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Imprisoning the Nation: Minimum Sentences in South Africa

**by
Edwin Cameron*
Constitutional Court of South Africa**

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Introduction: A Court with its foundations in prison

1. It is a great pleasure to be here today. I want to thank the University, and the Dean, Professor Bernard Martin, in particular, for granting me the honour of speaking in the University's distinguished lecture series.
2. The Constitutional Court, the building itself, is where I would want to start my journey with you tonight.
3. Those of you who have visited the Court will have seen its uniquely beautiful, accessible architecture, which people from all over the world admire.
4. Unlike the top courts of many other countries, the Constitutional Court is not a heavy structure erected at the head of a huge, imposing set of stairs, with Greco-Roman columns and a massive pediment looking down on intimidatingly on litigants and members of the public.

5. Instead, rather than seeking inspiration abroad, the Court's architects examined our own past and the significance of the spot in Braamfontein, Johannesburg, that the Court would occupy.¹
6. The Court itself stands alongside the Old Fort Prison – the prison where Nelson Mandela and Mahatma Ghandi were held. 150 000 red, worn-down bricks are built into the walls of the courtroom itself. Many of these bricks come from the Awaiting Trial Block in whose foundations the Court is now built — a symbol of oppression that imprisoned many hundreds of thousands of black South Africans under apartheid – mostly pass offenders, punished simply for being in an urban area with a black skin.
7. It is fitting that the Court, a vibrant symbol of the democracy that replaced apartheid, stands on the ruins of a notorious pass law prison – thus symbolising the triumph of hope over an iniquitous past. As the Justices of the Court sit in the courtroom, judging cases, we are surrounded by the bricks of apartheid – a constant reminder that our country used incarceration for misguided ends, and that the Constitution envisages a future with more respect for human worth.

1 From the Constitutional Court Clerk's Tour Guide Packet:

A high-security prison was built on this site in 1893 to house white male prisoners in Johannesburg. A few years later (1896-1899), a fort was built around the prison by the Boer President, Paul Kruger, to protect the Zuid-Afrikaansche Republiek from the threat of a British invasion into the Transvaal. The Fort's location provided a vantage point over the bustling mining city of Johannesburg and beyond towards Pretoria.

In 1900, during the South African War (or Anglo-Boer War), the British seized Johannesburg and imprisoned Boer soldiers in the Fort. A group of Cape Afrikaners was executed at the Fort, marking the beginning of the long history of the Fort as a place of punishment, confinement, and abuse. Once the war was over, in 1902, the Fort reverted to being a prison. It was Johannesburg's main place of incarceration for eight decades. The Old Fort prison was later extended to include "native" men's cells, called Number Four, and a women's section was added in 1907. The awaiting-trial block was constructed in the 1920s.

Both common criminals and political activists against apartheid were held at the prison. Mahatma Gandhi was imprisoned here in 1906, and striking white mineworkers were held here in 1907, 1913, and 1922. Under the apartheid government, only whites were held in the Old Fort itself, except for Nelson Mandela, who was given a bed in the hospital section when he was as an awaiting-trial prisoner in 1962, before his first conviction for leading workers to strike and leaving the country illegally. Also detained at various sections of the prison were Chief Albert Luthuli, Robert Sobukwe, Bram Fischer, Joe Slovo, Winnie Madikizela-Mandela, Barbara Hogan, and many other political activists.

8. The Court's design dates back to 1997. President Nelson Mandela himself praised it:

“The Constitutional Court building, indeed the entire Constitutional Hill precinct, will stand as a beacon of light, a symbol of hope and celebration. Transforming a notorious icon of repression into its opposite, it will ease the memories of suffering inflicted in the dark corners, cells and corridors of the Old Fort Prison. **Rising from the ashes of that ghastly era, it will shine forth as a pledge for all time that South Africa will never return to that abyss.** It will stand as an affirmation that South Africa is indeed a better place for all.”

9. Yet, as President Mandela was speaking these words, a terrible irony was emerging. For, in 1997, as architects were finalising the Court's design, our Parliament adopted a rather “neutral sounding” law,² the Criminal Law Amendment Act of 1997.³

10. This introduced the harsh mandatory minimum sentencing laws that have plagued our country for the past 20 years. This year, 2017, is the twentieth anniversary of their enactment. It is fitting that we should pause to consider their retrograde social consequences; and this is my message tonight.

Criminal Law Amendment Act, 105 of 1997

11. The new statute strictly curtailed the power of judges to determine the length of prison terms for offences or offenders. Instead, it provided minimum sentences for certain serious offenses. These included a mandatory life sentence for –

- premeditated murder,

² Dirk van Zyl Smit “Mandatory Sentences: A new conundrum for the new South Africa?” Punishment and Society vol 2(2) 197 (2000).

³ 105 of 1997.

- murder of a law enforcement official, or a potential state witness;
 - murder connected to a rape or robbery with aggravated circumstances;
 - rape committed more than once by the accused or others,
 - gang rape,
 - rape of a minor under 16.⁴
12. The law mandates a 15-year sentence for a first-time offender convicted of murder (under circumstances that would not otherwise merit a life sentence), robbery, certain drug-related offenses, weapons-related offenses, or “[a]ny offence relating to exchange control, extortion, fraud, forgery, uttering, theft”.
13. A repeat offender *must* be sentenced to not fewer than 20 years, and a third- or further-time offender a sentence of not fewer than 25 years.
14. Judges are allowed to depart from the mandatory minimum regime only if they are “satisfied that *substantial* and *compelling* circumstances exist which justify the imposition of a lesser sentence”.
15. This gives sentencing judges some leeway,⁵ but not very much.⁶
16. In addition, the minimum sentences cannot be suspended,⁷ and time spent awaiting trial cannot be counted as part of the sentence to be served.⁸

4 SS Terblanche “Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997” in *Criminal Justice in a New Society* (2003) 194 at 195-213 gives a full exposition of the import and language of the amending statute.

5 *S v Malgas* 2001 (2) SA 1222 (SCA).

6 *S v Vilakazi* 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA), per Nugent JA, citing the absence of “gradation” in the compulsory sentences, and quoting the incisive criticisms of Professor Terblanche.

7 Section 51(5).

8 Section 51(4).

17. Make no mistake: all the violent crimes listed are horrible. And our country suffers appallingly from awful and often unspeakable criminal violations and intrusions.
18. I don't argue tonight that crime in our country is not horrific. It is. Nor do I argue that criminals should not suffer severe punishment for the horrors they inflict on members of the public. They should.
19. My point is different. It is that minimum sentences are a poorly-thought out, misdirected, hugely costly *and above all ineffective* way of punishing criminals.
20. This is because minimum sentences have a pernicious effect – on our correctional system, on the offenders in it, and, most of all, on us – on our society, on us, the people.
21. The reason is that minimum sentences offer us a false promise – the belief that we are actually *doing* something about crime. We are not. And this false belief lets those who are responsible for effectively dealing with crime – our society's leaders – off the hook.

