

A STATE IN SHACKLES: THE EFFECT OF A DYSFUNCTIONAL CHILDHOOD ON CRIME AND IMPRISONMENT

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I. INTRODUCTION

In 1977, America's prisons held about 280,000 people, with a prison rate that had remained static for fifty years.¹ Since then, however, its prison

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Author's Forward: I began this undertaking to learn whether the common stories I read in pre-sentence reports and heard from those I sentenced to prison over the past decade reflect national patterns, and whether social and neurological sciences could illuminate the reasons behind their plight and help us understand their lives. I am indebted to several colleagues who graciously agreed to read drafts of the manuscript and for their invaluable suggestions and contributions, among whom are: retired Justice Judith Meierhenry, Justice Janine Kern, and Judge Douglas Hoffman. I also owe debts of gratitude to Denny Kaemingk, Secretary of the South Dakota Department of Corrections, Greg Sattizahn, State Court Administrator for the South Dakota Unified Judicial System, and Glenn Stanley, former South Dakota Superintendent of Juvenile Corrections and later Deputy Director of the South Dakota Board of Pardons and Paroles. Their comments, perspectives, and suggestions, while not always in accord with my own, were always meritorious and of great value. I alone bear responsibility for any errors in documentation or, for that matter, in judgment. Thank you also to the DOC staff, particularly Secretary Kaemingk and Executive Assistant, Rebecca Linnweber, for providing a trove of prison data, and always cheerfully answering my many questions.

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1. *Bureau of Justice Statistics Bulletin: Prisoners 1925-1981*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. (Dec. 1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf>. All this has taken place as the nation has experienced a more than two-decade period over which violent crime rates have plummeted. *Crime in the United States by Volume and Rate per 100,000 Inhabitants: 1993-2012*, FBI CRIM. JUST. INFO. SERVS., tbl.1, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls. The FBI categorizes four crimes as violent: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime>. Violent and Nonviolent crime in South Dakota Prisons is defined somewhat broader, by categories of crime. *Breakdown of Crimes of South Dakota Inmates*, SOUTH DAKOTA DEP'T OF CORR. (Feb. 2017)

population has exploded to 2.3 million men and women, growing at a rate seventeen times that of the nation's overall population growth. Despite massive efforts to reverse the trend, the Land of the Free now incarcerates more of its citizens than any other nation in the world, and five and one-half times the rate of forty years earlier.² Although the United States comprises less than 5% of the world's population, it harbors 25% of the world's prisoners.³ The United States also imprisons more people per capita than any other country;⁴ more than eight times that of Western Europe, nearly seven times that of Canada, three-and-one-half times that of Mexico,⁵ and more than China and India combined.⁶ In all, over seven million Americans today are either incarcerated or on felony supervision; eleven million go to jail each year,⁷ only a small minority of whom have been convicted of a crime. An estimated twenty million Americans have a felony record.⁸

South Dakota's numbers are even more staggering. In 1977, South Dakota housed about 500 inmates, but over the past four decades that number has swelled to more than 3,900—a roughly 750% increase.⁹ The state's prison numbers have grown at a rate thirty times that of the state's overall population increase during the period.¹⁰ Today South Dakota imprisons more people per capita than every state it borders.¹¹

<http://doc.sd.gov/documents/AdultCrimeBreakdownFebruary2017.pdf>. In 1977, the nation's population was around 220 million, while today, it is approximately 323 million. *U.S. Population by Year*, MULTPL (2017), <http://www.multpl.com/united-states-population/table>.

2. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL'Y INITIATIVE (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2017.html>. By 1977, the incarceration rate had already begun a steady ascent, from which it would not retreat: it was up that year more than 30% over 1973's numbers. *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUST. POL'Y INST., 4 graph 4 (May 2000), http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf; *One in 100: Behind Bars in America 2005-6*, THE PEW CTR. ON THE STATES (Feb. 2008),

http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2008/one20in20100pdf.pdf; Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 To 2010*, POPULATION ASSOC. OF AM. 5, <http://paa2011.princeton.edu/papers/111687> (last visited Apr. 21, 2017). There are today over 7.2 million adults either on probation or parole or in jail or prison. *Id.* at 2.

3. Wagner & Rabuy, *supra* note 2; Roy Walmsley, *World Prison Population List*, INT'L CTR. FOR PRISON STUDIES (2015), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf; Michelle Ye Hee Lee, *Yes, U.S. locks people up at a higher rate than any other country*, THE WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/>.

4. Walmsley, *supra* note 3, at 2. Actually, the tiny African nation of Seychelles reported holding 735 people in prison, exceeding the United States' rate for that reporting year. *Id.* at 4.

5. Walmsley, *supra* note 3, at 2-3, 3 tbl.2; Ye Hee Lee, *supra* note 3.

6. Walmsley, *supra* note 3, at 2.

7. Shannon et al., *supra* note 2, at 5, 12; Wagner & Rabuy, *supra* note 2.

8. *Id.*

9. *Bureau of Justice Statistics: Historical Statistics on Prisoners in State and Federal Institutions, Year End 1925-86*, U. S. DEP'T. OF JUST., 12 (May 1988), <https://www.ncjrs.gov/pdffiles1/digitization/111098ncjrs.pdf>; *Adult Population February 2017*, S.D. DEP'T OF CORR. (February 2017), <https://doc.sd.gov/documents/AdultPopulationFebruary2017.pdf>.

10. *See South Dakota, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/table/PST045215/46> (last visited Apr. 23, 2017). At the beginning of

The increased prison populations have placed unprecedented burdens upon state and federal welfare systems and state and county budgets which pay to feed, clothe, house, and cover the substantial medical costs of inmates. The era of mass incarceration has also profoundly affected millions upon millions of America's children. What do we really know, though, about the lives of those sentenced to prison and how they ended up there? While we know America's seemingly insatiable appetite for illegal drugs drives the vast majority of crime, what do we understand about the factors that lead to addiction?¹² Finally, are there ways in which the system itself actually perpetuates and exacerbates the problems and circumstances that led them to prison?

The answers to those questions lie not in the law, but in mountains of data developed in the fields of sociology, socioeconomics, demography, and in the still-unfolding science of the brain. It is in the data that a mosaic of the prison population emerges, revealing a multi-generational sub-culture made up largely of the under-educated, the dysfunctional poor, the addicted, and the mentally ill.¹³ This culture sustains itself into the next generation due to various mutations of those factors, fueled by exceedingly high rates of unintended births. These factors create an environment in which the children of prisoners often also grow up in impoverished, unstable homes, which can lead to a host of adverse educational and economic outcomes, and eventually lead those children also into

July 2016, South Dakota's estimated population was 865,454 compared to 686,000 in 1976. *Id.*; *South Dakota Crime Rates: 1960-2015*, DISASTERCENTER.COM, <http://www.disastercenter.com/crime/sdcrime.htm>. This represents a growth rate of about 26% during that period. *Id.* South Dakota's February 2017 prison population of 3,919 represents about a 720% rate of growth from the 478 inmates held in 1976. *See Bureau of Justice Statistics, supra* note 9; *Adult Population February 2017, supra* note 9. Thus, prison population has grown at 27.69 times the rate of the population as a whole during the period.

11. *Correction Statistic by State: South Dakota*, NAT'L INST. OF CORR., <http://nicic.gov/statestats/?st=SD> (last visited Apr. 23, 2017). Another way to compare incarceration rates is to consider a state's rate of violent crime to its imprisonment rate. By that measure, South Dakota's rates are at or near the top nationally, meaning it imprisons a higher percentage than other states with comparable violent crime numbers. *See id.* In South Dakota, Native Americans go to prison at about three and one-half times the rate of whites, and blacks at more than four times the rate of whites. *Compare Inmates by Race*, S.D. DEP'T OF CORR. (Oct. 31, 2016), <http://doc.sd.gov/documents/InmatesbyRaceOctober312016.pdf> (on file with author) (showing the number of inmates of each race in prison), *with South Dakota*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/BZA210214/46> (last visited Apr. 23, 2017) (showing the number of citizens of each race in South Dakota). Racial disparity within prison ranks is an issue so important that it warrants separate treatment. The issue will not be further analyzed here, except to note that in each racial group the same three-tiered educational divide has emerged, producing different economic and other life outcomes based on tier. *See* ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* (2015) (discussing that a three-tiered educational divide has emerged).

12. *Alcohol, Drugs, and Crime*, NAT'L COUNCIL ON ALCOHOLISM, AND DRUG DEPENDENCE INC., <https://www.ncadd.org/about-addiction/alcohol-drugs-and-crime> (last visited Apr. 23, 2017). Some estimates from South Dakota place the felony crime rate because of drugs at close to 90-95%. David E. Gilbertson, Chief Justice, South Dakota Supreme Court, *State of the Judiciary Message*, S.D. Unified Jud. Sys. (2017), http://ujs.sd.gov/Supreme_Court/messages.aspx.

13. While the term "dysfunctional" is susceptible to a variety of meanings, in this article, when used in reference to dysfunctional families, it means homes in which children are routinely exposed to parental absence, addiction, or severe mental illness, multiple parental lovers, and residence changes, all commonly resulting in their abuse or neglect.

poverty, mental illness, and addiction. The path they tread all too frequently leads to prison.

While the imprisoned come from all walks of life, each with a unique life story, two-thirds of South Dakota inmates lack a high school diploma, about 90% suffer from a substance disorder, many with a co-occurring mental disorder; a substantial number grew up fatherless and in poverty; many—including over half the women in prison—are childhood abuse survivors.¹⁴ Yet, more than half of the men and 75% of the women in South Dakota's prison system are there for nonviolent crimes.¹⁵

This article is not about statutes and case law. It is about the troubled lives experienced by so many dwelling in society's shadows, their road to prison, and the factors that continue to shackle them long after they have served their sentences. The first section canvasses the empirical data for the impact educational, familial, economic, and emotional circumstances play in presaging who will go to prison. The second section analyzes South Dakota's efforts to reform its criminal justice system. The final segment addresses ways in which some laws actually thwart an offender's rehabilitation and points to a way forward beyond the reforms implemented in South Dakota.

II. EDUCATIONAL, FAMILIAL, ECONOMIC, AND EMOTIONAL FACTORS THAT INCREASE LIKELIHOOD OF FUTURE IMPRISONMENT

In many ways, James and Christina help tell the stories of many who go to prison.¹⁶ Christina, now twenty-four, grew up amid the chaos of dysfunction, not knowing her father, and living in the homes of various men with whom her mother was romantically involved. One of the men sexually abused her and her siblings. Her mother did not report Christina's abuse and she received no counseling. Christina soon found ways to suppress her memories. She began using marijuana with her mother's younger sister, who babysat her. She started drinking alcohol at ten and smoking cigarettes at eleven.

School was always a problem for Christina. When she entered kindergarten, she already trailed her peers in reading, reciting the alphabet, counting, and one other key area: making friends. She often came to school in soiled clothes and with unkempt hair; other children said she smelled bad. All

14. Caroline Wolf Harlow, *Education and Correctional Populations*, BUREAU OF JUST. STATS., 1-2 (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>. Caroline Wolf Harlow, *Prior Abuse Reported by Prisoners and Inmates*, U.S. Dep't of Just., Bureau of Stats. Select Findings, <http://www.bjs.gov/content/pub/pdf/parip.pdf> (last visited June 20, 2016). The data is dated, published as it was in 1999; the numbers may well be higher today. Only 1.3% of South Dakota prisoners have even a two-year associates or technical degree. E-mail from Dennis Kaemingk, S.D. Dep't of Corr. Sec'y (June 27, 2016) (on file with author).

15. *Adult Population February 2017*, S.D. DEP'T OF CORR. (Feb. 2017), <https://doc.sd.gov/documents/AdultPopulationFebruary2017.pdf>.

16. While James and Christina may seem familiar to many in the court system, they are actually fictional composites of many defendants a trial judge meets in court and sends to prison. The characteristics they bear and their life experiences are well-represented among the prison population.

this made her an easy target for ridicule. Christina received only sporadic academic help, supervision, or encouragement in the home.

When Christina was twelve, her mother went to prison for drugs. She then went to live with her grandmother, but her grandmother's own drinking problem left her incapable of caring for Christina. It was there that Christina began cutting herself and experiencing severe depression. Eventually, authorities placed Christina and her siblings with her maternal aunt, who became their guardian. By then Christina was smoking marijuana daily. Christina and the aunt independently began snorting methamphetamine, but once they learned the other was using, they snorted together. Not surprisingly, Christina struggled with school attendance. After years of academic failure in several different schools, she did not return following her freshman year.

Christina became sexually active at fifteen. She did not use any birth control. She gave birth to a baby boy shortly after her seventeenth birthday. Following the child's birth, Christina had no further relationship with the father. Christina later bore two more children whom she conceived with different men. While Christina did not plan any of the pregnancies, she did not plan to avoid them either. In each case, she quickly found that the father was unsuitable as a husband and partner for raising her children. One partner physically abused her, and all three struggled themselves with substance abuse issues which led to incarceration. None of her children have meaningful relationships with their fathers.

By 2013, Christina's life distilled into a daily pattern of using meth and looking for ways to get another \$40 every few days in order to buy more. One day, the police came to the mobile home where she, three other adults, and her children were staying. Officers found meth and other illegal drugs there. Christina tested positive for meth, marijuana, and barbiturates. The officers soon arrested and handcuffed her, and she wept as a Department of Social Services ("DSS") worker led her children by the hand out of the drug-infested premises. DSS placed the children with her aunt, reportedly drug-free for about a year.

Today, Christina retains little of the physical beauty of her youth; her body has suffered permanent damage from years of meth use, and she appears to be a decade older than she is. Her skin is blotchy and one can trace the indentations around her mouth where the meth has rotted her teeth and damaged her gums. The drug has ravaged more than Christina's body: she now also struggles with memory issues.

Unlike Christina, James' parents were married for a brief time, although the marriage ended when James was young. They each have children from multiple partners. Addiction cut deep channels in James' family lines. Both of his grandfathers' lives were plagued by alcohol addiction. James' own mother and father abused drugs and alcohol as far back as he can remember. His most poignant memories of childhood are of his father beating him and his mother. Although James recalls tender moments when his father showed him love, he could never escape the overwhelming fear he felt for him, even flinching when his father entered a room. James' father left the family when he was five. After

that, James had no further relationship with him, and James' family then consisted of his mom and two younger siblings.

Since his mother had difficulty maintaining housing, James' family often lived with his mother's parade of boyfriends. They moved from town to town, and James spent time in at least eight different schools during his childhood. It was always hard to start over again in a new town. At times, the family was homeless. James recalls the hunger of missed meals, eating from dumpsters, always being dirty, and sensing that other children were staring at him.

On several occasions, authorities removed James and his siblings from their mother's care and placed them in a series of foster homes. The first set of parents imposed unreasonable punishments on him and his siblings—like locking them in a room for misbehaving. When James was ten, authorities placed him and his siblings with another family. It was there that he experienced the meaning of actual love, guidance, and care. There he could eat whenever he wanted, he learned the importance of basic grooming, his clothes were washed regularly, and together with his foster mom, he folded and placed them in his own drawer. These foster parents took him to church each Sunday, made him feel safe, and held him accountable for his increasingly troublesome actions.

Other boys bullied James in school.¹⁷ At twelve, shortly before returning to his mother's care, James was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and placed on Ritalin. His teachers reported continued attention and impulsivity issues, and quietly suspected that James' brain may have been affected by prenatal exposure to alcohol.

Money and transportation issues constantly dogged James. His baseball coach recognized his natural ability. The problem was that James lacked reliable transportation and had no money to buy a glove or cleats like the other kids wore. What bothered him most is what happened after games: while his teammates rushed to the concession stand for food, James, without money, went hungry, too embarrassed to explain why he did not join them.

He has struggled with severe depression and has, at various times, cut himself when dealing with low self-esteem. James also has made half-hearted attempts to take his life on a few occasions, which some might consider cries for help.

James entered the court system at thirteen, was adjudicated delinquent, and placed on probation. He violated probation by repeatedly running away from home. By then, James had dropped out of high school, having completed only part of his freshman year. After James ran away for a second time, he returned home, only to be barred from remaining there by his mother's then boyfriend, after he struck the boyfriend in a fight. This time the court committed James to

17. Bullying is a shared experience of many who eventually enter the prison system. Children exposed to childhood and adolescent bullying are nearly twice as likely to enter prison as adults as those who were not bullied. Christopher Zoukis, *Study Finds Victims of Bullying More Likely to Enter Criminal Justice System*, PRISON LEGAL NEWS (Nov. 2, 2015), <https://www.prisonlegalnews.org/news/2015/nov/2/study-finds-victims-bullying-more-likely-enter-criminal-justice-system/>.

the custody of the Department of Corrections (“DOC”), which placed him at the Youth Forestry Camp and later in other shorter-term facilities. Upon his release from DOC custody, he returned to the only home in which he had experienced stability: that of his loving foster parents. By this time, however, even they had little control over his behavior.

While James garnered some high school credits in DOC custody, he never earned either a diploma or GED. He found Algebra I too difficult, and because the course was required in order to graduate, and he was already older than his classmates, he decided to forego his efforts to earn a diploma and find a job instead. Due to his daily marijuana habit though, James often failed to show up to work and quickly lost each job he began. He then began to sell marijuana and any other drug he could come by in order to support his addiction. When James was eighteen, a friend offered him methamphetamine. When he smoked it, he experienced clarity of thought that he had never known before. He knew then that he was hooked.

A. EDUCATIONAL ATTAINMENT

In his 2015 book, *Our Kids*, author Robert D. Putnam, marshaled an impressive array of sociological and demographic data to describe the emergence over the past several decades of a tiered American society based largely on educational attainment.¹⁸ The research Putnam compiled demonstrates that a parent’s educational achievement is highly predictive of a host of other socioeconomic outcomes. They include: family income, net worth, marriage stability, church attendance, high school and college graduation rates, and—most notable to this discussion—incarceration. As a consequence, children of parents within the lowest educational tier today experience a more-pronounced inequality of opportunity than at any other period in the last century of American life. This shift has been so impactful that upward mobility—a hallmark of American values—is today rare within this tiered society.¹⁹ What has emerged is a society based largely on whether one earns a diploma and then goes on to earn a post-high school degree.²⁰ The highest educational tier comprises families in which the parents—or one of them—possess at least a bachelor’s

18. PUTNAM, *supra* note 11, at 77, 161-62. Putnam, former dean and currently the Malkin Professor of Public Policy at the Harvard University John F. Kennedy School of Government, has served as an advisor to both Democratic and Republican presidents and has consulted with leaders from around the world. *See id.* (describing author’s background on dustcover). In 2012, he received the National Humanities Award, the highest accolade for work in the humanities. *Id.* I am indebted to Mr. Putnam for covering much ground that I need not retread.

19. *See* PUTNAM, *supra* note 11, at 43 (citations omitted) (explaining that evidence suggests “absolute mobility has stalled since the 1970s, because both economic and educational advances have stalled”). This trend is contrary to Canada’s recent experience, where, according to Miles Corak, an economist at the University of Ottawa, upward mobility is greater and the income gap much smaller. Alan Freeman, *The Unbelievable Popularity of Canada’s Justin Trudeau*, WASH. POST (Oct. 18), https://www.washingtonpost.com/news/worldviews/wp/2016/10/18/the-unbelievable-popularity-of-canadas-justin-trudeau/?tid=pm_world_pop_b.

20. PUTNAM, *supra* note 11, at 44-5.

degree.²¹ The middle tier consists of families in which the parents have some college, but less than a four-year degree.²² The third tier consists of families in which the parents have earned a high school diploma or less.²³ As we will see, this third tier could itself be further divided based upon whether one has earned a diploma.²⁴ Once set in place, these tiers produce strikingly different outcomes for the children born into them.

