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Breaking the Chains of a Habitually Offensive Penal System: An Examination of Louisiana's Habitual-Offender Statute with Recommendations for Continued Reform

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Breaking the Chains of a Habitually Offensive Penal System: An Examination of Louisiana’s Habitual-Offender Statute with Recommendations for Continued Reform

*Harper G. Street**

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INTRODUCTION

In September 2020, Tom was arrested for, and subsequently charged with, possession of half an ounce of marijuana with intent to distribute in a Louisiana state court, his first criminal drug adjudication.¹ Under Louisiana’s existing laws regulating the penalties for possession with intent to distribute a Schedule I narcotic,² Tom was subject to imprisonment, with or without hard labor, for no less than one year and no more than ten years.³ Because this was Tom’s first drug offense, and because he was in possession of less than an ounce of marijuana, he was sentenced to no more than the one-year minimum prescribed in Louisiana Revised Statutes § 40:966(B)(1)(A), Louisiana’s relevant drug-penalty law.⁴ After Tom’s prison term ended, he completed his probationary period to the sentencing court’s satisfaction, thereby allowing the court to set aside and dismiss his felony conviction pursuant to Louisiana Code of Criminal Procedure article 893(E)(2), (3), or (4).⁵

Unfortunately, times were hard for Tom in the years following his release from state supervision, as it is difficult for an individual with a prior felony to attain meaningful employment even if the formal

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* J.D./D.C.L. candidate, 2022 Paul M. Hebert Law Center, Louisiana State University. Special thanks to my Executive Senior Editor, Brittany Williams Flanders; my Senior Editor, Zach Lester; and my faculty advisor, Robert Lancaster. This Comment would not be what it is today without your guidance and support.

1. The facts in this hypothetical are very loosely based on the facts in *State v. Noble*, 133 So. 3d 703 (La. Ct. App. 4th Cir. 2014).

2. For more information on federal drug scheduling, see *Drug Scheduling: Drug Schedules*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-scheduling> [<https://perma.cc/J92B-GC93>] (last visited Oct. 17, 2020) (designating marijuana as a Schedule 1 narcotic by the United States Drug Enforcement Administration).

3. LA. REV. STAT. § 40:966(B)(1)(a) (2021).

4. *Id.*

5. LA. CODE CRIM. PROC. art. 893(E)(2)–(4) (2021).

prosecution has been set aside.⁶ As a result, Tom once again looked to drug dealing as a means of economically sustaining himself. In 2024, Tom was charged with possession with the intent to distribute half an ounce of marijuana for the second time. Fortunately for Tom, the Louisiana Legislature passed House Bill 518 in 2019, amending Louisiana Revised Statutes § 15:529.1—or the habitual-offender statute, as it is colloquially known—so that it now bars prosecutors from using prior nonviolent felony convictions to enhance the sentences of defendants convicted of subsequent nonviolent felonies.⁷ Thus, Tom will only be subjected to the penalties prescribed specifically for the charge he received, which would likely be around one to five years based on the relatively small amount of narcotics he was caught with, setting his prospective release date at around 2029.⁸ In all, it is likely that Tom will only serve around six to seven years total for both of his convictions. On the one hand, with a growing number of states legalizing the recreational use of marijuana,⁹ Tom's sentence still appears to be rather harsh. On the other hand, it is a much smaller and more justified penalty than the one that he may have received just a few years earlier.¹⁰

Consider a similar circumstance taking place in 2015, just five years before Tom's first felony conviction in 2020. Like Tom and countless other Louisianians, Mark struggles to get by in an economy that does not make itself readily accessible to individuals with criminal records. Because Mark's criminal record serves as a barrier to obtaining meaningful employment and supporting himself financially, he has frequently turned to selling marijuana to earn a livable wage. In June 2015, Mark was arrested and subsequently convicted of possession with intent to distribute half an ounce of marijuana, the same offense as the one Tom would be charged with five years later. Mark had previously been convicted of the same crime in a Louisiana state court in 2012. Like Tom, he had satisfied his probationary period following his release from custody to the court's satisfaction, allowing for the conviction to be set aside and

6. See Richard A. Webster, *Louisiana's Felons Face the Most Employment Obstacles in U.S.*, TIMES-PICAYUNE (July 19, 2019), https://www.nola.com/news/politics/article_31d759ec-8fa9-5e11-afb0-27e8f4c7c60a.html [<https://perma.cc/TQ72-P4L2>].

7. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019); LA. REV. STAT. § 15:529.1(C)(3) (2021).

8. LA. REV. STAT. § 40:966(B)(1)(a)(2021).

9. Alicia Wallace, *These States Are Voting on Cannabis Legalization This November*, CNN BUS. (Sept. 12, 2020), <https://www.cnn.com/2020/09/12/business/cannabis-ballot-2020-election/index.html> [<https://perma.cc/2NHR-KDFC>].

10. See LA. REV. STAT. § 40:966(B)(3) (2016).

the prosecution dismissed.¹¹ Unfortunately for Mark, however, the version of Louisiana's habitual-offender statute in effect at the time of his 2015 marijuana conviction allowed prosecutors to consider the conviction as a prior felony offense—even though it had been set aside and dismissed pursuant to the Louisiana Code of Criminal Procedure—thereby providing the basis for prosecuting Mark for the 2015 arrest as a habitual offender.¹²

The version of the habitual-offender statute in effect from August 15, 2010, to October 31, 2017, provided, in pertinent part:

[I]f the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction.¹³

Pursuant to the version of Louisiana Revised Statutes § 40:966 in effect from June 29, 2015, to July 31, 2016, a person convicted for possession with intent to distribute a “substance classified in Schedule 1 [such as] marijuana . . . shall upon conviction be sentenced to a term of imprisonment at hard labor for not less than five nor more than thirty years.”¹⁴ Because Mark was tried in his 2015 conviction as a second-felony habitual offender, the law required that he serve a minimum of 15 years in prison, with a potential maximum sentence of 60 years.

Subsection K of the current habitual-offender statute provides that a defendant's case must be adjudicated in accordance with the version of the statute in effect at the time of the commission of the offense.¹⁵ As a result, Mark cannot seek to lower his sentence to be consistent with the current provisions of the statute barring the use of prior nonviolent felony offenses for sentence enhancement purposes.¹⁶ Thus, even if Mark only serves the minimum statutorily prescribed sentence of 15 years, he would not be released until at least a year after Tom, even though Tom was not sentenced until five years after Mark.¹⁷ In all, Mark would serve at least seven to eight more years than Tom despite the fact they committed the exact same offenses just five years apart from each other. This

11. LA. CODE CRIM. PROC. art. 893(E)(2)–(4) (2021).

12. Act No. 386, 2019 Leg., Reg. Sess. (2019).

13. LA. REV. STAT. § 15:529.1(A)(1) (2017).

14. *Id.* § 40:966(B)(3) (2016).

15. *Id.* § 15:529.1(K)(1) (2021).

16. *Id.*

17. *Id.*; *id.* § 40:966(B)(3) (2016); *id.* § 15:529.1(A)(1) (2017).

hypothetical situation is a relatively minor example of the injustices that have occurred and will continue to occur under the current language of the habitual-offender statute. Thus, the legislature must amend the statute further, beyond the changes enacted in House Bill 518. This will ensure that people like Mark will no longer be subject to unduly harsh prison sentences that are not congruent with the statute's current sentencing scheme or the public's shifting attitude toward the appropriate punishments for nonviolent offenders.¹⁸

The current version of Louisiana's habitual-offender law is located in Louisiana Revised Statutes § 15:529.1.¹⁹ Prior to 2019, the statute imposed enhanced sentences on defendants convicted of subsequent violent felonies as well as subsequent nonviolent felonies.²⁰ Under the authority of the pre-2019 version of Louisiana's habitual-offender statute, courts most commonly enhanced the prison terms of defendants convicted of possession of a Schedule II narcotic, a nonviolent offense.²¹ In fact, nearly 64% of inmates serving enhanced sentences in Louisiana prisons under the state's habitual-offender law are imprisoned for nonviolent offenses.²² Furthermore, under the strict sentencing guidelines of Louisiana's habitual-offender statute, the Louisiana prison population reached 40,000 incarcerated citizens in 2012.²³

18. Cf. Hayley H. Fritchie, *State v. Noble: Mandatory Minimum Madness in Louisiana*, 89 TUL. L. REV. 933, 938 (2015) ("Louisiana's resistance to reform comes at a time when public opinion conflicts with the length of the state's mandatory sentences, as demonstrated by a 2014 state poll that revealed that 78% of those surveyed opposed prison terms longer than six months for persons with multiple convictions of simple marijuana possession.").

19. LA. REV. STAT. § 15:529.1 (2021).

20. *Id.*

21. LOUISIANANS FOR PRISON ALTS., REMOVE NONVIOLENT OFFENSES FROM HABITUAL OFFENDER STATUTE (2019), https://assets.website-files.com/5a9462f6b010650001b8d7bd/5ca38fafaf774a08c82a1905_CJR_LPA%20Habitual%20Offenders%202019.pdf [<https://perma.cc/5DJ7-DVZM>] (citing PEW CHARITABLE TRS., LOUISIANA DATA ANALYSIS PART II: PRISON TRENDS CONTINUED (2016), https://www.splcenter.org/sites/default/files/la_drivers_ii_presentation_9-23-16_final.pdf#page=15&zoom=auto,-64,717 [<https://perma.cc/Z5DX-5HVC>] [hereinafter PEW, LOUISIANA DATA ANALYSIS PART II]).

22. *Id.*

23. PEW CHARITABLE TRS., LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS 3 (2018), https://www.pewtrusts.org/-/media/assets/2018/03/pspp_louisianas_2017_criminal_justice_reforms.pdf [<https://perma.cc/7Z3K-NGXR>] (citing data collected from the Louisiana Department of Corrections and the U.S. Department of Justice, Bureau of Justice Statistics) [hereinafter PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS].

Recently, though, the governor and the Louisiana Legislature have taken a number of measures to combat this issue.²⁴ Governor John Bel Edwards signed into law the 2017 Louisiana Criminal Justice Reform Act in an effort to reduce the state's total prison population and the ensuing burden on taxpayers.²⁵ The Louisiana Legislature went a step further in 2019 by enacting House Bill 518, which removed certain nonviolent felony offenses from sentence enhancement considerations under § 15:529.1.²⁶

Though the Louisiana Legislature and Governor John Bel Edwards have taken meaningful steps to rectify many of the problems that the state's habitual-offender statute created, one lingering problem remains. Pursuant to § 15:529.1(K), "[N]otwithstanding any provision of the law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed."²⁷ Thus, the provisions of the habitual-offender statute amended by House Bill 518, which removed nonviolent offenses from sentencing enhancement considerations, only operate prospectively.²⁸ While these amendments will hypothetically decrease the prison population over time by preventing the sentence enhancement of Louisiana citizens convicted of their second nonviolent felony offense after their enactment, the amendments fail to reduce the substantial number of nonviolent habitual offenders already serving enhanced sentences in Louisiana prisons under the authority of statutory provisions that are no longer in effect.²⁹ Thus, these inmates are serving sentences that would be considered unquestionably excessive under existing law if they were to be convicted of the exact same crimes today.

