

# “WE CAN ACTUALLY DO THIS”: ADAPTING SCANDINAVIAN CORRECTIONAL CULTURE IN PENNSYLVANIA

Jordan M. Hyatt, Synøve N. Andersen, Steven L. Chanenson, Veronica Horowitz, and Christopher Uggen\*

## ABSTRACT

*Though incarceration has almost always been a core aspect of punishment in the United States, a critical consideration of the basic nature of prison environments is often omitted from conversations about reform. Instead, and for myriad reasons, modern correctional policy had emphasized the punitive over the humane. In this way, America is an outlier, distinct from many other Western nations. From this position, however, there are many opportunities to look to global peers for a counterfactual; the Scandinavian nations provide an appealing option. Building upon a comparative, international examination of penal policy, this Article seeks to leverage these differences to explore how transnational exchanges can inform domestic policymaking. We examine the Scandinavian Prison Project, a correctional exchange primarily between Pennsylvania and Norway, to consider the challenges inherent in such endeavors, as well as opportunities for encouraging actionable reform in a prison environment.*

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\* Jordan M. Hyatt is an Associate Professor in the Department of Criminology and Justice Studies at Drexel University. Synøve N. Andersen is a Postdoctoral Fellow in the Department of Sociology and Human Geography at the University of Oslo. Steven L. Chanenson is a Professor of Law at Villanova University Charles Widger School of Law. Victoria Horowitz is an Assistant Professor in the Department of Sociology at the University of Buffalo. Christopher Uggen is a Regents Professor and the Martindale Chair in Sociology, Law, and Public Affairs at the University of Minnesota. © 2021, Jordan M. Hyatt, Synøve N. Andersen, Steven L. Chanenson, Veronica Horowitz, and Christopher Uggen.

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*Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness.*

—Justice William J. Brennan, Jr.<sup>1</sup>

## INTRODUCTION

Prisons are too often ignored. As a society, many of us do not like to think about what happens behind their walls.<sup>2</sup> Despite the American appetite for their use, we frequently act as if we are blind to the nature of their existence. The public discourse often focuses on catching, prosecuting, and sentencing people; interest evaporates until some of those same people re-offend once released from custody. Indeed, “[m]ost Americans feel that life in prison and jail does not affect them.”<sup>3</sup> That is demonstrably false.<sup>4</sup> Prisons are part of our criminal justice system and we all have a collective responsibility—for reasons both noble and egoistic—to ensure that they are “safe, humane and productive.”<sup>5</sup> This Article highlights the importance of caring about prison conditions and suggests that Americans can and should look abroad to understand how others navigate these waters. For individuals working in an American correctional system, visiting a starkly different penal system for education purposes can, under the right circumstances, provide an opportunity for critical—and potentially transformative—reflection. For example, a Pennsylvania correctional officer, reflecting on the experience of working inside of a Norwegian prison, noted that:

There were a couple of things that stood out, especially some key things I learned [were] really impressive. Some of it was in the staff interaction. Got to see that firsthand, in addition to the actual living quarters, whereby I got to observe firsthand the inmates cooking their food in the kitchen, civilian

1. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

2. *See, e.g.*, PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 159 (1967) (“Corrections is not only hard to see; traditionally, society has been reluctant to look at it.”); Steven L. Chanenson, *Society Must Not Forget Those It Incarcerates*, *PHILA. INQUIRER*, Dec. 26, 2016.

3. John J. Gibbons & Nicholas deB. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 *WASH. U. J.L. & POL’Y* 385, 387 (2006). In this Article, we will use the term “prison” because a state prison is the focus of the associated Scandinavian Prison Project study. However, many—if not most—of the ideas raised here could apply with equal or greater force to jails.

4. *See, e.g., id.* at 413 (“The conditions of confinement in our jails and prisons should concern everyone. How we treat the people we incarcerate and whether we protect and support the staff has consequences that reach beyond the walls of every institution. Staff return to their families at the end of a shift, and 95 percent of prisoners are eventually released, most of them to poor and minority communities where crime rates are high and employment rates are low.”).

5. *Id.* at 412; *see also id.* at 398 (“We must remember that our prisons and jails are part of the justice system, not apart from it.”).

clothing attire which I haven't seen in many, many years. [The Pennsylvania Department of Corrections] does not permit that . . . . And they were very receptive, very kind . . . . Say the initial, initial feeling for that was, oh, my gosh. Are you serious? This is really nice. Then I thought, wow, I don't know, we can't do this, and then I came back and said, no, alright, take a deep breath, I think we can, there are parts of this we can take away and we can actually do this. And already, already the wheels are spinning . . . . I felt charged up, energized, if you will, because I think it's simply because the folks here that we've met and work with, they're very serious about their work and they're happy. It shows they're happy that we've come here to learn from them. So therefore, I felt extremely, extremely proud . . . . But these folks here are on point. And even though they say we're not perfect and no one's saying they are.<sup>6</sup>

This individual, who so effectively articulates the transition from “are you serious?” to “we can actually do this,” was participating in an ongoing study named the Scandinavian Prison Project (“SPP”). This project, detailed in this Article, explores whether Scandinavian penal values and practices can be adapted successfully in the United States, specifically in Pennsylvania.

This Article proceeds in five Parts. Part I reviews America's relationship with prisons, noting that prisons remain central to America's view of punishment while prison conditions barely register in the popular imagination. Perhaps it is possible to learn from the experiences of other countries. Part II explores how international penal policy exchanges can inform domestic policymaking. Part III explains the distinctive carceral systems in Scandinavia and why they are widely viewed as exceptional. Part IV describes the Scandinavian Prison Project, which connects correctional officials in Pennsylvania with officials in Scandinavia, especially Norway. Part V chronicles the exchange and reports original qualitative research stemming from the Scandinavia Prison Project.

## I. AMERICAN CARCERAL REALITIES: PERCEPTIONS, REALITIES, AND MAPPING A BRIGHTER FUTURE

In this Part, the Article starts with a snapshot of how America often interacts with its prisons. This frequently dispiriting picture sparks the question of whether it is profitable to look to other countries for inspiration about correctional policy.

### A. *America's Relationship with Prisons: An Abridged Examination*

Few topics in the United States evoke more passionate emotions than crime and justice. Americans are concerned about the amount of crime, the expense of

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6. Interview with Lee, a pseudonym for a Pennsylvania corrections leader (June 6, 2019). Throughout this Article, we quote from interviews conducted with participants in the Scandinavian Prison Project (“SPP”). See *infra* Part IV. Citations to these interviews, as here, will identify the interviewees, their positions, and the date(s) of the interviews. To protect the privacy of the participants, however, we refer to them by assigned pseudonyms, rather than their actual names.

administering the multiple justice systems in the states and the federal government, and the fairness of those systems.<sup>7</sup> Today, we thus find an inherent tension within American culture regarding the utility and impact of incarceration. On one hand, while there has been greater attention paid in recent years to how many people are sent to prison and what happens to them when they return, the experience of life in prison itself remains a secondary concern, at best, for much of society.<sup>8</sup> On the other hand, culturally speaking, America has long had a prison-centric view. Indeed, for good or for ill, America has long been known for its prisons.<sup>9</sup> While probation is the most commonly imposed sentence,<sup>10</sup> prison is what really counts in the American popular imagination of punishment.