While nearly 90% of Americans have a high school diploma, and fully one-third have earned at least a bachelor's degree, the ranks of those who have not obtained a diploma are staggering and growing.²⁵ Each year over one million American graduation-age youth fail to earn a diploma.²⁶ Their graduation rate strongly correlates with income: students within the bottom 20% of family incomes are five times more likely to drop out of school than those of the upper twentieth percentile.²⁷ Even more troublesome for South Dakotans is that the graduation gap between low-income students and others is greater than that of any other state.²⁸

Academic failure plays a crucial role in who goes to prison: high school dropouts are eight times more likely than graduates to find themselves incarcerated, and two-thirds of prison inmates lack a diploma.²⁹

College graduation rates also have become so stratified by income that among students with an average level of academic ability, those who come from high-income homes are now about six times more likely to earn a college degree than youths from low-income homes.³⁰ The ultimate assault on the American concept of merit-based achievement, however, lies in the reality that today it is less likely that a high-scoring poor student will earn a college degree than a low-scoring student from a wealthy home.³¹ While this is not what we think of as the American way, it has become the American reality.

21. *Id.* at 45.

22. *Id.*

23. *Id.*

24. *Id.*

25. Camile L. Ryan & Kurt Bauman, *Educational Attainment in the United States: 2015: Current Population Reports*, U.S. CENSUS BUREAU, 2 (2016), <https://www.census.gov/hhes/socdemo/education/data/cps/2015/p20-578.pdf>.

26. Rumberger, Russell W., Ph.D., *Poverty and High School Dropouts: The impact of Family and Community Poverty on High School Dropouts*, AM. PSYCHOL. ASS'N (May 2013), <http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx>.

27. *Id.*

28. *Building a Grad Nation Data Brief: Overview of 2013-14 Graduation Rates*, GRADNATION: AM.'S PROMISE ALLIANCE (Jan. 21, 2016), <http://www.gradnation.org/report/2016-building-grad-nation-data-brief>.

29. John M. Bridgeland et. al, *The Silent Epidemic: Perspectives of High School Dropouts*, GATES FOUND. (March 2006), <https://docs.gatesfoundation.org/documents/thesilentepidemic3-06final.pdf>; email from Dennis Kaemingk, S.D. Dep't of Corr. Sec'y (June 27, 2016) (on file with author).

30. PUTNAM, *supra* note 11, at 189-90.

31. *Id.* at 189-90 fig. 4.7.

B. FAMILIAL FACTORS

Today, stark differences in educational attainment correlate in clear ways with the type of home in which a child grows. The structure of the family has changed in important ways over the past several decades. In the 1950s, the typical American family consisted of a father who worked outside the home, a mother-homemaker, and children.³² Those who had earned college degrees had often done so through the GI Bill.³³ Overall, most men had no education beyond a high school diploma. Still, one could earn a middle-class income sufficient to support a family through a variety of widely-available blue-collar jobs without the financial necessity of the mother entering the workforce.³⁴ Divorce was rare, and only 4% of births occurred outside marriage.³⁵

The structure of the family began to change dramatically during the 1970s as society increasingly came to accept sex outside of marriage. At about the same time,³⁶ the practice of bearing and raising children outside marriage began to shed much of its social stigma.³⁷

These changes in family structure were far more pronounced among the lower educational tier. Among this group, a “kaleidoscopic pattern began to emerge in which childbearing became increasingly disconnected from marriage, and sexual partnerships became less durable.”³⁸ Statistics bear this out. In 1960, about 5% of children born to parents with college degrees were living in a single-parent home.³⁹ By 2007, that figure remained stood at about 10%.⁴⁰ In contrast, in 1960, around 20% of the children born to parents who possessed no more than a high school diploma were born out of wedlock, but over the ensuing decades⁴¹ that number skyrocketed, so that by 2007, two of every three children born to a parent with no more than a high school diploma were born out of wedlock.⁴²

This does not mean that couples have spurned marriage. To the contrary, the vast majority of Americans across all tiers desire and expect to marry one

32. *Id.* at 61.

33. *Education and Training: History and Timeline*, U.S. DEP’T OF VETERANS AFF. (Nov. 21, 2013), <http://www.benefits.va.gov/gibill/history.asp>. In 1947, Veterans accounted for 49% of college admissions. *Id.* By 1956, almost half of veterans had participated in post-high school education through the bill. *See id.* (stating that 7.8 million of 16 million World War II Veterans took advantage of the “GI Bill” to obtain further education or training).

34. PUTNAM, *supra* note 11, at 61.

35. *Id.* (citing Andrew J Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 406 (June 2010)).

36. *Id.* at 62 (citing ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* 92-93 (New York: Simon & Schuster 2010)).

37. *Id.*

38. *Id.* at 63.

39. *Id.* at 66, fig. 2.3.

40. *Id.*

41. *Id.*

42. *Id.*

day. It is only that, for many, especially among the lower-educated, the reality has not matched their aspirations.⁴³

This lower-educated group of women also has a much higher rate of unintended pregnancies.⁴⁴ While today nearly half of all American pregnancies are unintended, that figure masks the impact of a stunningly high unintended birthrate among poor women. Unintended pregnancies are five times more likely among poor women than those who earn at least twice the poverty level.⁴⁵ Incredibly, today the unintended birth rate among impoverished American women is more than twice that of *developing* nations.⁴⁶ Like Christina, poor women, even though they do not necessarily plan to become pregnant, also do not plan to avoid it as often as do higher educated women.⁴⁷

Women in the lower educational tier typically have sex earlier and bear children earlier than most women.⁴⁸ The average age of first birth today among college-educated women is thirty, but women in the bottom tier bear their first child, on average, by twenty.⁴⁹ To make matters worse, babies born as a result of these unplanned pregnancies are less likely to be breast-fed, more likely to arrive prematurely, more likely to be neglected, and more likely to suffer from a variety of physical and mental problems.⁵⁰

This pronounced cultural shift has resulted in the prominence of what some sociologists call “fragile families,”⁵¹ a term that describes the living

43. *Id.* at 72-73. There are many suspected reasons for this, which Putnam and others address. *Id.*

44. *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> (citing Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, NEW ENGLAND J. OF MED. 843–852 (Mar. 3, 2016), <http://nejm.org/doi/full/10.1056/NEJMsa1506575>).

45. *Id.*

46. *Id.* In 2012, the unintended birth rate among poor American women ages 15 to 44 was 112 per 1,000, compared to 54 per 1,000 of similarly-aged women in less developed nations. *Id.* The rate among impoverished American women has actually increased since 1981, when it stood at around 100 per 1,000 similarly-aged women. *Id.* Meanwhile, by 2012, the unintended birthrate for less developed nations had declined from 71 in 1995 to 54, a reduction of nearly 25%. Press Release, Guttmacher Inst., New Study Finds That 40% of Pregnancies Worldwide Are Unintended: Findings Highlight Need for Increased Investment in Contraceptive Services (Sept. 17, 2014), <https://www.guttmacher.org/news-release/2014/new-study-finds-40-pregnancies-worldwide-are-unintended> (citing Gilda Sedgh, Susheela Singh, and Rubina Hussain, *Intended and Unintended Pregnancies Worldwide in 2012 and Recent Trends*, 45 STUD. IN FAM. PLANNING 301 (Sept. 2014), https://www.guttmacher.org/sites/default/files/article_files/j.1728-4465.2014.00393.x.pdf). South Dakota’s overall rate of unintended pregnancies in 2012 was 46—almost half of all pregnancies in the state were unplanned. *State Facts About Unintended Pregnancy: South Dakota*, GUTTMACHER INST. (2016), https://www.guttmacher.org/sites/default/files/factsheet/sd_17.pdf. While the report provided no separate data as to the rate for poor women in the state, the state average is slightly higher than the national rate of 45. *Id.* As with prison rates, the South Dakota unintended pregnancy rate exceeded—at least slightly—that of every bordering state. *State Facts About Unintended Pregnancy*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy>.

47. Putnam, *supra* note 11, at 63-65.

48. *Id.* at 64-65.

49. *Id.* at 64.

50. *Id.* (citations omitted); Sharon Lerner, *Knocked Up and Knocked Down: Why America’s Widening Fertility Class Divide is a Problem*, SLATE (Sept. 26, 2011, 4:14 PM), http://www.slate.com/articles/double_x/doublex/2011/09/knocked_up_and_knocked_down.html.

51. Putnam, *supra* note 11, at 64.

arrangements that result from a parent having children with a series of different partners—a practice known as multi-partner fertility.⁵² The fragile or blended family is characteristic of many less-educated families today, often comprised of two single parents who live in different homes. The child or children most frequently live with the mother, and have a mixture of siblings and half-siblings, some of whom they do not know.⁵³ The parents, frequently were never married to one another. If they ever lived together, they did not sustain their relationship, and instead migrated into serial domestic relationships with a succession of lovers.⁵⁴ The men who biologically help conceive these children have differing levels of relationship and contact with their children, but about one-half of single parents receive no support.⁵⁵ The mother—far more frequently the custodial parent—often resides with men who assume varying degrees of a parental role with her children, exposing them to a procession of stepfathers.⁵⁶ These arrangements, as we shall see, are not only a recipe for an unstable relationship; they often imperil the children.⁵⁷ It is more than coincidence that the low-income, poorly-educated, single-parent home has emerged during the same period that our state and nation's prison population has exploded.

C. ECONOMIC FACTORS

How important economically is the parent's education level? It turns out to be crucial. Some historical perspective is helpful. A hallmark of the Gilded Age, which ushered in the Twentieth Century, was widening income inequality: the wealthy few earned vast sums, while much of the lower end of the populace

52. *Id.* at 68.

53. See *Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2013*, U.S. CENSUS BUREAU (2013), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> (click on "Table C2" and download spreadsheet). To calculate the percentage of children living with a single mother, under "BOTH SEXES" divide the number of children "LIVING WITH MOTHER ONLY: Child of Householder (13,987)" by the sum (16,504) of LIVING WITH FATHER ONLY: Child of householder (2,517) and LIVING WITH MOTHER ONLY: Child of householder (13,987). This results in the figure that about 85% of the children living with a single parent live with their mothers.

54. PUTNAM, *supra* note 11, at 68.

55. *Id.* at 69; Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2011*, U.S. CENSUS BUREAU 3 tbl.1 (Oct. 2013), <https://www.census.gov/prod/2013pubs/p60-246.pdf>. To calculate the percent of single parents not receiving child support, divide All Custodial Parents Total from year 2011 (14,440) and divide by Not awarded child support under All Custodial Parents Total from year 2011 (7,383).

56. PUTNAM, *supra* note 11, at 63, 67-69.

57. By their nature, generalizations can be misleading and cannot fully explain the complexity of any individual life or family. Without question, many single mothers and also many fathers, in every income strata are wonderful parents who provide stability for their children. It must also be said that the role of a single parent is by magnitudes more difficult an undertaking than raising children with a stable partner, and made even more difficult when accompanied by factors such as low parental educational achievement and poverty. The references in this article are not about them. After all, two recent American presidents, William Jefferson Clinton and Barack Hussein Obama are the products of such supportive single-parent homes.

lived in abject poverty.⁵⁸ Even in the period leading up to the 1929 market crash, the top 1% of families received almost a quarter of all pretax income, while the bottom 90% received about half.⁵⁹

The WWII industrial boom, from roughly 1941-1970, transformed the American economy. During that period, poverty rates declined, median income steadily increased, and income inequality dramatically narrowed. By 1944 the one-percenters' share of income fell to only 11%, while the bottom 90%'s share increased to two-thirds, a figure that remained stable for three decades.⁶⁰ By the 1970s, however, the post-War blue-collar income gains began to wane and the income gap again began to widen. That pattern has continued largely unabated ever since.⁶¹

Between the years 1979 and 2005, while inflation-adjusted earnings for the upper 1% grew by \$745,000 per year, those of the bottom fifth of American households grew by only \$900 annually.⁶² By then, the educational gap had begun to demonstrate its impact. Between 1980 and 2012, real earnings of college graduates rose from 20-56% with greater gains among those with post baccalaureate degrees.⁶³ Meanwhile, real earnings of males with high school diplomas fell by 11% and by 22%, among high school dropouts.⁶⁴ These numbers, while striking, only begin to account for the educationally-based economic disparities that exist in America today. In 1960, roughly 20% of mothers in each tier worked outside the home.⁶⁵ That has changed dramatically, but not in the way one might expect. Today, 70% of college-educated mothers are in the workforce, compared to about 32% of those with no more than a diploma.⁶⁶ Moreover, college-educated mothers are roughly seven times more likely to have a spouse who also produces an income.⁶⁷ The single-parent family, on the other hand, often must rely largely on an array of welfare programs in order to survive.⁶⁸

Today, the most reliable route to poverty in the United States is being born into a single-parent mother-led home. Poverty is a reality experienced by nearly

58. Drew Desilver, *U.S. Income Inequality, on Rise for Decades, is Now Highest Since 1928*, PEW RES. CTR. (Dec. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/>.

59. *Id.*

60. *Id.* By 2012, the share of income for the top 1% again reached about one-quarter of the total, while the bottom 90%'s share fell below 50% for the first time ever. *Id.*

61. *Id.*

62. PUTNAM, *supra* note 11, at 35.

63. PUTNAM, *supra* note 11, at 35.

64. *Id.*

65. *Id.* at 71 fig. 2.6.

66. *Id.* at 71.

67. *Id.* Two-income homes reflect the reality that maintaining middle-class status now frequently requires two-income-earners in the household.

68. Ariel Kalil & Rebecca M. Ryan, *Mothers' Economic Conditions and Sources of Support in Fragile Families*, 20 THE FUTURE OF CHILD. 39, 57 (2010), http://www.futureofchildren.org/publications/docs/20_02_03.pdf.

seven in ten children raised by never-married mothers.⁶⁹ These impoverished homes bring with them alarming economic and social consequences; but their greatest impact is on the children who live in them.

D. THE IMPACT OF A PARENT'S ECONOMIC, FAMILIAL, AND EDUCATIONAL BACKGROUND ON A CHILD'S LIFE OUTCOME

Children from poor homes, particularly where dysfunction exists, tend to begin life at a significant disadvantage. While this process begins very early in life, the educational gap is already obvious by the time they begin formal schooling. From there, the gap only widens.⁷⁰ For example, while 72% of middle-class children can recite the alphabet by the time they start school, only 19% of poor children are able to do so.⁷¹ Children in poor families tend to acquire language and basic math skills more slowly. By the time they enter high school they are, on average, 3.3 grade levels behind those of higher socio-economic status and fall another grade level behind during the high school years.⁷² Because of the learning gaps that develop, it is not surprising that low-income youth drop out of school five times more often than youths from high-income families.⁷³

A potpourri of empirical data explains why children from impoverished homes experience such poor academic outcomes. For example, upper tier parents spend substantially more time with their children—including helping with homework—than parents in the lowest income and educational tiers.⁷⁴ Children of lower-educated parents also attend church far less, and they are exposed to less religious teaching than those children of college-educated parents.⁷⁵

69. *Census Brief: Children With Single Parents-How They fare*, U.S. DEP'T OF COMMERCE, ECON. & STATISTICS ADMIN. (Sept. 1997), <https://www.census.gov/prod/3/97pubs/cb-9701.pdf>. Of parents with children in poverty, less than two-thirds finished high school and 78% live in rental housing. *Id.* By comparison, children of parents who were once married and now divorced fare better: 85% of such parents have high school diplomas and only 52% of such children live in rented homes. *Id.*

70. PUTNAM, *supra* note 11, at 134.

71. *Id.* at 116 (citing GREG J. DUNCAN & RICHARD J. MURNANE, *RESTORING OPPORTUNITY: THE CRISIS OF INEQUALITY AND THE CHALLENGE FOR AMERICAN EDUCATION* 32 (New York: Russell Sage Foundation, 2014)). Children from college-educated homes benefit even more from the level of interaction and attention they receive from their parents and other care-providers. *Id.* In one study, child development specialists estimated that by the time children had entered kindergarten, those from professional families had heard 19 million more words than children from working-class homes and 32 million more words than children from parents on welfare. *Id.* Another striking aspect of the study revealed that children of working class and professional parents employed encouraging words with their children far more frequently than discouragement. *Id.* at 120 fig. 3.2. The result among parents on welfare was the opposite: their children heard more than twice as many discouraging as encouraging words. *Id.*

72. *Education and Socioeconomic Status*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/ses/resources/publications/education.aspx> (last visited Apr. 24, 2017).

73. *Id.*

74. PUTNAM, *supra* note 11, at 124-28, 162.

75. *Id.* at 224-26. Church attendance and religious involvement is associated with a variety of positive outcomes, including better parental relationships, more sports and other extracurricular

Summers tend to widen the gap.⁷⁶ Children in impoverished homes have far less money spent on them for travel, clothing, athletic and other gear, lessons, transportation, camps and other social and educational experiences.⁷⁷ These financial barriers can cause challenges that exclude them from a host of extra-curricular activities: band often requires children to rent or purchase instruments; sports participation requires that they have access to equipment, gear, and must often buy meals while travelling to games; various activities require transportation.⁷⁸ In short, children in impoverished homes are often denied, for economic reasons, opportunities to engage in the very activities that schools and communities have long found to have a positive effect on one's social, physical, and emotional development.⁷⁹

Children in poor families also experience instability that comes from frequent residence changes. A study of student mobility published by the National Academies of Science, Engineering, and Medicine, found "a significant relationship between mobility and both lower school achievement and dropping out."⁸⁰ The study also concluded that poor children move more than others and that the impact on their learning is more profound than in children from higher income homes.⁸¹ Transience can critically impair the impact schools might otherwise have on the child, since the child seldom remains in a school long enough for teachers to develop a sense of the child's needs. The cumulative effect of these realities is that poor children—especially those from fragile homes—tend to experience increased isolation from parents, teachers, and classmates.⁸²

In addition, studies suggest that, apart from other factors, simply growing up in a home without a biological father has profound, lasting effects on a child's academic achievement. Children growing up without biological fathers "perform worse on standardized tests, earn lower grades, and stay in school for fewer years, regardless of race and class."⁸³ Moreover, the absence of a dad in the home has the propensity to cause children to suffer in ways beyond the academic: they are statistically far more likely to experience behavioral and

participation, less substance abuse, less delinquency, and markedly higher rates of going on to college than non-participating youth. *Id.* at 224.

76. *Id.* at 86-87, 143, 162.

77. *Id.* at 125-26.

78. *Id.* at 125-26, 175-77.

79. *Id.* at 133-34.

80. NAT'L ACAD. OF SCI., ENGINEERING, AND MED., STUDENT MOBILITY: EXPLORING THE IMPACTS OF FREQUENT MOVES ON ACHIEVEMENT: SUMMARY OF A WORKSHOP 11 (The National Academic Press 2010).

81. PUTNAM, *supra* note 11, at 14.

82. *Id.* at 207-26 (suggesting that children of educated, affluent parents have wider range of informal mentors, exhibit greater propensity to socially trust others, attend church more frequently, and generally participate in the community to a higher degree).

83. *Id.* at 78 (citations omitted). These children account for 71% of students who fail to complete school. Edward Kruk, *Father Absence, Father Deficit, Father Hunger: The Vital Importance of Paternal Presence in Children's Lives*, PSYCHOL. TODAY (May 23, 2012), <https://www.psychologytoday.com/blog/co-parenting-after-divorce/201205/father-absence-father-deficit-father-hunger>.

psychological problems.⁸⁴ Such children are also more prone to have sex earlier than others and to become young, single parents themselves, perpetuating the circumstances of their own childhoods.⁸⁵ The lack of a stable father not only deprives a child of a father's guidance and role modeling but also has collateral effects, such as instilling a sense of rejection that often accompanies that parental absence.⁸⁶ Such youth also receive less protection than children living with both biological parents: a child living in a household with one parent and that parent's unmarried partner is 11 times more likely to suffer abuse than a child living with two biological parents.⁸⁷

Still other adverse consequences befall fatherless children. Apart from high rates of poverty, these children are also at a significantly-increased risk for drug and alcohol abuse,⁸⁸ and they account for 90% of youths who run away from home.⁸⁹ Most significant to this discussion, a large percentage of those in prison grew up fatherless, while others had fathers in the home who struggled with addiction or abuse.⁹⁰

The pattern of behavior that leads to prison perpetuates itself. A variety of studies show that children who grew up without a father in the home are themselves at much higher risk for imprisonment.⁹¹ The single fact of parental incarceration also strongly predicts that the inmate's child will also experience academic struggles.⁹² A sad synergy develops generationally between the lack of an education and future imprisonment: children born to high school dropouts were shown to be four times as likely to have an imprisoned parent as children born to college-educated parents.⁹³ Thus, it appears that the lack of education places one at far greater risk to enter prison, and that entering prison in turn increases the likelihood that the prisoner's child will fail to obtain a diploma and also enter the prison system.⁹⁴

84. PUTNAM, *supra* note 11, at 78 (citations omitted).

85. *Id.*

86. *Id.*; see also Patricia G. Schnitzer, Ph.D. & Bernard G. Ewigman, M.D., M.S.P.H., *Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, NCIB (Feb. 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1360186/>.

