⁴⁹

Unfortunately, AB 236 remains mostly silent on the issue of drug classification. The first draft of AB 236 attempted to adopt the ACAJ recommendations, but reclassification never made it into the final version of the bill.¹⁵⁰ While drug classification as a whole did not make it into the final version of the bill, the legislature did address the state's antiquated trafficking limits.¹⁵¹ Prior to the passage of AB 236, an individual in possession of as little as four grams of a controlled substance could be charged with low-level trafficking regardless

¹⁴¹ *Id.* at 17–18.

¹⁴² Elderbroom & Durnan, *supra* note 122, at 6.

¹⁴³ *Id.* at 16.

¹⁴⁴ OFFICE OF MGMT. & ENTER. SERVS., OKLAHOMA SMART JUSTICE REFORM ACT (SQ 781) FY 2018 CALCULATIONS: FINAL REPORT (2006), https://omes.ok.gov/sites/g/files/gmc316/f/SQ781_0.pdf [<https://perma.cc/ZJQ5-HW9K>]. In conjunction with S.Q. 780, Oklahoma voters passed S.Q. 781, which directed the Oklahoma Office of Management and Enterprise Services to assess the fiscal impact of S.Q. 780. *Id.*

¹⁴⁵ Elderbroom & Durnan, *supra* note 122, at 16.

¹⁴⁶ FINAL REPORT, *supra* note 9, at 25.

¹⁴⁷ *Id.*

¹⁴⁸ See Elderbroom & Durnan, *supra* note 122, at 1.

¹⁴⁹ FINAL REPORT, *supra* note 9, at 25.

¹⁵⁰ A.B. 236, 80th Sess. (Nev. 2019) (as enrolled); A.B. 236, 80th Sess. (Nev. 2019) (as introduced).

¹⁵¹ See A.B. 236, 80th Sess. § 119 (Nev. 2019).

of intent to sell.¹⁵² AB 236 amended low-level trafficking to possession of 100–400 grams of a schedule I or II controlled substance and raised high-level trafficking to possession of over 400 grams.¹⁵³

While AB 236 takes a number of progressive steps towards reducing recidivism, failing to include reclassification was one of its biggest shortcomings. Reclassification is a commonsense approach to reduce the state’s corrections budget and to avoid needlessly imposing the collateral consequences of a felony conviction on drug addicts. As a state, we do not see drug users as a grave threat to the public safety. Nevada law provides for mandatory probation for individuals convicted of a Category E felony.¹⁵⁴ Even with the mandatory probation provision, prison admissions for simple possession have risen significantly over the past decade.¹⁵⁵ This brings us back to the theories of justice and why we punish. If the goal is to promote public safety, then it makes no sense to convict first- and second-time drug offenders of felonies. Reclassifying simple possession offenses from a felony to a misdemeanor allows the state to focus its prosecutorial and correctional resources on more violent and high-need offenders. Additionally, addicts and individuals who have made mistakes in their lives would have the opportunity to get their lives back on track before they are labeled felons for the rest of their lives.

C. Specialty Courts

Specialty courts are unique courtroom settings because they focus on the treatment and rehabilitation of the offenders involved.¹⁵⁶ These courts can be one of the strongest tools a state has to drive down recidivism rates because instead of only punishing past behavior they “seek to change future behavior by addressing factors that contribute to offenders’ involvement in the criminal justice system.”¹⁵⁷ Data compiled by the National Drug Court Institute shows that adult drug courts typically reduce rearrest rates by 8 to 14 percent over a period of two years, with the best programs reducing recidivism by 35 to 80 percent.¹⁵⁸ Additionally, this research demonstrated that completion of a drug court program had long-lasting effects on its participants.¹⁵⁹ Several studies found that the effects of the drug court program stuck with participants for over three years after completion of the program, and one study found the effects of

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ NEV. REV. STAT. § 176A.100(b) (2019) (as amended by A.B. 236 § 24).

¹⁵⁵ FINAL REPORT, *supra* note 9, at 25.

¹⁵⁶ Emily F. Wood et al., *Specialty Courts: Time for a Thorough Assessment*, 36 MISS. C. L. REV. 332, 333 (2018).

¹⁵⁷ *Id.*

¹⁵⁸ DOUGLAS B. MARLOWE ET AL., NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 15 (2016).