One only has to look at a recent high-profile, fraud case with no quantifiable monetary loss to see the American fixation on prisons. In the so-called “*Varsity Blues*” investigation, numerous wealthy parents (some of whom were also famous) lied and paid money to help their children gain admission to more prestigious and selective universities.<sup>11</sup> In many ways, the cases flowing from this investigation became a kind of Rorschach test for America’s relationship with incarceration. A federal prosecutor in the case, Eric Rosen, made his and the government’s view crystal clear during the high-profile sentencing of actress Felicity Huffman, who was ultimately sentenced to two weeks in prison in addition to one year of probation, 250 hours of community service, and a \$30,000 fine. Mr. Rosen “argued forcefully in court, saying ‘the only meaningful and efficient sanction is prison’ . . . ‘A message must be sent, and imprisonment is the only way to send that message.’”<sup>12</sup>

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7. See, e.g., *Crime*, GALLUP HISTORICAL TRENDS, <https://news.gallup.com/poll/1603/crime.aspx> (describing an October 2019 poll in which 52% of respondents felt that the problem of crime in the United States was very serious or extremely serious. That number jumps to 93% if “somewhat serious” is included. However, that same poll indicated that only 13% of respondents thought that the problem of crime in the area where they lived was very serious or extremely serious.); Tachana Joseph-Marc, *Deficit or No Deficit, Florida Needs Criminal Justice Reform*, TAMPA BAY TIMES (Nov. 20, 2020), <https://www.tampabay.com/opinion/2020/11/20/deficit-or-no-deficit-florida-needs-criminal-justice-reform-column/> (discussing budgetary challenges in the Florida Department of Corrections); Samantha Laine Perfas, Jessica Mendoza, & Henry Gass, *Why Black and White Americans See the Justice System Differently*, CHRISTIAN SCIENCE MONITOR (Aug. 10, 2020), <https://www.csmonitor.com/USA/Justice/2020/0810/Why-Black-and-white-Americans-see-the-justice-system-differently-audio> (“Is the criminal justice system fair? The answer, it turns out, depends on whom you ask.”).

8. See, e.g., Gibbons & Katzenbach, *supra* note 3, at 387.

9. See generally GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE: THE COMPLETE TEXT* (Emily Katherine Ferkaluk trans., 1st ed. 2018) (1883).

10. See Joan Petersilia, *Probation in the United States*, in 22 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 149, 149 (Michael Tonry ed., 1997) (“Probation is the most common form of criminal sentencing in the United States.”); see also U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017–2018* (2020), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf>.

11. Jennifer Medina, Katie Benner & Kate Taylor, *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html>.

12. Joey Garrison, *Felicity Huffman Sentenced: 2 Weeks in Prison, \$30,000 Fine for College Admissions Scandal*, USA TODAY (Sep. 13, 2019), <https://www.usatoday.com/story/entertainment/celebrities/2019/09/13/felicity-huffmans-sentenced-college-admissions-scandal/2284438001/>.

Not everyone agreed with this approach, however. A criminal defense attorney unconnected to the case recognized the dominant incarceration-is-all-that-counts view and expressed his displeasure this way:

Our criminal justice system still has an unjust “jail-first” mentality. The default sentence for a first-time non-violent offender who accepted responsibility where no one suffered any loss should obviously be something other than incarceration. If that type of offender—with no aggravating factors—isn’t getting probation, then who is? The problem is that we are so tied to putting people in jail, even people we know will never do anything similar again, that our default is some prison.<sup>13</sup>

Viewing incarceration as the norm for such a wide swath of offenses is part of the reason why the United States leads the world in incarceration per capita.<sup>14</sup>

Yet the challenges go deeper than just the number of people incarcerated. What is expected of those correctional facilities? Staying with the illustration of *Varsity Blues*, the Federal Bureau of Prisons sent Ms. Huffman to the Federal Correctional Institution in Dublin, California. Given the apparent dearth of horrors at that facility, various commentators were outraged:

Felicity Huffman’s two-week sentence at a “Club Fed”<sup>15</sup> prison has been slammed on social media as a “vacation from life” as the actress enjoys visits from family, time for hobbies and steak for dinner. . . . Locals often refer to the facility “Chateau Dublin” because “it’s more like a luxury retreat than a prison”, a source told RadarOnline. It’s located close to the Bay Area, where the weather is pleasant year-round.<sup>16</sup>

Similar reactions followed when former political insider Paul Manafort was sent to the Federal Correctional Institution in Cumberland, Maryland.<sup>17</sup> For these critics at

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13. David Oscar Markus, *Felicity Huffman’s 14-Day Sentence is Unjust — Because It’s Too High*, THE HILL (Sep. 14, 2019), <https://thehill.com/opinion/criminal-justice/461429-felicity-huffmans-14-day-sentence-is-unjust-because-its-too-high>; see also Ellen Podgor, *More Varsity Blues — Privilege and Perspective*, WHITE COLLAR CRIME PROF BLOG (Sep. 14, 2019), [https://lawprofessors.typepad.com/whitecollarcrime\\_blog/2019/09/more-varsity-blues-privilege-and-perspective.html](https://lawprofessors.typepad.com/whitecollarcrime_blog/2019/09/more-varsity-blues-privilege-and-perspective.html).

14. World Prison Brief, *Highest to Lowest—Prison Population Rate*, [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (ranking USA first in the world for per capita incarceration).

15. “‘Club Fed’ is a derisive term used in North America to refer to a prison whose accommodations are seen as less severe than many other prisons. Club Fed is a pun on the ‘Club Med’ chain of all-inclusive resorts.” *Club Fed - Wikipedia*, [https://en.wikipedia.org/wiki/Club\\_Fed](https://en.wikipedia.org/wiki/Club_Fed) (last visited Apr. 6, 2021).

16. Lauren Fruen, *Felicity Huffman’s Two Week Sentence at “Club Fed” Prison Slammed as a “Vacation from Life,” as Actress Enjoys a Visit from Family, Time for Hobbies and Steak for Dinner After College Admissions Scandal*, DAILY MAIL (Oct. 21, 2019), <https://www.dailymail.co.uk/news/article-7596805/Felicity-Huffmans-two-week-sentence-Club-Fed-prison-slammed-vacation-life.html>; see also The Blast, *Felicity Huffman’s Swanky Federal Prison Offers Cappuccino & Apricot Scrub*, YOUTUBE (Oct. 16, 2019), <https://www.youtube.com/watch?v=6SzqkI-sROw> (describing conditions in prison where Felicity Huffman was to serve time as a “vacation” in part because commissary items included vanilla lattes, apricot scrub, and a pizza kit).

17. See Connor Boyd, *Inside the Maryland ‘Club Fed’ Prison Where Paul Manafort Will Serve Four-Year Sentence: Cell Doors Don’t Have Locks, Families Can Stay Over in Special Rooms and Prisoners Make Calls Whenever They Want*, DAILY MAIL (Mar. 8, 2019), <https://www.dailymail.co.uk/news/article-6785653/The-Maryland-Club-Fed-prison-Paul-Manafort-serve-four-year-tax-fraud-sentence.html> (noting that the facility felt

least, separation from society is insufficient. For prison to be the “real” punishment envisioned, deserved, and required, the experience must be unpleasant and perhaps dangerous.<sup>18</sup> It must be a dramatic departure from daily life outside of prison.<sup>19</sup>

Professor Joan Petersilia described this opposition to anything approaching civilian-style conditions for incarcerated people in her classic text *When Prisoners Come Home: Parole and Prisoner Reentry*:

Public sentiment and political rhetoric have also forced the reduction of many programs. During the 1990s, state legislatures and prison administrators eliminated certain privileges and programs that prisoners previously enjoyed. A number of “no-frills” statutes were passed, eliminating smoking, weight-lifting equipment, hot meals, personal clothing, telephone calls, family days, and so forth. Proponents argue that reducing such privileges is deserved—after all, incarceration should be punitive . . . .

Treatment and work programs have also been affected by society’s expectation that prison will be punishing and that prisoners should not receive free any services for which law-abiding citizens must pay. According to this “principle of least eligibility,” prisoners should be the least eligible of all citizens for social benefits beyond the bare minimum required by law.<sup>20</sup>

Yet, as the Supreme Court of the United States found in *Brown v. Plata*, even the bare minimum required by law concerning physical and mental health care is not always satisfied.<sup>21</sup>

More than a century ago, Winston Churchill famously stated: “The mood and temper of the public in regard to the treatment of crime and criminals is one of the

like a “junior college” and that Manafort will be “able to send and receive mail, make outgoing phone calls, see visitors when he chooses once a week and have access to emails every day” as well as being “free to leave the premises when [he] choose[s] to do jobs in the yard - which is surrounded by swathes of thick leafy woodlands with barely a neighbor in sight”).