87. Andrea J. Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, U.S. DEP'T OF HEALTH AND HUM. SERVS., 5-20 (2010), https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf.

88. Kruk, *supra* note 83.

89. *Id.*

90. Christopher J. Mumola & Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004*, BUREAU OF JUST. STAT., 8 (Oct. 2006), <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>. A U.S. Department of Justice study in 2004 found that less than half of state prison inmates spent most of their childhoods in a home with both parents. *Id.* Further, the study shows state prison inmates experienced elevated rates across a range of categories, including poverty, homelessness, substance abuse, child abuse, and family members' incarceration. *Id.*

91. Kay Hymowitz, *The Real, Complex Connection Between Single-Parent Families and Crime*, THE ATLANTIC (Dec. 3, 2012), <http://www.theatlantic.com/sexes/archive/2012/12/the-real-complex-connection-between-single-parent-families-and-crime/265860/>. A 1994 study of incarcerated Wisconsin juveniles found that "only 13% grew up with their married parents." *Id.*

92. PUTNAM, *supra* note 11, at 76-77.

93. *Id.* at 76.

94. *Id.* at 76-77.

The effects of alcohol and illegal substances also seem to impact children from different home environments differently. While the data suggests that children across the socio-economic tiers engage in harmful behavior such as binge drinking and marijuana use at comparable rates, children from supportive homes tend to have better access to mental health and addiction treatment, but they also tend to have a variety of additional buffers that insulate them from the most devastating effects of their mental health or addiction struggles.⁹⁵

Importantly, unlike children from supportive homes, impoverished, single-parented children suffer from the absence of what Putnam calls “air bags.”⁹⁶ His use of this term describes the supportive role that stable parents tend to play for their children—even into adulthood—in their times of need. For example, when a child from a stable family experiences a learning disability or developmental delay, the air bags deploy, and the parents obtain appropriate testing and help to address the need both in school and at home. When they encounter addiction or legal problems, again, the air bags deploy to aid them and soften the impact.

Children of upper-tier parents also have advantages in other ways. They tend to have access to a web of mentors not available to poor children. These mentors may be either formal or informal, including extended family, parental friends, business or work associates, pastors and church family, and neighbors.⁹⁷ Conversely, although poor children in impoverished homes tend to lack such parental contacts and mentors, they have a greater desire for them.⁹⁸

The greatest impact on children of a poor and dysfunctional home, however, appears to lie in what happens to affect the development of their minds very early in life. Neuroscientists have made inroads in recent decades in understanding just how crucial a child’s earliest years are in developing the social, emotional, and intellectual skills needed to thrive in life.⁹⁹ The authors of a groundbreaking study published in the National Academy of Sciences concluded: “Virtually every aspect of early human development, from the brain’s evolving circuitry to the child’s capacity for empathy, is affected by the environments and experiences that are encountered in a cumulative fashion,

95. *See id.* at 210 (explaining that children from affluent families have the benefit of “family and community ‘air bags’ that deploy to minimize the negative consequences of drugs and other misadventures . . .”).

96. *Id.* (“Affluent families provide their children with connections that poor families can’t.”).

97. *See generally id.* at 206-226 (discussing the different kinds of mentors available to affluent families).

98. *See id.* at 120-27, 226. The lack of mentors can have an enormous impact on an impoverished youth trying to navigate into adulthood. It tends to result in the youth having less knowledge and skill at understanding and taking advantage of the academic and other institutions that can help the youth move forward in a career and in life. Such a young person also tends to lack practical understanding of how to manage finances, and how to leverage opportunities—even those tailored for the young, such as job assistance and educational loans and grants. *Id.* at 216.

99. Harvard University’s Center on the Developing Child’s online collection is a particularly rich source of data on the subject. *Center on the Developing Child*, HARVARD, <http://developingchild.harvard.edu/> (last visited Apr. 25, 2017).

beginning early in the prenatal period and extending throughout the early childhood years.”¹⁰⁰

The neurobiological research shows that consistent connection with caring adults is essential to the development of a healthy infant brain.¹⁰¹ The science of stress and its impact on a young child bears this out. A child subjected to frequent and prolonged adversity tends to develop what academicians call toxic stress.¹⁰² This refers to what happens physiologically to a child exposed to a stressful environment over a prolonged period of time. Children in such settings build up higher levels of cortisol, a vital stress hormone.¹⁰³ As part of the body’s fight or flight mechanism, the child’s adrenal glands release cortisol in response to fear or stress.¹⁰⁴

For most people, once the immediate crisis has abated, the body’s cortisol levels return to normal. In a child exposed to continual stress, however, cortisol remains stored in the body, rather than dissipating. Those elevated cortisol levels interfere with one’s learning, memory and ability to concentrate, and can lead to depression, mental illness, a host of other long-term health problems.¹⁰⁵

Exposure to constant stress in the home can disrupt executive functions and disturb the ability to follow directions and address basic challenges.¹⁰⁶ Frequent exposure to parental abuse also elevates a child’s symptoms of conditions like anxiety, and ADHD, helping account for the skyrocketing incidence of the latter among school kids.¹⁰⁷ Perhaps worst of all, the hormone buildup attacks the last refuge of a child living in a toxic environment: resiliency, the ability to overcome life’s adversities.¹⁰⁸

100. PUTNAM, *supra* note 11, at 109 (quoting Bd. on Child, Youth, and Fam. Nat’l Res. Council and Inst. of Med., FROM NEURONS TO NEIGHBORHOODS: THE SCI. OF EARLY CHILD DEV. 388 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000)).

101. *Id.* at 109-10.

102. Steven D. Cohen, *Applying the Science of Child Development in Child Welfare Systems*, CTR. ON DEVEL. CHILD HARV. U., 6 (Oct. 2016), http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2016/10/HCDC_ChildWelfareSystems.pdf.

103. PUTNAM, *supra* note 11, at 116.

104. Christopher Bergland, *Cortisol: Why “The Stress Hormone” Is Public Enemy No. 1*, PSYCH. TODAY (Jan. 22, 2013), <https://www.psychologytoday.com/blog/the-athletes-way/201301/cortisol-why-the-stress-hormone-is-public-enemy-no-1>. The biochemist, Hans Selye, labeled the stressors eustress (good stress) and distress (bad stress). *Id.* Good stress creates the heightened sense of arousal that mobilizes the body into action by releasing cortisol. *Id.* Once the danger has passed, the body’s cortisol levels return to normal. *Id.* Bad stress operates much differently; it produces cortisol but does not provide an outlet for its buildup and instead takes the form of a sort of free floating anxiety, causing a myriad of problems. *Id.*

105. PUTNAM, *supra* note 11, at 112.

106. *Id.*

107. *Id.* at 114.

108. *See generally Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience*, NAT’L. SCI. COUNCIL ON THE DEVEL. CHILD (2015), <http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2015/05/The-Science-of-Resilience2.pdf> (providing extremely well-documented and useful science explaining how protective factors in a child’s social environment and body interact to produce resilience, and discussing strategies that promote healthy development in the face of trauma); *see also Resilience*, PSYCH. TODAY, <https://www.psychologytoday.com/basics/resilience> (last visited Apr. 25, 2017) (stating that “[r]esilience is that ineffable quality that allows some people to be knocked down by life and come back stronger than ever”).

The CDC-Kaiser “ACE” Study, conducted from 1995 to 1997, explored the connection between childhood abuse and neglect and later health and well-being.¹⁰⁹ Its goal was to quantify the degree to which an individual’s life may have been impacted by childhood trauma.¹¹⁰ The study’s results found a strong correlation between early adverse life experiences and poor outcomes in health and well-being in later life.¹¹¹ The study resulted in questionnaires, which physicians and other care providers now routinely utilize, which explore the presence in one’s life of key Adverse Childhood Experiences (“ACEs”).¹¹² As Nobel Prize-winning economist James Heckman has written: such ACEs correlate with bad outcomes for one’s lifetime and beyond, such as “poor adult health, high medical care costs, increased depression and suicide rates, alcoholism, drug use, poor job performance and social function, disability, and impaired performance of subsequent generations.”¹¹³ People who grew up in disadvantaged and dysfunctional homes frequently have encountered several such adverse life experiences by the time they reach adulthood.

E. EMOTIONAL FACTORS

1. *Mental Illness*

In light of this data, it is not surprising that children growing up impoverished and in dysfunctional homes are far more susceptible to mental illness than others.¹¹⁴ Today, almost one in five American adults—around forty-four million people—live with a mental disorder.¹¹⁵ Mental illness usually

109. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. OF PREVENTATIVE MED. 245, 245 (1998).

110. *Id.*

111. *Id.*

112. *Id.* at 247. The categories are: psychological, physical, or sexual abuse; household substance abuse; household mental illness; whether the mother was treated violently; or whether a family member went to prison. *Id.* at 248 tbl.1.

113. PUTNAM, *supra* note 11, at 113 (quoting James J. Heckman, *Promoting Social Mobility*, BOSTON REVIEW (Sept. 1, 2012), <http://www.bostonreview.net/forum/promoting-social-mobility-james-heckman>). See also Felitti et al., *supra* note 109, at 246 (indicating additional consequences assessed by ACE studies).

114. There is no clear data concerning whether the incidence of mental illness has increased over the decades (it is difficult to compare incidences of mental illness today with previous periods). Even those who question an increased incidence of mental illness, however, appear alarmed by statistics that show, for example, the number of doctor visits that resulted in a bipolar diagnosis in children and adolescents has increased forty times over the last decade. Ronald W. Pies, *Is There Really an “Epidemic” of Psychiatric Illness in the US?*, PSYCHIATRIC TIMES (May 1, 2012), <http://www.psychiatrictimes.com/articles/there-really-%E2%80%9Cepidemic%E2%80%9D-psychiatric-illness-us#sthash.z5moa6eC.dpuf> (citing Carmen Moreno et al., *National Trends in the Outpatient Diagnosis and Treatment of Bipolar Disorder in Youth*, ARCH GEN PSYCHIATRY 1035 (Sept. 2007), <http://psychrights.org/research/Digest/CriticalThinkRxCites/moreno.pdf>).

115. *Mental Health Facts in America*, NAT’L ALL. ON MENTAL ILLNESS (Apr. 12, 2015), <https://www.nami.org/getattachment/Learn-More/Mental-Health-By-the-Numbers/General-MH-Facts-4-12-15.pdf>. About 16 million American adults suffer from major depression. *Id.*

begins to appear relatively early in life: “One-half of all chronic mental illness begins by the age of 14; three-quarters by age 24.”¹¹⁶

A type of childhood adversity that almost always leads to mental illness comes from an entirely avoidable condition: Fetal Alcohol Spectrum Disorder (“FASD”).¹¹⁷ This condition includes an array of developmental abnormalities and permanent brain damage caused by a child’s prenatal alcohol exposure, which strikes before she draws her first breath.¹¹⁸ Ninety-four percent of people who suffer from it also have a mental illness, half display inappropriate sexual behaviors, and half also end up either incarcerated or institutionalized in a facility for psychiatric or drug treatment.¹¹⁹ They often exhibit poor impulse control, explosive outbursts, inability to see the future consequences of their acts or to empathize with others, and susceptibility to peer influence.¹²⁰ Close to two-thirds of youth with FASD drop out of school.¹²¹ The majority of children with the full effects of fetal exposure reside in foster homes.¹²² The problem has become so prevalent in the court system that, in 2012, the American Bar Association passed a resolution urging judges, lawyers, and others involved in the juvenile and criminal justice system to support awareness and training to help identify and respond effectively to FASD.¹²³

Individuals living with serious mental illness face an increased risk of chronic medical conditions.¹²⁴ Its ultimate manifestation—suicide—is the tenth leading cause of death in the U.S., exceeding that of homicides, and the second-

116. *Id.*

117. *Fetal Alcohol Spectrum Disorders (FASD) & the Criminal Justice System Fact Sheet*, MINN. ORG. ON FETAL ALCOHOL SYNDROME (“MOFAS”), 1 (Oct. 16, 2015), <https://www.mofas.org/wp-content/uploads/2015/09/FASDcriminaljustice2015.pdf>.

118. *Id.*

119. *Id.* at 2 (citations omitted).

120. *Id.* Researchers are gaining more understanding of the prevalence of FASD, which has recently been estimated in the range of two to seven cases per thousand. *Alcohol Facts and Statistics*, NAT’L INST. OF ALCOHOL ABUSE AND ALCOHOLISM (June 2016), <https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics>. A 2014 study conducted in Sioux Falls, South Dakota of 1,400 first graders found FASD to affect 2% to 5% of children in the city, compared to a previous estimate of 1% to 2%. Jon Walker, *Study: Fetal Alcohol is Double What was Believed in S.F.*, ARGUS LEADER (Nov. 29, 2014), <http://www.argusleader.com/story/news/2014/11/29/study-sf-fetal-alcohol-double-believed/19670773/>.

121. MINN. ORG. ON FETAL ALCOHOL SYNDROME, *supra* note 117, at 2 (citations omitted).

122. *Id.*

123. *Resolution 112B*, A.B.A. HOUSE OF DELEGATES (Aug. 6-7, 2012), http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_112_B.authcheckdam.pdf.

124. Serious mental illness, as the term is defined by federal law, refers to:

Persons: (1) age 18 and over, (2) who currently or at any time during the past year, (3) have a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet diagnostic criteria specified within the Diagnostic and Statistical Manual of Mental Disorders (DSM)-III-R, (4) that has resulted in functional impairment which substantially interferes with or limits one or more major life activities. All of these disorders have episodic, recurrent, or persistent features; however, they vary in terms of severity and disabling effects.

leading cause of death for ages fifteen to twenty-four.¹²⁵ Roughly 90% of those who die by suicide suffer from mental illness.¹²⁶ Mental illness also adversely affects the educational attainment of its victims: roughly 50% of students with a mental illness age fourteen and older drop out of high school—the highest dropout rate of any disability group.¹²⁷

Although mental illness cuts across economic levels, the incidence of it is highest among the poor. One of the most consistent findings in social science research is that the lower one's socioeconomic status, the higher the risk of mental illness.¹²⁸ Children from lower-income families are two to three times more likely than other children to suffer a mental disorder.¹²⁹ Low-income youths are more than three times as likely.¹³⁰ As the Center for Disease Control concluded in 2004, socioeconomic status has a significant impact on one's exposure to a host of psychosocial, environmental, and other factors that impact mental health.¹³¹

The life stressors of poverty that underprivileged children experience also affect adults in poverty. In fact, “[a]dults living with serious mental illness die on average twenty-five years earlier than other Americans, largely due to treatable medical conditions.”¹³² Like their children, they experience much higher toxic stressors arising from problems such as food and housing insecurity, and poorer health generally. They are statistically much more likely to have witnessed or experienced violence, and are more isolated from the community and its social structures.¹³³ There is also a synergistic effect between mental illness and poverty: the fact that a person suffers a mental illness increases the

125. *Suicide*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/statistics/suicide/index.shtml#part_153199 (last visited Sept. 19, 2016).

126. Jose Manoel Bertolote & Alexandra, Fleischmann, *Suicide and Psychiatric Diagnosis: A Worldwide Perspective*, WORLD PSYCHIATRY 181-85 (Oct. 2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1489848/>.

127. *Community Conversation about Mental Health: Information Brief*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN (June 2013), [https://www.mentalhealth.gov/talk/community-conversation/Information%20Brief%20remediated%20\(2\)-1.pdf](https://www.mentalhealth.gov/talk/community-conversation/Information%20Brief%20remediated%20(2)-1.pdf).

128. *Mental Illness and Poverty: A Fact Sheet*, FLA. COUNCIL FOR CMTY. MENTAL HEALTH (Jan. 2007), <http://www.fccmh.org/resources/docs/mentallillnessandpoverty.pdf>.

129. *Id.* See also Christopher G. Hudson, *Socioeconomic Status and Mental Illness: Tests of the Social Causation and Selection Hypotheses*, 75 AM. J. ORTHOPSYCHIATRY 3, 3 (2005) (“One of the most consistently replicated findings in the social sciences has been the negative relationship of socioeconomic status (SES) with mental illness: The lower the SES of an individual is, the higher is his or her risk of mental illness.”).

130. *Mental Illness and Poverty*, *supra* note 128.

131. *Id.* (citing *Self-Reported Frequent Mental Distress Among Adults: United States, 1993-2001*, CDC (Oct. 22, 2004), <http://www.cdc.gov/Mmwr/preview/mmwrhtml/mm5341a1.htm>).

132. *Mental Health by The Numbers*, THE NAT'L ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers> (last visited Nov. 17, 2016).

133. Esther Entin, *Poverty and Mental Health: Can the 2-Way Connection Be Broken?*, THE ATLANTIC (Oct. 26, 2011), <http://www.theatlantic.com/health/archive/2011/10/poverty-and-mental-health-can-the-2-way-connection-be-broken/247275/>; Barbara Mauer, *Morbidity and Mortality in People with Serious Mental Illness*, NAT'L ASS'N ST. MENTAL HEALTH PROGRAM DIRECTORS MED. DIRECTORS COUNCIL, 16 (Oct. 2006), <http://www.nasmhpd.org/sites/default/files/Mortality%20and%20Morbidity%20Final%20Report%208.18.08.pdf>.

risk for becoming or staying poor.¹³⁴ The mentally ill tend to have more difficulty holding a job, are more vulnerable to experience social stigmas, and are at an increased risk to experience addiction.¹³⁵ All this can either lead to or perpetuate poverty in a person's life.¹³⁶

Today, our nation and state experience the anomaly that, while the incidence of mental illness is markedly higher among the impoverished, it is they who are most routinely excluded from access to needed care: only about one in three adults receive needed treatment, with the inability to afford care among the chief reasons for unmet needs.¹³⁷

Youth transitioning to adulthood appear to experience the most difficulty obtaining health care, and also have the highest uninsured rates.¹³⁸ Yet inordinately high rates of them—totaling between two and one-half and five million people—suffer from a serious mental health condition.¹³⁹ They also have the highest rates of homicide, and high rates of homelessness, arrests, mental health problems, substance abuse, and school dropouts.¹⁴⁰ In light of the data it is not surprising that the vast majority of those in prison with untreated mental illness and addiction problems, not only lacked the support of stable family, but also access to necessary care and treatment.¹⁴¹

The way in which society has cared for the mentally ill has changed through the nation's history. In the early 1800s, the nation addressed their plight by imprisoning them. American prisons of that day were largely unregulated dens in which inmates—including the mentally ill—at times experienced inhumane, even brutal treatment.¹⁴² The Nineteenth Century brought with it change due largely to the efforts of one man and one woman. Congregationalist minister,

134. See Entin, *supra* note 133 (“This two-way connection between poverty and mental illness has been the subject of many studies around the world.”).

135. See Vijaya Murali & Femi Oyebode, *Poverty, social inequality and mental health*, 10 *ADVANCES PSYCHIATRIC TREATMENT* 216, 217 (2004) (suggesting that psychiatric disorders are more common among people of lower social class, in which unemployment and drug dependence are more prevalent). This is a worldwide phenomenon, as demonstrated by research which studied poverty and its relationship to mental illness in countries such as Africa, India, Mexico, Thailand, and China. Entin, *supra* note 133.