How did we get mandatory minimum sentences?

22. Understanding our current mandatory minimum scheme requires us to go back to 1994.⁹ Just as our country pulled itself out of the pernicious and degrading horrors of apartheid and started moving to democracy, there seemed to be an explosion of violent crime.
23. Comparative statistics to determine whether crime had actually increased are hard to come by. This is compounded by the

⁹ Even before: Dixon in Bill Dixon and Elrena van der Spuy *Justice Gained: Crime and Crime Control in South Africa's Transition* (2004) at xix quotes a seemingly unpublished 1992 paper by Glanz that says one of the few aspects about which all South Africans would agree is "the unprecedented increase in crime that has taken place over the past few years and the intolerable level that crime has reached".

fact that before democracy “South Africa” excluded almost 10 million of its people in the supposedly “independent” Bantustan homelands.¹⁰

24. Nevertheless, the new democracy experience a palpable fear. This was based in a grim reality – the massive upsurge in violence during the transition to democracy.

25. In the statistical year 1995-1996 alone, there were nearly 27 000 murders. As of 2007, South Africa was said to occupy the top of the world’s rankings in violent crime.¹¹

26. At that time, crime was seen not merely as an unfortunate reality. Crime threatened to destroy the new democracy itself.

27. In *S v Makwanyane*,¹² the great decision handed down in June 1995, the Constitutional Court declared the death penalty unconstitutional. The newly appointed President of the Court, Justice Chaskalson, acknowledged the perils of the crime wave:

“The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution”.¹³

28. *S v Makwanyane* is a globally celebrated case. It constitutes eloquent testimony not only of the strength of the Constitutional Court and our Constitution, but of the high aspirations that built our democracy.

29. By striking down the death penalty, the Court took a brave but perilous step. It invalidated a punishment that a clear majority

10 Statistics for pre-1994 “South Africa” related to a very different population. There is some indication, however, that, as civil dissent against apartheid grew, crime from the mid-1980s steeply rose. I am indebted for this point to Clare Ballard of the Lawyers for Human Rights.

11 Anthony Altbecker *A Country at War with Itself* (2007) at 12. Later, the author adds, “[T]he fact is that the vast majority of countries, including the poorest ones with the most horrible histories, really do seem to be much less violent than South Africa” (96).

12 1995 (3) SA 391 (CC).

13 *Makwanyane* para 117

of South Africans, black and white, urban and rural, township and suburban, supported.¹⁴

30. This stoked the fears of many – not based on statistics or sound theory – that the now-defunct death penalty had been an effective deterrent for violent criminals – yet now it was being taken away.¹⁵
31. The population’s rising sense of fear after 1994 was accompanied by sharply diminishing institutional proficiency on the part of the new state.
32. The police forces inherited by South Africa’s first post-apartheid government “were in a shambles”: they were “poorly led, poorly trained and thoroughly bewildered by the transition to democracy”.¹⁶
33. The detective services were experiencing an exodus of qualified [white] detectives who had served under apartheid.¹⁷ In addition, there were repeated restructurings of the police force. These had a calamitous effect on operational efficiency.¹⁸
34. By the end of 1999, the police force was one-fifth smaller than it had been in 1994 – and it was “worse equipped”.¹⁹

14 See James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) at 6.

15 While it is certainly true that, during apartheid, “white South Africans perceived the death penalty to be an appropriate and effective deterrent for black murderers” (Turrell in Dixon and van der Spuy (2004) (above) at ch 4 87), the same can surely be said, after apartheid, of the attitude of most South Africans to murderers and murder. Inspecting judge of prisons, JJ Fagan “Our bursting prisons”, *Advocate* (April 2005) at 33 rightly suggests that the minimum sentences were enacted possibly also to “placate the public after the abolition of the death sentence”.

16 Altbeker (2005) at 261.

17 Altbeker (2005) at 261 notes that white police officers “fearful for their career prospects and, in some cases, unwilling to work for a black-led Service, either nursed new grievances or left the organisation” (261). Altbeker (2007) at 139-145 notes that the detective services “suffered badly in the organisational politics of police transformation” post-1994 (139). The author says that “when as part of the civilian police directorate in 1998 he spoke to detectives countrywide, he found himself “meeting the most profoundly miserable people imaginable” (143). Comparable post-transition effects were perceptible amongst prosecutors (145).

18 Altbeker (2005) at 261-262; Altbeker (2007) at 27-29.

19 Altbeker (2005) at 262. The author continues: “Since the nadir, however, police management, assisted by a rapidly growing budget, has executed a remarkable, but largely unacknowledged, turnaround”, in which police numbers grew by nearly one-third between 2000 and 2005, rebounding to their 1995 level (262-263)

35. And so, in a new democracy struggling to secure its legitimacy, the state needed to respond to a racially loaded outcry from both black and white citizens about crime. Leading politicians felt compelled to act – and, perhaps more importantly, they felt compelled *to be seen to act*.
36. So Parliament acted in haste. The 1997 statute was adopted even though, under apartheid, just a quarter-century before, in 1971, the apartheid ideologue Dr Connie Mulder introduced minimum sentences for dagga and other drug-related offences.²⁰
37. These sentences had an appalling impact, were known to have failed completely in curbing the use and distribution of dagga, and were condemned with unusual outspokenness by the apartheid judiciary.²¹ The apartheid judges even condemned minimum sentences in “political” (that is, anti-apartheid) cases.²²
38. My first experience of the impact of minimum sentences was when I visited Vereeniging prison, in July 1976, as a vacation-break registrar to Judge Douglas Davidson, a judge of the then Transvaal Provincial Division of the Supreme Court, who was on circuit court. We found a prison crammed full of woman and men, most of whose only sin was to possess or pass on small amounts of dagga – something the indigenous populations of this country had been doing for centuries. Minister Mulder’s vicious laws forced the courts to impose severe minimum sentences for even trivial cases of dagga possession and dealing. The human impact was unforgettable.
39. Despite this acute history, the 1997 statute was adopted even though, just a year before, the new Minister of Justice, Dullah Omar – a peaceable and principled man – had appointed a committee of the South African Law Reform Commission to consider sentencing policy – and before the committee could report back to him.²³

20 Act 41 of 1971.

21 *S v Gibson* 1974 (4) SA 478 (A) at 481H-482B

22 *S v Mpetha* 1985 (3) SA 702 (A) at 706H (Corbett JA) and 710D-E (van Heerden JA, who as counsel eleven years before had argued for the appellant in *S v Gibson*). At issue was the five-year minimum sentence under the Terrorism Act 83 of 1967.