18. In some segments of society, jokes about prison rape continue to be seen as funny and somehow as part of the punishment. *See, e.g.*, Taige Jensen, Jonah M. Kessel, Leah Varjacques, & Japhet Weeks, *The Rape Jokes We Still Laugh At*, N.Y. TIMES (Jul. 19, 2018), <https://www.nytimes.com/video/opinion/10000005899858/the-rape-jokes-we-still-laugh-at.html>; *see also Understanding Rape in Prison*, MD. COAL. AGAINST SEXUAL ASSAULT (last visited Mar. 5, 2021), <https://mcasa.org/providers/resources-on-specific-topics/prea/prea-resources-and-webinars/under> (documenting how sexual assault makes prisons more dangerous for staff and prisoners).

19. *See* C.J. Ciaramella, *Federal Prosecutors Argue COVID-19 Is Just ‘One More Way to Perish in Prison,’* REASON (Sept. 25, 2020), <https://reason.com/2020/09/25/federal-prosecutors-argue-covid-19-is-just-one-more-way-to-perish-in-prison/> (“Federal prosecutors unsuccessfully tried to argue this week that an 80-year-old inmate serving a life sentence for marijuana offenses shouldn’t be released because COVID-19 is just ‘one more way to perish in prison.’”).

20. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 5 (2003).

21. *Brown v. Plata*, 563 U.S. 493, 503–04 (2011) (“Prisoners in California with serious mental illness do not receive minimal, adequate care. . . . Prisoners suffering from physical illness also receive severely deficient care.”).



most unflinching tests of the civilisation of any country.”<sup>22</sup> Still, relatively few Americans stop to assess how incarcerated individuals are treated, and if they did, they might not like what they saw. Such a picture might not speak well about those features that, according to Churchill, “mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.”<sup>23</sup> Indeed, current prison conditions in America reflect poorly on the country. Recent American accounts of prison abuse dispel thoughts that these concerns are outdated. As part of the daily crush of information, there is a regular drumbeat of stories—nevertheless often-ignored—about prisons in the United States that do not live up to constitutional minima, let alone to what many would view as our societal ideals.<sup>24</sup>

The experience of incarcerated people should speak to all of us for both idealistic and pragmatic reasons. As the Commission on Safety and Abuse in America’s Prisons concluded:

What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day’s shift. When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all.<sup>25</sup>

In 2003, Justice Anthony Kennedy of the Supreme Court of the United States gave a keynote address to the American Bar Association (“ABA”), in which he acknowledged these conditions.<sup>26</sup> The speech was a call-to-arms about “the inadequacies—and the injustices—in our prison and correctional systems.”<sup>27</sup> Justice Kennedy’s decision to focus on prisons and to do so before an audience of all types of lawyers was striking. He rejected the idea that this was only a problem for criminal lawyers, declaring that the “subject is the concern and responsibility of every

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22. Winston Churchill, Speech Before the House of Commons on the Treatment of Criminals (Jul. 20, 1910), [http://hansard.millbanksystems.com/commons/1910/jul/20/class-iii#S5CV0019P0\\_19100720\\_HOC\\_288](http://hansard.millbanksystems.com/commons/1910/jul/20/class-iii#S5CV0019P0_19100720_HOC_288).

23. *Id.*

24. See, e.g., Katie Benner, *Plans for Alabama’s Deadly Prisons ‘Won’t Fix the Horrors,’* N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/alabama-prisons.html> (“After months of promising to fix Alabama’s dangerously violent prison system, a panel appointed by the governor issued recommendations this week that would do little to address the underlying problems identified last year in a scathing Justice Department report, which documented prisoners being routinely assaulted and tortured, sometimes with the knowledge and even participation of prison guards.”); Lindsey Bever, *Feds Uncover ‘Deep-Seated Culture of Violence’ Against Youths on Rikers Island,* WASH. POST (Aug. 5, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/05/feds-uncover-deep-seated-culture-of-violence-against-youth-on-rikers-island/> (quoting the local U.S. Attorney describing Rikers Island as “a place where brute force is the first impulse rather than the last resort; where verbal insults are repaid with physical injuries; where beatings are routine while accountability is rare; and where a culture of violence endures even while a code of silence prevails . . .”).

25. Gibbons & Katzenbach, *supra* note 3, at 398.

26. Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), reprinted in 16 FED. SENT’G REP. 126 (2003).

27. *Id.*

member of our profession and of every citizen. This is your justice system; these are your prisons.”<sup>28</sup> After embracing universal responsibility for what happens behind bars, Justice Kennedy acknowledged that corrections had been neglected:

When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.

We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.<sup>29</sup>

With this stark plea to open their collective eyes and enter the “hidden world of punishment,”<sup>30</sup> he turned a bright light on the nature of the American system of sentencing and corrections. The Justice discussed the charge made by Professor James Whitman that corrections in the United States are designed to degrade and demean.

That is a grave and serious charge. A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people . . . . It is no defense if our current prison system is more the product of neglect than of purpose. Out of sight, out of mind is an unacceptable excuse . . . . I hope it is not presumptuous of me to suggest that the American Bar Association should . . . help find more just solutions and more humane policies for those who are the least deserving of our citizens, but citizens nonetheless. A decent and free society, founded in respect for the individual, ought not to run a system with a sign at the entrance for inmates saying, “Abandon Hope, All Ye Who Enter Here.”<sup>31</sup>

The ABA embraced Justice Kennedy’s challenge, and less than a year later it produced a report in response.<sup>32</sup> Much of the report focused on issues of sentencing. Even the prison conditions section appears to emphasize issues of reentry instead of prisons themselves.<sup>33</sup> One reason for this is because “[i]t is difficult even to develop a full understanding of what actually occurs in prisons throughout the country.”<sup>34</sup> The Kennedy Commission discovered that in 1969, then-Chief Justice

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28. *Id.*

29. *Id.* at 127.

30. *Id.*

31. *Id.* at 128.

32. See A.B.A. JUSTICE KENNEDY COMMISSION, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (2004).

33. *Id.* at 76–77.

34. *Id.* at 78.



Warren Burger urged the ABA to look into corrections, but “for all of the resources and energy and talent devoted to its work, it appears that the [previous ABA commission] . . . left little lasting impression on the legal landscape, and its work was all but forgotten in the crime war of the 1980’s.”<sup>35</sup> The Kennedy Commission concluded that “correctional systems too often fail to do any correcting. They warehouse inmates, and in the process may actually increase the chances that prisoners, once released, will be neither equipped nor inclined to conform their conduct to the law.”<sup>36</sup> The Kennedy Commission’s recommendation on prison conditions was to urge that they be “safe and humane, for prisoners and staff alike.”<sup>37</sup>

There have been other, more recent efforts to address prison conditions, including the Prison Rape Elimination Act<sup>38</sup> and the Commission on Safety and Abuse in America’s Prisons, which recommended, among other things, creating “a positive culture in jails and prisons grounded in an ethic of respectful behavior and interpersonal communication that benefits prisoners and staff.”<sup>39</sup> Yet, many in America still have a knee-jerk fascination with incarceration and a tendency to think that prison should be a place to go *for* punishment as opposed to a place to go *as* punishment.<sup>40</sup> This impulse may, in part, be due to the extreme range of penal conditions in American prisons and jails and a lack of consensus about what these conditions should be, as well as limited information on what the conditions *are*. As the National Research Council has noted, as a society, we lack this key scientific knowledge because “no truly comprehensive, systematic, and meaningful assessment of prison conditions in the United States exists.”<sup>41</sup>

Perhaps there is a value in looking across the Atlantic. While observers of a different era like Gustave de Beaumont and Alexis de Tocqueville looked to the United States for correctional guidance in Europe,<sup>42</sup> perhaps, today, the United States can seek inspiration from our colleagues across the ocean for a new model of American incarceration.