136. Entin, *supra* note 133.

137. *Community Conversation about Mental Health: Information Brief*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN (June 2013), [https://www.mentalhealth.gov/talk/community-conversation/Information%20Brief%20remediated%20\(2\)-1.pdf](https://www.mentalhealth.gov/talk/community-conversation/Information%20Brief%20remediated%20(2)-1.pdf). This fact goes a long way toward explaining why the mentally ill are overrepresented in our jails, prisons, and across the criminal justice system. *Id.* *Mental Health in America - Access to Care Data*, MENTAL HEALTH AM. (2016), <http://www.mentalhealthamerica.net/issues/mental-health-america-access-care-data>.

138. *Id.*

139. *Id.*

140. *Id.* The rate is about 6-12% among this group. *Id.*

141. More than two-thirds of those 26 or older referred to substance abuse treatment by the criminal justice system had no health insurance, which substantially exceeded the percentages for most other referral sources. *Health Insurance Status of Adult Substance Abuse Treatment Admissions Aged 26 or Older: 2011*, SAMHSA, tbl.1, fig. 1 (Feb. 6, 2014), [http://www.samhsa.gov/data/sites/default/files/sr134-health-insurance-2014/sr134-health-insurance-2014.htm](http://www.samhsa.gov/data/sites/default/files/sr134-health-insurance-2014/sr134-health-insurance-2014/sr134-health-insurance-2014.htm).

142. *Dorothea Lynde Dix*, HISTORY, <http://www.history.com/topics/womens-history/dorothea-lynde-dix> (last visited Apr. 25, 2017).

Louis Dwight, appalled by what he saw when he took Bibles into Massachusetts's prisons, set out to change it.¹⁴³ Dorothea Dix, America's most influential reformer of psychiatric care, followed Dwight's trailblazing, beginning in about 1840.¹⁴⁴ While teaching a Sunday school class outside a Boston jail, she noticed that, not only were there inmates who were clearly mentally ill—they had no heat in their cells.¹⁴⁵ Dix travelled to every prison and jail in Massachusetts, investigating and documenting conditions.¹⁴⁶ Dix shocked readers with accounts of prisoners being “flogged, starved, chained, physically and sexually abused by their keepers, and left naked and without heat or sanitation.”¹⁴⁷ Her efforts galvanized public opinion to improve the plight of the imprisoned and insane, and directly led to the more humane treatment of the mentally ill in psychiatric hospitals known as asylums in that state and in time, across the nation.¹⁴⁸

Because of these reforms, states increasingly treated the mentally ill in mental asylums, often for long periods. By 1880, the first census of the insane showed there were seventy-five psychiatric hospitals in the nation.¹⁴⁹ The census counted 92,000 “insane” persons, about 42,000 of whom were in homes, an equal number in hospitals and asylums, 9,000 in almshouses, and only 397 in the nation's jails.¹⁵⁰

In 1959, state mental asylums housed over one-half million mentally ill patients.¹⁵¹ By then, however, those asylums had developed a reputation—often earned—as testing grounds for quack psychiatry, lobotomies, and other horrors enacted upon troubled patients.¹⁵² In response, the nation began moving away from asylum-based treatment for the mentally ill to allow community-based treatment, as a less-restrictive alternative.¹⁵³

The shift to “deinstitutionalize” was dramatic. During the 1960s, mental facilities released hundreds of thousands of mentally ill people back to their

143. JENNIFER GRABER, *THE FURNACE OF AFFLICTION: PRISONS AND RELIGION IN ANTEBELLUM AMERICA* 74 (2011).

144. *Dorothea Lynde Dix, supra*, at note 142.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS* 28 (1997) [hereinafter TORREY I].

150. *Id.*

151. H. Richard Lamb & Linda E. Weinberger, *The Shift of Psychiatric Inpatient Care from Hospitals to Jails and Prisons*, 33 J AM. ACAD. PSYCHIATRY L. 529, 530 tbl.1 (2005).

152. See ONE FLEW OVER THE CUCKOO'S NEST (Fantasy Films 1975) (depicting such conditions). See generally E. Fuller Torrey & Robert H. Yolken, *Psychiatric Genocide: Nazi Attempts to Eradicate Schizophrenia*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2800142>; Andrew Korda, *The Nazi Medical Experiments*, 7 AUSTL. DEF. FORCE HEALTH J. 33 (2006), http://www.defence.gov.au/health/infocentre/journals/adfhj_apr06/adfhealth_7_1_33-37.pdf.

153. The movement away from asylum care roughly coincided with the development of the first widely distributed psychotic drug, which also allowed some patients to function well in a community setting. TORREY I, *supra* note 149, at 8-11, 35-42, 205-07.

communities. States permanently closed entire wings—in some cases entire facilities—impacting the millions through the decades since who have suffered from serious mental illness and would have benefited from long-term care.¹⁵⁴ While in 1955 the nation's mental health hospitals provided one psychiatric bed for every 300 of its citizens, by 2005 there remained only one such bed for every 3,000 Americans, with most kept for court-ordered placements.¹⁵⁵ As a result, about nine in ten people who would have been in mental health hospitals in 1955, were no longer there by 1994.¹⁵⁶

The policy shifted to fund community treatment centers that would provide trained professionals to deliver counseling and prescribe the new antipsychotic drugs that were beginning to be introduced. The goal was to support patients while they remained in their communities and worked jobs, in order to allow them to live more normal lives.

The problem was that the states, including South Dakota, failed to use the savings from hospital closures to invest in community programming. Then, during the 1980s, the federal government drastically cut its funding and converted the aid to block grants that the states could designate as they saw fit, leaving community mental health to compete with other claimants for the federal funds, and state mental health funding suffered even more.¹⁵⁷

Today the United States houses about three times *more* seriously mentally ill persons in jails and prisons than in hospitals, making them once again our chief repository for the mentally ill.¹⁵⁸ The mentally ill now comprise between 16 and 20% of the nation's prison population, a more than a three-fold increase since 1983.¹⁵⁹ In addition, nearly 60% of female state prison inmates, while

154. *Id.*

155. E. Fuller Torrey, et al., *More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States*, TREATMENT ADVOC. CTR., 8 (May 2010), http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf [hereinafter Torrey II].

156. TORREY I, *supra* note 149, at 8-9.

157. Daniel Simmons-Ritchie, *Mental Health Crisis Part 3: How Do You Fix a Broken System?*, RAPID CITY J. (Sept. 21, 2014), http://rapidcityjournal.com/news/mental-health-crisis-part-how-do-you-fix-a-broken/article_3156f789-60a1-51a2-8cd7-1f10d1ee7f41.html. See also Mark Walker, *Patient Attacks Take Toll on State Mental Hospital*, ARGUS LEADER (updated June 3, 2016), <http://www.argusleader.com/story/news/2016/05/21/patient-attacks-take-toll-state-mental-hospital-staff/84434948/>.

158. Torrey II, *supra* note 155, at 8. The study cited here indicated that South Dakota housed more than twice as many mentally ill persons in prisons than in hospitals. *Id.* at 19 tbl.1. North Dakota, on the other hand, had the best ratio of all states in that they housed about the same number in each. *Id.*

159. *Id.* at 1. Similarly, in a 2006 Special Report, the Bureau of Justice Statistics estimated that state prisons incarcerated 705,600 mentally ill adults, federal prisons another “78,800, and local jails lodged 479,900.” Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU JUST. STATS. 1 (Sept. 2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>. In addition, research suggests that “people with mental illnesses are overrepresented in probation and parole populations at estimated rates ranging from two to four times the general population.” Seth Jacob Prins & Laura Draper, *Improving Outcomes for People with Mental Illnesses under Community Corrections Supervision: A Guide to Research-Informed Policy and Practice*, COUNCIL OF STATE GOV'TS JUST. CTR., 11 (2009), <https://csgjusticecenter.org/wp-content/uploads/2012/12/Community-Corrections-Research-Guide.pdf>. Unlike the mistreatment of the 1800s, today psychotropic drugs can play a key role, at least in maintaining order among the imprisoned mentally ill.

perhaps not diagnosed with a mental illness, suffered abuse before age eighteen.¹⁶⁰ Meanwhile, the trend continues into the next generation: troubled youth continue to enter the juvenile court system, with their own serious mental health issues: 70% of youth in juvenile justice systems have at least one mental health condition and at least 20% live with a severe mental illness.¹⁶¹

The result is that in America today, we are experiencing a perverse reversion to history in which prisons have again become houses of the addicted and the mentally ill.¹⁶² Because prisons and jails are not designed to serve as *de facto* mental hospitals, incarcerating the mentally ill brings with it, apart from the lack of humane environment and care, a host of problems for law enforcement, prisons, and the courts.¹⁶³ Mentally ill prisoners cost substantially more to house, largely because of medication costs.¹⁶⁴ They tend to stay longer, in part because of difficulty following rules in jail and those in prison more often fail to make first parole eligibility; they often spend frequent stints in jail or prison; they tend to present more serious management problems; and they commit suicide at higher rates—by one study, they account for half of all prison suicides.¹⁶⁵ Finally, the mentally ill are more often subjected to abuse by other inmates, and at times even by guards who may not understand nor possess the training to deal with their disorder.¹⁶⁶ The result is that imprisoning a mentally ill person tends to exacerbate the condition.¹⁶⁷

South Dakota's experience in caring for its mentally ill illustrates the troubling connection between deinstitutionalization and incarceration of the mentally ill. South Dakota averaged over 1,700 beds at its state mental hospital in Yankton throughout the decade of the 1950s. During the 1960s deinstitutionalization movement, the state reduced its bed numbers and

160. See Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers*, BUREAU JUST. STATS., 1 (Apr. 1999), (finding 57.2 percent of state prison inmates suffered either physical abuse (46.5%), sexual abuse (39.0) or both prior to prison entry). Because this source is dated, the numbers are likely higher today.

161. *Mental Health by The Numbers*, *supra* note 132. Viewed from a different perspective, about 40% of adults suffering from a serious mental illness have spent time in jail or prison. Torrey II, *supra* note 155, at 1.

162. Torrey II, *supra* note 155, at 9.

163. *Id.* at 9-10.

164. *Id.*

165. *Id.* at 1.

166. *Id.* at 9-11. This is not to imply that penal institutions fail to make diligent efforts to understand and compassionately deal with mentally-ill inmates. South Dakota's DOC has adopted an array of reform measures over the past decade. It has increased its mental health staffing, and subjected its entire staff to training in mental health first aid, with additional training for staff working in its Restrictive Housing and Mental Health Unit. Interview with Denny Kaemingk, Secretary, South Dakota Dep't of Corr. (Nov. 1, 2017). It is also training its staff in Dialectical Behavioral Therapy, considered the model psychological treatment method for borderline personality disorder and a wide range of other depressive disorders. *Id.* See also, *What is DBT?*, LINEHAN INST., <http://behavioraltech.org/resources/whatisdbt.cfm> (last visited Apr. 26, 2017).

167. *The Effects of Incarceration on Mental Health*, GOODTHERAPY.ORG (Mar. 15, 2013), <http://www.goodtherapy.org/blog/prison-incarceration-effects-mental-health-0315137>.

established eleven community mental health centers. Today, 281 beds remain.¹⁶⁸

In 2015, controversy erupted after the Sioux Falls Argus Leader published an investigative report revealing that mentally ill defendants were routinely required to wait months in jail before obtaining court-ordered psychiatric evaluations.¹⁶⁹ The article prompted the appointment of a task force to study the issue.

The delays that mentally ill inmates face while awaiting mental evaluations is, however, only the tip of an enormous iceberg.

Critics assert that the state's overflowing jails and prisons are the product of state policies that have underfunded community mental health, and have resulted, apart from the human tragedy, in higher public costs rather than savings.¹⁷⁰

There is factual support for the critics' claims. In a nearly year-long survey of South Dakota's jails reported in 2014, the Rapid City Journal discovered that one in six of those housed in South Dakota's jails—266 inmates—suffered from a serious mental illness.¹⁷¹ Sheriffs across the state echo similar sentiments: available services to care for the mentally ill are often scant; medication costs overwhelm county budgets. One Yankton County inmate incurred medical costs in excess of \$100,000 during his stay.¹⁷²

The *Rapid City Journal* report concluded that many of the mentally ill patients jailed in South Dakota each month re-offend shortly after release, up to ten times over the course of a year.¹⁷³ To further aggravate the problem, the *Journal* report found that many of the state's jails continued to employ solitary confinement to control mentally ill inmates, a troubling practice likely to make the condition worse.¹⁷⁴ The mentally ill not only cycle in and out of jail: the revolving door also frequently takes them to prison and back.¹⁷⁵

The South Dakota Supreme Court's Chief Justice, David E. Gilbertson, recently confronted one problem the state faces in caring for the mentally ill: the

168. Simmons-Ritchie, *supra* note 157.

169. Mark Walker, *Court Delays Leave Mentally Ill Behind Bars*, ARGUS LEADER (Nov. 14, 2015), <http://www.argusleader.com/story/news/2015/11/14/court-delays-leave-mentally-ill-waiting-behind-bars/75362910/>. It is unclear why this particular story prompted a state response. A year earlier, the Rapid City Journal published an extensive series on the topic with a similar assertion. Daniel Simmons-Ritchie, *Mental Health Crisis Part 3: How Do You Fix a Broken System?*, *supra* note 159. Moreover, the jailing and imprisonment of the mentally ill has been a familiar topic in the court and prison system for over a decade.

170. Daniel Simmons-Ritchie, *Mental Health Crisis Part1: South Dakota Crippled by Surge of Mentally Ill Inmates*, RAPID CITY J. (Sept. 21, 2014), http://rapidcityjournal.com/news/mental-health-crisis-part-south-dakota-crippled-by-surge-of/article_95e8e093-8d9e-57eb-b2f2-a687fb82a898.html.

171. *Id.* The article states that Pennington County medical costs had risen more than five-fold between 1996 and 2013, with 84% of the costs incurred for psychotropic drugs. *Id.* The report also found that another 132 state prison inmates had a serious mental illness. *Id.*

172. *Id.* That Yankton County Jail Administrator lamented that, "I do feel like, a lot of days, that I run a mental institution instead of a jail." *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

critical shortage of qualified mental health providers.¹⁷⁶ While a nationwide problem, it is more acute in South Dakota than in all but one other state. The Kaiser Family Foundation, in a study of the topic, concluded that South Dakota has only enough mental health providers to meet 15% of the state's needs.¹⁷⁷

The provider shortage is symptomatic of the state's more fundamental funding failures, demonstrated again by national data on the state's mental healthcare systems. South Dakota's level of funding for mental health falls below that of each adjacent state.¹⁷⁸

In 2010, Congress passed and President Obama signed the Patient Protection and Affordable Care Act ("ACA").¹⁷⁹ Two of the law's hallmarks are mandatory coverage for mental health and addiction treatment,¹⁸⁰ and the expansion of the federally subsidized Medicaid program to cover adults who earn up to 138% of the poverty level.¹⁸¹ Several states, including South Dakota, challenged the constitutionality of various parts of the law. In its landmark ruling, the United States Supreme Court, while upholding the law's constitutionality in most regards, struck the requirement that the states expand Medicaid to cover their poorest adults.¹⁸²

As a result, under the law the decision whether to expand Medicaid coverage is left to the individual states. To date, nineteen states—including South Dakota—have declined to expand Medicaid.¹⁸³ South Dakota's Medicaid rules continue to provide medical care to impoverished children under eighteen and to any custodial parent who resides in the home. When a child reaches

176. David E. Gilbertson, Chief Justice, South Dakota Supreme Court, State of the Judiciary Message, S.D. Unified Jud. Sys. (2017), http://ujs.sd.gov/Supreme_Court/messages.aspx.

177. *Id.* See also *Mental Health Care Health Professional Shortage Areas (HPSAs)*, KAISER FAM. FOUND., <http://kff.org/other/state-indicator/mental-health-care-health-professional-shortage-areas-hpsas/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Apr. 26, 2017) (providing a table of state mental health facts).

178. *Mental Health Care Health Professional Shortage Areas*, *supra* note 177.

179. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

180. See 42 U.S.C. § 18022(b)(1)(E) (explaining that mental health and substance use disorder services are covered as an essential health benefit).

181. Actually, the Medicaid law limits Medicaid eligibility to 133 percent of the poverty rate. 42 U.S.C. § 1396a(a)(10)(A)(i)(VI) (2012). The ACA's companion act, however, reset the upper income threshold at 138% of poverty. Health Care and Education Reconciliation Act (HCERA) of 2010 § 1004(e), 42 U.S.C. § 1396a (e)(14)(I) (2012). See also *Federal Poverty Level*, HEALTHCARE.GOV (2016), <https://www.healthcare.gov/glossary/federal-poverty-level-FPL/> [hereinafter *Federal Poverty Level*] (explaining that if income is below 138% of the federal poverty level and state has expanded Medicaid coverage, one qualifies for Medicaid based only on that person's income).

182. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012). While no single opinion commanded the support of a majority of the justices, a majority concluded that the Medicaid expansion requirement was unconstitutionally coercive, thus severing it from the act. *Id.*

183. *Status of State Action on the Medicaid Expansion Decision*, KAISER FAM. FOUND., <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Apr. 26, 2017).

adulthood, coverage ends.¹⁸⁴ Medicaid ceases to cover a parent when a child no longer lives in the home.¹⁸⁵

The poor in South Dakota face a dilemma: an impoverished adult without dependent children in the home remains ineligible for Medicaid, yet also is ineligible for subsidized coverage under the ACA. This contradictory circumstance leaves the individual without effective health care coverage for either mental health or addiction treatment, or for that matter, any other medical care.¹⁸⁶ This lack of access to health care poses the greatest barrier to treatment for the impoverished who are disabled by mental health or addiction issues.¹⁸⁷

2. Substance Abuse

The United States has had a long and conflicted history with drugs and alcohol. Americans consumed massive amounts of alcohol throughout much of the nineteenth century and into the early twentieth century.¹⁸⁸ By 1830, those over age fifteen, on average, drank nearly seven gallons of pure alcohol each year.¹⁸⁹ Over the course of the last century, millions developed an appetite for drugs like cocaine and marijuana as well, and began to use them in various forms. As the popularity of these drugs became increased, they became outlawed.¹⁹⁰ Other drugs emerged, such as LSD, not officially banned in the United States until 1967.¹⁹¹ Since the 1970s, the nation's drug laws have become increasingly comprehensive and sanctions for their use have grown harsher, initiated by the Nixon Administration's institution of a War on Drugs.

South Dakota followed the trend toward harsher drug laws with felony controlled substances enactments.¹⁹² Today in South Dakota, nearly any illegal drug possession, except for small amounts of marijuana, subjects a person to a potential prison sentence.¹⁹³ Yet, based on the number of charges filed, illegal substance use—particularly that of drugs like marijuana and methamphetamine—are more prevalent in the state today than ever before. This suggests, as the statistics show, that harsh laws and prison sentences have not curbed use.¹⁹⁴ Sadly, less than 10% of those with illegal drug or alcohol

184. S.D. ADMIN. R. 67:46:01:02 (2016).

185. *Id.*

186. *Federal Poverty Level*, *supra* note 181. For 2016, the poverty threshold is \$11,880 for an individual and \$24,300 for a family of four; 138% is \$16,242 for an individual and \$33,465 for a family of four. *Id.*

187. *Id.*

188. See KEN BURNS & LYNN NOVICK, PROHIBITION (PBS 2011) (discussing the history of the Prohibition Era).

189. *Id.*

190. See WILLIAM E. LINK ET AL., FACTS ABOUT DRUG ABUSE: TRAINER'S MANUAL IV-28, IV-30 (Elaine Casey ed., 1977).

191. *Id.*

192. See S.D.C.L. §§ 22-42-1 to -21, 34-20b-1 to -114 (2012 & Supp. 2016).

193. *Id.* §§ 22-42-1 to -21.

194. *The Facts on Drugs and Crime in America*, NAT'L ASS'N. OF DRUG COURT PROF'L, 1, <http://www.nadcp.org/sites/default/files/nadcp/Facts%20on%20Drug%20Courts%20.pdf> (last visited

problems receive the needed specialized treatment.¹⁹⁵ While those who use illegal drugs and those who abuse alcohol cut across each of the nation's socioeconomic tiers, addiction dogs the poor at elevated rates.