40. Parliament enacted the provisions as part of a multi-pronged legislative response intended to deal severely with crime and criminals.
41. Other legislative components of the strategy included a domestic violence statute that enabled easier recourse to the courts for protection orders,²⁴ a witness protection program,²⁵ a wide-ranging statute ostensibly dealing with organized crime, but in fact casting the criminal net much wider, and giving the courts powers to freeze and order forfeiture of criminal gains,²⁶ tough new bail laws,²⁷ harsher conditions²⁸ restricting the release of prisoners on parole²⁹ and increased sentencing jurisdiction for magistrates.³⁰
42. But the harshest – and most immediately impactful – of these measures were the dramatically increased sentences for most offenders – even for non-violent offences like fraud, exchange control violations and drugs.

23 Van Zyl Smit (2004) at 239. Chris Giffard and Lukas Muntingh “The Effect of Sentencing on the Size of the South African Prison Population”, report commissioned by the Open Society Foundation for South Africa (, 2006),, quoting Julia Sloth-Nielsen, state that there is no doubt that the Parliamentary Portfolio Committee on Justice and Constitutional Development in its haste to enact the new laws “by-passed” the South African Law Reform Commission. See too also Giffard and & Muntingh “The numbering of days: Sentencing and prison population growth” *SA Crime Quarterly* (June 2007) at 21.

24 Domestic Violence Act 116 of 1998.

25 Witness Protection Act 112 of 1998, replacing section 185A of the Criminal Procedure Act 51 of 1977.

26 Prevention of Organised Crime Act 121 of 1998, covering “racketeering” (section 2), money laundering (section 4), criminal gang activities (section 9)

27 Criminal Procedure Amendment Act 1995; section 4(f) of the Criminal Procedure Second Amendment Act 85 of 1997, requiring “exceptional circumstances” for release on bail where an accused was charged with specified serious crimes. The Constitutional Court upheld the new bail laws in June 1999 in *S v Dlamini* 1999 (4) SA 623 (CC).

28 Parole and Correctional Services Amendment Act 1997, which came into effect on 1 October 2004. See Altbeker (2007) 32-33f. Steinberg (2005) accurately notes that “the flexible release system used during the apartheid era was scrapped in 1993, to be replaced by a confusing and convoluted ‘credits’ system incapable of deployment in the management of prison volumes”. The 1993 system was, in turn, replaced in 2004 by the new provisions, “which render the release system even more rigid”.

29 Section 73(6)(b)(iv) of the Correctional Services Act 111 of 1998, which came into force on 31 July 2004, provides that anyone sentenced to life incarceration “may not be placed on day parole or parole until he or she has served at least 25 years”. Section 73(6)(b)(v), which required that those serving minimum sentences of imprisonment serve at least four-fifths of their sentences, was repealed by section 12 of Act 5 of 2011.

30 The Magistrates Court Amendment Act 66 of 1998 extended the sentencing powers of magistrates presiding in district courts (twelve months’ to three years) and regional courts (ten to fifteen years).

43. The Law Reform Commission’s report did eventually appear. But it came too late for Parliament to consider it. It set out six alternatives.³¹ These included more sensible, just measures such as presumptive sentencing guidelines, voluntary sentencing guidelines, and legislative guidelines.³² Presciently, it also cautioned that, although too early to gauge long-term effects, the new sentences would likely have a “profound” effect on the prison population.³³
44. But Parliament had already shut the door. It had selected the harshest option – without the benefit of mature law reform deliberative processes.
45. In enacting the new sentences, government looked to the UK and the US experiences with mandatory minimums – and it hurriedly incorporated them.
46. Politically, this provided seeming benefits:
- a. Harsh compulsory sentences eliminated the risk of judges supposedly being “soft on crime”.
 - b. They diminished the risk of inconsistent sentencing.
 - c. Most important, they provided politicians with a pay-off – the appearance of a state coordinated and purposeful in dealing with crime, responsive to public anxiety and fears, and tough on criminals.
47. The pay-off was beguiling. But it was a fraud. Minimum sentences, as we shall see, achieve almost nothing in reducing crime.

31 In *S v Vilakazi* 2012 (6) SA 353 (SCA) para 10, Nugent JA pointed out that a sophisticated system to construct guidelines to secure consistency in sentencing was subsequently recommended by the South African Law Reform Commission in December 2000 – a recommendation made after a comprehensive review of sentencing practice in this country and abroad. But the sophisticated guideline-system the SALRC recommended, which “would have been welcome to many judges who face the difficult task of sentencing”, was never introduced. Instead the “temporary regime” in the 1997 statute became permanent.

32 Sentencing Guidelines: South Africa, Library of Congress, available at: <https://www.loc.gov/law/help/sentencing-guidelines/southafrica.php>

33 SALC Discussion Paper 91, Project 82, page 16.

48. What is more, the pay-off was packaged as a *temporary* solution to a *temporary* problem.

49. Minister Omar told Parliament that the new sentences were “to tide us over our transition period”.³⁴ They were necessary to “restore confidence in the ability of the criminal justice system to protect the public against crime”.³⁵ The initial period for which the statute operated was two years only.³⁶

50. Around that time, there was a widespread belief that crime, although high, had its roots in apartheid and the struggle against it. As justice prevailed in the new democratic order, it would gradually abate. One scholar summarises the approach to crime and punishment when the new government took power in April 1994 as embodying widespread acceptance that—

“Violent crime in particular was attributed to the dislocation caused by the struggle against apartheid. The belief was that in a democratic South Africa, the crime rate would gradually decline and that the remaining crime could be dealt with by a fair criminal justice system, following the precepts of the new Constitution and imposing relatively moderate punishments.”³⁷

51. The real state of affairs, had it been known and appreciated, might have provided some support for this more insightful approach.

34 Van Zyl Smit (2000) 203

35 Hansard, *Debates of the National Assembly* 16 November 1997, cols. 608-8).

36 Section 53 of the Criminal Law Amendment Act of 1997 states: “Sections 51 [minimum sentences for certain serious offences] and 52 shall, subject to subsections (2) and (3), cease to have effect after the expiry of two years from the commencement of this Act.”

37 Van Zyl Smit (2004) at 231. The author says this attitude was reflected in the “Alternative White Paper” on penal reform by the Penal Reform Lobby Group in 1995. See also Altbeker (2007) at 29-33: Despite efforts at ameliorating the structural problems of unemployment and poverty that many saw as the underlying causes of crime, “crime in post-liberation South Africa quickly became a hot political problem and, as public fears grew, it became increasingly difficult to sell a root-causes-first argument. The honeymoon ended quickly and, by the late 1990s, the apparent wisdom of government’s conviction that crime had its roots in social problems that must be tackled first, began to sound like a refusal to take responsibility for the problem” (31). Altbeker (2007) recounts an arresting summary of this “textbook account of the roots of present-day violence” (96-100), even though, as he explains, “it doesn’t completely satisfy” (101-103). Van Zyl Smit (2004) 232. Van Zyl Smit (2000) 203.