In order to further remedy Louisiana's problem of mass incarceration and its burden on the state's taxpayers, additional amendments must be made to the state's habitual-offender statute. The remedies currently available are inadequate to assist these nonviolent habitual offenders in a meaningful way. Thus, the legislature should further amend § 15:529.1 to provide reviewing courts with discretionary authority to amend the sentences of already-convicted nonviolent habitual offenders, in light of the amendments in House Bill 518, so that their required prison terms may more accurately reflect the sentencing guidelines currently in effect in the statute.

24. *See id.*; *see also* Act No. 386, 2019 Leg., Reg. Sess. (La. 2019).

25. *See* PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23.

26. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019).

27. LA. REV. STAT. § 15:529.1(K)(1) (2021).

28. *Id.*

29. *Id.*

Part I of this Comment will examine the history of habitual-offender statutes and mandatory-minimum sentencing in both the United States as a whole and Louisiana more specifically. This historical backdrop of the mandatory-minimum-sentencing and habitual-offender statutes will in turn illustrate how the country arrived at its current mass incarceration dilemma. Part II will discuss recent developments in criminal-justice reform in Louisiana and the positive implications that these reforms will have on the state's issues of prison overcrowding. Additionally, this Part will highlight some of the lingering problems inherent in these reforms that will continue to hinder their ultimate goals. Finally, Part III will argue that to adequately accomplish the stated goals of Louisiana's criminal-justice reforms, the Louisiana Legislature must amend Louisiana Revised Statutes § 15:529.1 beyond the measures included in House Bill 518 to provide inmates sentenced under the pre-2019 version of Louisiana's habitual-offender statute with meaningful post-sentencing relief. To support the need for such a solution, Part III will illustrate that the existing remedies available to reduce prison sentences are ineffective in promptly rectifying the state's issues with mass incarceration.

I. THE TROUBLING HISTORY OF RECIDIVIST LAWS IN THE UNITED STATES

Recidivist laws permitting sentencing enhancements for repeat offenders have existed throughout the United States since the country's establishment.³⁰ Though specifically enumerated habitual-offender statutes did not arise until the early twentieth century, the existence of early recidivist laws—such as mandatory-minimum sentences for repeat offenders—provided state legislatures with the legal framework on which they would eventually model their respective statutes.³¹ Thus, to fully understand the history of habitual-offender statutes in the United States, it is necessary to examine the nation's extensive history of seeking heightened penalties for defendants found guilty of committing multiple offenses.³²

30. See Abigail A. McNelis, *Habitually Offending the Constitution: The Cruel and Unusual Consequences of Habitual Offender Laws and Mandatory Minimums*, 28 CIV. RTS. L.J. 97, 101 (2017).

31. *Id.*

32. *Id.* at 100.

A. History of Habitual-Offender Statutes in the United States

Habitual-offender statutes have existed in one form or another in the United States since the 1920s, during the era of prohibition and rampant organized crime.³³ The first incarnation of these recidivist laws came in the form of the Baumes Law of 1926 in New York, which was enacted to combat the state's rising crime rates following World War I.³⁴ This version of the New York law imposed a mandatory life sentence for offenders convicted of a third felonious crime.³⁵ By 1948, almost every state had followed New York's example, enacting recidivist statutes that imposed the possibility of extended sentences in cases where defendants were convicted of subsequent and numerous felonies.³⁶ State legislatures enacted these recidivist statutes to serve as a daunting deterrent to potential career criminals and maintain a peaceful society by removing chronic law-breakers from its communities.³⁷

Though the aforementioned recidivist laws enacted in the early twentieth century serve as the primary direct predecessors to the habitual-offender statutes that are currently in effect today, the ideological rationale for such laws can be traced back further to the more general legal regime of mandatory minimums.³⁸ Mandatory minimum provisions provide judges with guidelines for sentencing defendants convicted of certain enumerated offenses, namely by providing the lowest possible sentencing lengths allowed for such charges.³⁹ As with habitual-offender statutes, mandatory-minimum sentences are meant to deter potential criminals from committing similar offenses.⁴⁰ These sentencing provisions historically

33. Paul W. Tappan, *Habitual Offender Laws in the United States*, 13 FED. PROB. 28, 28 (1949).

34. *Id.*

35. *Id.*

36. *Id.* 29–31 (listing Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

37. Meredith S. Byars, *State v. Muhammad: The Supreme Court of Louisiana Restores Continuity to the Statutory Construction and Application of the Habitual Offender Law*, 79 TUL. L. REV. 1561, 1562 (2005) (citing *State v. George*, 48 So. 2d 265, 267 (La. 1950)).

38. McNelis, *supra* note 30, at 100.

39. *Id.*

40. *Id.*

required judges to consider a number of different factors in determining whether applying a statutory mandatory minimum was appropriate for certain offenders, including a defendant's prior criminal history.⁴¹

Mandatory-minimum-sentencing guidelines are not new legal regimes.⁴² They existed as early as 1790 in the then newly established United States.⁴³ Original versions of this sentencing scheme, however, were generally only applied to the most serious offenses of the era, such as piracy and murder.⁴⁴ Mandatory minimum guidelines, like Louisiana's habitual-offender statute today, adhere to strict sentencing formulas by imposing exact penalties on convicted defendants whose conduct falls under the statutes' sentencing enhancement requirements.⁴⁵

However, despite the traditionally limited utilization of these mandatory sentencing provisions, certain political and societal shifts in the mid-twentieth century allowed for enhanced sentencing practices to be extended to lower-level crimes at a much more frequent rate than in years past.⁴⁶ In the 1970s, President Nixon's "War on Drugs" began to develop and expand rapidly.⁴⁷ During this time, the nation saw a staggering increase in the statewide application of mandatory-minimum sentences for a number of different drug offenses.⁴⁸ This increase was a byproduct of the belief that such excessive sentences would serve as an effective

41. *Id.* More specifically,

[w]hen determining the applicability of a mandatory minimum for an individual offender, judges consider objective criteria, such as the quantity of drugs possessed or prior criminal history. Likewise, mandatory minimum statutes adhere to strict formulas. For example, a criminal convicted of crime A, such as possession with intent to sell, must be sentenced to B years, subject to C condition, such as past felony convictions.

Id. (citing *Dorsey v. United States*, 567 U.S. 260, 265–66 (2012)).

42. *Id.* at 101.

43. *Id.*

44. *Id.*

45. *Id.* at 100 ("For example, a criminal convicted of crime A, such as possession with intent to sell, must be sentenced to B years, subject to C condition, such as past felony convictions.") (citing *Dorsey*, 567 U.S. at 265–66).

46. Louis Westerfield, *A Study of the Louisiana Sentencing System and Its Relationship to Prison Overcrowding: Some Realistic Solutions*, 30 LOY. L. REV. 5, 11–12 (1984).

47. See *United States v. Vasquez*, 2010 U.S. Dist. LEXIS 32293, at *6–7 (E.D.N.Y. Mar. 30, 2010).

48. See Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 127 (2014–2015).

deterrent in the country's perceived struggle with drug trafficking and addiction.⁴⁹

The United States' shift toward harsher application of mandatory-minimum sentences is largely attributable to the American public's habit of rousing itself into a fervor in fear of rising crime rates.⁵⁰ Some scholars connect the American populace's "crime phobia" at this time to figures published in an FBI report compiled in the late 1970s and early 1980s, which seemed to evidence an increase in violent-crime rates throughout the country.⁵¹ Critics of this FBI report note that the study was more than likely inaccurate

from year to year because of "increased use of computers by the police, changes in police departments' crime reporting procedures, shifts in public attitudes that result in the reporting of more crimes, and an increasing number of people who insure[d] their property and, thus, [had to] report to the police when [their property was] stolen."⁵²

Regardless of the questionable methodology that the FBI employed in formulating its analysis, the report was enough to push law-abiding citizens to favor harsher penalties.⁵³

Criminal-justice scholars also note that this anti-crime movement was further exacerbated by politicians and the news media of the time, which sensationalized reports of increased crime rates for voter support and increased viewership.⁵⁴ Political actors sought to garner support from the voter base by delivering dramatic speeches detailing the degradation of American society as a result of the nation's supposedly incorrigible criminal population, while at the same time emphasizing their status as "law and order" candidates.⁵⁵ The news media of the time followed suit in

49. *See id.*

50. *See* Westerfield, *supra* note 46, at 12 (discussing the crime phobia of the 1970s' effects on the country's increasingly strict application of its mandatory minimum statutory provisions) (citing K. KRAJIK & S. GETTINGER, *OVERCROWDED TIME* 5 (1982)); *see also* ACLU, *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES* 33 (2013) (detailing a resurgence of anti-crime sentiments across the country in the 1990s and the ensuing increase in harsh sentencing practices).

51. Westerfield, *supra* note 46, at 12 (citing K. KRAJIK & S. GETTINGER, *OVERCROWDED TIME* 7 (1982)).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

this endeavor by providing extensive coverage to a select number of crimes committed against law-abiding citizens.⁵⁶ Extensive media coverage, along with repetitive virtue signaling on the part of savvy politicians, ultimately culminated to create an abundance of unsympathetic criminal-justice policies throughout the United States, implemented through both federal and state legislation.⁵⁷

Unfortunately, the true roots of the spike in crime during this era—primarily drug and property crimes—were never truly addressed in a meaningful way.⁵⁸ In regard to drug offenses, scholars note that many of the factors inherently present in the nation’s drug epidemic, namely addiction and desperation, largely prevent the mandatory-minimum sentences applied to these cases from serving any meaningful purpose in actually combating the nation’s drug affliction.⁵⁹ Similar problems in mandatory-minimum-sentencing statutes can be attributed to their application toward property crimes.⁶⁰ One scholar writes that increases in property crimes can largely be attributed to deteriorating economic conditions, which in turn drive desperate citizens to theft as a means of supporting themselves, rather than any inherent trait of criminality.⁶¹

The proliferation of mandatory-minimum-sentencing statutes caused a staggering increase in the nation’s inmate population, straining already overcrowded prison systems.⁶² Though prison overcrowding was—and still is—an issue afflicting states across the nation, no region exemplifies this dilemma more than the American South.⁶³ Further, while the South

56. *Id.*

57. *Id.* at 11 (“By 1982, at least 37 states had passed some form of mandatory sentencing law, requiring imprisonment for a minimum length of time. Most of these laws have been enacted [within the late seventies and early eighties].”).