Today, some regions of the United States are in the midst of a heroin epidemic. Roughly three-quarters of its users were introduced to it through prescription drugs.¹⁹⁶ While deaths are also on the rise nationally from the pain-killing drug, fentanyl, South Dakota's current scourge—apart from rampant alcohol abuse—is methamphetamine.¹⁹⁷ This highly addictive drug, chemically similar to amphetamine used to treat ADHD, takes the form “of a white, odorless, bitter-tasting crystalline powder.”¹⁹⁸ Its typical ingredients include: Epsom salts, drain cleaner, cold medicine, lithium batteries, and lighter fluid.¹⁹⁹ The recovery rate for meth addicts is low across the board.²⁰⁰ The rate for those who receive no treatment hovers at around a 5% recovery rate, while those who receive residential treatment which incorporates counseling and recreational activities experience a modest 12% recovery rate.²⁰¹ The key to fighting the drug appears to lie in preventing its first use.

Those with ADHD are particularly vulnerable to the highly addictive and physically destructive effects of meth use and have more difficulty overcoming addiction to it, often reporting they use the drug because it calms them and helps maintain focus.²⁰² Once the user experiences the calm, clarity, and focus the

Apr. 26, 2017). See also Brian Elderbroom, et al., *Assessing the Impact of South Dakota's Sentencing Reforms: Justice Reinvestment Initiative*, URBAN INST., 2 (May 2016), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000762-Assessing-the-Impact-of-South-Dakota%27s-Sentencing-Reforms-Justice-Reinvestment-Initiative.pdf> (indicating felony drug filings are at an all-time high).

195. *Behavioral Health Treatments and Services*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., <http://www.samhsa.gov/treatment> (last visited Nov. 17, 2016). This statistic is based on whether needed specialized treatment was received over the previous twelve months. *Id.*

196. Lenny Bernstein & Joel Achenbach, *A Group of Middle-Aged Whites in the U.S. is Dying at a Startling Rate*, WASH. POST (Nov. 2, 2015), <https://www.washingtonpost.com/national/health-science/a-group-of-middle-aged-american-whites-is-dying-at-a-startling-rate/2015/11/02/47a63098-8172-11e5-8ba6-cec48b74b2a7>. The article notes that, according to the Centers for Disease Control and Prevention, the heroin death toll has quadrupled in the decade that ended in 2013. *Id.*

197. Kathryn Q. Seelye, *Heroin Epidemic Is Yielding to a Deadlier Cousin: Fentanyl*, NEW YORK TIMES (Mar. 25, 2016), https://www.nytimes.com/2016/03/26/us/heroin-fentanyl.html?_r=0. Fentanyl is a synthetic opioid analgesic similar to morphine but 50 to 100 times more potent. *Fentanyl*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/fentanyl> (last visited Apr. 26, 2017); Jake Shama, *Meth: A Constant Battle, 'A Huge Problem,'* MITCHELL REPUBLIC (Aug. 6, 2016, 8:15 AM), <http://www.mitchellrepublic.com/news/local/4088909-meth-constant-battle-huge-problem>.

198. *Methamphetamine*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/methamphetamine> (last visited Apr. 26, 2014).

199. See Robb Silver, *The Meth Business Shake and Bake*, YOUTUBE (May 27, 2015), <https://www.youtube.com/watch?v=WtggDyLDIMo> (showing a user manufacturing and later using meth).

200. May Wilkerson, *Why Can't Most Meth Addicts Stay Clean?*, THE FIX (Aug. 2, 2012), <https://www.thefix.com/content/why-cant-most-meth-addicts-stay-clean8107>.

201. *Id.* This statistic defines recovery rate as remaining clean for three years. *Id.*

202. *MIND Institute Researchers Study ADHD and Methamphetamine Addiction*, U.C. DAVIS HEALTH SYSTEM (Sept. 10, 2012), <https://www.ucdmc.ucdavis.edu/publish/news/newsroom/6944>. Research previously determined that: “One third of the subjects (32%) who began using between the ages of 10 and 15 reported doing so because of the calming effect that methamphetamine had on them. These participants were classified using the Wender Utah Rating Scale as having ADHD

drug initially brings, the desire to pursue the feeling uniquely exposes them to its addictive trap.²⁰³ Despite the popularity of more modern drugs, alcohol dwarfs all other substances as the drug of choice. Of the twenty million people in the United States with an addiction, over 80% are alcoholics.²⁰⁴

The interplay between addiction and mental disorders is powerful. Half of those with a substance use disorder—10.2 million adults—also had a co-occurring disorder: an addiction combined with one or more mental health problems.²⁰⁵ Conversely, nearly a third of all people diagnosed with a mental disorder also abuse substances.²⁰⁶ They appear to face a higher risk for substance abuse to blunt mental or physical pain.²⁰⁷

The extent of the impact addiction and mental illness has had on the American culture is most powerfully humanized by a 2015 discovery. Two demographers, pouring over reams of Census data, discovered that the death rates of middle-aged white Americans—aged 45 to 54—have actually increased each year beginning in 1999.²⁰⁸ Never before had such a group experienced even a single year of increasing death rates, let alone more than a decade of them.²⁰⁹ Furthermore, the increased death rates were solely attributable to mortality increases among one demographic group: those with a high school diploma or less.²¹⁰ Even more telling, the increased death rates among this group were entirely accounted for by elevated death rates from drug and alcohol poisonings, suicides, and chronic liver diseases and cirrhosis.²¹¹ Drug and alcohol poisoning deaths among those without high school diplomas increased

symptomatology.” Pete Quily, *Crystal Meth’s ADD/ADHD Connection Part 2*, ADULT ADD STRENGTHS (July 21, 2005), <http://adultaddstrengths.com/2005/07/21/crystal-meths-add-connection-part-2/>.

203. *MIND Institute Researchers Study ADHD and Methamphetamine Addiction*, *supra* note 202.

204. *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, SAMHSA, 7 (2014), <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

205. *Mental Health by The Numbers*, *supra* note 132.

206. *Behind Bars II: Substance Abuse and America’s Prison Population*, NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, 3 (2010), <http://www.centeronaddiction.org/addiction-research/reports/behind-bars-ii-substance-abuse-and-america%E2%80%99s-prison-population#.WQC-cYWcH4g> (click “DOWNLOAD THIS REPORT”).

207. *Economic Status and Abuse*, DUALDIAGNOSIS.ORG, <http://www.dualdiagnosis.org/drug-addiction/economic-status/> (last visited Apr. 26, 2017).

208. Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT’L ACAD. SCI. U.S. AM. 15078, 15,080 tbl.1 (2015), <http://www.pnas.org/content/112/49/15078.full.pdf>.

209. *Id.* at 15,078.

210. *Id.* at 15,079, 15,080 tbl.1.

211. *Id.* The data also revealed self-reports of correlative declines in physical and mental health, problems conducting daily living activities, increases in chronic pain and inability to work, and clinically-measured deterioration in liver function. *Id.* at 15,080. Deaths for American Blacks and Hispanics continued their downward trends although their death rates remain higher than for whites. *Id.* at 15,079. In addition, white Americans within the upper two socioeconomic tiers experienced declining death rates, consistent with long-term trends. *Id.* at 15,079-80 tbl.1.

more than four-fold during this period; deaths by chronic cirrhosis increased by one-third; deaths by suicide nearly doubled.²¹²

The data shook American demographers.²¹³ It represented a stark and previously un-detected reversal of a twenty-year trend of declining rates among all demographic groups in the United States and around the world.²¹⁴ The effect of this development has been so profound that, if the previous death rate patterns had held, half a million American citizens who would still be alive today.²¹⁵

In hindsight, the finding should not have come as a surprise in light of the dramatic shifts that have been documented among the poorest tier of society and the lack of adequate care and treatment for them. While addiction actually increases the risk for future poverty, for those who survive, its greatest impact is that appropriate treatment is often inaccessible.²¹⁶

In a real sense, demographers identified a phenomenon on one side of the deep fault line within American culture. On that side, in society's dark shadows, those with poor educations and low incomes struggle with addiction and mental illness at highly elevated rates. One harrowing result is that those who populate our prisons are nearly all substance addicts or abusers. We need look no further to confirm this than within South Dakota's borders: 85% of male offenders and 93% of females in the state's prisons were assessed at intake with a substance abuse or dependence.²¹⁷

III. SOUTH DAKOTA REFORM EFFORTS: SENATE BILL 70

By 2012, South Dakota's prisons had grown to more than 3,600 inmates.²¹⁸ Projections suggested that in ten years the numbers would grow by another 25%—at an added cost of over \$200 million.²¹⁹ Largely in response to these fiscal realities, South Dakota, led by Governor Dennis Daugaard, embarked on efforts to reverse the trend.²²⁰ Those efforts culminated in the adoption of South

212. *Id.* at 15,080 tbl.1.

213. Gina Kolata, *Death Rates Rising for Middle-Aged White Americans, Study Finds*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/health/death-rates-rising-for-middle-aged-white-americans-study-finds.html>.

214. Case & Deaton, *supra* note 208, at 15,078. By comparison, even the AIDS epidemic, which has claimed about 650,000 lives from 1981 through 2015, failed at its height to cause an actual uptick in death rates. *Id.* at 15,081; Bernstein & Achenbach, *supra* note 196.

215. Case & Deaton, *supra* note 208, at 15,078, 15,081.

216. *Drug Talk*, NAT'L COUNCIL ON DRUG ABUSE, <http://ncda.org/jm/index.php/publications/drug-talk/66-poverty-a-drug-abuse> (last visited Apr. 26, 2017) (citing Robert Kaestner, *Does Drug Use Cause Poverty?*, NAT'L BUREAU OF ECON. RES., 346 (1999), <http://www.nber.org/papers/w6406.pdf> (indicating that "past-year use of marijuana or cocaine increases the likelihood that family income will be less than \$12,000").

217. Email from Dennis Kaemingk, Sec'y of the S.D. Dep't of Corr., June 27, 2016 (on file with author).

218. Elderbroom et al., *supra* note 194, at 1.

219. *Id.*

220. See Dennis Daugaard, Governor, South Dakota, State of the State Address, Pierre, S.D., at 14 (Jan. 8, 2013), <http://sd.gov/governor/docs/2013%20State%20of%20State.pdf>.

Dakota Senate Bill 70 (“SB 70”), the Public Safety Improvement Act, signed into law in 2013.²²¹

Chief Justice Gilbertson actively promoted the reform effort, which was aided by research and assistance from the Pew Foundation.²²² The South Dakota Legislature, with overwhelming bipartisan support, passed the comprehensive reforms.²²³ Those reforms are grounded in the principles that the courts should imprison only those from whom the public needs protection and that instead of imprisonment the state should offer non-violent offenders improved community supervision and treatment in the dual effort to reduce recidivism and achieve long-term savings by avoiding prison costs.²²⁴

Senate Bill 70’s enactment brought sweeping changes in how the justice system reacts to the nonviolent offender, and, in particular, how judges sentence those convicted of Class 5 and 6 felonies.²²⁵ The law requires a judge to sentence an offender convicted of either class of felony, with certain exceptions, to probation, unless the court finds that aggravating circumstances exist that “pose a significant risk to the public and require a departure from presumptive probation.”²²⁶

SB 70 expanded the state’s drug court programs. A drug court is a court-supervised intensive probation program that emphasizes therapeutic means instead of incarceration for convicted defendants who struggle with an addiction. Its goal is to increase offender accountability and decrease recidivism.²²⁷ SB 70 also implemented the national Hope Court Initiative, a program more suited to rural areas lacking drug courts and the treatment services available in a more

“For [community corrections] to work, though, we need additional treatment and supervision capacity. We can’t send more probationers or parolees out into the community without more court service officers and probation officers to supervise them. The workgroup recommends, and my budget proposes, funding to build that capacity. Investing those dollars today will save millions in prison costs.”

Id.

221. 2013 S.D. Sess. Laws ch. 101, 218-36.

222. *Public Safety in South Dakota*, PEW CHARITABLE TRS. (Aug. 14, 2015), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/02/06/public-safety-in-south-dakota>.

223. 2013 S.D. Sess. Laws ch. 101, 218-36. The vote was 31-2 in the Senate, and 63-7 in the House. SOUTH DAKOTA LEGIS. RES. COUNCIL, http://sdlegislature.gov/Legislative_Session/Bills/RollCall.aspx?Vote=13283&Session=2013 (last visited Apr. 26, 2017).

224. *South Dakota Public Safety Improvement Act*, SD.GOV, <http://psia.sd.gov/general.aspx> (last visited Apr. 26, 2017).

225. 2013 S.D. Sess. Laws ch. 101 § 53, 228. An individual convicted of a Class 5 Felony is subject to a maximum prison sentence of five years and a Class 6 felony conviction subjects one to up to two years in prison. S.D.C.L. § 22-6-1.8 to 1.9 (2006 & Supp. 2016).

226. 2013 S.D. Sess. Laws ch. 101 § 53, 228. In such a case, “the judge shall state on the record at the time of sentencing the aggravating circumstances and the same shall be stated in the dispositional order.” S.D.C.L. § 22-6-11 (2006 & Supp. 2016). The law actually prohibits a court from entering any sentence other than probation in the absence of aggravating circumstances as stated. S.D.C.L. § 22-6-11 (2006 & Supp. 2016). The Supreme Court has not yet addressed whether this language prohibits a court from imposing jail, fines, or court costs in addition to probation, although lower courts have frequently done so.

227. 2013 S.D. Sess. Laws ch. 101 § 3, 220. The law defines drug court to include courts for those convicted of driving under the influence of alcohol. *Id.*

metropolitan area.²²⁸ The program focuses on those convicted of felonies, regardless of the offense, who are at high risk to reoffend because of ongoing drug or alcohol issues.²²⁹

The new law established a standardized sanctions procedure and grid to guide court services and parole officers in imposing the appropriate response to a probation violation.²³⁰ It provides for earned discharged credits of one month for every month of good behavior on probation or parole.²³¹ SB 70 also requires that those who supervise probationers and parolees use evidence-based practices, based upon what works as revealed by research, and allows the supervising officer to gauge the individual's criminal risks and needs in order to focus resources on moderate-risk and high-risk offenders.²³²

SB 70 instituted a different approach for collections of money owed under a judgment of conviction once probation or parole has expired.²³³ Under that law, the DOC or the court may place any adult offender with an outstanding court-ordered financial obligation into what the law terms the administrative financial accountability system, which manages unpaid amounts.²³⁴ A separately enacted law prohibits an individual from obtaining or renewing a license to drive or hunt unless the judicial debt and a cost recovery fee are paid or a payment plan enacted.²³⁵

The law makes it a felony to ingest or have a controlled substance in the body in an altered state.²³⁶ The crime is either a Class 5 or a Class 6 felony, depending on the substance.²³⁷ The law has proven controversial, despite the

228. See 2013 S.D. Sess. Laws ch. 101 § 9, 220 (“The Supreme Court is authorized to establish two South Dakota HOPE court pilot programs.”).

229. 2013 S.D. Sess. Laws ch. 101 § 10(3)-(6), 221. Features of this program are judicial involvement in setting and communicating expectations and consequences for noncompliance to the probationer program; frequent, effective, and randomized drug or alcohol testing; swift and proportional sanctions for noncompliance with program conditions; and prompt warrant service for absconding. *Id.*

230. 2013 S.D. Sess. Laws ch. 101 § 32, 224.

231. 2013 S.D. Sess. Laws ch. 101 § 36(1), 225. This law excludes those on probation for less than six months and sex offenders. 2013 S.D. Sess. Laws ch. 101 §§ 24, 222, 36(4), 225.

232. 2013 S.D. Sess. Laws ch. 101 § 27(1), 223.

233. 2013 S.D. Sess. Laws ch. 101 § 43, 226.

234. 2013 S.D. Sess. Laws ch. 101 §§43, 44, 226. Under Section 48 of the law, the failure to comply with the plan of restitution or for financial obligations remains a probation violation, and, as under prior law, a court may also hold the individual in contempt of court. 2013 S.D. Sess. Laws ch. 101 § 48, 227.

235. S.D.C.L. § 1-55-11 (Supp. 2016).

236. S.D.C.L. § 22-42-5.1 (2006 & Supp. 2016). South Dakota already had a statute that made it a Class I misdemeanor to ingest a substance other than alcohol for becoming intoxicated. S.D.C.L. § 22-42-15 (2006 & Supp. 2016). The South Dakota Supreme Court had also previously ruled that the State could establish that a defendant possessed a controlled substance under S.D.C.L. § 22-42-5, by showing its presence in an altered state in the body. *State v. Mattson*, 2005 S.D. 71, ¶ 57, 698 N.W.2d 538, 555 (holding possession could be shown by knowing . . . ingestion of the drugs); *State v. Schroeder*, 2004 SD 21, ¶14, 674 N.W.2d 827, 831 (reading S.D.C.L. § 22-42-5 together with the amended definition of a controlled drug, possession may occur if a person knowingly possesses “an altered state of a drug or substance absorbed into the human body.”).

237. 2013 S.D. Sess. Laws ch. 101 §§ 57, 71-72.

reality that the enactment merely codified what the case law had already established.²³⁸

The results of SB 70 have been mixed: the law's presumption that Class 5 and 6 felons be placed on probation appears to have produced more uniformity as to Class 5 and Class 6 felony sentences.²³⁹ SB 70's graduated supervision sanctions have also increased predictability and uniformity for probationers across the state in how low-level felons are supervised, because they provide the probationer with advance notice of the range of potential sanctions for particular violations.²⁴⁰

Early on, SB 70 appeared to produce some reductions in prison numbers.²⁴¹ Those early successes, however, were soon reversed. By the end of March 2017, the state's prisons held 490 women and 3,414 males, for a total of 3,904, all record numbers, and contrary to the projections Pew Research provided prior to implementation showing that prison numbers would steadily decline.²⁴²

The law is not without its detractors. There are concerns among law enforcement, prosecutors, defense lawyers, and many who work within the court system that the state has not fulfilled its promise to provide enhanced treatment and supervision for offenders. Many among these groups view the reforms as simply allowing convicted but still-addicted drug users, who may pose a risk of harm, back into the state's communities without any meaningful consequence or needed treatment.²⁴³

There is also concern in the way both the South Dakota Unified Judicial System ("UJS") and the DOC have relaxed the severity of their responses to probation and parole violations. Under the UJS Response Grid, for example, a positive urinary analysis that indicated the probationer used an illegal drug does not necessarily result in any incarceration.²⁴⁴ Similarly, the DOC's response grid has been modified so even a new felony conviction, so long as the new

238. 2013 S.D. Sess. Laws ch. 101 § 9, 220.

239. Elderbroom et al., *supra* note 194, at 7 fig. 2. As of the date of the report, 80% of those convicted of Class 5 and 6 felonies eligible for presumptive probation were actually placed on probation rather than imprisoned. *Id.* This compares to about 60% of such individuals who were placed on probation as recently as 2011. *Id.*

240. *Id.*

241. *South Dakota Public Safety Improvement Act*, *supra* note 224 (stating "the law had stabilized the state's prison population, cutting the number of parole violators sent to prison by 8 percent. Additionally, the number of offenders completing parole increased by 23 percent between fiscal years 2012 and 2014").

242. *Adult Population February 2017*, S.D. DEP'T OF CORR. (Feb. 2017), <https://doc.sd.gov/documents/AdultPopulationFebruary2017.pdf>.