52. Between 1991 and 2000 – before the 1997 statutes came into effect – the number of prosecutions dropped by nearly one-quarter, while the number of convictions dropped by nearly one-fifth.³⁸
53. So until the end of the decade in which South Africa became a democracy, there was *in fact* “no significant increase in the number of cases that the criminal justice system was being called upon to process”.³⁹
54. To the contrary, there was “a decline in the number of offenders recorded as being found guilty of crime”.⁴⁰
55. Admittedly, these statistics could point to a decrease in the efficacy of the criminal justice system, but they may also point to a decrease in actual crime.
56. The fact is that Parliament didn’t know, and may have been misinformed.
57. As with our national response to AIDS – another insidious and frightening threat to our new democracy – we should have rigorously followed evidence and evidence-based solutions. But we didn’t. As with AIDS, this may have cost us very dearly.
58. Instead, Parliament committed itself to the new system – and it extended it every two years until in 2007. In that year, Parliament made with only minor amendments made the new sentences permanent.⁴¹
59. In *S v Dodo*, the Constitutional Court – sitting in that building built into the foundations of an apartheid pass law prison – upheld the harsh sentencing regime.⁴²

38 Jonny Steinberg “Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa”, paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005, citing figures from the Institute of Security Studies “Criminal Justice Monitor”, available at www.csvr.org.za/docs/correctional/prisonovercrowding.pdf (accessed 5 July 2017).

39 Van Zyl Smit (2004) 232.

40 Id.

41 Criminal Law (Sentencing) Amendment Act 38 of 2007.

42 Affirming the approach to the “substantial and compelling” formula the Supreme Court of Appeal adopted in *S v Malgas* 2001 (2) SA 1222 (SCA).

60. Parliament even tried to extend the minimum sentencing laws to apply to children over 16 but under 18.⁴³ The Constitutional Court, by a majority of 7-4, struck the extension down.⁴⁴
61. It is now exactly two decades since the minimum sentences were enacted. They are still in effect. It is time to reconsider them. Let me explain why.

How do we justify minimum sentences?

62. The state's moral power to put people in prison is founded on the premise that there is some purpose behind punishment – some underlying theory that justifies the use of state power to punish individuals for their criminal behavior. If the mandatory minimum scheme is to be justified, it must be because it promotes some defensible purpose.
63. Scholars often speak of four possible rationales for incarceration.
64. **First**, the threat of incarceration deters individuals from engaging in criminal activity.
65. **Second**, incarceration incapacitates criminals – while they are in prison, it prevents them from committing more crimes.
66. **Third**, putting people in prison can rehabilitate criminals. Prison works teaches them a lesson – and it makes them better, more useful, members of society when they get out.
67. And **fourth**, prison is retributive. It inflicts vengeance. It is a vindication of justice, for victims and for society as a whole.

43 Section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 made minimum sentences applicable to offenders aged 16 and 17 at the time they committed the offence.

44 *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (2) SACR 477 (CC).

68. Unfortunately, the mandatory minimums that Parliament enacted cannot be satisfactorily justified by any of these rationales.

i. **Deterrence**

69. Mandatory minimum sentences deter crime, the argument goes. They stop people from harming others. Drawing from rational-choice theory, they presume that criminals assess both the severity of the punishment and the probability of getting caught before they commit a particular crime. Mandatory minimums make the punishment clear and well-known to the public. By increasing the severity of impending punishment, they deter crime.

70. The argument is intellectually appealing. Unfortunately, it is not supported by a shred of evidence.

71. The experts' consensus is universally against minimum sentences. They make "little or no significant impact" in reducing serious and violent crime, achieving consistency in sentencing, and addressing public perceptions that sentences are not sufficiently severe.⁴⁵

72. This is true generally. And it is true within South Africa in particular. One South African scholar has explained that, though punishment does have a deterrent effect,

"it is the *certainty of punishment* rather than the severity of the sentence that is likely to have the greatest deterrent impact".⁴⁶

45 Sloth-Nielsen & Ehlers (2005) (p. 20).

46 Van Zyl Smit (2004) 248. The author adds:

"There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked."

73. This is not only right. It is one of the few precious insights we have gained over the last two or three hundred years about why people commit crimes – and about what may stop them.
74. A 2014 report from the American National Academy of Sciences endorses this. It explains that criminals are primarily deterred by the risk of being caught. In themselves, longer sentences have no discernible deterrent impact.⁴⁷
75. And studies worldwide confirm this.⁴⁸ There is “no evidence to suggest that longer sentences reduce crime levels, except insofar as they keep some offenders in custody who are thus unable to commit offences”.⁴⁹
76. On the contrary – the evidence is “clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or modest deterrent effect that soon wastes away”.⁵⁰
77. In a comprehensive survey of the available evidence on whether harsh sentences or mandatory minimum sentences deter crime, a group of Canadian experts have concluded that they **“know of no reputable criminologist who . . . believes that crime rates will be reduced, through deterrence, by raising the severity of sentences handed down in criminal courts.”**

47 Jeremy Travis, Bruce Western, and Steve Redburn (eds) *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Academy of Sciences (2014,) at 155. (Steinberg (2005): “if anything deters, it is the certainty, not the increasing marginal severity, of punishment”.)

48 Steinberg (2005).

49 Giffard and Muntingh (2006) at 78.

50 M Tonry, *Sentencing, judicial discretion and training* (1992), quoted in SS Terblanche 218-219 and Sloth-Nielsen and Ehlers (2005) at 16.

78. The authors conclude that “**crime is not deterred, generally, by harsher sentences**”.⁵¹ What *does* make a difference is the likelihood that a criminal will be caught and prosecuted.
79. Besides, studies that show that most active and violent offenders either don’t think that they will be caught, or if they were to be caught they don’t have any idea what punishment to expect from their crimes.
80. Severe sentences can have little impact on these criminals because they do not consider the severity of what sentence they may face before committing the crime.⁵²
81. It need only be added, that, sadly, we are doing a poor job at actually convicting accused persons. The National Prosecuting Authority’s track record is anything but shining.⁵³
82. The deterrence rationale in criminal law is the most important of the rationales. Yet mandatory minimums play little or no role in deterring crime.
83. This does not mean that we shouldn’t deal harshly with those who commit terrible crimes. We should. But minimum sentences aren’t the way.

ii. Prevention or Incapacitation

51 Anthony N Doob, Cheryl Webster, and Rosemary Gartner “Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation,” *Criminological Highlights*, 14 Feb. 2014, at A-2 to A-3, available at: <http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>.