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35. *Id.* at 79. Of course, even that 1969 plea by Chief Justice Burger occurred after the 1967 publication of the landmark CHALLENGE OF CRIME IN A FREE SOCIETY, which noted: “For a great many offenders, then, corrections does not correct. Indeed, experts are increasingly coming to feel that the conditions under which many offenders are handled, particularly in institutions, are often a positive detriment to rehabilitation. Life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading.” PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 159 (1967).

36. See A.B.A JUSTICE KENNEDY COMMISSION, *supra* note 32, at 79.

37. *Id.* at 83.

38. See Title 34 U.S.C., Chapter 303.

39. Gibbons & Katzenbach, *supra* note 3, at 407.

40. See Alison Shames & Ram Subramanian, *Doing the Right Thing*, 27 FED. SENT’G REP. 9, 11 n.1 (2014) (“Human dignity is a concept that most people in the United States do not typically associate with prisons.”).

41. NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 167 (2014)

42. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 9.

### B. *Learning from Foreign Lands?*

America views itself as an exceptional nation. It is a place where others come to learn.<sup>43</sup> America is the exporter of crucial practices supporting democracy, freedom, and the rule of law.<sup>44</sup> Unfortunately, those truths have obscured the fact that America, like any person or nation, can always learn from others. This is especially true when it comes to corrections.

The idea of looking to other countries for ideas about the law—even about the criminal justice system—is not new.<sup>45</sup> In practice, however, it is far from common.<sup>46</sup> There has been a growing American interest in comparative corrections in recent years.<sup>47</sup> The Vera Institute of Justice (“Vera”) was part of this modern vanguard. In 2013, Vera and the Prison Law Office sponsored a trip to Germany and the Netherlands for criminal justice officials from Colorado, Georgia, and Pennsylvania.<sup>48</sup> Remarkably, one of the German correctional leaders later wrote that he was surprised to hear from Americans. He had regular visitors from other countries near and far, “but we have never had anyone from the United States. In over thirty years of working in corrections, in different positions, never have I seen U.S. visitors.”<sup>49</sup>

It seems, however, that Americans to an increasing extent are looking abroad for inspiration on how to change their criminal justice system(s). Modern advocates have developed a robust set of travel-based correctional education programs, many of which include or emphasize Scandinavian policies.<sup>50</sup> The Amend program,

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43. See Jörg Jesse, *Differences That Make a Difference?*, 27 FED. SENT’G REP. 30, 30 n.1 (2014) (“Why do we not have any transatlantic conversations about these issues? It may not help that Americans are seen as believing that their approach is correct, perhaps even superior, so that what others do and how they do them appear to be of little interest.”).

44. See Elisabetta Grande, *Comparative Criminal Justice: A Long Neglected Discipline on the Rise*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 191, 202–05 (Mauro Bussani & Ugo Mattei eds., 2013) (describing areas of American import and export).

45. See, e.g., JOHN HOWARD, THE STATE OF THE PRISONS IN ENGLAND AND WALES: WITH PRELIMINARY OBSERVATIONS, AND AN ACCOUNT OF SOME FOREIGN PRISONS AND HOSPITALS 51 (4th ed. 1792); CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 34 (Chapman & Hall eds. 1913).

46. See Grande, *supra* note 44, at 189 (While comparative law emerged from civil law and “has for years paid almost no attention to criminal justice[, t]hings today are rapidly changing . . . . New international dynamics ask for a deep understanding of the similarities between criminal legal systems rather than of their differences, pushing criminal justice into the realm of a modern comparative law methodology, one that takes an integrative approach instead of a contrastive one.”).

47. See, e.g., Cyrus Ahalt, Craig Haney, Kim Ekhaugen & Brie Williams, *Role of a US–Norway Exchange in Placing Health and Well-Being at the Center of US Prison Reform*, 110 AM. J. PUB. HEALTH S27, S28 (Jan. 2020) (describing a program to “develop correctional policies and practices that are influenced by the Norwegian approach but account for the specific needs and constraints of their particular context”).

48. Shames & Subramanian, *supra* note 40. Professor Chanenson, then a member of the Pennsylvania Commission on Sentencing, was part of the Pennsylvania delegation.

49. Jesse, *supra* note 43, at 30.

50. See Ahalt et al., *supra* note 47, at S27–S29; Janelle Guthrie, *Looking to Norway for Inspiration on Reducing the Use of Solitary Confinement*, VERA INST. OF JUST. (Mar. 11, 2020), <https://www.vera.org/blog/addressing-the-overuse-of-segregation-in-u-s-prisons-and-jails/looking-to-norway-for-inspiration-on-reducing-the-use-of-solitary-confinement>; *Reimagining Prison in Germany and Norway*, VERA INST. OF JUST., <https://www.vera.org/spotlights/reimagining-prison-in-germany-and-norway>.

based out of the University of California, San Francisco, “enrolled [American] policymakers and government officials in an immersive program in Norway designed to introduce them to a radically different approach to correctional work” through a long-term partnership with the Norwegian Correctional Service.<sup>51</sup> Amend is now engaged with frontline staff and adapting Norwegian practices in several American prisons, with an emphasis on increasing the health of both incarcerated people and correctional staff through officer training and community-based reforms.<sup>52</sup> Implementing Norwegian-inspired practices has resulted in meaningful reforms for staff and incarcerated persons, for example in the state of North Dakota’s correctional system.<sup>53</sup>

## II. PRINCIPLES FOR FRAMING INTERNATIONAL POLICY EXCHANGES

American correctional policy has developed, in recent years, as a largely inward-facing effort, emphasizing evidence and examples drawn from within national and cultural borders. This has not always been the case, as a body of scholarship and practice has developed to guide and classify the complex efforts necessary to facilitate comparative international policymaking. Through this lens, we may ask: What might be accomplished by looking to prisons elsewhere?

This Part highlights scholarly views on comparative work generally with a focus on comparative justice and corrections. It demonstrates that properly-done comparative corrections efforts can serve as both a window and a mirror by demonstrating what is happening elsewhere while simultaneously encouraging self-reflection.

Professor David Nelken has characterized comparative work as “discovering [both] surprising differences and unexpected similarities” about both oneself and others.<sup>54</sup> Comparative justice work is an arduous endeavor and one that has spawned many critics. Professors Andersen and Hyatt have previously described the task at hand this way:

Modern-day comparative criminal justice research has developed into a diverse field that encompasses a range of qualitative, ethnographic, and empirical approaches. Yet researchers still grapple with several fundamental challenges, the most important of which is the inherent difficulty of making valid and useful comparisons: while apples-to-apples assessments are easy enough,

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51. Ahalt et al., *supra* note 47, at S28; *see also Amend: Changing Correctional Culture*, UCSF, amend.us (last visited Apr. 6, 2021).

52. Ahalt et al., *supra* note 47, at S28.

53. L.K. Bertsch, *Reflections on North Dakota’s Sustained Solitary Confinement Reform*, in *SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM* 325, 325-26 (J. Lobel & P. Smith eds., 2019).