243. Shama, *supra* note 197. A common lament of both prosecutors and law enforcement was voiced by one county sheriff: "Local entities were told that the state was going to bring these programs to the local communities to get those people reformed or rehabilitated, and I haven't seen any new ones come within my county, yet." *Id.*

244. SOUTH DAKOTA SUPREME COURT RULE 16-01 (S.D. Unified Jud. Sys. 2016), <https://ujs.sd.gov/uploads/sc/rules/Rule%2016.01.pdf>.

felony is subject to presumptive parole, is no longer sufficient cause to revoke one's parole.²⁴⁵

On the other hand, the law's enforcement has raised executive branch concerns that prosecutors are overcharging under the newly codified ingestion statute.²⁴⁶ The executive branch has also expressed concern that some judges too frequently sentence those convicted of ingestion to prison.²⁴⁷

The divide between the perceptions of prosecutors and law enforcement on the one hand, and that of the executive branch on the other, was displayed in two different newspaper articles published in the spring of 2016. The first detailed the complaints of a local prosecutor and county sheriff who met with the Attorney General to complain that a judge was releasing too many convicted drug users back into the community.²⁴⁸ Later that same week, executive branch officials opined that judges continue to sentence people to prison that they are "mad at" rather than those who pose a public safety risk.²⁴⁹ These countervailing views reflect tensions one might expect following such a significant shift in the law; any sweeping enactment requires time to allow wrinkles to be ironed out. Yet, in the case of SB 70, the concerns expose deeper, more fundamental disagreement over the reform law's implementation and perceived flaws.

These opposing views were further highlighted in May 2016, when the Governor's Office released the results of the Justice Reinvestment Initiative report that assessed the impact of the state's sentencing reforms.²⁵⁰ The report identified several changes resulting from the sentencing reforms. Among them were: that South Dakota judges were sentencing Class 5 and 6 offenders to probation more frequently; that those sentenced for drug abuse and addiction offenses saw the length of their sentences cut in half; that courts sentenced a staggering 77% more people for Class 5 or Class 6 felony drug possession and ingestion after the law's enactment; and that felony filings increased rather than decreased since SB 70's enactment.²⁵¹ The report's authors assert that this

245. *RTV Parole Violation Severity Scale*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION (Mar. 6, 2017), <http://www.interstatecompact.org/LinkClick.aspx?fileticket=vsEnGEuX-rc%3d&tabid=1219&portalid=0&mid=4136>.

246. S.D.C.L. § 22-42-5.1 (Supp. 2016). As to the law's pre-enactment treatment of ingestion as a felony, see *supra* note 237.

247. John Hult, *Overflowing Women's Prison Moves Inmates to Family-Style House*, ARGUS LEADER (Mar. 3, 2016), <http://www.argusleader.com/story/news/2016/03/02/womens-prison-overflows-drug-offenders/81243310/>. Prosecutors and law enforcement counter that there is little distinction between possessing the drug in its pre-use form and having possessed and taken it—perhaps in another county or jurisdiction—but having it in an altered state in one's body. In either case they suggest that since the person has used the illegal substance, to treat one more lightly simply because the drug has already been consumed prior to arrest carries no logic.

248. Jake Shama, *Legal Battle: SB 70 Creating Rift Between Officials, Judicial Process*, DAILY REPUBLIC (Mar. 12, 2016), <http://www.mitchellrepublic.com/news/local/3985571-legal-battle-sb-70-creating-rift-between-officials-judicial-process>.

249. John Hult, *Dad: Children Bemoan Loss of Inmate Family Program*, ARGUS LEADER (Mar. 4, 2016), <http://www.argusleader.com/story/news/2016/03/04/family-bemoans-loss-inmate-family-program/81323828/>.

250. Elderbroom, et al., *supra* note 194.

251. *Id.* at 1-2, 6-9.

increase was driven by increased ingestion filings.²⁵² Their own data, however, belies that conclusion. Even excluding all felony ingestion charges, the state's annual felony drug filing totals constituted all-time highs for each year since SB 70's enactment.²⁵³

The report contains several recommendations. Chief among them is that policymakers reduce drug ingestion from a felony to a Class 1 misdemeanor—and consider the same reclassification for possession of a controlled substance.²⁵⁴ The report also recommends that the State further restrict who may be sentenced to prison on Class 5 and 6 felonies by requiring judges first find that the defendant “poses a ‘significant risk’ to public safety.”²⁵⁵ Finally, the recommendations urge the State to continue to expand problem-solving courts, such as drug and DUI courts.²⁵⁶

IV. MONETARY BURDENS OF CRIMINAL CHARGES AND CONVICTIONS

Despite South Dakota's reform efforts, there remain ingrained practices that tend to exacerbate jail and prison crowding and actually destabilize the lives of those offenders already struggling. SB 70 did not address these practices, which tend to incarcerate impoverished convicts more often and longer, making it less likely they will ever emerge from the cycle of behavior that led to their imprisonment. Apart from this, some of these practices also run afoul of South Dakota law. South Dakota Codified Law section 23A-43-1 provides that a person charged with a crime is entitled to be released on personal recognizance or unsecured appearance bond at the first appearance before a judicial officer unless that officer determines that (1) such a release will not assure the defendant's appearance in future court proceedings; or (2) the defendant poses a danger to the community or any member of it.²⁵⁷

South Dakota's presiding judges annually adopt an order establishing a bond schedule. This order authorizes clerk magistrates to either release a defendant on personal recognizance or set bond within a wide range of dollar amounts. The bond set involves no analysis of the statutory considerations of risk of flight or harm or ability to pay.²⁵⁸

Once a cash bond is set, the defendant remains in custody unless able to post the required money or until a judge authorizes the defendant's release on personal recognizance. This bond schedule order appears at odds with South Dakota Codified Law section 23A-43-2, since the bond schedule order bases bail

252. *Id.* at 9.

253. *Id.* Moreover, while the number of ingestion filings was significant during the period, particularly in Pennington County, the study's authors failed to note the reality that ingestion guilty pleas are often taken as part of a plea bargain when possession could as well have been proven.

254. *Id.* at 12.

255. *Id.*

256. *Id.*

257. S.D.C.L. § 23A-43-2 (2004).

258. *Order FY17 Fine and Bond Schedule for Use by Clerk Magistrates*, S.D. UNIFIED JUD. SYS., 1-2 (2016), http://www.ujs.sd.gov/uploads/secondcircuit/FineandBond_Statewide.pdf.

decisions, at least initially, on factors that do not analyze the public risk the person may pose, but instead, on the crime alleged for which the individual is presumed innocent. This creates an outcome where an indigent defendant remains incarcerated, while a defendant who faces the same charge—and who may pose a greater public risk—but can post a bond, is entitled to pre-trial release.²⁵⁹

While some who remain in jail pre-trial pose a distinct risk of harm to the public, many others are there simply because they are too poor to post even a small bond while they await their case's resolution.²⁶⁰ Frequent flyers pose unique challenges. They are men and women whom authorities repeatedly arrest for low-level crimes. They cycle through local correctional institutions on a regular basis, often with chronic addiction and mental disorders.²⁶¹ Due to previous failures to appear, prosecutors and those who set bonds may consider the frequent flyer a flight risk. Nevertheless, they are usually released within a few days of arrest, typically without having received needed chemical dependency or mental health treatment that might address the reasons for their repeated arrests—increasing the likelihood of their imminent return.²⁶²

Even when a defendant completes a prison sentence, financial hurdles to rehabilitation remain. Ex-prisoners, already among the poorest of America's poor before conviction,²⁶³ often find that after a felony conviction, it becomes even harder to emerge from addiction and poverty.²⁶⁴ For the ex-convict,

259. Karen Dolan & Jody L. Carr, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, INST. POL'Y STUD., 5, 10, 14, 16 (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> (internal citations omitted). The current jail and prison crowding crisis provides a prime opportunity to reconsider both the fairness and the wisdom of bond schedules for the indigent defendant and the public, which, after all, bears the costs of incarceration. Across the United States, annual jail admissions have doubled in the past 20 years, swelling to nearly 12 million people. *Id.* at 15. Of those held in local jails, roughly three-fifths await trial. *Id.*

260. *Id.* at 15. Herein lies the problem with the right to bail on a charge-based schedule. The determination requires a committing magistrate to engage in a case-by-case analysis to determine whether the State—which bears the burden of proof—established that the defendant is a risk of either harm or flight, rather than only reviewing the level of charge lodged for which the defendant is constitutionally presumed innocent.

261. Marilyn Chandler Ford, *Frequent Fliers: The High Demand User in Local Corrections*, 3 CAL. J. OF HEALTH PROMOTION 61, 61-71 (2005).

262. According to a recent report, Minnehaha County instituted efforts in about 2010 to increase arrests for people who were a nuisance, as the retired police chief stated: "Maybe they aren't necessarily breaking the law, but they're being a nuisance." John Hult, *County seeks options for petty but expensive offenders*, ARGUS LEADER (Nov. 10, 2015), <http://www.argusleader.com/story/news/2015/11/10/county-seeks-options-frequent-flyers/75239750/>. The report concluded that about half the beds were being used by people who had been in the local jail more than once within the previous month. *Id.* Evidencing the effectiveness of the city's increased efforts, nuisance arrests skyrocketed from 31 in 2010 to 423 four years later, an increase of over 1,300%. This came at a time the county's jail experienced unprecedented crowding. *Id.*

263. SpearIt, *Shackles Beyond the Sentence: How Legal Financial Obligations Create a Permanent Underclass*, 1 IMPACT 46, 46 (2015).

264. This begins with the obligation to report their felony convictions on most job applications. With little education and often a poor work history, they are largely foreclosed from employment except for low mobility, high turnover, and entry-level work. These challenges alone make it a daunting task to find a place to live, pay a deposit and utilities, buy groceries, obtain transportation, pay court-ordered

though, there is more. South Dakota law provides for the imposition of a host of financial obligations that can accompany a felony conviction. These obligations can further consign the defendant who has emerged from incarceration having “paid his debt to society,” to a lifetime of additional indebtedness that thwarts rehabilitation and keeps the person permanently entrenched in poverty.²⁶⁵

These financial obligations begin with the defendant’s court-appointed attorney, the cost of which, while initially borne by the county, is ultimately the defendant’s legal responsibility.²⁶⁶ South Dakota, like many other states, permits the county to take a lien against the defendant’s assets for the cost of any court-appointed attorney’s fees.²⁶⁷ South Dakota law also permits counties to charge a defendant with the costs of any jail, and a court may impose these and any of the following amounts as a condition of probation: fines, court and prosecution costs, probationary costs such as electronic monitoring and 24/7 compliance, cost of treatment, and where a victim suffers monetary loss, restitution.²⁶⁸ The total of these costs can easily reach into the thousands of dollars, even in routine felony cases that do not go to trial.²⁶⁹ When the person is released on probation or parole, the convict remains responsible to pay these obligations. While some are able to pay significant amounts, the vast majority, who had difficulty maintaining employment before going to prison, are often unable to meet these costs with what little money they have left.

Legislatures and courts have not always imposed such financial burdens upon convicted felons. The practice has grown across the nation demonstrably over the past twenty-five years. In 1991, for example, one-quarter of inmates nationally reported owing fines, costs, fees, or restitution, but by 2004, that number had grown to 66%. Today, between 80 and 85% of inmates nationally leave custody owing debts, more than a three-fold increase from a generation earlier and all during the period of exploding prison populations.²⁷⁰

The manner in which the system collects this money can result in further incarceration. South Dakota law authorizes a court to hold a person in contempt for failure to pay fines, costs, or restitution.²⁷¹ This law establishes a contempt process by which a court can, after a hearing, impose jail time for a willful failure to pay. Section 23A-27-25.5, on the other hand, prohibits a court from

child support, and meet a host of other expenses of daily living. For many prisoners exiting the penal system, it becomes a struggle to survive, increasing the likelihood of re-offending.

265. *Id.*

266. The South Dakota court-appointed attorney is paid \$94.00 per hour, plus expenses. For counties that have public defenders, those public defenders’ liens are based on the court-appointed attorney’s fees rather than the reduced contract rate the county actually pays.

267. S.D.C.L. § 23A-40-10, 11 (2016).

268. S.D.C.L. § 24-11-45 (2015), *see also* S.D.C.L. §§ 22-6-1, 2-3-52, 23A-27-26, 23A-27-12.1, 23A-27-18.3, 23A-28-21.

269. Court-appointed attorneys’ fees for defending against a felony charge in South Dakota can easily exceed \$1,000.00. Email from Greg Sattizahn, Court Administrator for the South Dakota Unified Judicial System (Jan. 18, 2017) (on file with the author). In Davison County, jail costs are \$25.00 per day, however, jail costs are \$95.00 for defendants being held for charges in other counties. *Id.*

270. Dolan & Carr, *supra* note 259, at 10 fig. 1.

271. S.D.C.L. §§ 23A-27-25.3, 23A-27-25.5 (2016).

holding a person in jail for failure to pay unless it first establishes that any failure was willful.²⁷² Despite this law, courts across the United States—and here in South Dakota—commonly issue warrants for failure to pay fines, costs, or restitution, in both misdemeanor and felony cases, which require a defendant post bond in the amount owed before the defendant can be released.²⁷³ Once a bond is set, the person may be released from jail only upon payment of the bond owed or after a hearing, which can be a week or more.

Section 23A-27-25.5 establishes a limit on the incarceration: no imprisonment may be longer than the number of days times the total fines and costs owed, divided by sixty.²⁷⁴ Thus, the individual encounters the choice between challenging the claim of willful failure to pay—which often means the individual remains in jail—or paying the amount owed, which may secure an earlier release. In practice, impoverished convicts arrested who owe post-judgment amounts often choose to simply “sit them out,” at the per-day rate, thereby satisfying the indebtedness to the county while at the same time the county incurs the additional jail costs.

Despite the remarkably counter-productive nature of this process, it remains widespread, even in South Dakota’s courts. None of this is beneficial to the convicted felon or to the public.²⁷⁵

The United States Department of Justice (“DOJ”), in the wake of its investigation of Ferguson, Missouri’s practices, found that some of the practices employed there were widespread in other jurisdictions, as well. Among its findings were that impoverished defendants often spent more time in jail than those with money facing the same charge and are exposed to jail for failure to pay monetary amounts as a judgment of conviction without a prior hearing. The DOJ found that these practices sometimes caused the individuals to lose their jobs and even their homes.²⁷⁶ Thus, in March 2016, the DOJ provided guidance to state courts regarding common court practices that violate the Constitution

272. S.D.C.L. § 23A-27-25.5 (2016).

273. See Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, DOJ, & Lisa Foster, Director, Office for Access to Justice, DOJ (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

274. S.D.C.L. § 23A-27-25.5 (2016). The intent of this law is to limit the length of incarceration once the State proves contempt. In practice, it all too often provides a way to erase monetary amounts owed and remove the unpaid debt from the clerk’s accounts.

275. The practice of arresting and holding individuals in custody without any finding of willful failure to pay may also trample on constitutional protections, a topic beyond this article’s scope. See *Bearden v. Georgia*, 461 U.S. 660, 674 (1983) (holding, over thirty years ago, that a trial court could not revoke probation without a determination that the defendant had failed to make bona fide efforts to pay). The Court in *Bearden v. Georgia* held:

By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

Id.

276. Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, DOJ, & Lisa Foster, Director, Office for Access to Justice, DOJ, 2 (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

and recommended best practices in their place.²⁷⁷ South Dakota's practices are directly implicated by each of the concerns the DOJ expressed, but particularly these:

- (1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;
- (2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees; . . .
- (5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections; [and]
- (6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release²⁷⁸

V. THE WAY FORWARD

A sad but common lament of a South Dakota court services officer to a sentencing judge goes like this: the defendant needs intensive long-term addiction treatment. Since, however, no such treatment is available in South Dakota, the officer is left to recommend prison in an effort simply to keep the individual from the addictive drug. This reality helps explain how the state's prison numbers have grown at thirty times the pace of its population growth over the past four decades.²⁷⁹ As we have seen, our state prisons now hold seven and one-half times more of our citizens than forty years ago. If the state's prison ranks had grown at the same pace as our population during that period, they would today house about 650 men and women, instead of nearly 4,000.²⁸⁰ Almost 90% of those sent there are substance abusers who are there for short stays: for over a decade our state has admitted into prison and released back into the community about 3,000 individuals annually, a turnover rate of about 88%.²⁸¹ Even in the wake of SB 70, 80% of men and women admitted to prison

277. *Id.* at 1-2.

278. *Id.* at 2. To date, neither the UJS nor the State's executive branch have responded to the DOJ's recommendations.

279. *See supra* note 10.

280. *Id.*

281. *DOC Adult Inmates Received and Released FY 1985-2017*, S.D. DEP'T OF CORR. (Mar. 10, 2017), <https://doc.sd.gov/DOCUMENTS/ADULTRECEIVEDRELEASEDFEBRUARY2017.PDF>. The turnover rate was computed by taking the number of inmates who left prison in 2016 and dividing by the average daily count for the year. *Id.* *See also DOC Adult Average Daily Count, FY 1984-2017*, S.D. DEP'T OF CORR. (Mar. 10, 2017), <https://doc.sd.gov/documents/AdultADCFebruary2017.pdf>; *Breakdown of Crimes of South Dakota Inmates, February-17*, S.D. DEP'T OF CORR. (Mar. 10, 2017), <https://doc.sd.gov/documents/AdultCrimeBreakdownFebruary2017.pdf>. When one looks into the faces of the imprisoned, one is immediately struck by two things: many look like older adolescents, and most look more broken than dangerous.

in South Dakota annually are sent there for a non-violent crime.²⁸² The imprisoned increasingly consist of those who survived childhood deprivation: poverty, family dysfunction, and abuse, only to continue the cycle. As one longtime DOC official has stated: “We send them to prison because it is easier than treating their needs.”²⁸³

We must not lose track of the role that individual agency plays in life. It is, after all, in the individual’s ability to improve her circumstances by good choices and effort that the American Dream still holds its vibrancy. Yet, for the vast majority of those who enter prison, the family structure designed to produce the core skills and virtues that enable one to act responsibly in society were neither taught nor modeled in the home. The challenge the justice system confronts, then, is how to rehabilitate an offender who lacks the basic building blocks necessary to live a stable, law-abiding life.

We have learned from the past forty years’ experience that imprisoning nonviolent offenders, particularly the addicted and mentally ill, does little to actually help them and tends only to aggravate their problems and expand prison populations. No matter how well operated, a prison is neither designed for nor capable of meeting the needs of addicts and the mentally ill. This population requires stable housing, steady family support, employment, treatment for their addictions, and counseling for mental disorders. When such individuals are removed from their communities and sent to prison they lose whatever stability, family support, employment, treatment, and counseling is available to them in the communities from which they came, only to be re-released after a short stay. They then must often find new housing, new employment, work with a new supervision officer, and perhaps a new counselor or treatment provider. All of this is highly disruptive and counterproductive to society’s goal. Moreover, it costs over \$21,000 annually to house a prison inmate in South Dakota; the state can supervise eighteen probationers for that amount.²⁸⁴

Though brief prison stays are frequently counterproductive, neither is it wise in many cases simply to place the offender on standard probation and order outpatient treatment. The sorts of supervision and outpatient treatment offered are often inadequate to address the long-ingrained problems the individual presents. Moreover, addicts left untreated in communities often commit other

282. . Chart of Non-Violent Admissions, FY14-FY17, provided by DOC’s Rebecca Linwebber, by email, dated May 4, 2017 (in author’s possession).

283. The statement was made to the author by Glenn Stanley, who retired as the Deputy Director of the South Dakota Board of Pardons and Paroles. It is repeated here with his permission.

284. The cost of standard probation is \$1,211. Email from Greg Sattizahn, Court Administrator for the South Dakota Unified Judicial System (Jan. 18, 2017) (on file with the author). Prison should generally be reserved for those who pose appreciable risks of harm to the community. This group is more expansive than violent offenders; it includes those who prey upon the addictions of others by selling drugs, not because of any addiction but as a business venture. There are, of course, other occasions which, for various reasons, one convicted of a nonviolent crime might be sentenced to prison. In these situations, release may so offend the community’s peace and dignity that justice is vindicated only by a prison sentence. Where the public safety is not jeopardized, however, the reality of such a sentence is often more important than its length.

crimes, some of them violent, helping to explain the steady climb in violent crime over the past decade.²⁸⁵

Beyond this, experience shows that the best supervision will fail unless those with cognitive deficits or co-occurring disorders also receive both mental health and addiction treatment commensurate with their needs—at times best provided in a secure, long-term care facility. Thus, while the public's safety does not often require that nonviolent offenders be incarcerated, it often does require that they be therapeutically treated. We are not adequately addressing this need in South Dakota. In the absence of meaningful supervision and treatment, prosecutors cannot be faulted for continuing to prosecute new violations on re-use, and judges will continue to send some to prison, simply due to the absence of a suitable alternative that preserves the public's safety.²⁸⁶ In such a climate, absent real reform, the state's prison numbers will continue to grow.