52 David A Anderson, “The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging” 4 *American Law and Economics Review*, (2002,) at 293-313. Altbeker (2007) contends, from a further angle, that South Africa’s crime problem “cannot be solved, or even significantly reduced, using current police strategies which focus on preventing crime from happening, and that far more attention needs to be paid to *building our capacity to identify, prosecute and incarcerate criminals*” (33-34).

53 See Jean Redpath, “Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa”, ISS monograph 186 (2012), who provides the evidence. There is cause to believe that the NPA’s track record has, since 2012, only become worse.

84. A better justification is that longer prison sentences reduce crime by incapacitating individuals who are prone to commit crimes.⁵⁴
85. There is some force to this. “Lock them up and don’t let them out.” But this doesn’t help us explain or justify our mandatory minimums and the way they works in South Africa.
86. It is worth taking a moment to understand why. It is primarily because the “incapacitation effect” is reduced as the incarceration rate increases – in other words, as we lock up more and more offenders.
87. Even the most lenient criminal justice systems of justice arrest and jail the worst criminals, like those who repeatedly commit violent crime. These people should be locked up.
88. But the point is this: locking away large numbers of less dangerous people for long periods simply does not help very much to further reduce crime.⁵⁵
89. There is another important consideration. The point of locking away and incapacitating violent offenders is usually fully served by the time they reach 50 or 60. This is the age where, statistically, they are not likely to commit such crimes again.⁵⁶
90. Statistical evidence also shows that higher rates of incapacitation and longer sentences may not actually reduce crime.
91. A recent report by the Brennan Center for Justice at NYU School of Law indicates that incarceration has not produced a reduction of crime in the United States. Using an economic model

54 Travis above n 11 at 155.

55 See Steven Raphael and Michael Stoll, A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime, Brookings, May 1, 2014; available at: <http://www.brookings.edu/research/papers/2014/05/01-reduce-incarceration-maintain-low-crime-rates-raphael-stoll>.

56 Id.

that includes the latest 13 years of data, the report found that, since 2000, the effect of increasing incarceration on the crime rate has been effectively zero.⁵⁷

92. The converse is also true. Another recent study from California shows that *reducing* incarceration does not result in a significant increase in crime. After the United States Supreme Court ruled that California’s overcrowded prison system resulted in cruel and unusual punishment California was obliged to pass reforms that ended the practice of sending convicts back to prison for technical parole violations. The result was that approximately 20 000 convicts – who otherwise would have been sent to prison – remained free. Studies found that **there was no effect on violent crime and only a small effect on property crime**. They found that each year of prison not served due to California’s reform was estimated to cause an additional 1.2 auto thefts. In other words, as the authors of those studies found, “harshness in sentencing often results in prison spells that cannot be justified by the risk posed by the offender”.⁵⁸

93. Indeed, there is some suggestion that, for some, incarceration can actually increase the incidence of crime. This is because prison affords a high-level education in the social networks of criminal activity.

iii. Rehabilitation

94. Rehabilitation is a third justification for locking criminals up. In fact, our Correctional Services Act 11 of 1998 provides that the purpose of the correctional system is to contribute to maintaining a

57 Roeder, Eisen, and Bowling, “What Caused the Crime Decline?”, Brennan Center for Justice at New York University School of Law, (2015), available at: https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf.

58 Doob, supra note 12, at p. A-2 to A-3.

just, peaceful and safe society by (c) “promoting the social responsibility of human development of all sentenced offenders”.⁵⁹

95. But mandatory minimum sentences work perversely against that laudable objective. An offender serving a long-term or life sentence, becomes a different *type* of prisoner – with generally lost hopes and shorn ties of community kinship, suffering the uncertainty of indeterminate release. These prisoners are generally more susceptible to social and psychological problems than shorter-term prisoners.
96. This is not to say that some prisoners don’t richly deserve long and even indeterminate sentences. That is not my point. My point is that we have engaged in sweepingly counter-productive overkill in forcing the courts to apply these sentences.
97. Correctional officials almost all say that extremely long prison sentences leave offenders with nothing to hope for; release is so long off that they are not amenable to rehabilitation.⁶⁰
98. Given what we know about the effect long-term sentences have overall on prospects of rehabilitation, our sentencing regime is in fact fundamentally at odds with the Correctional Services Act – which makes it clear the objective of incarceration is to create a more socially responsible society.
99. In addition, rehabilitation is sadly lacking in many, if not most, South African prisons. First, overcrowding makes rehabilitation programs impracticable.⁶¹
100. More than ten years ago, a particularly fine and conscientious inspecting judge of prisons, Judge Hannes Fagan, warned that overcrowding “precludes proper rehabilitation”. Instead, it “turns prisons instead into places where criminality is nurtured”.⁶²

59 Section 2(c). Section 18(1) gives every prisoner a right to reading material of choice, unless it “constitutes a security risk or is not conducive to his or her rehabilitation”.

60 Sloth-Nielsen and Ehlers (2005) at 17, quoting Altbeker Open Society Foundation study.

61 Altbeker (2007) at 146 states that overcrowding in prisons has made implementing rehabilitation (an unproven science) “impossible” (146). He adds at (150) that “our overcrowded prisons will rehabilitate no-one” – “They are also a potential time bomb that needs to be defused”.

62 JJ Fagan *Advocate*, April 2005 at 35.

101. Second, neither the facilities nor the personnel exist to implement rehabilitation programs.
102. In June, my law clerks and I visited Devon pre-release correctional facility, 88km from Johannesburg. Though the buildings were old and not purpose-built (it was a converted military barracks), the centre was well-run, the personnel impressively humane and efficient, the facilities clean and the location, on a prison farm, conducive to rehabilitation, with beautiful functioning agricultural facilities.
103. There was also a training workshop. But the official in charge of the workshop told us that his training had come to a dead stop. He could not obtain welding irons, steel paint or steel from the Department. The budget had run out. The Department had no more money for essential for rehabilitative training. That seemed a very major tragedy to me.

iv. Retribution

104. The fourth and last reason that could justify the mandatory minimum sentences is retribution – the idea that severe sentences should be imposed upon criminals engaged in the most severe of crimes.
105. There is a strong emotional and historical appeal to this. It dates back to the Old Testament principle, “an eye for an eye”. It is embodied in *lex talionis*, the law of talion or vengeance.
106. Its modern variant is that a criminal offender is morally blameworthy and deserves to be punished.
107. The basic impulse is correct. And it is rooted in moral justification. It also makes good human sense. It is certainly the only sound rationale for the death penalty – that someone who commits an unspeakable crime against another should die an unspeakable death, at the hands of the state, when his spinal column is broken at the end of a rope round his neck after a two-metre fall.