54. DAVID NELKEN, *COMPARATIVE CRIMINAL JUSTICE: MAKING SENSE OF DIFFERENCE* 32 (2010); *see also* Steven L. Chanenson, *Sentencing Beyond Our Borders*, 22 *FED. SENT’G REP.* 201, 201 (2010) (“Looking outside of our own legal system allows us to see things—about ourselves as well as the other systems—that might otherwise be invisible. We can notice things that might have been overlooked.”).

many balk when an orange enters the equation. Criminal justice systems comprise a complex set of legal authorities, institutions, and programs. Attempting a national-level comparison of these systems means that there are hundreds of practical or ideological apples and oranges at play; the combinations are myriad. . . . Moreover, this fundamental problem is accompanied by the challenges inherent within both methods (*e.g.*, incomparable measures or unreliable data) and contexts (*e.g.*, cultural and linguistic biases).<sup>55</sup>

Elsewhere, Nelken has argued that both ethnocentrism, the assumption that a domestic approach is superior, and relativism, an inability to fully comprehend foreign ideals and motivations, challenge many comparative criminal justice efforts. Overcoming these challenges in perspective and interpretation, he also notes, requires both explanatory and interpretative strategies that emphasize a “real-world” understanding of domestic and foreign policies and realities.<sup>56</sup>

Beyond those hurdles, there is the not-so-hidden suspicion that much comparative work is little more than an amusing, albeit hypothetical, thought exercise. One scholar offered a pithy summary of this criticism: “So comparative study is dismissed as an excuse for international travel, a luxury that serious social scientists leave to dilettantes.”<sup>57</sup> He rejected that assessment just as succinctly: “Comparative study is thoroughly mainstream in any significant intellectual way; it can indeed be done successfully, and there are substantial reasons for doing so.”<sup>58</sup>

Professor Michael Tonry<sup>59</sup> acknowledges that the “[l]atent functions [that] drive much human activity”<sup>60</sup> apply to comparative criminal justice research as well. Significantly, however, he also articulates three positive overt functions associated with comparative research:

The first is to help policymakers and others look across national boundaries to learn how things are done elsewhere. The second is to examine the extent to which, and the conditions under which, countries successfully import ideas from elsewhere. The third, the most important, is to put national policies and practices into cross-national contexts in order to know what differences they make in national patterns of crime and punishment.<sup>61</sup>

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55. Synøve Nygaard Andersen & Jordan M. Hyatt, *Building a Policy “Sandbox”: An Opportunity for Comparative Sentencing and Corrections*, 31 FED. SENT’G REP. 14, 14 (2018).

56. David Nelken, *Comparative Criminal Justice*, 6 EUROPEAN J. CRIMINOLOGY 291, 291–92 (2009).

57. David H. Bayley, *Policing: The World Stage*, in *POLICING ACROSS THE WORLD: ISSUES FOR THE TWENTY-FIRST CENTURY* 2 (R.I. Mawby ed., 2013).

58. *Id.*

59. Professor Tonry is a member of the Advisory Board to the Scandinavian Prison Project described in this Article.

60. Michael Tonry, *Is Cross-National and Comparative Research on the Criminal Justice System Useful?*, 12 EUR. J. CRIMINOLOGY 505, 506 (2015).

61. *Id.*

These are the hopes and goals that have animated the SPP.

To achieve the second two overt functions, it is important to start by identifying legal transplants: “the moving of a rule or a system of law from one country to another, or from one people to another.”<sup>62</sup> Professor Richard Frase<sup>63</sup> provided a wake-up call for this area of the law more than thirty years ago when he published an influential examination of the French and American approaches.<sup>64</sup> Frase observed that “[a] major shortcoming of comparative criminal procedure literature thus far is that it has focused attention on the extremes of difference and similarity. What is needed now is greater attention to smaller yet real differences which may permit viable ‘legal transplants’ to the American context.”<sup>65</sup> Frase’s words still ring true today, especially in the realm of comparative corrections.

Smaller may indeed be better in this context. The late Professor Norval Morris once argued that “a grand vision of a new goal . . . [may] be achieved by means of politically viable incremental steps.”<sup>66</sup> Professors Andersen and Hyatt embraced this by focusing on what they termed the micro and external dimensions of comparative research.<sup>67</sup> “[F]ocusing on smaller, yet salient, differences at the micro level improves the prospects of identifying components of one system that can be used as the basis of reform in another.”<sup>68</sup> Of course, legal transplants, like their horticultural cousins, may not always thrive in their new surroundings.<sup>69</sup> As Professor Tonry notes, “[h]owever appealing innovations may appear in the originating country and in the abstract, their adoption and survival are unlikely unless they fit comfortably into the receiving country’s penal and political cultures.”<sup>70</sup>

There are various kinds of legal transplants enacted for an array of reasons. Categorizing and understanding why certain transplants are supported can provide

62. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (1974); *see also* Grande, *supra* note 44, at 201 (“Since the seminal work of Alan Watson in 1974, legal transplants – that is, the borrowing by a legal system of rules, concepts, and categories from another legal system – have always captured comparatists’ attention.”); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 *AM. J. COMP. L.* 839, 839 (2003) (“Legal transplants, the movement of laws and legal institutions between states, have become central to the study of comparative and international law.”).

63. Professor Frase is a member of the Advisory Board to the Scandinavian Prison Project described in this Article.

64. *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care*, 78 *CALIF. L. REV.* 539, 542 (1990).

65. *Id.* at 547–48 (footnote omitted).

66. Norval Morris, *Book Review*, 91 *HARV. L. REV.* 1367, 1370 (1978) (reviewing LLOYD L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977)); *see also id.* at 1369 (“The truly difficult task in criminal justice reform is to define politically viable courses of legislative, regulatory, and judicial conduct which are capable of avoiding the formidable ability of existing institutions to swallow changes without affecting the overall system.”).

67. Andersen & Hyatt, *supra* note 55, at 16.

68. *Id.* at 17; *see also id.* at 18 (arguing that “micro-level international collaboration can provide otherwise unavailable information and encourage reform”).

69. *See* DAVID SCOTT, *AGAINST IMPRISONMENT: AN ANTHOLOGY OF ABOLITIONIST ESSAYS* 21 (2018) (“Let me start, if I may, with a metaphor about ‘penal horticulture.’”).

70. Tonry, *supra* note 60, at 510–11.

meaningful insights into the process and perhaps even the likelihood of ultimate success. Professor Jonathan Miller crafted a typology of legal transplants with four categories: “Each type is tied to a different set of factors that can motivate a transplant, and the types are titled: i) the Cost-Saving Transplant; ii) the Externally-Dictated Transplant; iii) the Entrepreneurial Transplant; and iv) the Legitimacy-Generating Transplant.”<sup>71</sup> As with many models, real life is often messier, and individual transplants may fall into more than one category.<sup>72</sup>

As discussed below, the entrepreneurial transplant and the legitimacy-generating transplant are particularly relevant to the current interest in comparative corrections with the United States as a potential importer. In this context, the people supporting what might be classified as an entrepreneurial transplant are not likely to be animated by an entrepreneurial spirit in the sense of personal financial gain. Rather, “[t]he individuals involved may well show enormous idealism in adopting the transplant. But their investment in the transplant is an investment in developing expertise that offers concrete payoffs, and without such payoffs they would take alternative paths.”<sup>73</sup> These payoffs may come in the form of professional success or ideological satisfaction. As the classifications are not mutually exclusive, this same work may also be viewed as the goals and results of a legitimacy-generating transplant. “One of the most frequently offered explanations as to why transplants occur and to some extent when they tend to succeed is the prestige of the foreign model.”<sup>74</sup>

In rounding out a discussion of the comparative law goals surrounding an examination of correctional practices, one cannot forget Professor Tonry’s third overt function of contextualizing national practices. As Professors Andersen and Hyatt put it:

It is . . . important to stress that the returns of such an endeavor will likely be greatest if the focus is less on how the United States can “become more like Norway” and more on the ways in which international comparisons can serve as an opportunity to think outside the box and stretch the imagination about what is possible or impossible, what potentially should be done, what should never be done, and what should stay exactly the way it is.<sup>75</sup>

Thus, SPP aims to be both a window and a mirror. It provides a window into what is possible for a correctional facility—one inspired by a different culture but

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71. Miller, *supra* note 62, at 842.

72. *Id.* (“Many transplants are a mix of the four types, and one rarely encounters a type in pure form.”).