SB 70 contains a number of well-intentioned and well-crafted, evidence-based reforms. Many of these measures, although still in their developmental stages, hold promise for reforming offenders' lives. Yet, the reform effort falls short in at least two crucial ways: (1) the enhanced supervision and treatment its proponents promised has not materialized, and (2) the reforms fail to reach the root of the problem: the profound, lifelong damage inflicted upon the children who grow up in dysfunctional families. The circumstances our state experiences cry out for reforms that lie beyond those thus far enacted, some beyond the court system itself. What follows are recommendations aimed at achieving the goals SB 70 sought to accomplish.

A. REHABILITATING THE BRUISED LIFE

1. *Increase the Supervision of and Services Available to Probationers*

Most offenders need a counselor and guide more than they need a guard. The vast majority of them will successfully complete probation requirements. Those who find their way to prison, though, come disproportionately from a subset of offenders who, even though nonviolent, lack a diploma and a work ethic, experience one or more underlying mental disorders, and a substance

285. See e.g., Jennifer Naylor Gesick, *Rapid City, Sioux Falls Leadership Teaming up to Fight Meth*, RAPID CITY J. (Sept. 28, 2016), http://rapidcityjournal.com/news/local/meth-use-reaches-unprecedented-levels-rapid-city-and-sioux-falls/article_676f2d86-a0b8-5b16-b09b-de9133bb8c36.html (discussing South Dakota's increase in meth users). Violent crime in South Dakota has reached record highs during this decade. South Dakota Population and Number of Crimes 1960-2015; <http://www.disastercenter.com/crime/sdcrime.htm>.

286. Reducing the charge for possession of controlled substances from a felony to a misdemeanor is unlikely to prove an effective response to overflowing prisons. Reducing the consequences ignores the underlying problems that drive use—addiction and mental illness—and simply postpones the time of treatment. Those convicted of misdemeanors are not subject to supervised probation with its attendant evidence-based supports, monitoring, and sanctioning. Thus, the result of such a reduction in consequence, while likely to produce short-term prison reductions—will produce far worse outcomes over time.

disorder. Such high-needs probationers who lack appropriate supervision will more likely continue to violate probation and eventually enter the prison system. South Dakota simply continues to lack the supervision services this group requires to succeed in the community. To address this, the state needs: (a) more court services officers to handle the increased felony caseload; and (b) more intensive probation officers skilled in providing services for the high needs probationer.²⁸⁷

The reality is that today most of the state's court services officers have neither the training nor the time to serve all this latter group's needs. Intensive probation officers with smaller caseloads trained in addressing the high needs probationer are far better positioned to assist these needy individuals. They can help them obtain community mental health and addiction treatment, steady employment, stable housing, and attend to the details of life required for them to rehabilitate within the community.²⁸⁸

2. Provide Addiction Treatment Appropriate to the Probationer's Needs

The best-trained court services officer will find little success working with a probationer until the individual's substance disorder is under control and any underlying mental disorder—often at the root of addiction—is treated. South Dakota is in dire need of inpatient treatment facilities, particularly those that provide the sort of inpatient programming required by individuals with decades-long addictions. The Intensive Methamphetamine Treatment Unit at the South Dakota Women's Prison provides a model.²⁸⁹ The problem is that it is the only treatment center of its kind in the state. Thus, in the absence of community alternatives, when sentencing a nonviolent female offender with a protracted

287. With a 26% increase in felony convictions and more Class 5 and 6 felons placed on probation since SB 70's adoption, the number of men and women on supervision has significantly grown. Elderbroom et al., *supra* note 194.

288. As an alternative to more intensive probation officers, the state could achieve similar results by employing adult social services workers to address the community needs of these high needs probationers. As it is, repeated probation violations can produce what might be termed "probation violation fatigue," a situation in which all involved in the probationer's case grow weary of working with the individual because of repeated violations. This is a sad and all-too frequent path to prison for the nonviolent offender. People who comprise this group who require higher supervision are most often addicted, mentally ill, and mentally challenged. They may struggle with co-occurring disorders, or any of a variety of other learning disabilities and cognitive impairments. They frequently come from a dysfunctional family, have never developed a work ethic, suffer inordinately from a lack of family support, and they struggle to overcome these challenges while also trying to fulfill all their probation requirements. In addition, for many impoverished probationers, the lack of transportation poses daily obstacles to compliance with even the most basic probation requirements. This creates added difficulties getting to work, and to a variety of other sites, which may include: Job Service, Social Services, Department of Motor Vehicles, Court Services, the Sheriff's Office for 24/7 testing, treatment provider, counselor's office, and the county welfare office.

289. See *South Dakota Women's Prison: Intensive Methamphetamine Treatment Unit*, S.D. DEP'T OF CORR., <https://doc.sd.gov/adult/facilities/wp/meth.aspx> (last visited Apr. 26, 2017). This program lasts for fifteen-months. *Id.* The first five months are spent in the women's prison, supplemented with about fifty hours each week in programming. *Id.* The initial phase is followed by approximately three months in a half-way house, and six months of aftercare in the community. *Id.* No such program exists for incarcerated men.

meth addiction, judges will look to the South Dakota Women's Prison program as a last resort for adequate treatment.²⁹⁰

South Dakota is in dire need of long-term, intensive treatment centers on each side of the state that will address both men and women's addiction and underlying mental disorders. In addition, the state should consider severing the Intensive Methamphetamine Treatment Unit from the Women's Prison. Such treatment centers hold the promise of transforming our state's care for those with long-term, deeply ingrained addictions. They also harbor the potential to change the arc of the state's prison numbers in future decades.

3. *Adequately Fund the State's Community Mental Health System*²⁹¹

The delays the mentally ill experience sitting in jail while awaiting mental evaluations are a symptom of a far deeper issue. South Dakota's historic failure to address the needs of its mentally ill has resulted in far more of them being housed in jails and prisons than in a therapeutic care facility.²⁹² Access to quality community mental healthcare is the key for many to remain stable and law-abiding in the community.²⁹³ That requires adequate funding. The state pays a steep price for our failure to provide this care in added jail and prison costs, county care of the poor, and a host of other welfare costs for the families of the individuals, but the infinitely more important and incalculable costs are those related to its effects on children and the fabric of society.

290. This helps explain why roughly 83% of the women housed in that facility are nonviolent offenders.

291. The lack of funding is something mental health advocates have decried for years. They are right: there is no reason this state should be at the nation's bottom in providing for the needs of its most troubled citizens, while at the same time incurring the cost of incarcerating so many of them. The reality is that we are already paying large sums of money at the state and local level to house and treat the state's mentally-ill population. Adequately funding community mental health will likely pay dividends by reducing the number of our population in the jail and prison cycle.

292. See *supra* notes 169, 170 and accompanying text.

293. An example of a state that employs a different model regarding mentally ill inmates is Iowa. In 1967, the State of Iowa established a psychiatric hospital for the evaluation, treatment, and care of individuals in its court and prison system. *Iowa Medical & Classification Center*, IOWA.GOV, <http://oakdaleprison.com/background.php> (last visited Apr. 26, 2017). The Iowa Medical and Classification Center has 706 beds in twenty-two housing units, including a psychiatric hospital and a Special Needs Unit. *Id.* The Center is located on fifty-four acres and is the site for all evaluation and treatment of men and women. *Id.* It serves defendants awaiting competency hearings, those receiving treatment to restore competency, those discharged from prison but civilly committed and awaiting appropriate placement, and those found not guilty by reason of insanity. Lettie Prell, *Iowa Recidivism Report: Prison Return Rates FY2013*, IOWA DEP'T OF CORR. 5 (Mar. 2014), <http://www.doc.state.ia.us/UploadedDocument/479> ("Between FY2007 and FY2013, recidivism rates for offenders with chronic mental illnesses declined by 9.6 percentage points for male offenders and by 16 percentage points for female offenders.").

4. *Expand Eligibility for Specialty Courts*

“Drug courts outperform virtually all other strategies [to reform] drug-involved offenders.”²⁹⁴ South Dakota’s drug courts suffer from a self-imposed limitation: they exclude too many of our citizens who could benefit from them. They do this by prohibiting drug court teams from exercising local control to accept into their programs a probationer on supervision for distribution of a controlled substance or one who has been convicted of a violent felony. Such sweeping exclusions are contrary to the National Association of Drug Court Professionals’ (“NADCP”) recommended best practices.²⁹⁵ An added word of caution regarding drug courts is also warranted: despite the promise they offer, they are not, as some suggest, a panacea for meeting the challenges of either drug abuse or mass incarceration. All the South Dakota drug and alcohol courts combined are able to serve only a small percentage of those who need such a program.²⁹⁶ Drug courts are also expensive, at \$8,300 per participant, seven times the annual cost of standard probation. They are only one tool—albeit useful—in an ill-stocked toolbox.

5. *Develop a State Program for Young, Nonviolent Felons*

Crime’s biggest enemy is a stable home; after that, it is an education and then a decent job. The single most pressing needs for most probationers, apart from mental health and addiction treatment, relate to employment. They need to obtain a diploma, develop a work ethic, and learn to hold a job. Education, jobs, and prisons are intricately interwoven. Those who fail academically often never

294. Douglas B. Marlowe et al., *A Sober Assessment of Drug Courts*, 16 FED. SENT’G REP. 153, 153 (2003) [hereinafter Marlowe I].

295. See *Adult Drug Court Best Practice Standards: Volume 1*, Nat’l Ass’n of Drug Ct. Profs., 8 (2013). Each drug court team is specifically trained to make admissions decisions. *Id.* at 5-6. Due to each team make-up, several of its members are often well-acquainted with an individual applicant. Even if the drug court team approves the applicant for admission, the sentencing judge holds the authority to send an applicant to prison. *Id.* at 21. They also run contrary to the National Drug Court Institute’s decades of evidence-based research and experience. The data actually demonstrates that violent offenders and addicts who sell drugs to support a habit—rather than for a profit—statistically do as well in drug court as the average participant. Such broad exclusions deprive individual drug courts of local control and autonomy to consider the particular individual’s background and all the facts to determine whether to admit that candidate. Moreover, when the Class 5 and Class 6 candidate is denied drug court admission, he or she is almost always placed on standard community probation with far less supervision than drug court would afford. See *National Drug Court Planning Initiative Training Program: Planning Workbook*, NAT’L ASS’N OF DRUG CT. PROFS., 133 (2011). Over 90% of violent offenders are back on the streets shortly after arrest. Yet, these offenders often receive far less supervision than they would in drug court. The evidence also suggests that over 90% of addicts deal drugs. *Id.* Most are never caught. *Id.*

296. All South Dakota drug and alcohol courts combined served 314 participants in 2015; the current capacity is 450. David E. Gilbertson, Chief Justice, South Dakota Supreme Court, State of the Judiciary Message, S.D. Unified Jud. Sys. (2017), http://ujs.sd.gov/Supreme_Court/messages.aspx.

learn values such as reliability, diligence, teamwork, and perseverance that are necessary to hold and grow in a job. This needs to change.²⁹⁷

Young adults on probation for low-level crimes and nonviolent prison inmates would benefit from a program that combines the pursuit of a diploma with learning a trade needed in South Dakota's industries. Such a program, modeled on the 1930s-era Civilian Conservation Corps and Job Corps programs, would assist youth to earn a diploma and develop the work ethic and skills they need to support themselves while also promoting economic development.²⁹⁸ And it would be far more economically beneficial than simply housing them in prisons and jails.

6. *Reconsider the use of Bond Schedules and the Imposition of Monetary Sanctions as a Probation Condition*

South Dakota would benefit from a fresh approach to pre-trial bail. The state should prohibit bail practices that cause indigent defendants to remain

297. The absence of the marginally trained from the work force has a prominent impact on economic development as well. As of May 2016, there were 5.4 million jobs open in the United States. Patrick Gillespie, *4 U.S. governors on jobs: Not enough workers*, CNN MONEY (May 3, 2016, 7:48 PM), <http://money.cnn.com/2016/05/03/news/economy/us-governors-job-skills/>. This reached near a record amount. *Id.* While these numbers are indicative of a growing economy, it also indicates "that employers can't find people with the right skills." *Id.* "When it comes to new, unfilled jobs, there's not enough skilled workers there." *Id.*

The absence of reliable workers has significantly impacted South Dakota's economic development, as two illustrations show. A Mitchell, South Dakota, employer reported that out of 280 new hires, only one remained a year later: "We lost 279 of them Mostly because of work ethic issues." Steve Young, *Trail King Hired 280 Employees Last Year and One Remains*, ARGUS LEADER (May 6, 2015, 5:21 PM), <http://www.argusleader.com/story/ourchangingcity/2015/05/05/workforce-development-yakley-trail-king/26913199/>. The effect of the state's worker shortage and our high prison population's impact upon it was also demonstrated in 2011, when the State's legislature passed, and the governor signed into law, an initiative: "1000 New South Dakotans." This initiative authorized the State to recruit 1,000 largely semi-skilled workers from out of state. The law's purpose was to address a work-force shortage that verged on a crisis, stunting businesses from expanding. Despite the law's recruiting efforts, the jobs went mostly unfilled. Why were there no South Dakota workers to do the jobs? Likely in part because these needed workers are in our prisons and our jails, cared for at public expense, at far higher rates than neighbors like North Dakota and Minnesota, rather than contributing to society.

298. The Civilian Conservation Corps was a Depression-era works program intended to promote conservation and build good citizens through vigorous, disciplined, outdoor labor. *Civilian Conservation Corps*, HISTORY, <http://www.history.com/topics/civilian-conservation-corps> (last visited Apr. 26, 2017). Job Corps is a free educational and vocational program administered by the United States Department of Labor for youths aged sixteen to twenty-four. *About Job Corps*, JOB CORPS, <http://www.jobcorps.gov/AboutJobCorps.aspx> (last visited Apr. 26, 2017). It does not accept individuals on court supervision. In addition, the state receives federal funding through the South Dakota Department of Labor for a variety of job services, including job training, coaching, employer incentives, and even vocational education for convicted felons. The state should also fully utilize the federal funds made available by the Second Chance Pell Grant and similar programs. They present opportunities to identify and develop worthy candidates within the prison system who demonstrate the aptitude to complete a course of vocational education and the likelihood of success. The Second Chance Pell Pilot program provides federal funds to allow qualified inmates the ability to work toward an associate's or bachelor's degree. Press Release, U. S. Dep't of Educ., U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals (July 31, 2015), <http://www.ed.gov/news/press-releases/us-department-education-launches-second-chance-pell-pilot-program-incarcerated-individuals>.

incarcerated solely because they cannot afford to pay for their release.²⁹⁹ Without this change, our jails will remain holding cells for the addicted and the mentally ill.³⁰⁰ South Dakota should also bar courts from incarcerating people or issuing suspensions of drivers licenses—often necessary to hold a job—for nonpayment of court debt without first conducting an indigence determination that establishes that any failure to pay was willful.³⁰¹ These practices, while they possess a tough-minded appeal, often run counter to the goal of rehabilitation and contravene the recent DOJ recommendations.

7. *Promote Community Sanctions by Providing Counties Meaningful Financial Assistance*

For SB 70's purposes to be realized, the state must also help counties defray their added costs to implement community sanctions such as reimbursing counties for its jail costs for each day a probationer serves beyond a fixed number of days, such as thirty. The state can also show counties it genuinely seeks community-based solutions to crime by subsidizing county efforts to increase work release, and promoting alcohol and GPS monitors based on a sliding scale for indigents, as alternatives to pre-trial detention.³⁰²

B. PROTECTING THE NEXT GENERATION OF AT-RISK CHILDREN

For if you suffer your people to be ill-educated, and their manners to be corrupted from their infancy, and then punish them for those crimes to which their first education disposed them, what else is to be

299. See S.D.C.L. § 23A-43-2 (2016) (authorizing the release of a defendant on personal recognizance or unsecured bond unless the court determines the defendant poses a risk of flight or harm to the community). New Mexico voters recently agreed to change that state's constitution to prevent detention of defendants who are not dangerous or a flight risk "solely because of financial inability to post a money or property bond." Jon Schuppe, *With Trump in White House, Criminal Justice Reformers Will Look Elsewhere*, NBC NEWS (Nov. 10, 2016), http://www.nbcnews.com/storyline/2016-election-day/trump-white-house-criminal-justice-reformers-will-look-elsewhere-n681536?cid=eml_pol_20161110. This represents, as the article notes, a key step in making the justice system fairer for poor defendants. *Id.*

300. In 2006, Pennington County established a diversion program offering help to inmates with protracted addiction and mental health issues. Jomay Steen, *Program Helps Addicts Rebuild Lives*, RAPID CITY JOURNAL (May 19, 2009), http://rapidcityjournal.com/news/local/program-helps-addicts-rebuild-lives/article_3356d61b-83fd-57ba-8caf-d2158d233dce.html. The program offers guidance and support, and then, upon release, intensive case management, seeking to keep the frequent flyer out of jail. *Id.* The program claims it has reduced incarceration by over 47,000 days, equating to a savings of close to \$3 million. Microsoft Power Point from Pennington County Sheriff's Office (on file with author). These numbers are based on the histories of about 1,000 inmates two years prior to the program and for the two years after its completion. *Id.*

301. See S.D.C.L. § 1-55-11 (2016).

302. Many defendants face difficulty paying \$180 per month, yet have more success with sobriety on an ankle bracelet than with twice-daily testing, which allows the individual to consume some amounts of alcohol between testing without detection.

concluded from this, but that you first make thieves and then punish them.³⁰³

As we have seen from the mountains of data, the problem of mass imprisonment has its deepest roots in dysfunctional homes that expose a child to neglect and abuse, and in the educational challenges they encounter once they begin formal schooling.³⁰⁴ The problems these children encounter arise so early in life and are so obvious that any kindergarten teacher is able to identify the students who will, in time, likely fall out of the educational system and into the criminal justice system.

The reality is that end-of-line solutions—such as those contained in SB 70—and in the prior section of this article—at best offer only limited promise because they do not reach the source of the problem. The brokenness, the long-ingrained addiction, and the lack of a support system in the lives of those whom courts and probation officers encounter are in many cases too deeply-rooted in an adult's life to overcome, despite the court system's best efforts.

The more substantial gains, both economically and in the impact on human lives, lie in addressing the problem where it begins, in early childhood. While it is the essence of the American Dream that each child have a fair opportunity to reach her potential, unless we as a state choose to protect these vulnerable children, their prospects of breaking free from the cycle of dysfunction are and will remain bleak.

1. Protecting our Children

a. Strengthening DSS's Ability to Protect Children Against Abuse and Neglect

The research shows, as we have seen, that childhood neglect and trauma produces neural deficits that become increasingly difficult to reverse past around age two.³⁰⁵ While no combination of government, church, and civic programs can take the place of a stable, loving home, we not only can but must do more—far more—to protect our children. The well-documented connection between adverse early experiences and a wide range of costly problems, including criminal behavior, underscores the extent to which protecting our children must be a critical part of any effort to reverse mass incarceration.³⁰⁶ To do so, we

303. THOMAS MORE, *UTOPIA* (1516) (writing of a phenomenon in 16th Century England similar to that in the United States today).