58. McNelis, *supra* note 30, at 102.

59. *Id.* (citing Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 948 (2001)).

60. See Westerfield, *supra* note 46, at 14; see also *State v. Bryant*, 300 So. 3d 392, 393–94 (La. 2020) (“Pig Laws were largely designed to re-enslave African Americans. They targeted actions such as stealing cattle and swine—considered stereotypical ‘negro’ behavior—by lowering the threshold for what constituted a crime and increasing the severity of its punishment . . . this case demonstrates their modern manifestation”).

61. See Westerfield, *supra* note 46, at 14.

62. *Id.* at 11.

63. *Id.* at 7 (“Beginning in 1970, the national prison population increased by 43 percent; this increase was especially dramatic in the South.”) (citing 1 J. MULLEN, *AMERICAN PRISONS AND JAILS: SUMMARY AND POLICY IMPLICATIONS*

stood out with regard to prison overcrowding in the 1970s, Louisiana's own incarceration rate was substantially disproportionate in its own right.⁶⁴

In 1978, a survey of prison populations across various states "revealed that, although Louisiana [was] ranked number nine in population density [among the states examined], it [was] ranked number seven in prison population and sixth in the number of total persons incarcerated."⁶⁵ In the years following, Louisiana's problem with prison overcrowding continued to grow, increasing by 21% from 1981 to 1982 and raising the total number of prisoners in the state per 100,000 civilians to 251 by the end of the year.⁶⁶ One of the largest contributors to Louisiana's overcrowded prison system is the state's habitual-offender law, which is one of the state's most frequently utilized forms of mandatory-minimum sentencing.⁶⁷

B. History of the Habitual-Offender Law in Louisiana: Louisiana Recidivist Law in the Early Twentieth Century

The Louisiana Legislature promulgated the state's first version of its habitual-offender law in 1928.⁶⁸ As was common with most federal and state legislatures' goals in enacting recidivist laws across the United States, the Louisiana Legislature's stated purpose in drafting its habitual-offender statute was to "discourage repeated criminal behavior and to

OF A NATIONAL SURVEY 15 (1980)). For further explanation of the South's prison population increase, see MULLEN, *supra* note 63, at 15-16 (1980):

By 1968, the South, which had previously held about 36 percent of the nation's state prisoners, began to increase its share. By 1978, this region held almost half of all state prisoners in the U.S., . . . although it contained less than one-third of the U.S. population. While the remainder of the nation had increased its state prison population by 31 percent between 1970 and 1978, the South showed an increase of 84 percent. In the South, the number of persons per 100,000 in state prisons was more than twice as great as the number in the Northeast and 93 percent higher than the average for the other three regions. The number of prisoners in the South was not only disproportionate to its share of the civilian population but also to its share of serious . . . [violent] crime.

Id.

64. See Westerfield, *supra* note 46, at 8.

65. *Id.* (citing MULLEN, *supra* note 63, at 17 (1980)).

66. *Id.* (citing BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUST., PRISONERS IN 1982 (April 1983)).

67. *Id.* at 29.

68. Fritchie, *supra* note 18, at 934; 1928 La. Acts 15.

protect society by removing the persistent offenders from its midst.”⁶⁹ This early version of the statute was particularly harsh, requiring that the minimum sentence imposed on a second-time offender be at least as long as the maximum sentence available for a first conviction.⁷⁰ Additionally, while the minimum sentence the statute prescribed for third-time offenders was required to equal the maximum sentence allowed for a second conviction, fourth-time felony offenders were required to spend the rest of their natural lives in prison.⁷¹

Louisiana legal scholar Donald V. Wilson illustrated one such example of the unquestionably harsh outcomes of Louisiana’s 1928 habitual-offender statute in the following hypothetical.⁷² Consider, “[f]or example, the least possible sentence that could be imposed on an offender convicted for the second time of a larceny of over twenty dollars was imprisonment for ten years. A life sentence was mandatory for the individual convicted four times of a larceny of over twenty dollars.”⁷³ Moreover, when the circumstances of a defendant’s conviction required the statute to be applied, sentencing judges were granted no discretion under the language of the statute to decrease the length of the prescribed sentence, creating an abundance of disproportionately harsh mandatory prison terms.⁷⁴ During this era, defendants and their attorneys consistently called upon the Board of Pardons to grant some form of reprieve to these unjustifiably punished defendants.⁷⁵ The uncompromising structure of the 1928 statute ultimately created defects in the statute’s practical applicability, with many parishes applying the statute inconsistently and others electing to not use it at all as a result of judicial objections over its undue severity.⁷⁶

In order to remedy the 1928 habitual-offender statute’s issues of practicability—and to promote uniformity and equitability in sentencing—the Louisiana Legislature amended the statute in 1942.⁷⁷ The 1942 amendment to Louisiana’s habitual-offender law reduced the

69. S. Renee Bourg, *The Louisiana Habitual Offender Statute: When the Time Doesn’t Fit the Crime*, 54 LOY. L. REV. 941, 946 (2008).

70. Donald V. Wilson, *The Louisiana Criminal Code: Making the Punishment Fit the Criminal*, 5 LA. L. REV. 53, 61 (1942) (citing 1928 La. Acts 15).

71. Westerfield, *supra* note 46, at 29.

72. *See* Wilson, *supra* note 70, at 61.

73. *Id.* (citing 1928 La. Act 15).

74. *See* Westerfield, *supra* note 46, at 30.

75. Wilson, *supra* note 70, at 61.

76. *Id.*

77. Westerfield, *supra* note 46, at 30.

statutorily prescribed lengths for minimum and maximum penalties, while also providing that habitual offenders were henceforth eligible for parole after serving one-third of their sentence.⁷⁸ One of the most notable additions the 1942 amendment made to the habitual-offender statute was the inclusion of a five-year elapse period provision, “making the statute inapplicable when more than five years had elapsed between the expiration of the sentence imposed for the previous felony and the date of commission of the subsequent felony.”⁷⁹ A nearly identical provision providing defendants with a protective elapse period in between felonies can be found in Louisiana’s current habitual-offender statute, as will be discussed in greater detail below.⁸⁰

C. The Habitual-Offender Law in Louisiana: Post “War on Drugs” Era

Though the Louisiana Legislature amended various aspects of the state’s habitual-offender law a number of times following the 1942 amendment, the statute’s current structure—located in Louisiana Revised Statutes § 15:529.1—can be traced back to the resurgence of the anti-crime movement in the 1990s.⁸¹ As stated above, crime spikes throughout the United States in the 1970s, along with sensationalized media reports on the prevalence of drug-related violence, led federal and state legislatures to adopt strict mandatory-minimum sentences for many nonviolent offenses.⁸² The public’s anti-crime sentiment during the 1970s only increased over the following decades, reaching somewhat of a pinnacle in the 1990s.⁸³ In response to this public outcry over elevated crime rates, state legislatures, en masse, began to extensively adopt strict three-strike and habitual-offender laws to combat the nation’s perceived rising criminal population.⁸⁴

The current version of Louisiana’s habitual-offender law contained in Louisiana Revised Statutes § 15:529.1—aside from the post-2019 amendments to the law that will be discussed in greater detail below—is

78. Bourg, *supra* note 69, at 946.

79. Westerfield, *supra* note 46, at 30 (citing 1942 La. Acts 45).

80. See LA. REV. STAT. § 15:529.1(C)(1) (2021).

81. Byars, *supra* note 37, at 1562; see also Samara Marion, *Justice by Geography? A Study of San Diego County’s Three Strikes Sentencing Practices from July-December 1996*, 11 STAN. L. & POL’Y REV. 29, 30 (1999); see also Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 409–22 (1997).

82. ACLU, *supra* note 50, at 33.

83. *Id.*

84. McNelis, *supra* note 30, at 106.

largely a product of this 1990s crime-wave hysteria.⁸⁵ The basic framework of § 15:529.1 is as follows:

[I]f a person is convicted of a felony, then subsequently commits another felony, the punishment for the subsequent conviction may be enhanced. The precise range of possible penalties are set out by the statute and depend upon the nature of the offense and the number of previous convictions. By virtue of the law itself, a person so sentenced is ineligible for probation or suspension of sentence, and if the underlying offense has further prohibitions, i.e., no parole eligibility, those prohibitions apply to the enhanced sentence as well.⁸⁶

Further, whether a defendant's sentence will be enhanced is entirely within the discretion of the presiding district attorney.⁸⁷ If the district attorney decides to initiate such an action, then the state must prove that the defendant was in fact convicted of a prior felony in a separate hearing through a factual showing of said prior conviction's existence.⁸⁸ Additionally, subsection C of § 15:529.1 provides that a defendant may not be charged as a habitual offender if a certain amount of time has passed in between the previous felony conviction and the subsequent felony offense currently being charged.⁸⁹ These elapse periods range from five to ten years depending on the nature of the prior felonies.⁹⁰ In effect, this provision requires the prosecutor to establish that such a cleansing period has not accrued between the defendant's prior convictions and the subsequent felony currently being prosecuted in order to charge the defendant as a habitual offender.⁹¹ If such a time period has elapsed, then the defendant will not qualify as a habitual offender.⁹² However, if the district attorney is able to establish that the defendant is eligible for habitual-offender status, then the trial court is effectively deprived of any sentencing discretion it may have otherwise possessed, thereby forcing the

85. Byars, *supra* note 37, at 1562; *see also* Marion, *supra* note 81, at 30; Vitiello, *supra* note 81, at 409–22.

86. GAIL DALTON SCHLOSSER, LOUISIANA CRIMINAL TRIAL PRACTICE § 26:7 (4th ed. 2020).

87. *See* LA. REV. STAT. § 15:529.1(D)(1)(a) (2021); *see also* SCHLOSSER, *supra* note 86, at § 26:7.

88. *See* LA. REV. STAT. § 15:529.1(D)(1)(b) (2021); *see also* SCHLOSSER, *supra* note 86, at § 26:7.

89. *See* LA. REV. STAT. § 15:529.1(C)(1) (2021).

90. *Id.*

91. *See id.*; *see also* SCHLOSSER, *supra* note 86, at § 26:7.