¹⁵⁹ *Id.*

the program on recidivism lasted fourteen years.¹⁶⁰ In addition to successfully driving down recidivism rates, adult drug courts are cost effective for the jurisdictions using them.¹⁶¹ From the data analyzed by the NDCI, adult drug courts offered an average return on investment of two to four dollars for every one dollar invested, which saved local communities an average of \$3,000 to \$22,000 per participant.¹⁶² This type of return is promising in light of extremely poor return on taxpayer money for incarcerating drug users.¹⁶³

Fortunately for local municipalities, they are not left guessing how to best implement their specialty court programs. The National Association of Drug Court Professionals (NADCP) released two volumes of best-practice standards based on years of research and analysis of drug court practices throughout the country.¹⁶⁴ These standards include practices for determining eligibility, responsibilities of the court, sanctions and incentives, treatment practices, testing, and monitoring.¹⁶⁵

In Nevada there are currently eighty-five specialty court programs¹⁶⁶ including adult drug court, family drug court, mental health court, and DUI court.¹⁶⁷ In 2019 alone, Nevada specialty courts served nearly 6,800 participants, nearly twice as many as in 2010.¹⁶⁸ While the state's specialty court program has seen impressive growth over the past decade, the ACAJ still identified a number of shortcomings with Nevada's program.¹⁶⁹ Nevada traditionally assigns offenders to specialty courts as either a condition of a deferred sentence or as a condition of probation post-conviction.¹⁷⁰ Under the deferred sentence approach, offenders will have their cases dismissed upon successful completion of the program.¹⁷¹ Conversely, when a program is instituted as a condition of an offender's probation after a conviction, the offender still has to live with the negative collateral consequences of the conviction even if the offender successfully completes the program.¹⁷² This difference appears to have a meaningful

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Letter from Adam Gelb to Chris Christie (June 19, 2017) at 10.

¹⁶⁴ MARLOWE ET AL., *supra* note 155, at 17.

¹⁶⁵ See generally 1 NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS (2013); 2 NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS (2015).

¹⁶⁶ SUPREME COURT OF NEV., ANNUAL REPORT OF THE NEVADA JUDICIARY: FISCAL YEAR 2019 51 (2019) [hereinafter ANNUAL REPORT 2019].

¹⁶⁷ *Specialty Court Program Overview*, SUPREME COURT OF NEV., https://nvcourts.gov/AOC/Programs_and_Services/Specialty_Courts/Overview [https://perma.cc/M86C-74LN] (last visited Mar. 25, 2020).

¹⁶⁸ ANNUAL REPORT 2019, *supra* note 163, at 51; SUPREME COURT OF NEV., ANNUAL REPORT OF THE NEVADA JUDICIARY: FISCAL YEAR 2010 48 (2010).

¹⁶⁹ See FINAL REPORT, *supra* note 9, at 21–22.

¹⁷⁰ *Id.* at 12.

¹⁷¹ *Id.*

¹⁷² *Id.* at 22.

effect on an offender's success rate in the program. According to the ACAJ's research, in 2017 "67 percent of participants with a deferred sentence were successful in their Specialty Court program, compared to just 42 percent of participants who were successful without a deferral."¹⁷³ Despite this dramatic difference in success rates, Nevada courts still impose specialty court programs as a condition of probation post-conviction at a much higher rate than deferred sentences.¹⁷⁴

The success rate disparity between deferred sentence programs and post-conviction programs does not necessarily mean post-conviction programs do not have an essential role to play in rehabilitating offenders.¹⁷⁵ Depending on the individual's specific offense and risk assessment, a post-conviction program may be appropriate.¹⁷⁶ Post-conviction drug courts have been shown to be more effective for high-risk and high-need offenders.¹⁷⁷ This kind of situation could arise under the reclassification proposal discussed earlier for an offender facing his or her third or subsequent possession offense. Individuals facing multiple possession offenses might need the structure and associated consequences of a post-conviction program, but those individuals still clearly need help and treatment for their addictions.

While the overall growth and success of Nevada's specialty court programs is encouraging, there are still areas of the program that can be improved to ensure the state is maximizing the dollars spent on the program. In its final report, the ACAJ identified two main areas of improvement: deferred sentences and eligibility criteria.¹⁷⁸ The ACAJ's analysis showed that offenders with a deferred sentence were significantly more likely to successfully complete their specialty court programs than post-conviction offenders, but Nevada still tends to favor post-conviction programs.¹⁷⁹ As a result, the ACAJ recommended that non-violent offenders entering a specialty court program be entitled to the rebuttable presumption of a deferred sentence.¹⁸⁰

Ultimately, the Nevada legislature did not adopt the ACAJ's presumption recommendation. AB 236 does provide a mechanism for judges to defer sentences for individuals placed in specialty court programs.¹⁸¹ Specifically, AB 236 allows a court to "defer judgement for any defendant who is placed in a specialty court program" and "[u]pon completion of the terms and conditions of the deferred judgment, and upon a finding by the court that the terms and conditions have been met, the court shall discharge the defendant and dismiss the

¹⁷³ *Id.* at 12–13.