304. In his January 2009 State of the Judiciary address, Chief Justice Gilbertson recalled the polling of state judges a few years earlier as to the number one factor which affected the environment in which the judicial system performs its work. David E. Gilbertson, Chief Justice, South Dakota Supreme Court, State of the Judiciary Message, S.D. Unified Jud. Sys. (2009), http://ujs.sd.gov/Supreme_Court/messages.aspx. The unanimous answer: the disintegration of the family. *Id.*

305. PUTNAM, *supra* note 11, at 112.

306. *See supra* note 131.

must employ a DSS workforce sufficiently staffed and trained to thoroughly investigate claims of child harm and address affected children's needs.³⁰⁷

Nationally, child protection services are able to identify maltreatment in only a minority of children who actually experience it.³⁰⁸ The annual United States Department of Health and Human Services Report presents cause for special concern with regard to South Dakota's DSS workforce and its ability to perform its role. According to the most recent report, South Dakota's investigative force appears understaffed: it has the third-lowest workforce of any American state.³⁰⁹ This may account for why South Dakota has reported the lowest percentages of screened-in reports of abuse and neglect in the nation. By 2015 that percentage had fallen to a paltry 16.2%.³¹⁰ Over the past three reporting periods, South Dakota had only two-thirds as many reported victims as North Dakota, even though North Dakota's population is less.³¹¹

While reports of abuse or neglect have remained constant, DSS is closing about a third fewer than even four years earlier—without conducting an investigation or an alternative.³¹² More troubling still during this period, the number of cases that received an investigation or alternative response, the number of confirmed abuse or neglect cases, and the number of court actions filed have all declined by around 33%.³¹³ The result is that as of 2015, South Dakota's DSS is identifying and courts have been able to protect about one-third fewer children who are abused or neglected annually than it did four years earlier.³¹⁴ These startling statistics raise even more concern occurring, as they

307. In 2014 alone, 702,000 children in the United States were verified to have suffered abuse or neglect. *Child Maltreatment 2014*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <http://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf#page=21> (last visited Apr. 26, 2017). This is the latest year for which statistics are available. The youngest are the most vulnerable. About 92% of the perpetrators were the child's parent and 99% were either a parent, a parent's partner, or the child's relative. *Id.* at 46.

308. Andrea J. Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 16 (2010), https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf. (“The NIS-4 again verified that result, finding that CPS investigated the maltreatment of only 32% of children who experienced Harm Standard maltreatment and of 43% of those whose maltreatment fit the Endangerment Standard.”)

309. *Child Maltreatment 2015*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 13 (2015), <https://www.acf.hhs.gov/sites/default/files/cb/cm2015.pdf>.

310. *Id.* at 11.

311. *Id.* at 48.

312. *Id.* at 11, 28.

313. *Id.* at 28; *see also* UJS Statistics for overall Abuse and Neglect filings 2010-2016, provided to author by email attachment on December 8, 2016, by Bill Poppenga, UJS IT Project Manager. There were 706 Abuse and Neglect actions filed in 2010; by 2015 that number had dwindled to 550.

314. *Child Maltreatment 2014*, *supra* note 307, at 12, 30. No other state experienced such a precipitous drop. In fact, nationally, the number of substantiated child victims actually increased during that period. Moreover, in South Dakota, the rate of abuse reporting has remained steady during the period; it is just that the state's DSS suddenly began substantiating far fewer such reports. *Id.* at 12, 30. The numbers year by year were: 15,623 referrals in 2011; 16,021 in 2012; 15,679 in 2013; and 15,563 in 2014. *Id.* at 12, 30. The numbers for the years 2011 to 2013 come from the same Child Maltreatment reports the government publishes annually, all of which are available online. The declines in screened-in abuse and neglect cases correlate with a decline in abuse and neglect actions instituted in the state's courts during the same time period, which reflect an approximately 33% decline. In 2014, South Dakota

do, in the midst of a meth epidemic in which the number of children exposed to harm in the state has, if anything, grown.

The implication of all this is that, while we imprison one generation of adults—many who were themselves abused and neglected as children—we are failing to protect another generation of children from victimization.³¹⁵

b. Providing at-risk Parents Assistance

Sometimes the key to protecting at-risk children lies in working with parents rather than removing the child. The state should evaluate how to better assist poor and struggling parents, particularly during the early years of a child's life.³¹⁶ The evidence shows that the most powerful gains come from parental coaching and regular home visits. These services teach the parents nurturing skills, and assist the family to cope with stress and child-raising issues.³¹⁷ These visits would also provide another important sort of opportunity to screen young children with apparent developmental or emotional delays and get them needed assistance early.

2. *Protecting our Children's Life Opportunities Through Education*

a. Ensure Early Childhood Education for At-risk Children

Disadvantaged children start school behind their peers academically and from there only fall further behind.³¹⁸ Youth from poor homes are five times more likely than youth from higher income families to drop out; nowhere is the graduation gap based on income greater than in South Dakota.³¹⁹ Those living without a father in the home account for almost three-quarters of all dropouts.³²⁰ When they drop out, as we have seen, they are far more likely to eventually enter the prison system.

Policymakers should rethink their repeated rejection of efforts to aid disadvantaged and at-risk children academically before they enter kindergarten. Birth-to-three screening, mandatory preschool testing, and quality Pre-K

reported only about one-half the number of victims than comparably-sized North Dakota (1,616 to 886). *Id.* at 56.

315. South Dakota annually has the lowest numbers of abortions in the nation. Fundamental to the commitment to reduce abortion is the promise to care for those our laws protect through birth. The evidence—as seen in the DSS statistics and state's prison populations—suggest that promise is largely an empty one.

316. Putnam, *supra* note 11, at 248. The U.S. lags behind almost all other advanced nations in providing support for parents of babies, including parental leave and workplace flexibility. *Id.*

317. Putnam, *supra* note 11, at 249.

318. This chain of events is, in turn, usually accompanied by one or more of the following: untreated emotional issues; learning disabilities; a toxic home environment; long school absences; and not uncommonly, substance abuse.

319. *See supra* note 28 and accompanying text.

320. *See supra* notes 71, 80 and accompanying text.

programs, which, while expensive, have been shown to improve the life chances of children from low-income families.³²¹ South Dakota is one of five states that provides no funding aid for preschool, despite mountains of research that suggest early education helps poor children prepare for school and reduces the achievement gaps.³²²

b. Promote a Learning Environment for all Students Appropriate to Their Needs

The impact of parental incarceration affects not only the education of the prisoner's children; it carries over to their classmates as well, even though the classmates' parents are not in prison.³²³ In addition, the data establishes that this ripple effect applies to classmates of abused children, so that their classmates also experience lower achievement scores and decreased college graduation rates. The tendency for such children to exhibit behavioral problems in the classroom slows the learning process for all students.³²⁴ This dismaying reality should invoke a sense of urgency among South Dakota's educational and governmental leaders, and parents, too, in an effort to protect the education of all our youth, while at the same time providing opportunities for struggling children to achieve academic success.³²⁵

To this end, we should empower teachers, who are the number one sentinels of abuse-reporting, to do so more readily and without fear of recrimination. In addition, teachers should be expected to formally identify to administrators each year, children who appear to be at risk of academic failure, so that mentors within the school system can monitor and guide them. It would pay dividends not just for the child, but also for the school, the taxpayer, and other children.

c. Combat Truancy

Regular attendance has proven crucial in academic achievement. In 2014, the federal government for the first time collected data on student

321. Putnam, *supra* note 11, at 248-51. The United States lags behind much of the developed world with only 38% of three-year-olds enrolled, compared to the developed nations' average of 70%. *Id.* at 251. In 1998, Oklahoma adopted such a program that appears to have produced remarkable gains in reading, writing, and math skills. *Id.*

322. *50 State Review: State Pre-K Funding for 2015-16 Fiscal Year: National Trends in State Preschool Funding*, EDUC. COMM'N OF THE U.S. (Jan. 2016), http://www.ecs.org/ec-content/uploads/01252016_Prek-K_Funding_report-4.pdf.

323. Putnam, *supra* note 11, at 77. This may be attributable to an increase in disruptive behavior such children tend to demonstrate. *Id.* at 78 (stating that these children are likely to demonstrate behavior problems).

324. *Id.*; see also, Gabrielle Emanuel, *How Domestic Violence in One Home Affects Every Child in a Class*, NPR (Sept. 3, 2016), <http://www.npr.org/sections/ed/2016/09/03/491204888/how-domestic-violence-in-one-home-affects-every-child-in-a-class>.

325. Alternative schools provide the best opportunity for success for many at-risk youths. They often allow them to work at their own pace and provide extra assistance in the subject areas in which they struggle.

absenteeism.³²⁶ It revealed that 6.5 million students—13% of all students—were chronically absent from schools in 2013 and 2014.³²⁷ Strikingly, half those absences arose from only 4% of reporting school districts, including Rapid City.³²⁸ In 2013-2014, nearly one-third of Rapid City School District students were chronically absent.³²⁹ Truancy not only portends future academic failure; it is most often also a symptom of other problems in the child's life.³³⁰

Apart from the incalculable benefits in a person's life, the financial stakes of how these children fare academically are high. Helping a child who would otherwise drop out to graduate from high school reaps huge taxpayer savings: as much as \$388,000 over the course of the child's lifetime.³³¹ It is difficult to overstate the importance of teaching and showing youth—especially those from at-risk homes—the important truth of personal agency: that each of us possess the ability to shape our destiny, and of personal responsibility. Civics courses provide the context in which to develop these principles. They also present an opportunity to teach the responsibilities of parenthood—including the costs—and the important role both parents play in a child's upbringing.

Civics courses also present opportunities to educate youth about the realities of addiction, including how specific drugs, such as alcohol, meth and opiates, impact the body over time. State officials recently announced that they were embarking on an anti-meth program in the state's high schools. The idea is valid, but offering this education only to high school youth is a mistake: small children see the drug in their homes and by at least sixth grade, some begin to use themselves. Montana has implemented what many consider a model meth program for South Dakota to consider.³³²

326. Press Release, U.S. Dep't of Educ., Persistent Disparities Found Through Comprehensive Civil Rights Survey Underscore Need for Continued Focus on Equity, King Says (June 17, 2016), <http://www.ed.gov/news/press-releases/persistent-disparities-found-through-comprehensive-civil-rights-survey-underscore-need-continued-focus-equity-king-says>.

327. *Id.*

328. Mike Anderson, *Rapid City Public Schools Have Some of the Lowest Attendance in the U.S.*, RAPID CITY J. (Sept. 25, 2016), http://rapidcityjournal.com/news/local/rapid-city-public-schools-have-some-of-the-lowest-attendance/article_82c54079-d625-5882-97ee-d9c8991c3cae.html. Chronic absence is defined as missing 10% or more days in a school year. *Id.*

329. *Id.* The 2014-15 year showed little improvement: that year 29% were chronically absent. *Id.*

330. Truancy almost never occurs in a vacuum or simply because a child, for no identifiable reason, chooses to habitually skip school. The root problem is often a more complex issue. It may have to do with a parent unwilling or unable to discipline or provide structure, one or more learning disabilities, social phobia, or bullying. Worse yet, frequent moves are often a part of a truant's lifestyle and sometimes a sign the parents are avoiding the authorities out of concern for abuse or neglect charges or because of their own unstable lifestyles.

331. *Community Conversation About Mental Health: Information Brief*, SAMHSA, 10 (June 2013), [https://www.mentalhealth.gov/talk/community-conversation/Information%20Brief%20remediated%20\(2\)-1.pdf](https://www.mentalhealth.gov/talk/community-conversation/Information%20Brief%20remediated%20(2)-1.pdf).

332. MONTANA METH PROJECT, <http://montanameth.org/resources/#school> (last visited Apr. 27, 2017). The program is known as the Montana Meth Project. *Id.* It allows free downloads of instructional materials. *Id.*

d. Mobilize Private Assistance

Civic and charitable organizations and individuals can play an important role in the lives of fragile families and felons.³³³ These groups provide state leaders with a reservoir of assistance. Safeguarding our vulnerable children's futures will require an "all-hands-on-deck" approach.

3. *Helping Low-Income Parents Obtain Adequate Access to Basic Healthcare*

a. Provide Access to Mental Health and Addiction Treatment

One important way we can protect children is by allowing their parents to address mental health and addiction issues. Apart from addiction's effect on crime, close to three-quarters of abuse or neglect victims suffer at the hands of an adult with a substance disorder.³³⁴ The poor do receive healthcare. It is just that those without access to any coverage tend to get theirs untimely, in emergency rooms, jails, and prison.³³⁵ By then, the problems tend to be much worse and the treatment far more costly and sporadic. It is pennywise and pound foolish to preclude those without the means to pay from timely care. Without proper care and treatment many thousands of South Dakotans will continue to self-medicate by using illegal drugs like meth, marijuana, and opiates, which will in time lead some into the prison system.

Today, tens of thousands of impoverished South Dakota adults—many with mental illness and addiction who are vulnerable to fall into the prison system, are foreclosed from adequate care. State leaders must find ways to change this. Expanding Medicaid provides the best option. With so many in our state prison system today whose chief crime is addiction, treating rather than imprisoning them would not only aid their recovery, but would also produce substantial state budget savings. Under Medicaid Expansion, if the nonviolent addicted population were moved out of our prison system into therapeutic facilities to treat their addiction and underlying mental disorders, prison costs—now roughly

333. Faith-based and other community programs and efforts can play a key role in changing lives in a variety of ways. Churches and church youth groups similarly can play a vital role in reaching out to and including disaffected kids to help them live law-abiding, productive lives. Teen Challenge of the Dakotas is such an example. It is a faith-based program that is free to anyone who seeks to enter. Regrettably, South Dakota lacks a Teen Challenge program for women, who remain in vital need of long-term treatment opportunities. Safe Families for Children, is a faith-based program dedicated to providing volunteer families to care for a parent's child for up to three months during crises in the parent's life. More can be accomplished. While a variety of church and other groups participate in prison visits, a void exists in mentoring ex-inmates and helping them rebuild their lives. One ex-prisoner asks: "Why is it that the same vans that come to the prison . . . to take us to Bible study seem hesitant to pick us up from our homes now that we are released?" Morgan Lee, *Life After Prison*, CHRISTIANITY TODAY, 39, 44 (Sept. 2016).

334. See *supra* note 211 and accompanying text.

335. County government often bears the burden of these costs by virtue of the care-of-the-poor law. S.D.C.L. Ch. § 28-13 (2016). This group is also heavily represented in the court system; the state and counties also incur costs for their care that arise while in their custody.

\$118 million—could be cut substantially, with the federal government paying 95% of the treatment costs in 2017, gradually decreasing to 90% in 2020 and thereafter.³³⁶

Providing such care would provide an opportunity to move such individuals into the ranks of the employed and help them to become better providers and parents for the children who do not live with them, often due to their addictions.

b. Maintain Access to Affordable Birth Control for Parents of At-risk Children

The staggering rate of unintended births in America, on the rise for the past four decades, should alarm us all. That the unintended pregnancy rate among the nation's population with no more than a high school diploma is more than twice that of developing nations accounts for no small share of our national woes.³³⁷ This is a solvable problem that starts with better access to and use of birth control. Two-thirds of U.S. women at risk for unintended pregnancy use contraceptives consistently and correctly; they account for only 5% of all unintended pregnancies.³³⁸ By contrast, the remaining 95% of unintended pregnancies are attributable to the one-third of women who either do not use contraceptives or who use them inconsistently.³³⁹

An enhanced family planning program that provides more accessible birth control for impoverished adult men and women can change the current trajectory in South Dakota just as they have in the developing-world, but it won't happen until policymakers treat this issue as the crisis it has become. Such a program should be part of a broader effort to hold adult parents responsible for their children.

The most unspeakably tragic unintended pregnancies result when a child enters the world from the womb of a mother addicted to meth. Yet in South Dakota today, meth-addicted moms whose children have already been removed from the home, with alarming frequency again become pregnant during the course of abuse and neglect proceedings, after losing Medicaid eligibility.³⁴⁰ We should do all that is possible to prevent the mother from again conceiving while she remains addicted.

336. See *State Medicaid Expansion Approaches*, KAISER FAM. FOUND. (Apr. 27, 2017), <http://kff.org/medicaid/fact-sheet/state-medicaid-expansion-approaches/>. A variety of states with Republican leadership have decided to expand Medicaid, thereby returning federal tax dollars to their states. These states include: Indiana, Kentucky, North Dakota, Iowa, Ohio, Alaska, Montana, West Virginia, Arizona, Arkansas, and Louisiana. Some have received waivers for providing expansion coverage in creative ways.

337. *Unintended Pregnancy in the United States*, *supra* note 45.

338. *State Facts About Unintended Pregnancy: South Dakota*, GUTTMACHER INST. (2016), https://www.guttmacher.org/sites/default/files/factsheet/sd_17.pdf.

339. *Id.*

340. Davison County witnessed fourteen such mothers whose children had been removed from the home, again conceiving during A & N proceedings over a roughly three-year period. Email report of Braden Hoefert, former Deputy States Attorney, Davison County, South Dakota (Jan. 27, 2017) (on file with author).

4. *Understanding the Critical Importance of at Least One Responsible Adult Influence in a Child's Life*

We too easily fall into the thinking that an individual subjected to childhood abuse need only pull himself up by his own bootstraps to succeed in life. That thinking, while appealing, contradicts the evidence. Childhood abuse affects people differently, and some learn to overcome the worst of its effects, but it turns out that this not because the individual possesses some innate resilience or strength of character. Pediatric neuroscience has established that there is no resilience gene, no in-born grit, no innate self-reliance that children, and the adults they grow into, can summon.³⁴¹ Resilience develops over time, and requires the reliable presence of at least one supportive adult—whether parent or other mentor—who aids in the development of effective life-coping skills.³⁴² Such mentors can make the difference in the life of a troubled child.

VI. CONCLUSION

The sad reality remains that, in society's darkest corners, outside the view of most policymakers are children who live lives of unspeakable desperation and neglect, who start school behind other children only to fall further and further behind, and who, at alarming rates fall out of the school system and into the prison system. The problem of the dysfunctional family—which lies close to the core of mass incarceration as well as a host of other national ills—may well be the most confounding dilemma confronting America. Its tentacles extend beyond the prisons, and unseen, into many of the economic, social, and cultural tensions the nation experiences. To overcome it, we must first acknowledge its role. Our political leaders have shied away from confronting this reality in public, while privately shrugging their collective shoulders and sighing that nothing can be done. If they are right, our children and grandchildren face a dramatically altered American society because they will not be able to bear the societal costs of the dysfunction that lies ahead.

Those who pass laws and administer justice should do so with a dose of humility and compassion, for in nearly each case they were born into families far different than most who are sentenced to prison. None can really know what his or her own life would be like were the roles reversed.

Even apart from the infinitely more important human aspect, enlightened self-interest should motivate us to aggressively pursue fundamental reform. That must begin with rethinking the precept that prison reform equates to cost savings—at least in the short term. Corrections budgets will only realize savings

341. *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience*, NAT'L SCI. COUNCIL ON THE DEVEL. CHILD, 7 (2015), <http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2015/05/The-Science-of-Resilience2.pdf>.

342. *Id.* at 2.

when entire wings are shuttered. The solution to our prison population crisis, forty years in the making, presents no cheap solutions or short cuts.

While we have taken a series of wrong turns in dealing with the nonviolent offender, our greatness as a people manifests itself best in an ability to acknowledge and correct our faults.³⁴³ The problems we face with mass incarceration, while intractable, are solvable. To meet them we will need to summon our collective energy and the sort of ingenuity and creative resourcefulness employed in so many other crises through the generations.

America—and South Dakota—are great because of the ideals we hold. The heart of these ideals is the founding principle that we are all created equal, and that the Creator has endowed us with rights government cannot take away, among which are life, liberty, and the pursuit of happiness.³⁴⁴ This latter concept has been defined as the right to attain the fullest stature of which one is innately capable, regardless of the circumstances of birth or position.³⁴⁵ The question that looms for each generation is whether it will live up to these ideals. To do so, we must ensure a fair opportunity for a decent life to everyone—including those whom society too readily considers its least. They are, after all, our fellow citizens; their children are our children, and it is not only their future that is at stake: it is the future of us all.³⁴⁶

343. Tocqueville expressed a similar observation. ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Chapter XIII (2015). The Israeli diplomat, Abba Eban once reflected: “Men and nations behave wisely when they have exhausted all other resources.” *Abba Eban Quotes*, AZ QUOTES, http://www.azquotes.com/author/4322-Abba_Eban (last visited Apr. 27, 2017).

344. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

345. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 214-15 (1931).

346. This thought restates the theme of Putnam’s book.