92. *See* LA. REV. STAT. § 15:529.1(C)(1) (2021).

court to vacate any sentence it may have previously adjudicated in favor of a new sentence that aligns with the statutorily prescribed time ranges provided in § 15:529.1.⁹³

D. Mass Incarceration in Both the United States and Louisiana

As a result of mandatory-minimum-sentencing laws, with habitual-offender statutes being one of the most commonly utilized forms, the number of incarcerated persons in the United States has nearly quadrupled over the past 40 years.⁹⁴ Though mandatory-minimum statutes and habitual-offender laws were originally intended to combat rises in violent-crime rates,⁹⁵ a 2013 American Civil Liberties Union report revealed that a large number of inmates currently sentenced to life without parole as a result of prior convictions were convicted of low-level, nonviolent offenses,⁹⁶ mostly drug-related and property crimes, which numerous commentators have linked to poverty and addiction.⁹⁷

Mass incarceration is an especially prevalent issue in Louisiana, which has the one of the highest rates of prisoners serving life sentences without parole for nonviolent offenses.⁹⁸ These high rates of nonviolent offenders sentenced to excessively long prison terms in Louisiana are largely a byproduct of the state's enthusiastic use of its habitual-offender statute.⁹⁹ The fact that the maximum penalties enforced under § 15:529.1 are frequently only enhancements of the mandatory-minimum sentences in the state's more specific criminal statutes—which standing alone are some of the most severe in the country—supports this contention.¹⁰⁰

Prior to 2019, Louisiana's habitual-offender statute imposed enhanced sentences on defendants convicted of subsequent violent felonies as well as subsequent nonviolent felonies.¹⁰¹ Under the authority of this pre-2019

93. *See id.*; *see also* SCHLOSSER, *supra* note 86, at § 26:7.

94. McNelis, *supra* note 30, at 100 (citing ACLU, *supra* note 50, at 32).

95. *Id.* at 106.

96. *Id.* at 105 (citing ACLU, *supra* note 50, at 18, 21).

97. *See* State v. Bryant, 300 So. 3d 392, 393 (La. 2020).

98. McNelis, *supra* note 30, at 106 (citing ACLU, *supra* note 50, at 23) (noting also that additional southern states such as Florida, Georgia, Alabama, Mississippi, South Carolina, and Oklahoma have exceedingly high rates of prisoners serving life sentences without parole for nonviolent offenses as well).

99. *Id.*

100. *See* Fritchie, *supra* note 18, at 935 (citing Lauren Galik & Julian Morris, *Smart on Sentencing, Smart on Crime: An Argument for Reforming Louisiana's Determinate Sentencing Laws*, REASON FOUND. 6 (2013)).

101. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019).

version, state courts most frequently enhanced terms of imprisonment for defendants convicted of possession of a Schedule II narcotic.¹⁰² In fact, nearly 64% of inmates currently serving enhanced sentences in Louisiana prisons under the habitual-offender statute are imprisoned for nonviolent offenses.¹⁰³ Nearly 20% these nonviolent offenders were convicted of drug possession.¹⁰⁴ Under the strict sentencing guidelines of Louisiana's habitual-offender statute, the Louisiana prison population expanded to around 40,000 incarcerated citizens in 2012.¹⁰⁵ In 2013, Louisiana's criminal-justice system placed 847 out of every 100,000 Louisiana citizens in prison, making Louisiana the most incarcerated state in the nation with an incarceration rate sitting at 114% above the national average.¹⁰⁶

Though the state implemented statutory and administrative changes between 2012 and 2015 that somewhat reduced the number of inmates in state prisons, Louisiana maintained the highest incarceration rate per capita in the United States during that period.¹⁰⁷ The negative effects of the state's high incarceration rate notably manifested in the form of excessive costs to Louisiana taxpayers.¹⁰⁸ In 2012, Louisiana's rising prison population, which had more than doubled since 1990,¹⁰⁹ forced the state to spend nearly \$729.9 million on adult correctional services.¹¹⁰ Despite the aforementioned statutory and administrative changes promulgated between 2012 and 2015, state legislators still appropriated \$625 million for correctional expenditures in 2017.¹¹¹

Additionally, Louisiana's mandatory-minimum-sentencing laws have negative effects beyond mass incarceration and the ensuing burden on

102. LOUISIANANS FOR PRISON ALTS., *supra* note 21, at 1 (citing PEW, LOUISIANA DATA ANALYSIS PART II, *supra* note 21).

103. *Id.*

104. *Id.*

105. PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23, at 3 (citing data collected from the Louisiana Department of Corrections and the U.S. Department of Justice, Bureau of Justice Statistics).

106. Fritchie, *supra* note 18, at 935.

107. PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23, at 3 (citing data collected from the Louisiana Department of Corrections and the U.S. Department of Justice, Bureau of Justice Statistics).

108. *Id.*

109. Fritchie, *supra* note 18, at 935 (citing *Population Trends—Raw Data: 1989–2015*, LA. DEP'T PUB. SAFETY & CORR., <https://doc.louisiana.gov/wp-content/uploads/2019/08/jan.19.bb.pdf> [<https://perma.cc/3WKH-TNBB>] (last modified Dec. 31, 2012)).

110. *Id.*

111. PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23, at 3.

state taxpayers.¹¹² Following an analysis of crime statistics in the state, the ACLU determined that the mandatory sentence that Louisiana law requires for a conviction of possession of marijuana disproportionately affects African Americans.¹¹³ This imbalance in the allocation of penalties for minor drug offenses exists despite there being no noteworthy statistical difference in African Americans' use of marijuana compared to other races.¹¹⁴

Another troublesome byproduct of Louisiana's habitual-offender statute is that it gives district attorneys undue prosecutorial leverage.¹¹⁵ Prosecutors utilize this leverage to secure plea deals from defendants in place of proceeding to formal trials.¹¹⁶ When threatened with an extended sentence as a habitual offender, defendants are more likely to agree to disproportionate sentences in order to avoid receiving a potentially decades-long prison term at trial.¹¹⁷ This problem is not isolated to Louisiana alone though, as data from the Bureau of Justice Statistics indicates that nearly 94% of felony convictions in state courts arise out of plea deals.¹¹⁸ In Louisiana, the average sentence range for inmates convicted as habitual offenders is 34.5 years, while the average sentence term for the total prison population is only 16.5 years.¹¹⁹ To maintain this prosecutorial power, district attorney organizations, along with state sheriffs who profit off of high incarceration rates, have stymied a number of legislative bills aimed at reforming the state's mandatory sentencing practices.¹²⁰

112. Fritchie, *supra* note 18, at 936.

113. *Id.* (citing THE WAR ON MARIJUANA IN BLACK AND WHITE, AM. CIV. LIBERTIES UNION 153 (2013)).

114. See U.S. DEP'T OF HEALTH & HUM. SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 88 (2014).

115. LOUISIANANS FOR PRISON ALTS., *supra* note 21.

116. Fritchie, *supra* note 18, at 936 (citing Martin Kaste, *States Push for Prison Sentence Overhaul; Prosecutors Push Back*, NPR (July 9, 2014, 3:32 AM), <https://www.npr.org/2014/07/09/329587949/states-push-for-prison-sentence-reform-and-prosecutors-push-back> [<https://perma.cc/3SF4-LFKG>]).

117. LOUISIANANS FOR PRISON ALTS., *supra* note 21.

118. *Id.* (citing BUREAU OF JUST. STAT., FELONY SENTENCES IN STATE COURTS, 2006 (2009)).

119. *Id.* (citing LA. DEP'T OF PUB. SAFETY & CORR., BRIEFING BOOK (2018)).

120. Fritchie, *supra* note 18, at 936–37.

II. INSUFFICIENCY OF EXISTING AMENDMENTS TO LOUISIANA'S HABITUAL-OFFENDER STATUTE

Despite the efforts of some prosecutors and sheriffs to block legislative reforms,¹²¹ a number of state governmental actors recently came together in an effort to remedy some of the detrimental effects that the severe provisions of § 15:529.1 and other various criminal statutes have brought onto the state.¹²² In 2017, Governor John Bel Edwards, working in conjunction with a bipartisan coalition of state legislators and representatives from the Department of Corrections, called for reforms to the Louisiana criminal justice system with the goal of eliminating Louisiana's status as the most incarcerated state per capita in the country and, in turn, reducing the burden on state taxpayers.¹²³ Thus, in 2017, Governor Edwards signed into law ten criminal-justice reform bills.¹²⁴ As part of this ten-bill package, state legislators reduced habitual-offender penalties by: (1) reducing mandatory-minimum sentencing for most second and third offenses, while also providing courts with the discretion to disregard minimum sentences enumerated in the habitual-offender statute if they deem them to be cruel and unusual; (2) eliminating the possibility of life sentences for defendants convicted of a fourth nonviolent conviction; and (3) shortening the time that must elapse before a felony can no longer be used for enhancement purposes for nonviolent subsequent offenses.¹²⁵

Louisiana legislators took a step further in reducing the severity of the habitual-offender statute in 2019 with House Bill 518.¹²⁶ This bill amended the habitual-offender statute by declaring that a felony offense that is not a crime of violence as defined by Louisiana Revised Statutes § 14:2(B) and that has been set aside and dismissed pursuant to Code of Criminal Procedure article 893(E)(2),(3), or (4) shall not be considered a prior conviction for the purpose of enhancing a defendant's sentence for a subsequent nonviolent felony.¹²⁷ Additionally, House Bill 518 states that a trial court may not consider a defendant's set-aside-and-dismissed prior nonviolent felony offenses for the purpose of computing the statute's five-

121. *Id.* at 938.

122. *See* PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23, at 1.

123. *See id.*

124. *See id.*

125. *Id.*; *see also* S.B. 220, 2017 Leg., Reg. Sess. (La. 2017); S.B. 221, 2017 Leg., Reg. Sess. (La. 2017).

126. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019).

127. *Id.*; LA. REV. STAT. § 15:529.1(C)(3) (2021).

year elapse period if the defendant's subsequent felony conviction is also a nonviolent offense.¹²⁸ The habitual-offender statute's elapse period provides that once a certain period of time has passed—usually five years—in which a defendant has received no criminal convictions, then the state may no longer prosecute said defendant as a habitual offender.¹²⁹ Thus, under the authority of the amendments House Bill 518 enacted into § 15:529.1, prior nonviolent felony offenses may no longer interrupt a defendant's five-year elapse period.¹³⁰

A. Problems with Recent Reforms

Despite the steps the Louisiana Legislature has taken in combating the state's high incarceration rate, one issue arising out of the habitual-offender statute's reformed provisions still remains. Pursuant to subsection K(1) of § 15:529.1, “notwithstanding any provision of law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed.”¹³¹ Thus, it can be inferred that the amended provisions of the habitual-offender statute only operate prospectively.¹³²

Louisiana appellate court jurisprudence regarding the applicability of statutory amendments in sentencing certain defendants supports this inference.¹³³ For example, in *State v. Surry*, the Louisiana Second Circuit Court of Appeal reviewed the district court's sentencing of defendant Alexander Surry, who was seeking supervisory review for the denial of his motion to correct an illegal sentence.¹³⁴ Surry was sentenced to life imprisonment at hard labor without the possibility of parole for his conviction of cocaine possession with intent to distribute, based on his status as a third-felony habitual offender.¹³⁵

128. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019).