¹⁷⁴ *Id.* at 12.

¹⁷⁵ See 1 ADULT DRUG COURT BEST PRACTICE STANDARDS, *supra* note 162, at 6.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ FINAL REPORT, *supra* note 9, at 22.

¹⁷⁹ *Id.* at 12–13.

¹⁸⁰ *Id.* at 22.

¹⁸¹ A.B. 236, 80th Sess. § 19 (Nev. 2019).

proceedings.”¹⁸² It is encouraging that this option is built into the mechanics of AB 236, but the ultimate success of the programs relies on judges exercising their discretion to use this option, and it requires sufficient available programs to handle these offenders.

Additionally, the ACAJ identified that the Drug Court and Mental Health Court programs do not have standard eligibility criteria for admission into the programs.¹⁸³ As a result, Nevada experiences “significant regional variation in which offenders participate in the programs.”¹⁸⁴ Currently, most jurisdictions in Nevada use a referral system from the court handling the case to place offenders into specialty court programs.¹⁸⁵ Conversely, the DUI Court program has standardized admission criteria that are set in statute and has a higher success rate than the other specialty court programs.¹⁸⁶ Similar to the DUI court criteria, the NADCP recommends that drug court admissions be established on an objective basis.¹⁸⁷ The NADCP found evidence-based selection criteria to be significantly more reliable than subjective criteria in matching offenders with appropriate treatment programs.¹⁸⁸ As a result, programs using standardized tools typically enjoy higher success rates than those that do not.¹⁸⁹ Specifically, programs are most successful when “the intensity of the criminal justice supervision is matched to participants’ risk for recidivism” and “treatment focuses on the specific disorders and conditions that are responsible for the participants’ crimes.”¹⁹⁰

Standardized eligibility criteria serve another important goal of ensuring specialty court programs are being used for the high-risk and high-need offenders.¹⁹¹ High-risk and high-need offenders are typically addicted to drugs or alcohol, and are at a higher risk of recidivism or failing in a less intensive program.¹⁹² Studies have shown that drug courts are “approximately twice as effective at reducing crime and 50 [percent] more cost-effective when they serve high-risk, high-need participants”¹⁹³ Conversely, low-risk offenders may actually see negative results from rigorous specialty court programs.¹⁹⁴ By placing too many limitations on a low-risk offender, the system may be simply setting them up for failure. Additionally, research shows that mixing low- and

¹⁸² *Id.* at §§ 19(3)(a), (5).

¹⁸³ FINAL REPORT, *supra* note 9, at 22.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ NEV. REV. STAT. § 484C.320 (2019); FINAL REPORT, *supra* note 9, at 22.

¹⁸⁷ 1 ADULT DRUG COURT BEST PRACTICE STANDARDS, *supra* note 162, at 5.

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Id.*

¹⁹⁰ MARLOWE ET AL., *supra* note 155, at 16.

¹⁹¹ 1 ADULT DRUG COURT BEST PRACTICE STANDARDS, *supra* note 162, at 6.

¹⁹² *Id.*

¹⁹³ MARLOWE ET AL., *supra* note 155, at 16.

¹⁹⁴ *See* 1 ADULT DRUG COURT BEST PRACTICE STANDARDS, *supra* note 162, at 6–7; FINAL REPORT, *supra* note 9, at 22.

high-risk offenders yields negative results because the low-risk offenders are exposed to anti-social behavior present in high-risk participants.¹⁹⁵

Based on these findings, Nevada should adopt standardized eligibility criteria for all specialty court admissions. Potential participants should undergo an in-person assessment, similar to DUI Court, to assess the offender's individual risk and need characteristics. Using this process can ensure that only those offenders who will benefit from the specialty court program are being admitted. This system conforms with the NADCP's standards for best practices and focuses resources on the participants who would benefit most from the programs. Funding continues to be a major roadblock to maximizing the effectiveness of the specialty court system in Nevada.¹⁹⁶ For example, the Las Vegas mental health court can only handle a handful of cases at a time, and cases can take a few years to complete.¹⁹⁷ As a result, the Las Vegas mental health court has had only sixty-three participants from 2015 to 2019.¹⁹⁸ However, based on the NDCI's return on investment numbers, specialty courts are a compelling candidate for increased state funding.¹⁹⁹