73. *Id.* at 850; *see also id.* (noting that these types of “individuals and groups . . . use international norms to strengthen their positions in domestic debate”).

74. *Id.* at 854; *see also id.* at 856 (noting that Alan Watson asserted that “it is difficult for legislators and judges to get new approaches accepted by others, and the prestige of the foreign model provides needed legal authority”).

75. Andersen & Hyatt, *supra* note 55, at 16.



adapted to thrive in Pennsylvania.<sup>76</sup> It also provides a mirror. What will we discover about corrections in the Keystone State and America more broadly?<sup>77</sup>

### III. SCANDINAVIAN PENAL EXCEPTIONALISM

The carceral systems in the three Scandinavian countries of Denmark, Norway, and Sweden<sup>78</sup> have become a focal point for myriad popular culture and journalistic considerations of penal conditions.<sup>79</sup> They have also emerged as a common comparison case within the sociological,<sup>80</sup> penological,<sup>81</sup> legal,<sup>82</sup> and design literatures<sup>83</sup> for the Anglo-American approach to prisons that often

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76. Tonry, *supra* note 60, at 507 (describing comparative and cross-national criminal justice research as providing “models for law reform emulation”).

77. *Id.* (noting that another function of comparative work is “to enable people to see institutions and practices in their country as they look to outside observers and relative to those elsewhere”).

78. As generally understood, Scandinavia consists of these three countries. Danes, Norwegians, and Swedes share a common history, maintain economic and cultural ties, and most citizens can understand the other regional languages. Iceland and Finland are also included with the Scandinavian nations in the broader classification of the Nordic countries, though the Icelandic and Finnish linguistic heritages are each distinct. See generally T.K. DERRY, *A HISTORY OF SCANDINAVIA: NORWAY, SWEDEN, DENMARK, FINLAND AND ICELAND* (2000) (tracing the history of the Scandinavian countries from the earliest times to the present day and noting the common features these countries inherited from their past); MARY HILSON, *THE NORDIC MODEL: SCANDINAVIA SINCE 1945* (2008) (exploring Scandinavia as a historical region, particularly within the context of the Scandinavian or Nordic “model” of politics and policy in modern times, and revealing patterns of similarity and difference across national boundaries).

79. See, e.g., Knut Egil Wang, *Inside Norway’s Halden Prison*, STORY INST., <https://www.thestoryinstitute.com/halden> (last visited Jan. 14, 2021); Amelia Gentleman, *Inside Halden, the Most Humane Prison in the World*, *GUARDIAN* (May 18, 2012), <https://www.theguardian.com/society/2012/may/18/halden-most-humane-prison-in-world> (exploring Norway’s “most humane” prison); *Is This a ‘Luxury Prison’?*, *BBC NEWS* (Mar. 5, 2018), <https://www.bbc.com/news/av/world-43261564> (asking if Norway’s Halden Prison is a “luxury prison”); *How Norway Turns Criminals into Good Neighbours*, *BBC NEWS* (July 7, 2019), <https://www.bbc.com/news/stories-48885846> (exploring how Norway rehabilitates in its prisons); Henrik Pryser Libell & Matthew Haag, *New York’s Jails are Failing. Is the Answer 3,600 Miles Away?*, *N.Y. TIMES* (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/nyregion/nyc-rikers-norway.html> (describing how New York officials are looking to Norway when designing new prisons).

80. See generally Philip Hancock & Yvonne Jewkes, *Architectures of Incarceration: The Spatial Pains of Imprisonment*, 13 *PUNISHMENT & SOC’Y* 611, 612–13 (2011).

81. See, e.g., Andrew von Hirsch, “Neoclassicism,” *Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate*, 29 *CRIME & DELINQ.* 52, 52 (1983); Francis Pakes & Katrine Holt, *Crimmigration and the Prison: Comparing Trends in Prison Policy and Practice in England & Wales and Norway*, 14 *EUR. J. CRIMINOLOGY* 63, 63 (2017); William L. Selke, *A Comparison of Punishment Systems in Denmark and the United States*, 15 *INT’L J. COMPAR. & APPLIED CRIM. JUST.* 227, 229–30 (1991); Christopher Uggen, Robert Stewart & Veronica Horowitz, *Why Not Minnesota? Norway, Justice Reform, and 50-Labs Federalism*, 31 *FED. SENT’G REP.* 5, 5–6 (2018).

82. See, e.g., Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 *EMORY INT’L L. REV.* 329, 332 (2017); Thomas M. Lockney, *A Comparison of Drinking and Driving Law in Norway and North Dakota: More Than a Difference in Penalties*, 76 *N.D. L. REV.* 33, 33–35 (2000).

83. See, e.g., Jordan M. Hyatt, Synøve N. Andersen & Steven L. Chanenson, *Prison Cells as a Grounded Embodiment of Penal Ideologies: A Norwegian-American Comparison*, in *THE PRISON CELL: EMBODIED AND EVERYDAY SPACES OF INCARCERATION* 45, 45–47 (Jennifer Turner & Victoria Knight eds., 2020); Francesca Giofrè, Livia Porro & Elisabeth Fransson, *Prisons Between Territory and Space: A Comparative Analysis Between Prison Architecture in Italy and Norway*, in *PRISON, ARCHITECTURE AND HUMANS* 39, 39 (Elisabeth



dominates the global correctional conversation.<sup>84</sup>

Under the umbrella of a concept referred to as “Scandinavian penal exceptionalism,” recent scholarship has sought to understand the distinguishing characteristics of the Scandinavian systems, the salient contextual elements that allowed for the historical developments,<sup>85</sup> and the socio-economic context<sup>86</sup> needed for sustained support for the Scandinavian penal system. In his foundational two-part article, in which he brought the term into the academic lexicon, New Zealand criminologist John Pratt focuses on the exceptional prison conditions and characteristics that define “Scandinavian penal exceptionalism” as they were observed in the Scandinavian countries.<sup>87</sup> Drawing on a series of visits to correctional facilities, he notes that there are several traits of the penal systems that are common, and perhaps uniquely combined, within Scandinavia. In synthesizing his observations, he notes that Scandinavian penal systems often (1) are comprised of a large number of small prisons (often with 100 inmates or fewer); (2) all prisons are state-run; (3) correctional officers are highly educated; (4) health, education, and library services are typically administered by the same service providers as used in the community; (5) the social hierarchy in prisons is relatively flat and characterized by shared governance; and (6) that living standards in these prisons are relatively high.<sup>88</sup> Overall, Pratt argues that this constellation of prison conditions can be explained by the fact that “[g]enerally speaking, in this region, it is recognized that going to prison is itself the punishment for crime; prison conditions can then approximate to life

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Fransson, Francesca Giofrè & Berit Johnsen eds., 2018); Leonard D. Baer & Bodil Ravneberg, *The Outside and Inside in Norwegian and English Prisons*, 90 GEOGRAFISKA ANNALER: SERIES B, HUMAN GEOGRAPHY 205, 205-206, 208 (2008).

84. See generally Hans J. Engbo, *Normalisation in Nordic Prisons—From a Prison Governor’s Perspective*, in SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE 327, 327 (Peter Scharff Smith & Thomas Ugelvik eds., 2017) (comparing England, Wales, and Norway); Uggen et al., *supra* note 81, at 5 (comparing Minnesota to Norway).

85. Tapio Lappi-Seppälä, *Penal Policies in the Nordic Countries 1960–2010*, 13 J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION 85, 85 (2012); Roddy Nilsson, *The Most Progressive, Effective Correctional System in the World’: The Swedish Prison System in the 1960s and 1970s*, in PENAL EXCEPTIONALISM? NORDIC PRISON POLICY AND PRACTICE 91 (Thomas Ugelvik & Jane Dullum eds., 2011).