129. LA. REV. STAT. § 15:529.1(C)(1) (2021).

130. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019); LA. REV. STAT. § 15:529.1(C)(3) (2021).

131. LA. REV. STAT. § 15:529.1(K)(1) (2021).

132. *Id.*

133. *See State v. Surry*, 121 So. 3d 804 (La. Ct. App. 1st Cir. 2013); *see also State v. Buhcannon*, 119 So. 3d 853 (La. Ct. App. 4th Cir. 2013) (in which the court concluded that a prior felony conviction for solicitation of a crime against nature that was subsequently reduced to a misdemeanor by the Louisiana Legislature can nevertheless serve as a felony for enhancement of a defendant's sentence under the habitual-offender statute).

134. *Surry*, 121 So. 3d at 805.

135. *Id.*

Surry was sentenced under the version of the habitual-offender statute in effect at the time of the commission of his third felony offense in January 2001.¹³⁶ At that time, § 15:529.1 prescribed a mandatory life sentence

when *any one* of the offender's three previous felony convictions: [1] was defined in La. R.S. § 14:2(13) as a crime of violence; or [2] was a violation of the Controlled Dangerous Substances Law punishable by imprisonment for more than five years; or [3] was any other crime punishable by imprisonment for more than 12 years.¹³⁷

Later that year, however, the Louisiana Legislature amended § 15:529.1 to only mandate a life sentence without benefit of parole when

all three prior felony convictions fall into at least one of these categories: [1] any crime of violence, as defined under La. R.S. 14:2(B); a sex offense, as defined under La. R.S. 15:540, *et seq.*, when the victim is under the age of 18 at the time of the crime; [2] a drug offense punishable by 10 years or more; or [3] any other conviction punishable by imprisonment for 12 years or more.¹³⁸

Under the amended version of the habitual-offender statute in effect at the time of his appellate hearing, Surry would not have been subject to a life sentence without parole because one of his felony convictions for cocaine possession was punishable by no more than five years.¹³⁹ Despite the new sentencing guidelines, the Second Circuit determined that the changes made to the habitual-offender statute alone did not provide Surry with any form of post-sentencing relief.¹⁴⁰ The Second Circuit based its determination on a line of Louisiana Supreme Court jurisprudence holding, generally, that the law in effect at the time of the commission of a defendant's offense dictates the extent of the prescribed penalty.¹⁴¹

So while the amendments provided in House Bill 518 will hypothetically reduce the number of Louisiana citizens incarcerated for nonviolent felony offenses in the future, it does nothing to decrease the

136. *Id.*

137. *Id.* (bold type removed).

138. *Id.* (bold type removed).

139. *Id.*

140. *Id.*

141. *Id.* at 805–06 (citing *State v. Sugasti*, 820 So. 2d 518 (La. 2002); *State v. Wright*, 384 So. 2d 399, 401 (La. 1980); *State v. Narcisse*, 426 So. 2d 118, 130–31 (La. 1983)).

substantial number of inmates already serving time whose sentences were enhanced under the old version of the statute.¹⁴² As stated above, the majority of prisoners serving extended time in Louisiana state prisons under the habitual-offender statute are nonviolent offenders.¹⁴³ Looking to the burden on state taxpayers resulting from the imprisonment of habitual offenders alone, it is estimated that the cost to detain prisoners in Louisiana is over \$21,000 per prisoner each year.¹⁴⁴ For example, in 2019, because an estimated 64% of the 5,000 people serving time in Louisiana under the habitual-offender statute were there for nonviolent crimes¹⁴⁵ it cost the state, and thus taxpayers, roughly \$67.2 million per year to hold those nonviolent offenders, most of whom were sentenced under statutory provisions no longer in effect.

B. Ineffectiveness of Currently Available Forms of Post-Sentencing Relief

While the prospective amendments enacted in House Bill 518 fail to readily assist already-convicted habitual offenders, there are some existing avenues for post-conviction relief available to these inmates.¹⁴⁶ The two most frequently utilized forms of such relief are parole and diminution of sentences based on good behavior, or “good time” as it is more commonly called.¹⁴⁷ As part of the 2017 Louisiana Criminal Justice Reform Act, the state legislature expanded parole eligibility for habitual offenders convicted of nonviolent offenses by decreasing the amount of time such defendants must serve before the state parole board may examine their case from 33% to 25% of sentence served.¹⁴⁸ The Act similarly expanded habitual offenders’ eligibility for “good time” release by reducing the required percentage of sentence already served from 40% to 35%.¹⁴⁹ A third, but less common, form of relief available to habitual offenders is through appellate review, where defendants challenge their prison

142. LA. REV. STAT. § 15:529.1(K)(1) (2021).

143. LOUISIANANS FOR PRISON ALTS., *supra* note 21.

144. *Id.* (citing LA. DEP’T OF PUB. SAFETY & CORR., *supra* note 119).

145. *Id.*

146. *See* LA. REV. STAT. § 15:574.4 (2021); *id.* § 15:571.3; *see also* Erick V. Anderson, *Appellate Review of Excessive Sentences in Non-Capital Cases*, 42 LA. L. REV. 1080, 1081 (1982).

147. *See* LA. REV. STAT. § 15:574.4 (2021); *id.* § 15:571.3.

148. PEW, LOUISIANA’S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23, at 13; S.B. 139, 2017 Leg., Reg. Sess. (La. 2017); LA. REV. STAT. § 15:574.4 (2021).

149. PEW, LOUISIANA’S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23, at 13; S.B. 139, 2017 Leg., Reg. Sess. (La. 2017); LA. REV. STAT. § 15:571.3 (2021).

sentences based on the constitutional Eighth Amendment prohibition against cruel and unusual punishment.¹⁵⁰ However, as will be illustrated in the subsections below, these existing mechanisms for post-sentencing relief are wholly inadequate, and sometimes completely ineffective, in providing these habitual offenders with a meaningful remedy.

1. Parole and Good Time

Though parole and “good time” releases seem like viable options for remedying the state’s overloaded prison population, a closer look at the application of these forms of relief shows that their underlying ameliorative effect is lacking.¹⁵¹ Looking again at the fact that in 2019 the majority of habitual offenders in Louisiana prisons were nonviolent offenders, it follows that these inmates were convicted prior to the effectuation of the 2019 amendments to § 15:529.1.¹⁵² Thus, the amount of time these prisoners were sentenced to as a result of the pre-2019 version of the statute is no longer congruent with the sentencing guidelines promulgated in the most current version of the statute.¹⁵³ The required amount of time that a nonviolent offender sentenced under prior versions of the statute must serve to meet the 25% threshold for parole eligibility is inherently longer than it would be for repeat offenders convicted of the same nonviolent crimes today.¹⁵⁴ The same issue arises when considering the effectiveness of early releases for good behavior.¹⁵⁵

For example, imagine that Thomas was convicted as a second-felony nonviolent habitual offender for possession with intent to distribute of two and a half pounds of marijuana, a Schedule I narcotic, on July 1, 2019, in a Louisiana state court. Thomas was thereafter sentenced to twelve years imprisonment pursuant to the versions of Louisiana’s habitual-offender and drug-possession statutes in effect at the time.¹⁵⁶ Because Thomas was sentenced after the passage of the Criminal Justice Reform Act of 2017, he will only have to serve 25% of his sentence to be considered for parole eligibility as a non-violent offender.¹⁵⁷ Nevertheless, Thomas was sentenced prior to the enactment of House Bill 518, so he still received a

150. See Anderson, *supra* note 146.

151. See, e.g., LA. REV. STAT. § 15:574.4 (2021); see also *id.* § 15:571.3.

152. LOUISIANANS FOR PRISON ALTS., *supra* note 21, at 1.

153. LA. REV. STAT. § 15:529.1(C)(3) (2021).

154. *Id.* § 15:574.4; *id.* § 15:529.1(C)(3).

155. *Id.* § 15:571.3; *id.* § 15:529.1(C)(3).

156. See *id.* § 15:529.1(A)(1) (Aug. 1, 2018–July 31, 2019); *id.* § 40:966(B)(2)(b) (Aug. 1, 2018–July 1, 2019).

157. *Id.* § 15:574.4.

substantial sentence enhancement as a habitual offender.¹⁵⁸ Thus, Thomas would need to serve 25% of his twelve-year sentence to obtain parole eligibility. As a result, Thomas would need to serve at least three years before the state's parole board could even consider his eligibility for sentencing review.¹⁵⁹

Now consider that Thomas, instead, did not commit his second-felony offense until August 2, 2019. After his arrest in early August, Thomas was convicted for his felony offense in September 2019 and sentenced to four years imprisonment in accordance with the drug possession statute in effect at the time.¹⁶⁰ Thomas's sentence would be far shorter in this second scenario because he did not commit his second-felony offense until August 2, 2019, a day after the effectuation of the House Bill 518 version of the state's habitual-offender statute. Pursuant to these amendments, the prosecutor handling his case would not be able to charge Thomas as a habitual offender despite the offense being his second nonviolent felony.¹⁶¹ Needing only serve 25% of his four-year sentence, Thomas would only have to serve one year of his sentence before becoming eligible for review by the state's parole board.¹⁶² In sum, the disparity in the required amount of time that Thomas would have to serve before he is eligible for parole review in these two separate, but nearly identical, scenarios simply boils down to a difference in which month of 2019 he was arrested and convicted.¹⁶³

Nonviolent habitual offenders convicted and sentenced under the pre-House Bill 518 version of the habitual-offender statute face a similar disparity in the percentage of sentence served that is required for good time release eligibility, with an even higher percentage threshold of 35% as opposed to the 25% required for parole.¹⁶⁴ Additionally inmates are vulnerable to a number of other obstacles in seeking early releases under both the parole and "good time" statutes, such as minor disciplinary infractions during the time of their incarceration.¹⁶⁵ For example, the

158. *See id.* § 15:529.1(A)(1) (Aug. 1, 2018–July 31, 2019).

159. *See id.* § 15:574.4 (2020).

160. *Id.* § 40:966(B)(2)(b) (Aug. 1, 2019–July 31, 2020).

161. *Id.* § 15:529.1(C)(3) (2020).

162. *See id.* § 15:574.4.