108. But that same emotion – the thirst for vengeance – leads to a terrible logic. If the crime is terrible enough, must we not visit it with a horrific enough punishment to slake our thirst for vengeance?
109. This impulse has been responsible for the cruellest of punishments throughout history. Why hang only, when you can hang, draw and quarter?
110. Ultimately, nothing can slake the thirst for vengeance – not hanging, not drawing and quartering, not cutting thieves’ and robbers’ hands off.
111. And we are left with the sombre question whether the state, that represents our aspirations to just order, should be the instrument of horrific punishment. Most societies have decided No.
112. Under our Constitution, retribution alone cannot be the theory upon which we base our criminal punishments.
113. So why then the minimum sentences? “Upon this point, a page of history is worth a volume of logic”.⁶³
114. The scheme is a product of misshapen history, the wish of our politicians to be seen to be doing something about crime, and their desire to seem tough on crime.
115. And so, though mandatory minimums have no proven benefit under any theory of punishment, they were enacted as a hurriedly-passed, temporary measure to respond to the fears of a freshly democratic, newly transitioning, post-apartheid society.
116. We are left with a sad conclusion. As with President Mbeki’s policies on AIDS, mandatory minimums were not a product of well-informed research or sound policy-making.
117. The law, designed to respond to past fears, is misdirected and ineffective. But more than just being ineffective, it continues to

63 *New York Trust Company v. Eisner* U.S. Supreme Court (1921) (Oliver Wendell Holmes).

impose an enormous economic and human toll upon our democracy.

The Costs of Mandatory Minimum Sentences

(a) Overcrowding

118. The most feelingful and most perceptible cost the mandatory minimum scheme imposes on our society is overcrowding of our prisons.

a. In 2014, South Africa's prisons were operating at 125 per cent of their official capacity. They had one-quarter more offenders housed in them than they were designed to take.⁶⁴

b. This was a direct result of the striking increase in long sentences.

c. Sentenced offenders are serving longer sentences than ever before.

d. In 1995, there were 433 people serving life sentences in South Africa. By 2016, this number had risen to **13 260**. That is a **2 353 per cent** increase.⁶⁵

119. This is not unique to South Africa. Excessive sentencing and prison overcrowding occur worldwide. According to statistics collected by the High Commissioner of the Human Rights Council, more than 10.2 million people around the world are imprisoned.⁶⁶

64 Clare Ballard, "The discourse and policies around sentencing and punishment in South Africa: 1994 – 2014", available at: <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ballard.pdf>.

65 See Marché Arends of the Wits Justice Project, "Life, Interrupted: Hundreds of inmates consider legal action over parole delays", available at (accessed 30 June 2016).http://www.dailymaverick.co.za/article/2016-06-22-life-interrupted-hundreds-of-inmates-consider-legal-action-over-parole-delays/?utm_source=Daily+Maverick+First+Thing&utm_campaign=b1240b40f2-First_Thing_20+june&utm_medium=email&utm_term=0_c81900545f-b1240b40f2-127664633#.V2uPdLh9600.

66 Report of the United Nations High Commissioner for Human Rights, Human rights implications of overincarceration and overcrowding (Advanced Edited Version), 10 Aug. 2015 (citing Roy Walmsley, World Pre-trial/Remand Imprisonment List, 2nd edition (London, International Centre for Prison Studies, 2014)).

120. But statistics tell us so little when we try to understand what we mean by “overcrowding”. It is a sweet word, a euphemism, for the inhumane state of our many of our prisons.
121. Prison overcrowding in our country is dire. Some years ago, my fellow Constitutional Court justices and I started a programme where we each try to visit at least one prison per year. Over the past seven years, I have visited some fourteen facilities.⁶⁷
122. In one, admittedly an awaiting-trial, and not long-term, facility, the conditions were worse than I had imagined possible.
123. In my 2015 report on Pollsmoor prison, I was “deeply shocked” by the “extent of overcrowding, unsanitary conditions, sickness, emaciated physical appearance of detainees.”⁶⁸. My report details abominable conditions I saw in the awaiting-trial section. The cells we saw were “filthy and cramped” – overcrowding at that time of some 300 per cent, the highest in the country. “The overall deplorable living conditions were profoundly disturbing”.
124. Although Pollsmoor has the highest rate of overcrowding, the staff there emphasised that overcrowding is not unique to Pollsmoor: “It is a national problem.”⁶⁹
125. And this is not the fault of correctional personnel – the people we charge to run our prisons. Overwhelmingly, I have found prisons personnel to be well-trained, humane, professional and committed.
126. It is our fault. We, the people, in whose names these things are done, are responsible.

(b) Violation of Human and Constitutional Rights

67 See <http://www.constitutionalcourt.org.za/site/PVisits/PrisonVisits.html>. (Pollsmoor, Modderbee, Boksburg, Sterkfontein Hospital, Lindela Repatriation Centre, Kroonstad, Makhado, Polokwane, Groenpunt, Barkley West, Kuruman, Kutama Sinthumule, Losperfontein, Devon (report pending).)

68

69 Pollsmoor Prison Report at para 113.

127. The issue of overcrowding, perpetuated by the mandatory minimum scheme, affects all of us. It degrades our country's respect for human and constitutional rights. It degrades our moral fabric. It degrades us.
128. The Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. Everyone has inherent dignity and the right to have their dignity respected and protected.⁷⁰
129. The Constitution specifically notes that detainees and sentenced prisoners have the right to “conditions of detention that are consistent with human dignity”. This provision requires that, at a minimum, prisoners and detainees should have access to exercise, adequate accommodation, nutrition, reading material, and medical treatment.⁷¹
130. The Constitution also protects prisoners and detainees from cruel, inhuman, or degrading treatment or punishment.⁷²
131. In *Lee v Minister for Correctional Services*, the Constitutional Court noted that “[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations,” and that “a civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation . . . inherent in the right . . . to ‘conditions of detention that are consistent with human dignity.’”⁷³
132. In addition, the Correctional Services Act stipulates that correctional centres must have, among other things: (a) sufficient space to enable inmates to move freely and sleep comfortably within the confines of their cells; (b) accommodation that is properly ventilated; (c) cells with sufficient natural and artificial

70 Sections 7 and 10 of the Bill of Rights.

71 Section 35(2)(e) of the Bill of Rights.

72 Section 12(e) of the Bill of Rights.

73 *Lee v Minister for Correctional Services*, para 65; see also my dissenting judgment, at para 113 (prisoners are a “vulnerable group to whom our system of constitutional protection owes particular solicitude”).

lighting that allows inmates to read and write; (d) sufficient and accessible ablution facilities available to all inmates at all times, including access to hot and cold water for washing purposes; (e) a separate bed and bedding for every inmate which provides adequate warmth for the climatic conditions and which complies with hygienic requirements.⁷⁴

133. Apartheid taught us the degradation of imprisonment, its unjust uses, and inhumanity and injustice that incarceration may entail.

134. But did we learn the lesson? One might think that a country so well versed in the misuse of prisons might have, under democracy, become a leader in the humane treatment of prisoners. Indeed, the UN Standard Minimum Rules on the Treatment of Prisoners are named the "Mandela Rules" to honour the legacy of the late President of South Africa.