D. Sources of Funding

*"A penny saved is two pence clear."*²⁰⁰

Asking the question of how state programs are funded is an essential step in the legislative process. Indeed, one could argue that it is better to not pass a law at all than to pass a law without ensuring the enacting and enforcing bodies have the tools they need to succeed. The sponsors of AB 236 relied on collected data to carefully shape legislation that was not only sound policy-wise, but that was also fiscally possible and responsible. In fact, if all the provisions included in the initial draft of AB 236 had been enacted, the state would have saved an estimated \$640 million by averting nearly 90 percent of the state's projected prison population growth.²⁰¹ Furthermore, AB 236 ensures that future legislators are able to continue to effectively reform Nevada's criminal justice system by ensuring that they have accurate and current data by requiring the Sentencing Commission to collect and analyze data relating to prison admis-

¹⁹⁵ 1 ADULT DRUG COURT BEST PRACTICE STANDARDS, *supra* note 162, at 7.

¹⁹⁶ Jeniffer Solis, *Specialty Courts Contend with Shortfalls in State Mental Health System*, NEV. CURRENT (Sept. 18, 2019), <https://www.nevadacurrent.com/2019/09/18/specialty-courts-contend-with-shortfalls-in-state-mental-health-system> [<https://perma.cc/2SMK-LRDJ>].

¹⁹⁷ *See id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See* discussion *supra* Section II.D.

²⁰⁰ BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACS FOR 1733–1758 (1737), *reprinted in* THE PREFACES, PROVERBS, AND POEMS OF BENJAMIN FRANKLIN 71 (Paul Leicester Ford ed., Knickerbocker Press 1890).

²⁰¹ FINAL REPORT, *supra* note 9, at 21.

sions, releases, and parole practices, and to present that data in an annual report to the legislature.²⁰²

However, whenever any new resources are made available, there is a great temptation to earmark those resources for state programs such as public education or healthcare. Nevertheless, it would be a mistake to simply reapportion future savings facilitated by AB 236's changes. First, it would be bad policy to divert funding from a department just because it implements practices and policies that result in net savings. Not only would this preclude the department from 'reinvesting' saved funds into expanding policies and laws that have already *proven* to be cost saving, it would also create a perverse incentive for state actors to be fiscally inefficient—to ensure that their funding would not be reallocated to other departments by future legislation.

Second, while \$640 million is a large sum of money, it is a proverbial 'drop in the bucket' when compared to the funding that education and healthcare already receive. Nevada's current overall budget accounts for \$29,407,082,276.²⁰³ Forty-four percent of that amount is already allocated to human resource programs such as Medicare, and 24.59 percent is designated for education.²⁰⁴ The Department of Corrections (DOC) accounts for only 2.54 percent of the state's budget.²⁰⁵ Therefore, diverting any savings from criminal justice reform into education and healthcare would only have a negligible impact in those areas. It is therefore proposed that future Nevada legislatures use any funds that are saved through the implementation of AB 236 (as will be reported annually by the Sentencing Commission) to fund additional cost-saving criminal policies, procedures and programs such as the pre-sentencing diversion program, specialty court programs, and treatment programs discussed above.

CONCLUSION

AB 236 is a monumental step forward for criminal justice reform in Nevada. The bill allocates limited resources to dealing with the most dangerous criminals in our society and eases some of the unnecessary burdens placed on low-level and first-time offenders. Still, there is work to be done to ensure justice is being served in a way that protects the public and is financially sound. This paper asks the people of Nevada to take a step back and ask, what is the point of punishment? In light of those principals, we believe there is more that can be done to break the cycle of recidivism and accomplish those goals. No

²⁰² A.B. 236, 80th Sess. § 5–6 (2019).

²⁰³ *Statewide Expenditure by Function*, OPEN GOV., <http://www.openbudget.nv.gov/OpenGov/ViewBudgetSummary.aep> [<https://perma.cc/MD37-W8MJ>] (last visited Mar. 23, 2020).

²⁰⁴ *Id.*

²⁰⁵ *Id.* (a \$640 million increase to Nevada's current DOC budget would increase the DOC budget by more than 85 percent, whereas that same \$640 million applied to Nevada's current education budget would increase the education budget by a mere 0.8 percent).

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longer should a first-time offender, convicted of simple possession of a controlled substance, be subjected to the collateral consequences of a felony conviction and face up to four years in prison. Nor should individuals with serious drug and mental health issues be warehoused in state prisons without receiving the treatment they need. This sort of punishment drains the state's budget, creates a vicious cycle of recidivism, and does not accomplish the system's criminal justice goals. As a state, we have taken a step forward, but it is up to all of us to keep walking.