163. *See id.* § 15:547.4; *id.* § 15:529.1(C)(3); *id.* § 15:529.1(A)(1) (Aug. 1, 2018–July 31, 2019); *id.* § 40:966(B)(2)(b) (Aug. 1, 2019–July 31, 2020).

164. *See id.* § 15:571.3 (2020); *id.* § 15:574.4.1.

165. Lea Skene, *He Got Life for Stealing Hedge Clippers Under Louisiana's Habitual Offender Law. Now He's Free After 24 Years*, *ADVOC.*, https://www.theadvocate.com/baton_rouge/news/article_4ef13e22-0efa-11eb-b5e0-27d

state's parole board denied 62-year-old, habitual offender Fair Wayne Bryant's request for parole in 2019—after Bryant had already served nearly 23 years of his sentence—on account of a prison disciplinary infraction he received in 2018 for being caught with a cigarette, despite the fact that it was Bryant's only writeup in the preceding five years.¹⁶⁶ Though the board eventually granted Bryant parole in October 2020, the aforementioned tribulations he faced illustrate that even a misstep as minor as being caught with a cigarette in prison can serve as a major obstacle for any habitual offender seeking an early release through parole or the good time statute.¹⁶⁷

Further, the negative effects of being sentenced under the prior version of § 15:529.1 don't end at release. In Louisiana, parole allows for an inmate to be released from prison earlier than their sentence originally required based on the parole board's determination “that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen so that [they] can be released without detriment to the community or to [themselves].”¹⁶⁸ However, the prisoner must still serve the remainder of their sentence in the community under the direct supervision of the state's Department of Corrections.¹⁶⁹ Thus, even if a nonviolent habitual offender is granted an early release from prison through parole, they are not truly “released” from continuous state supervision.¹⁷⁰ Instead of truly receiving some form of ameliorative relief, paroled nonviolent habitual offenders sentenced under the pre-2019 version of § 15:529.1 will nevertheless be obligated to serve the remainder of their prolonged sentences, simply in a new location and under different circumstances.¹⁷¹

b0371d9f8.html [<https://perma.cc/G97L-Q3TT>] (last updated Oct. 15, 2020, 5:22 PM).

166. *Id.*

167. *See generally id.*

168. LA. REV. STAT. § 15:574.4.1(B) (2021).

169. *See* LA. BD. OF PARDONS & PAROLE, PAROLE IN LOUISIANA, <https://doc.louisiana.gov/wp-content/uploads/2019/08/PAROLE-IN-LOUISIANA.pdf> [<https://perma.cc/UJ48-2KKA>]; *see also* Brittany Williams, Comment, *The Underbelly of the Criminal Justice System: A Critique and Proposed Reform of Parole Hearings in Louisiana*, 81 LA. L. REV. 1569 (2020).

170. *See id.*; *see also* LA. REV. STAT. § 15:529.1(C)(3) (2021).

171. *See* LA. REV. STAT. § 15:574.4.1 (2021); *see also* LA. BD. OF PARDONS & PAROLE, *supra* note 169.

2. Constitutional Eighth Amendment Reviews

Another avenue for sentencing reconsideration available to nonviolent offenders sentenced under older versions of Louisiana's habitual-offender statute is through appellate review of their sentence based on the constitutional prohibition of excessive punishment.¹⁷² However, as recent Louisiana appellate jurisprudence evidences, courts are hesitant to grant writs of review to consider the constitutional excessiveness of sentences enhanced under the habitual-offender statute.¹⁷³ In instances where appellate courts do find sentences prescribed under § 15:529.1 excessive, it is usually under circumstances in which defendants were exposed to mandatory minimum life sentences.¹⁷⁴ However, as the following discussion of the Louisiana Supreme Court's recent decision in *State v. Bryant* illustrates, even exposure to unduly harsh life sentences is not a guarantee of constitutional review or sentence reductions for habitual offenders.¹⁷⁵

In *State v. Bryant*, the Louisiana Supreme Court denied Fair Wayne Bryant's writ application for review of his life sentence arising out of his status as a habitual offender without providing any explanation.¹⁷⁶ His life sentence first arose out of an incident in 1997 in which Bryant was arrested for unsuccessfully attempting to steal a pair of hedge clippers.¹⁷⁷ Following his conviction at trial, Bryant was sentenced to life imprisonment under the habitual-offender law based on his four prior felony convictions.¹⁷⁸

172. See Anderson, *supra* note 146, at 1081.

173. See *State v. Bryant*, 300 So. 3d 392 (La. 2020); *State v. Noble*, 133 So. 3d 703, 705–06 (La. Ct. App. 4th Cir. 2014); *State v. Johnson*, 709 So. 2d 672 (La. 1998); *State v. Morgan*, 673 So. 2d 256 (La. Ct. App. 4th Cir. 1996); *State v. Calhoun*, 776 So. 2d 1188 (La. Ct. App. 1st Cir. 2000); *State v. Ricks*, 823 So. 2d 441 (La. Ct. App. 4th Cir. 2002).

174. See *State v. Hayes*, 739 So. 2d 301 (La. Ct. App. 1st Cir. 1999) (in which the court held defendant's statutorily prescribed life sentence for theft over \$500 as a third-felony habitual offender excessive); *State v. Burns*, 723 So. 2d 1013 (La. Ct. App. 4th Cir. 1998) (wherein the court vacated defendant's mandatory life sentence for a fourth-felony conviction of possession and distribution of cocaine on grounds that it was constitutionally excessive); *State v. Neal*, 762 So. 2d 281 (La. Ct. App. 5th Cir. 2000) (holding that a mandatory life sentence under the habitual-offender statute as a fourth-felony offender for theft of goods valued between \$100 to \$500 was constitutionally excessive).

175. See *Bryant*, 300 So. 3d 392, 393–95.

176. *Id.*

177. *Id.*

178. *Id.*

While one of Bryant's prior convictions was a crime of violence—an attempted armed robbery conviction in 1979, 18 years earlier—the remainder of his subsequent convictions were nonviolent crimes, which the sole dissenting justice referred to as “crimes of poverty.”¹⁷⁹ Bryant's three nonviolent felony convictions included possession of stolen things, attempted forgery of a check worth \$150, and simple burglary of an inhabited dwelling.¹⁸⁰ In her lone dissenting opinion, Chief Justice Johnson noted that “[i]t is cruel and unusual to impose a sentence of life in prison at hard labor for . . . criminal behavior which is most often caused by poverty or addiction.”¹⁸¹

Chief Justice Johnson additionally noted the excessive expenses placed on state taxpayers as a result of the Louisiana's harsh sentencing scheme.¹⁸² The justice noted that “[s]ince his conviction in 1997, Mr. Bryant's incarceration has cost Louisiana taxpayers approximately \$518,667.”¹⁸³ Justice Johnson further noted that because Bryant is currently 60 years old, Louisiana taxpayers would have to pay an additional one million dollars to punish Bryant for his failed attempt to steal a pair of hedge trimmers if he were to live another 20 years in state confinement.¹⁸⁴ Though public sentiment overwhelmingly agreed with Justice Johnson's opinion on the matter,¹⁸⁵ the majority of the Louisiana Supreme Court nevertheless elected to deny Bryant's application for review without providing an explanation for its ruling.¹⁸⁶ While the *Bryant* opinion shows that Louisiana courts are hesitant to grant appellate review of even the most severe sentences enhanced under the habitual-offender law, additional jurisprudence illustrates that courts are even less likely to

179. *Id.*

180. *Id.* at 393.

181. *Id.*

182. *Id.*

183. *Id.* (citing data compiled by the Louisiana Department of Corrections for the fiscal year of 2019–2020 showing that the average cost per day of incarcerating one person is \$62.49).

184. *Id.*

185. See Amanda Holpuch, *Louisiana Court Upholds Black Man's Life Sentence for Trying to Steal Hedge Clippers*, GUARDIAN (Aug. 7, 2020), <https://www.theguardian.com/us-news/2020/aug/07/louisiana-court-denies-life-sentence-appeal-fair-wayne-bryant-black-man-hedge-clippers> [<https://perma.cc/ZJV9-8MGG>]; see also Teo Armus, *He Got Life for Stealing Hedge Clippers. The Louisiana Supreme Court Says It's a Fair Sentence.*, WASH. POST (Aug. 5, 2020), <https://www.washingtonpost.com/nation/2020/08/05/louisiana-supreme-court-life-sentence/> [<https://perma.cc/GT8B-DYNV>].

186. *Bryant*, 300 So. 3d 392.

grant reviews based on constitutional excessiveness for some of the more minor enhanced sentences imposed under § 15:529.1.¹⁸⁷

In *State v. Noble*, a man was convicted for possessing two marijuana cigarettes in 2011, his fourth conviction for marijuana possession.¹⁸⁸ Under the Louisiana law in effect at the time, a fourth conviction for simple possession of marijuana was considered a felony.¹⁸⁹ Because Noble was convicted for three prior nonviolent felony drug offenses, the state was allowed to prosecute him as a habitual offender under the version of the statute in effect at the time.¹⁹⁰ Despite the mandatory minimum 13-year sentence that Louisiana's habitual-offender statute required,¹⁹¹ the trial judge sentenced Noble to only five-years imprisonment at hard labor.¹⁹²

After the trial court made this discretionary decision, the state filed a writ application with the Louisiana Fourth Circuit Court of Appeal arguing that the defendant and trial court provided an insufficient showing to garner a deviation from the statutorily prescribed mandatory-minimum sentence.¹⁹³ The Fourth Circuit elected to affirm the five-year sentence, finding that Noble had sufficiently proven that the 13-year minimum was constitutionally excessive.¹⁹⁴ The state then appealed the Fourth Circuit's ruling to the Louisiana Supreme Court. The Louisiana Supreme Court reversed and vacated Noble's five-year sentence based on its own determination that the mandatory-minimum sentence was not constitutionally excessive.¹⁹⁵ The Court arrived at this determination after a finding that the trial judge's justifications for deviating from the statutory minimum—which described the detrimental effects on Noble's family and noted the lack of severity of Noble's primarily drug-related criminal history—were insufficient to show that Noble's circumstances were

187. Anderson, *supra* note 146, at 1092.

188. Fritchie, *supra* note 18, at 933 (citing *State v. Noble*, 133 So. 3d 703, 705–06 (La. Ct. App. 4th Cir. 2014)).

189. *Id.*

190. *Id.*

191. *Id.* at 934 (“Noble’s previous felony convictions for nonviolent drug offenses in 1991 and 2003 allowed the state to prosecute him under Louisiana’s habitual offender law as a third-felony offender, which carries a mandatory minimum sentence of thirteen years and four months’ imprisonment”) (citing *Noble*, 133 So. 3d at 705–06).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

exceptional enough to warrant a deviation from the statutorily authorized mandatory-minimum sentence.¹⁹⁶