135. But the formal guarantees of our constitutional system are undermined by overcrowding – and overcrowding is inextricably linked to excessive incarceration: meaning, over-imposition of long sentences.

B. Racial Disparity

136. Racial disparity cuts to the core. As a result of apartheid, our black populations were subordinated, marginalized and disenfranchised.

137. And the mandatory-minimum system perpetuates racial disparity.

138. The development of the prison system was closely linked to the institutionalization of racial discrimination in South Africa. This dates back to the time that "pass laws" were introduced for

⁷⁴ Section 7(1) of the Correctional Services Act; section 3(2)(b) of Correctional Services Regulations 2004 as amended on 25 April 2012.

Africans in the 1870s to the vicious systematisation of apartheid after 1948.

139. The worst effects of sentencing policy are felt by black people. The war on drugs, the long sentences for petty crime, and the long pre-trial prison stays all disproportionately affect the poor and Black and Coloured people.⁷⁵
140. America illuminates perhaps even worse racial disparities. Over-incarceration in the United States has disproportionately impacted African-American and other minority communities.⁷⁶
141. Today, nearly 80% of our current prison population is black, 18% is coloured and less than 2% is white.⁷⁷ Thus, if we care about racial equality, we must acknowledge the racist aspects of our current, post-democracy penal system.
142. Again, I emphasise, my point is not “let-them-all-out”. It is to enjoin us to seek a better, saner, more efficient and well-directed solution to crime.

C. Monetary cost

143. The cost of mandatory minimum sentencing scheme is exorbitant.
144. Unduly long sentences impose a strain on our country’s economic health.

75 Dr Abdul Domingo, a psychiatrist at Stellenbosch University, has urged an overhaul of this country’s drug policies, according to a report in **The Star**. Criminalisation and incarceration could not be relied on as the only form of intervention as it undermined an individual’s prospects of education and employment, Domingo added. **‘It fails to offer any form of clinical input, and care, and ultimately worsens the plight of drug users, their families and communities,’** he said. Domingo said it was time SA realised drug users deserved to be helped and not harmed. ‘A revision of drug policies should aim at minimising harm to those at risk of using substances in a harmful way, not exacerbate it.’ Domingo said some people were genetically predisposed to addiction while others stood a higher risk due to environmental factors, such as easy access to substances or circumstances that promoted usage. According to statistics, more than 10% of South Africans abuse one narcotic or the other, and this is higher than the global norm. [LegalBrief Thursday 30 June 2016]

76 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

77 <https://www.dailymaverick.co.za/article/2017-07-18-fact-sheet-the-state-of-south-africas-prisons/#.Wd30hY-CxaQ>

145. With an inmate population of nearly 160,000, the annual cost of jailing offenders is R21 billion. This means that an average annual cost to house a single prisoner for one year is over R133,000.⁷⁸
146. Compare this to the fact that the average cost of educating a child in a public school is less than one-quarter that amount (R32,000).⁷⁹
147. This cost is compounded by the fact that these individuals are kept behind bars, unable to contribute to the economic growth of our country.
148. And it is not just the cost. It is the waste. We are throwing money and lives away on legislative policies that were ill-researched and misdirected.

D. Human Cost

149. But it is easy to get lost in numbers.
150. Long sentences take a toll on so many lives. Years and years behind bars affect not only the prisoner. Prison sentences—long prison sentences in particular—destroy families, put children at a disadvantage, and perpetuate cycles of violence and disparity.

E. Misplacing the solution – the diversionary cost

151. Finally, the minimum sentencing scheme has blunted our social purpose.
152. We know what works to help stop crime. It is not singling out a small handful of criminals and imposing long sentences on

⁷⁸ <https://businesstech.co.za/news/general/104579/how-much-each-prisoner-costs-sa-taxpayers-every-day/>

⁷⁹And a year's worth of private high school tuition is still less, at R125,000. <https://businesstech.co.za/news/finance/151557/how-much-it-will-cost-to-send-your-child-to-school-in-south-africa-over-the-next-20-years/>

them. It is the tough task of police follow-up, detection, pursuit, arrest, arraignment, prosecution and sentence.

153. For this we need to build our criminal justice systems. We need to train detectives and police personnel. We need to improve our blood analysis and other evidence and forensic analysis systems.

154. From all these hard, slogging, vital and effective tasks, minimum sentences have diverted public attention.

155. The patient, difficult and deliberate tasks of crime prevention, crime detection, pursuit and arraignment of criminals are what we should be spending our time and effort and money on.

156. Effective crime-fighting requires “resourcing investigative and prosecutorial systems better” and “training, training and more training”. It also requires “aligning incentives in the police and prosecution services to ensure that the focus is on the kinds of crime and criminal that result in the most social harm”.⁸⁰

157. This, as a well-informed author on crime says, is “not rocket science”. But it demands “the dogged processing of paper and information, most of it relatively standardised”.⁸¹

158. And this is a job we can do with our present police personnel. Our nation, police personnel to population, is not under-policed. Our police personnel are under-trained and under-utilised.

159. Crucially, “tackling violent criminals head on” does not mean lengthening already punitive sentences:

“Counter-intuitive as it may seem, it makes more sense to send larger numbers of violent people to jail for shorter periods than to imprison smaller numbers for longer”.⁸²

160. But we are not doing this.

80 Altbeker (2007). So too Sloth-Nielsen & Ehlers (2005) 17.

81 Altbeker page 147.

82 Altbeker pages 148-149.

161. Instead, we have outsourced our outrage about crime to the occasional judicial officer who seems to impose too light a sentence.
162. As a result:
- a. South Africa has more than 13 000 persons serving life-sentences. This is the third highest number of life-sentenced prisoners, in absolute terms, in the world – after only the U.S. and India.⁸³ But as a proportion of the national population, we are second-highest in life sentences.
 - b. Most disquieting—our country is the only country in the world where life sentences show a dramatically increasing rate of growth.⁸⁴
 - c. And sentences between 10-15 years have increased 77% over the past 13 years, while sentences under 24 months have plummeted.⁸⁵
163. Let me spell out what this means. Instead of finding the resources and mustering the effort to track down every rapist, every murderer – which we know would help stop rape and murder, even if we give shorter sentences – we single out a tiny handful of murderers and rapists.
164. And upon them – this pathetically small and inadequate sample of criminals – we impose life sentences. They carry our outrage. But the system is illogical, inefficient and counter-productive.
165. It is a poor substitute for efficacy and reason in combating crime.
166. Life sentences on a tiny handful of rapists and murderers is a poor way to console the many many thousands of rape survivors

83 Appleton and van Zyl Smit (currently unpublished (September 2017) 3.

84 Id. (“Rates of growth are important too. Figure 3 below shows the increase in the number of life-sentenced prisoners has been most dramatic in South Africa, while other rates of growth have been more gradual.”)