86. See Victor Lund Shammass, *Prisons of Labor: Social Democracy and the Triple Transformation of the Politics of Punishment in Norway, 1900–2014*, in SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE: EMBRACED BY THE WELFARE STATE? 57 (Scharff Smith & Thomas Ugelvik, eds., 2017).

87. John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119, 119 (2008) [hereinafter Pratt, *Scandinavian Exceptionalism, Part I*]; John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part II: Does Scandinavian Exceptionalism Have a Future?*, 48 BRIT. J. CRIMINOLOGY 275, 275 (2008) [hereinafter Pratt, *Scandinavian Exceptionalism, Part II*];

88. See Pratt, *Scandinavian Exceptionalism, Part I*, *supra* note 87; Pratt, *Scandinavian Exceptionalism, Part II*, *supra* note 87. But see Craig Minogue, *The Engaged Specific Intellectual: Resisting Unethical Prison Tourism and the Hubris of the Objectifying Modality of the Universal Intellectual*, 18 J. PRISONERS ON PRISON 129, 129 (2009) (critiquing Pratt for relying on official visits for data and engaging in “prison tourism”); Peter Scharff Smith, *A Critical Look at Scandinavia*, in PENAL EXCEPTIONALISM? NORDIC PRISON POLICY AND PRACTICE 38 (Thomas Ugelvik & Jane Dullum eds., 2012) (noting that Pratt chose to focus on aspects of the system that were novel at the expense of the mundane and more problematic elements).

outside as far as possible, rather than being allowed to degrade and debase all within.”<sup>89</sup> This, in itself, distinguishes the Scandinavian ideological approach from the more punitive philosophies that guide American-style penal policies.<sup>90</sup> This has led the Scandinavian system to be viewed as a penal cockaigne or utopia, irrespective of the grounded reality of such assessments.<sup>91</sup>

Within Scandinavia, Norway’s prisons have generally received more media and public attention than those in Sweden and Denmark. While there are many possible reasons, two points that attract a great deal of international attention to Norwegian prisons have been Halden Prison, the “most humane prison in the world,”<sup>92</sup> and the often-litigated conditions of confinement for a notorious mass killer.<sup>93</sup> A Nordic recidivism study also pointed to Norway as having the lowest recidivism rates (twenty percent) in the region.<sup>94</sup> All of these issues have highlighted the distinctive facilities and custodial conditions within Norway.<sup>95</sup> There are, however, many similarities between the various Scandinavian systems.<sup>96</sup> Within the context of this paper, the Norwegian model takes primacy. Nevertheless, experiences and models from the other Scandinavian facilities and systems also informed the development of the exchange and the SPP.

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89. Pratt, *Scandinavian Exceptionalism, Part I*, *supra* note 87, at 119; see also *Straff i Fengsel*, KRIMINALOMSORGEN, <https://www.kriminalomsorgen.no/straff-i-fengsel.516314.no.html> (last visited Mar. 5, 2021).

90. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314 (2000).

91. See MARC MORJE HOWARD, UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM 74 (2017) (asserting that “on the issue of prison conditions, the Scandinavian countries deserve particular attention, since they represent the opposite extreme to the U.S., as they are unusually humane.”) (footnote omitted). This article accepts the world as it finds it – that is, with prisons. Engaging in a discussion about the relative merits and plausibility of penal abolition is beyond the scope of this article. Cf. SCOTT, *supra* note 69, at 22, 25-29 (exploring what the author describes as the “mythology of the ‘utopian prison’”).

92. Gentleman, *supra* note 79; see also *Inside Halden Prison, The Most Humane Prison In The World*, ALL THAT’S INTERESTING (July 28, 2011), <https://allthatsinteresting.com/halden-prison>.

93. *Anders Breivik: Just How Cushy Are Norwegian Prisons?*, BBC NEWS (March 16, 2016), <https://www.bbc.com/news/magazine-35813470>; Panos Kapotas, *The Saga of Anders Breivik’s Prison Conditions Puts European Democracy in the Spotlight*, THE CONVERSATION (March 2, 2017), <https://theconversation.com/the-saga-of-anders-breiviks-prison-conditions-puts-european-democracy-in-the-spotlight-73917>.

94. The original, Scandanavian-language report is Ragnar Kristoffersen, *Retur: en nordisk undersøgelse af racidiv blant klienter i kriminalforsorgen*, KRIMINALOMSORGENS HØGSKOLE OG UTDANNINGSSENTER KRUS (2013). An English summary and discussion has also been published: Ragnar Kristoffersen, *Relapse Study in the Correctional Services of the Nordic Countries: Key Results and Perspective*, 2 KRIMINALOMSORGENS HØGSKOLE OG UTDANNINGSSENTER KRUS 168, 168–70 (2013), <https://krus.brage.unit.no/krus-xmlui/handle/11250/160435>.

95. For example, Bastøy Prison, the country’s largest low-security facility, is located on an island and often discussed less with regard to the prison itself but rather to the freedom the incarcerated individuals enjoy and the connection to nature that the context provides. See Dominique Moran & Yvonne Jewkes, ‘Green’ Prisons: Rethinking the ‘Sustainability’ of the Carceral Estate, 69 GEOGRAPHICA HELVETICA 345, 351 (2014). But see Victor Lund Shammass, *The Pains of Freedom: Assessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway’s Prison Island*, 16 PUNISHMENT & SOC’Y 104, 104 (2014).

96. Doria Schartmueller, *Doing Indefinite Time: Penal Confinement and the Life-Imprisoned Offender in Denmark, Finland, and Sweden*, 99 PRISON J. 66, 66 (2019).

Scandinavian penal and correctional characteristics did not arise in a vacuum. Instead, the design and conditions inside of these prisons reflect the broader societies in which they operate. In the case of all of the Scandinavian nations, a strong welfare state<sup>97</sup> allows for a correctional system that provides incarcerated citizens access to services not commonly found behind prison walls in other countries.<sup>98</sup> Some have highlighted how this welfare-correctional nexus might take on the two-faced nature of a “Big Mother penal welfare state” that both controls and cares for her citizens.<sup>99</sup> This nexus, however, also lays the foundation for an official policy regarding punishment that focuses on limiting freedoms and community engagement while at the same time preserving access to the support and resources that are nearly uniformly available within the community.<sup>100</sup>

In order to meet the obligations and commitments of the welfare state, as well as the policy goals of the Norwegian Correctional Service (“NCS”) (e.g., recidivism reduction, community protection),<sup>101</sup> the modern Norwegian prison climate<sup>102</sup> was developed to ensure that conditions of confinement are in line with the relevant

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97. In this context, the welfare state can be distinguished from pure capitalist and other economic models. See Rune Halvorsen, Bjorn Hvinden & Mi Ah Schoyen, *The Nordic Welfare Model in the Twenty-First Century: The Bumble-Bee Still Flies!*, 15 SOC. POL’Y & SOC’Y 57, 59 (2016). Halvorsen and colleagues write that:

A key trait of the Nordic Model is the combination of active social and economic policies. It supports the equalization of life chances by ensuring free access to education, promoting participation in paid work for the whole adult population (including women), and, finally, by offering a comprehensive system of social protection. The Nordic social or welfare model is combined with economic and industrial policies oriented towards competitiveness and efficiency. To this end, economy-wide coordinated wage setting through collective agreements has long been a key feature of Nordic industrial relations.