The Louisiana Supreme Court then remanded the case to the trial court, and the court resentenced Noble to a term of 13 years and four months.¹⁹⁷ Noble subsequently appealed this new sentence to the Fourth Circuit, arguing that his sentence was excessive under the Louisiana Constitution, Article I, Section 2, which prohibits the imposition of excessive punishment.¹⁹⁸ Ultimately, the Fourth Circuit held that the trial court did not abuse its discretion in resentencing Noble to the mandatory minimum of 13 years and four months, as this prison-term was in line with the prescribed sentencing guidelines promulgated in the version of the state's habitual-offender statute in effect at the time.¹⁹⁹

Further examination of appellate court jurisprudence shows that the outcome presented in *State v. Noble* does not stand alone in its showing that nonviolent habitual offenders are unlikely to receive any form of reprieve from the Louisiana appellate court system.²⁰⁰ For example, in *State v. Johnson*, the Louisiana Supreme Court held that the trial court's reduction of the defendant's sentence from the mandatory minimum of 20 years imprisonment to 30 months based on the defendant's nonviolent criminal history was not justified.²⁰¹ Additionally, in *State v. Morgan*, the Fourth Circuit held that the trial court erred in deviating from the statutorily prescribed mandatory-minimum sentence of 20-years imprisonment by instead sentencing the defendant to only 7 years.²⁰² The *Morgan* court noted that, like in the *Noble* case, the trial judge failed to specify any adequate factual justification for deviating from the statutorily prescribed mandatory minimum other than merely declaring that the 20-year sentence was constitutionally excessive.²⁰³ Finally, in *State v. Ricks*, the Fourth Circuit held that the trial court's sentencing of the defendant to 10 years imprisonment for distribution of cocaine was an improper departure from the mandatory-minimum sentence of 15 years that the

196. *Noble*, 133 So. 3d at 705.

197. Fritchie, *supra* note 18, at 934 (citing *Noble*, 133 So. 3d at 705–06).

198. *Noble*, 133 So. 3d at 705.

199. Fritchie, *supra* note 18, at 934 (citing *Noble*, 133 So. 3d at 705–06).

200. *See State v. Johnson*, 709 So. 2d 672 (La. 1998); *see also State v. Morgan*, 673 So. 2d 256 (La. Ct. App. 4th Cir. 1996); *see also State v. Ricks*, 823 So. 2d 441 (La. Ct. App. 4th Cir. 2002).

201. *See Johnson*, 709 So. 2d at 672.

202. *See Morgan*, 673 So. 2d at 256.

203. *See id.*

habitual-offender statute prescribed based on the defendant's status as a second-time offender with a prior felony drug conviction.²⁰⁴

This line of jurisprudence illustrates why a nonviolent habitual offender's plea for sentence review based on the grounds of constitutional excessiveness is not truly a viable form of ameliorative relief.²⁰⁵ The actual success of these writs of review is hindered by the fact that, in most circumstances, the version of § 15:529.1 in effect at the time defendants committed the nonviolent offenses statutorily permitted the extended sentences that defendants now claim are unconstitutionally excessive.²⁰⁶ Louisiana jurisprudence supports this conclusion, as the state's appellate courts have consistently held that a reviewing court may only set aside a sentence "upon a finding of a manifest abuse of discretion by the sentencing judge and may not consider whether another sentence would have been more appropriate."²⁰⁷ It seems highly unlikely that a reviewing court would find a sentencing judge to have manifestly abused their discretion by simply following the appropriate sentencing guidelines prescribed in the version of the habitual-offender statute in effect at the time, especially if the sentence in question is anything less than life imprisonment.²⁰⁸

In sum, while there are a number of different forms of post-sentencing relief available to inmates sentenced as nonviolent habitual offenders today, none truly remedy the inequities to which these prisoners are subjected. Parole and "good time" are a means of early release, but prisoners can only obtain such release by serving a substantial percentage of their unjustifiably extensive sentences.²⁰⁹ Further, just because inmates are paroled does not mean that they are free of the state's continued supervision.²¹⁰ Additionally, minor prison infractions as innocuous as smoking a cigarette can prevent prisoners from even being considered by

204. See *Ricks*, 823 So. 2d at 441.

205. See generally *State v. Bryant*, 300 So. 3d 392 (La. 2020); *State v. Noble*, 133 So. 3d 703, 705–06 (La. Ct. App. 4th Cir. 2014); *Johnson*, 709 So. 2d 672; *Morgan*, 673 So. 2d 256; *Ricks* 823 So. 2d 441.

206. See *State v. Ventress*, 817 So. 3d 377, 382 (La. Ct. App. 5th Cir. 2002) (ruling that a defendant must be sentenced according to the law in effect at the time the adjudicated offense was committed, and that thus, any downward deviations from the appropriate statutorily prescribed mandatory minimum was unwarranted).

207. *Fritchie*, *supra* note 18, at 940 (citing *State v. Taylor*, 701 So. 2d 766, 772 (La. Ct. App. 4th Cir. 1997)).

208. See *id.*; see also cases cited *supra* note 174.

209. See LA. REV. STAT. § 15:574.4 (2020); *id.* § 15:529.1(C)(3).

210. See LA. BD. OF PARDONS & PAROLE, *supra* note 169.

the state's parole board.²¹¹ Finally, as the above-detailed jurisprudence illustrates, seeking appellate review of their sentence appears to be an all but fruitless endeavor for nonviolent habitual offenders.²¹² Thus, it is apparent that in order to rectify the injustices perpetrated under the authority of Louisiana's habitual-offender statute, further legislative reforms are necessary.

III. FURTHER AMENDING LOUISIANA REVISED STATUTES § 15:529.1

In order to effectuate the goals championed in the 2017 Louisiana Criminal Justice Reform Act, namely reducing the state's incarceration rate and its ensuing burden on state taxpayers,²¹³ the Louisiana Legislature must further amend Louisiana Revised Statutes § 15:529.1. These additional amendments should allow the prospective changes enacted in House Bill 518²¹⁴ to be applied retroactively to nonviolent habitual offenders currently serving extended sentences in Louisiana state prisons under the authority of the pre-2019 version of the statute.²¹⁵ Such an amendment will help to bring the state's sentencing policies more in line with the common public sentiment that the state's mandatory-sentencing laws are excessively severe.²¹⁶ Finally, these amendments will allow Louisiana to better conform its sentencing practices with the more lenient national sentencing standards governing punishment for nonviolent offenses.²¹⁷

211. See Skene, *supra* note 165.

212. See cases cited *supra* note 173.

213. See PEW, LOUISIANA'S 2017 CRIMINAL JUSTICE REFORMS, *supra* note 23.

214. Act No. 386, 2019 Leg., Reg. Sess. (La. 2019); LA. REV. STAT. § 15:529.1(K)(1) (2021).

215. See LOUISIANANS FOR PRISON ALTS., *supra* note 21 ("The majority (64 percent) of people serving time in Louisiana prisons under the Habitual Offender Statute are there for nonviolent crimes. Thirty-one . . . percent of people convicted as habitual offenders are incarcerated for drug offenses.").

216. Fritchie, *supra* note 18, at 938 ("Louisiana's resistance to reform comes at a time when public opinion conflicts with the length of the state's mandatory sentences, as demonstrated by a 2014 state poll that revealed that 78% of those surveyed opposed prison terms longer than six months for persons with multiple convictions of simple marijuana possession.").

217. See *id.* ("Because the legislature resists any substantial reform, there is a growing deviation from national sentencing standards, most notably in the area of nonviolent, low-level drug offenses. In 2013, United States Attorney General Eric Holder announced that low-level, nonviolent federal drug offenders could no longer be charged under 'ultimately counterproductive' mandatory minimums but, instead, must receive individual sentences.").

A. Current Post-Sentencing Ameliorative Relief Statutes Are Ineffective

Under current law, there appear to be three ways to effectuate the goal of providing post-sentencing ameliorative relief to nonviolent habitual offenders.²¹⁸ As discussed below, however, subsection K of Louisiana Revised Statutes § 15:529.1 renders each existing method ineffective. Thus, the most effective way for the Louisiana Legislature to remove this statutory block is to amend § 15:529.1 to grant the reviewing judge the discretion to amend previously adjudicated sentences in a way that conforms with the new sentencing guidelines under § 15:529.1(C)(3), which provides that subsequent nonviolent felony offenses may not be considered for the purposes of enhancing a previously convicted nonviolent felony offender's sentence.²¹⁹

1. Louisiana Code of Criminal Procedure Article 881.5

Legislation analogous to the above proposed amendment already exists in the form of Louisiana Code of Criminal Procedure article 881.5, entitled “correction of illegal sentence by trial court.”²²⁰ Article 881.5 of the Code of Criminal Procedure provides, “On motion of the state or the defendant, or on its own motion, at any time, the court may correct a sentence imposed by that court which exceeds the maximum sentence authorized by law.”²²¹ Despite the existence of this ameliorative code article, however, subsection K of Louisiana's current habitual-offender statute prevents the statute's applicability to nonviolent habitual offenders properly sentenced under prior versions of § 15:529.1. To refresh, § 15:529.1(K)(1) provides in pertinent part that “notwithstanding any provision of law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed.”²²² In comparing this provision to the language of Louisiana Code of Criminal Procedure article 881.5, it is apparent that the language of § 15:529.1(K)(1) would preclude article 881.5's availability to defendants like the ones mentioned in the hypotheticals discussed in this Comment's introduction. Thus, even if a nonviolent habitual offender was sentenced to a prison term that is no longer congruous with the provisions of § 15:529(C)(3)—the statutory amendment effectuated in House Bill

218. See LA. CODE CRIM. PROC. art. 881.5 (2021); LA. REV. STAT. § 15:308 (2021).

219. LA. REV. STAT. § 15:529.1(C)(3) (2021).

220. LA. CODE. CRIM. PROC. art. 881.5 (2021).

221. *Id.*

222. LA. REV. STAT. § 15:529.1(K)(1) (2021).

518—the offender’s sentence would still not meet the requirements of article 881.5, as the length of the sentence would not exceed the maximum sentence retroactively authorized by § 15:529.1(K)(1) and would therefore not be considered an illegal sentence as article 881.5 requires.²²³

2. Louisiana Revised Statutes § 15:308

Similar problems arise for habitual offenders seeking to have their sentences reduced under Louisiana Revised Statutes § 15:308,²²⁴ which provides that the amendments enacted into various criminal statutes by Act 403 of the 2001 Regular Session of the Louisiana Legislature, which included some amendments made to § 15:529.1, may be applied retroactively for the purposes of amending a convicted defendant’s sentence.²²⁵ Nevertheless, cases such as *State v. Dick* and *State v. Surry* illustrate that, while courts acknowledge that § 15:308 provides for the retroactivity of legislative amendments to criminal statutes in some circumstances, the language in subsection (K)(1) of the habitual-offender statute prevents such retroactivity of the law from applying to habitual offenders.²²⁶

3. Louisiana Code of Criminal Procedure Article 893(A)(1)(a)

Louisiana Code of Criminal Procedure article 893(A)(1)(a) also provides nonviolent habitual offenders with some form of post-conviction relief.²²⁷ The article states, in pertinent part:

When it appears that the best interest of the public and of the defendant will be served, the court, after a first, second, or third conviction of a noncapital felony, may suspend, in whole or in part, the imposition or execution of either or both sentences, where suspension is allowed under the law, and in either or both cases place the defendant on probation under the supervision of the

223. *Id.* § 15:529.1(C)(3); LA. CODE. CRIM. PROC. art. 881.5 (2021); LA. REV. STAT. § 15:529.1(K)(1) (2021).