85 Magubane, More Long Jail Terms Point to Rise in Violence, Business Day (18 May 2017). Sentences between six and 12 months have decreased 51%, those between 12 and 24 months have decreased 71%.

and bereaved families whose perpetrators are never tracked down, arrested, brought to trial or sentenced at all.

167. And during all this misdirected, ineffectual sentencing, at a terrible price, we have been silent.

168. The United States is instructive for us here.⁸⁶ In 1998 we adopted wholesale elements of American penal policy – including, most drastically, mandatory minimum sentences.

169. The social, constitutional, and economic costs of these harsh sentences have been vigorously debated on both sides of the partisan line in the United States, even amidst the grotesqueries of the current public debate there.

170. Here, by contrast, we have barely murmured.

171. Our silence should make us reconsider: Have the years of violence and a fear of crime left a psychic scar on our approach to incarceration? Have we committed ourselves to long compulsory sentences because we want *something* done about crime – even when we know they are ineffective and unproven?

172. And are our fear and bewilderment about crime still hobbling our ability to make the reforms that other nations are now implementing?

173. Perhaps. So what is the way forward?

174. How can we bring about what Mandela declared before the Constitutional Court—a South Africa that is indeed better for all?

⁸⁶ Most strikingly, the United States – the country with the world’s largest prison population; 5 percent of the world’s population, yet 25 percent of the world’s prisoners – seems to have begun the arduous process of reversing course. A national debate has arisen over the racially disparate impact of incarceration on minority communities, the excessive societal and economic cost of over-incarceration, and the adverse consequences of prison overcrowding on physical and mental health care.

The federal government has released 6,000 nonviolent inmates from federal prisons, legislators are considering criminal justice reform measures that would reduce mandatory sentencing, and judges across the country have been refashioning sentences, asking prosecutors to drop unfair charges, and granting requests to expunge old convictions. New York Times, U.S. to release 6,000 inmates under new sentencing guidelines, Oct. 17, 2015; New York Times, Senate Plan to Ease Sentencing Laws, Oct. 2, 2015; New York Times, From the Bench, A New Look at Punishment, Aug. 28, 2015.

A Way Forward

175. The bad news is: there are no short-cuts.
176. Addressing crime in a way that is effective and also preserves dignity and justice is difficult. It will take courage from our leaders. But it is indeed possible.
177. We must devote the resources to ensure that prisoners receive constitutionally adequate standards of care. And, if that is impracticable at our current level of incarceration, we must adopt strategies for reducing incarceration – particularly where incarceration does not meaningfully reduce crime.
178. But there are several things we can do now. Things to safely reduce the number of incarcerated.
- d. First, we should scrap minimum sentences for most low-level, nonviolent, or non-serious crimes. Where circumstances are extraordinary, we can trust judicial officers to impose extraordinary sentences in these cases. We don't have to tie their hands.
 - e. This is particularly true for drug-related offenses – mandatory minimums should be eliminated.⁸⁷ More suitable punishments include: shorter sentences, probation, community service, electronic monitoring, or medical treatment. This is the public health option that Portugal has successfully implemented. The “war on drugs” is a hugely expensive and almost entirely pointless waste of lives and resources.
 - f. Second, the Parliament should consider a Sentencing Council. This should reform or replace mandatory minimum sentences.
 - g. The mandatory minimum sentencing regime was instituted based on recommendations from two committees established by the Minister of Justice. One committee recommended the establishment of a Sentencing Council, which, among other

⁸⁷ The Criminal Law Act 105 of 1997 prescribes any contravention of section 13(f) of the 1992 Drugs and Drug Trafficking Act if the value of the drugs is higher than R50,000 or, in case of offences practiced ‘by any person, group of persons, syndicate or enterprise acting in the execution or furtherance of a common purpose or conspiracy’, if the value of the drugs is higher than R10,000, or if the offender is ‘a law enforcement officer.’

things, would be tasked with developing and reviewing sentencing guidelines. Many countries use a sentencing council, but our Parliament has yet to take it up.

- h. Under its current system of mandatory minimums, South Africa currently provides the same mandatory minimum sentence for drug trafficking as for murder. Unnecessarily harsh sentencing should be reviewed and replaced.
- i. Third, we should explore treatment for the mentally ill, instead of prison. Prison is not an institution that is currently equipped to treat those with mental health or addiction problems.
- j. Fourth, the use of super-max or isolation facilities should particularly be scrutinized because of their adverse impact on inmate health and mental health.⁸⁸
- k. Finally, and vitally important: locking up awaiting trial prisoners should change. Pre-trial detention practices should be overhauled. Denial of bail should be based on danger to society, not on whether you can afford bail.

179. Right now, we have no sense of immediacy in considering these constitutional and moral challenges.

180. This is because we are all terrified of crime – all of us, black and white, rural and urban, suburban and township.

181. Those fears are too often justified. But they should be well-channelled. They should be directed at solutions that work. Minimum sentences have done nothing for us.

182. Our efforts to repress and punish the offender have not rid our streets and homes of the terror of violent crime.

183. Though high crime rates mean popular support for more and longer sentences, they don't work. They don't contain the danger.

88 Patricia Carole Perkins and Emily Seawell, "Human Dignity and Evolving Standards of Decency: Disciplinary Segregation of Inmates in South Africa and the United States" (paper in progress), available at: <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Perkins-Seawell.pdf>; ENCA, Solitary Confinement of Six Pretoria Prisoners in the Spotlight, July 16, 2015, available at: <https://www.enca.com/south-africa/solitary-confinement-six-pretoria-prisoners-spotlight>.

184. Instead, let us hold our leaders accountable and guide them to the hard work and systems-building that will result in the most effective crime prevention policies.
185. Let us see minimum sentences for the false promise they offered. They proved pernicious, misguided and futile.
186. Let us replace them with redoubled commitment to detecting, arresting, arraigning, trying, sentencing and jailing every single rapist, every murderer, every sexual offender – some for very long periods, others for lesser periods.⁸⁹
187. The more rapists and murderers we successfully pursue and arrest and try and convict and sentence, the less rigidity we need in our sentencing scheme.
188. Only by taking these steps will we make South Africa a safer, peaceful, and humane society. Only by taking these steps will we actually deter crime. And, only by taking these steps will we fulfill Mandela’s promise of transformation from a country of oppression into one of freedom.

89 *Makwanyane* makes this argument, exactly, though in relation to the death penalty –

“We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime. There will always be unstable, desperate, and pathological people for whom the risk of arrest and imprisonment provides no deterrent, but there is nothing to show that a decision to carry out the death sentence would have any impact on the behaviour of such people, or that there will be more of them if imprisonment is the only sanction” (para 121) AND “The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness” (para 122).