224. *See State v. Dick*, 951 So. 2d 124 (La. 2007); *see also State v. Surry*, 121 So. 3d 804 (La. Ct. App. 1st Cir. 2013); *see also State v. Belvin*, No. 18-0421, 2019 WL 1473514 (La. Ct. App. 4th Cir. Apr. 3, 2019).

225. *See LA. REV. STAT. § 15:308(B)* (2021).

226. *See Dick*, 951 So. 2d at 124; *see also Surry*, 121 So. 3d at 804; *Belvin*, 2019 WL 1473514.

227. *See LA. CODE CRIM. PROC. art. 893(A)(1)(a)* (2021).

division of probation and parole.²²⁸

This article provides sentencing judges with the discretion to suspend a habitual offender's sentence in whole or in part if the judge deems that such a suspension would serve the interest of both the public and the defendant in light of the defendant's disposition and the facts of the particular case.²²⁹ Despite this article, however, the cases discussed above show that state courts are unwilling to utilize this statutory provision for habitual offenders, even in cases in which its application would seem the most appropriate.

For example, in the case of *State v. Bryant*, the Louisiana Supreme Court refused to amend a 63-year-old man's life sentence, authorized under the habitual-offender statute, for his failed attempt to steal a pair of hedge clippers, instead electing to allow him to spend the rest of his living years behind bars.²³⁰ On its face, it seems that this case certainly should have warranted at least a partial suspension of the defendant's sentence when considering the best interest of the public and the defendant.²³¹ Fortunately, the state's review board granted Bryant parole in October 2020,²³² but a reviewing court could have provided him with the post-sentencing relief he deserved long before this eventual outcome.²³³ Alternatively, consider the Fourth Circuit's decision in *State v. Noble*, in which a father was sentenced to over 13 years in prison based on his three prior nonviolent felony drug convictions for simply possessing two marijuana cigarettes for personal use.²³⁴ In such a circumstance, the court would have certainly served the best interest of the defendant and the public—or more specifically Noble's wife and children—if it had elected to suspend at least a portion of Noble's unconscionable sentence.²³⁵ It seems likely that any rational onlooker examining the facts of Noble's case would conclude that such a situation warranted the remedies provided by article 893(A)(1)(a). Nevertheless, in both cases, along with many other cases involving habitual offenders, the courts refused to exercise any such discretion.²³⁶

228. *Id.*

229. *See generally id.*

230. *See State v. Bryant*, 300 So. 3d 392, 392 (La. 2020).

231. *See generally* LA. CODE CRIM. PROC. art. 893(A)(1)(a) (2021).

232. *See Skene, supra* note 165.

233. *See* LA. CODE CRIM. PROC. art. 893(A)(1)(a) (2021).

234. *See State v. Noble*, 133 So. 3d 703, 703 (La. Ct. App. 4th Cir. 2014).

235. *See generally* LA. CODE CRIM. PROC. art. 893(A)(1)(a) (2021).

236. *See State v. Bryant*, 300 So. 3d 392 (La. 2020); *Noble*, 133 So. 3d 703; *State v. Johnson*, 709 So. 2d 672 (La. 1998); *State v. Morgan*, 673 So. 2d 256 (La.

In sum, legislation allowing for ameliorative relief does exist in the form of Louisiana Revised Statutes § 15:308 and articles 881.5 and 893(A)(1)(a). However, section K of the habitual-offender statute illustrates that they are inadequate to remedy the excessive sentences of nonviolent habitual offenders convicted before the House Bill 518 amendments. It seems that any statute or code article enacted by the state legislature seeking to provide ameliorative relief would be inapplicable to inmates sentenced under § 15:529.1 based on the statute's requirement that inmates must be sentenced in accordance with the version of the statute in effect at the time of the commission of their offense.²³⁷ Thus, it is up to the Louisiana Legislature to address this injustice by enacting new legislation directly providing unequivocal, ameliorative relief to the nonviolent habitual offenders precluded from it by the current framework of the habitual-offender statute.

B. The Need for an Unequivocal Statement of Amelioratory Rights in Louisiana Revised Statutes § 15:529.1

The only way to ensure that nonviolent habitual offenders sentenced under prior versions of the habitual-offender statute may obtain ameliorative relief is to amend § 15:529.1 by inserting additional provisions directly within the statute's framework. Specifically, these provisions will serve to establish the availability of sentence review for the purpose of realigning previously adjudicated prison terms with the statute's new sentencing guidelines. Until such an amendment is instituted, nonviolent habitual offenders will continue to serve overburdensome sentences with no reprieve in sight. As such, the Louisiana Legislature should amend § 15:529.1 to provide as follows:

L. The provisions of Subsection C of this Section, as amended by Act No. 386 of the 2019 Regular Session of the Legislature, shall henceforth be made available to reviewing courts for their consideration in determining whether to grant ameliorative relief to nonviolent habitual offenders petitioning for sentence review under this provision by amending petitioners' sentences in order to make them more congruous with the sentencing guidelines effectuated into this Section by Act. No. 386 of the 2019 Regular Session of the Louisiana Legislature.

Ct. App. 4th Cir. 1996); *State v. Ricks*, 823 So. 2d 441 (La. Ct. App. 4th Cir. 2002).

237. See LA REV. STAT. § 15:529.1(K)(1) (2021).

The new subsection L expressly grants reviewing courts the authority to review the sentences of nonviolent habitual offenders sentenced before the 2019 amendment in order to amend their sentences so that they better reflect the habitual-offender statute's new sentencing guidelines. Additionally, in order to prevent any contradictions within the habitual-offender statute with the addition of Subsection L, Subsection K of § 15:529.1 will also need to be amended.²³⁸ This revision need not be extensive, however, as § 15:529.1(K)(1) could simply be amended to read: "Except as provided in Paragraph (2) of this Subsection *and the provisions of Subsection L of this Section*, notwithstanding any provision of law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed."²³⁹ These two additional amendments will ensure that defendants are no longer left with hollow options for ameliorative relief like articles 881.5 and 893(A)(1), while also explicitly stating that sentences can be adjusted notwithstanding the ban contained in the current version of section K.

In practice, a defendant such as Fair Wayne Bryant would be able to petition to the court presiding over his prison term to readjust his sentence. Such an amendment could have substantially reduced Bryant's incredibly lengthy sentence, while also saving the Louisiana taxpayer a significant amount of money. Defendants like Noble, who had to serve roughly 14 years for possession of two marijuana cigarettes based on his two prior cocaine convictions, could be reunited with their families sooner. In the *Noble* case specifically, the trial court tried to rectify the injustice of Noble's sentence but could not because of the restrictive language of subsection K.²⁴⁰ As such, the amendments proposed herein would free courts from the restrictive language of the current habitual-offender statute that prevents them from exercising their judicial discretion to provide

238. *See id.* ("Except as provided in Paragraph (2) of this Subsection, notwithstanding any provision of law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed").

239. *See id.*

240. *See Noble*, 133 So. 3d at 706 ("Although both trial judges clearly found that the mandatory minimum sentence in this case (thirteen and a half years) is grossly disproportionate to the crime in this case . . . at the resentencing hearing the trial judge was unable to articulate additional reasons beyond those already found insufficient by the Louisiana Supreme Court to support a downward departure . . . [u]nder these circumstances, we cannot find that the trial judge abused his discretion.").

more equitable sentences for defendants such as Noble and Bryant who they believe deserve more lenient treatment under the law.

The specific language provided in these amendments is the best solution to achieve this goal. Repealing section K of the statute altogether would hinder the statute's more justified purpose of appropriately sentencing violent habitual offenders. The more modest approach recommended herein will not only provide nonviolent habitual offenders with the continued relief that they deserve, but it will also not conflict with the state's interest of punishing violent criminal acts to ensure the safety of society. Thus, the changes enacted into the habitual-offender statute by these amendments will adequately balance the interest of Louisiana's nonviolent habitual-offender inmate population with the state's interest of continuing to deter repeated violent criminal behavior.

CONCLUSION

Louisiana has a troubled history with its criminal-justice system and mass incarceration, as the two issues continue to serve as a lingering blemish on the state's national reputation to this day.²⁴¹ The Louisiana Legislature and Governor John Bel Edwards undoubtedly pushed the state in the right direction with the much-needed reforms they implemented in the 2017 Louisiana Criminal Justice Reform Act along with the recent amendments they implemented into the habitual-offender statute through House Bill 518. However, most of these reforms only operate prospectively. Therefore, many of the positive effects of these revisions will not noticeably manifest themselves for several years. As a result, a large contributor to the state's issue of mass incarceration, namely the lengthy—and now, unwarranted—prison sentences imposed on nonviolent habitual offenders, will continue to persist under the state's currently available remedies.

As this Comment illustrates, the problem of mass incarceration, a result of the state's historied, overzealous application of the habitual-offender statute to nonviolent offenders, is a pressing issue that is in desperate need of a practical and readily available solution. Thus, in order to resolve what is one of Louisiana's oldest and most persistent problems, the Louisiana Legislature must take further action to amend Louisiana Revised Statutes § 15:529.1. The model statute detailed above, providing ameliorative relief to nonviolent habitual offenders through expanded

241. See Lea Skene, *Louisiana Once Again Has Nation's Highest Imprisonment Rate After Oklahoma Briefly Rose to the Top*, *ADVOC.* (Dec. 25, 2019), https://www.theadvocate.com/baton_rouge/news/article_4dcdfe1c-213a-11ea-8314-933ce786be2c.html [<https://perma.cc/ZA96-22T7>].

judicial discretion for sentencing review, should be implemented by the Louisiana Legislature in order to effectuate this necessary change.