*Id.*

98. Peter S. Smith & Thomas Ugelvik, *Punishment and Welfare in Scandinavia*, in SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE: EMBRACED BY THE WELFARE STATE? 5 (Peter S. Smith & Thomas Ugelvik eds., 2017). *But see* Vilde Ystanes & Thomas Ugelvik, ‘They Tell Me I’m Dangerous’: Incarcerated Mothers, Scandinavian Prisons and the Ambidextrous Penal-Welfare State, 60 BRIT. J. CRIMINOLOGY 892, 892–93 (2020) (noting the ideological tensions that arise when implementing welfare policy in a correctional context). This, of course, can create challenges when dealing with classes of individuals who are not eligible for the benefits of the social safety net such as non-citizens. See Thomas Ugelvik, *The Limits of the Welfare State? Foreign National Prisoners in the Norwegian Crimmigration Prison*, in SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE: EMBRACED BY THE WELFARE STATE? 405 (Scharff Smith & Thomas Ugelvik eds., 2017). The mirroring of changes in external conditions and non-carceral policies can also become a pathway for magnifying inequity. See Victor L. Shammass, *The Rise of a More Punitive State: On the Attenuation of Norwegian Penal Exceptionalism in an Era of Welfare State Transformation*, 24 CRITICAL CRIMINOLOGY 57, 58 (2016) (considering how changes in attitudes towards the welfare state impacts prison policies).

99. Smith & Ugelvik, *supra* note 98.

100. Norwegian Ministry of Justice and the Police, *Punishment That Works—Less Crime—A Safe Society: Report to the Storting on the Norwegian Correctional Services (English Summary)*, 31 FED. SENT’G REP. 52 (2018).

101. *Id.*

102. See generally John Pratt & Anna Eriksson, ‘Mr. Larsson Is Walking out Again’. *The Origins and Development of Scandinavian Prison Systems*, 44 AUSTL. & N.Z. J. CRIMINOLOGY 7, 7 (2011). *But see* Are Høidal, *Normality Behind the Walls: Examples from Halden Prison*, 31 FED. SENT’G REP. 58, 58 (2018) (noting that the Norwegian prison environment in the 1980s was dissimilar to the current day and required extensive efforts to implement reforms).

ideological foundations. These foundations are most commonly summarized in what is called the “normality principle”<sup>103</sup> in Norway.<sup>104</sup> As reflected in official documents and public websites produced by the NCS, the normality principle is defined the following way:

The punishment is the restriction of liberty; no other rights have been removed by the sentencing court. Therefore, the sentenced offender has all the same rights as all others who live in Norway. No-one shall serve their sentence under stricter circumstances than necessary for the security in the community. Therefore, offenders shall be placed in the lowest possible security regime [and] [d]uring the serving of a sentence, life inside will resemble life outside as much as possible.<sup>105</sup>

This principle stands in stark contrast to the “principle of least eligibility” that characterizes the American system.<sup>106</sup> In his account of implementing the normality principle in a Nordic context, former Norwegian prison governor Hans Jørgen Engbo stresses that normality is, first and foremost, to be seen as a pragmatic aim for prisons and that life in prison can never be seen as truly normal.<sup>107</sup> Are Høidal, founding and current governor of Halden Prison, sees the principle of normality guiding many aspects of prison life such that the community inside of the walls will be as similar to the community outside as possible, given the restrictions required by the sentence and security needs.<sup>108</sup> From a practical perspective, this is manifest in the construction and design of common areas and living units,<sup>109</sup> staff-incarcerated person interactions,<sup>110</sup> daily routines and movement,<sup>111</sup> and the “import model” used throughout the Norwegian system, through which

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103. Though also referred to as the “principle of normality,” we refer to this ideal as simply the normality principle throughout, in keeping with previous English-language discussions of the topic.

104. Høidal, *supra* note 102, at 59; Engbo, *supra* note 84, at 327.

105. *About the Norwegian Correctional Service*, KRIMINALOMSORGEN, <https://www.kriminalomsorgen.no/?cat=536003#> (last visited Jan. 21, 2021) (commas added).

106. PETERSILIA, *supra* note 20, at 5.

107. Engbo, *supra* note 84, at 336–37.

108. Høidal, *supra* note 102, at 58; *see also* Yanique A. Anderson & Linda Gröning, *Rehabilitation in Principle and Practice: Perspectives of Inmates and Officers*, 4 BERGEN J. CRIM. L. & CRIM. JUST. 220, 224 (2016).

109. *See, e.g.*, Hyatt, Andersen & Chanenson, *supra* note 83, at 45; Yvonne Jewkes & Kate Gooch, *How Lessons in Scandinavian Design Could Help Prisons With Rehabilitation*, CONVERSATION (Jan. 4, 2019), <https://theconversation.com/how-lessons-in-scandinavian-design-could-help-prisons-with-rehabilitation-106554>; Linda Samson, *Can the Architecture of a Prison Contribute to the Rehabilitation of Its Inmates?*, DESIGN INDABA (Apr. 29, 2019), <https://www.designindaba.com/articles/creative-work/can-architecture-prison-contribute-rehabilitation-its-inmates>.

110. *See, e.g.*, Torsten Kolind, Vibeke A. Frank, Odd Lindberg & Jouni Tourunen, *Officers and Drug Counsellors: New Occupational Identities in Nordic Prisons*, 55 BRIT. J. CRIMINOLOGY 303, 315 (2015); Terje Emil Fredwall, *Guarding, Guiding, Gate Opening: Prison Officer Work in a Norwegian Welfare Context*, in SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE: EMBRACED BY THE WELFARE STATE? 157 (P. S. Smith & T. Ugelvik eds., 2017).

111. Berit Johnsen, *Movement in the Prison Landscape: Leisure Activities—Inside, Outside and In-between*, in PRISON ARCHITECTURE AND HUMANS 65 (Elisabeth Fransson, Francesca Giofrè, Berit Johnsen eds., 2018).

community-based educators and staff provide the same level of services to prisoners that are provided to non-incarcerated citizens.<sup>112</sup>

This idea of “normality” in prisons has focused a substantial amount of international attention on the Scandinavian approach. From an Anglo-American perspective, much of the extensive media coverage focuses on the apparent contradictions between a correctional policy that supports a humane and less punitive approach to incarceration, and recidivism rates that are lower than those observed in many other, more punitive systems.<sup>113</sup> While this might challenge the “prison first” attitude held by many in the United States, it is important to recognize that the concept of normality in prisons is not a uniquely Scandinavian invention.<sup>114</sup> For instance, Rule 5 of the European Prison Rules published by the Council of Europe states that “[l]ife in prison shall approximate as closely as possible the positive aspects of life in the community.”<sup>115</sup> In the revised commentary to the recommendations, it is further detailed that:

Rule 5 emphasises the positive aspects of normalisation. Life in prison can, of course, never be the same as life in a free society. However, active steps should be taken to make conditions in prison as close to normal life as possible and to ensure that this normalisation does not lead to reproducing undesirable

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112. Lidia Santora, Geir Arild Espnes & Monica Lillefjell, *Health Promotion and Prison Settings*, 10 INT’L J. PRISONER HEALTH 27, 31 (2014); Hilde Hetland, Ole-Johan Eikeland, Terje Manger, Åge Diseth & Arve Asbjørnsen, *Educational Background in a Prison Population*, 58 J. CORRECTIONAL EDUC. 145, 147 (2007); see also Hilde Kristin Ljødal & Erlend Ra, *Prison Libraries the Scandinavian Way: An Overview of the Development and Operation of Prison Library Services*, 59 LIBR. TRENDS 473, 473–74 (2011), <http://hdl.handle.net/2142/18746>.

113. See, e.g., HANS M. GRAUNBØL, BO KIELSTRUP, MARJA-LIISA MUILUVUORI, SASU TYNI ERLENDUR SIGURDUR BALDURSSON, HAFDÍS GUÐMUNDSDÓTTIR, RAGNAR KRISTOFFERSEN, LARS KRANTZ, & KARIN LINDSTÉN, KRIMINALOMSORGEN, RETUR: EN NORDISK UNDERSØGELSE AF RECIDIV I KRIMINALFORSORGEN (2010). But see Synøve Nygaard Andersen & Torbjørn Skardhamar, *Pick a Number: Mapping Recidivism Measures and Their Consequences*, 63 CRIME & DELINQUENCY 613, 628 (2017).

114. Uta-Maria Kuder, *Greetings of the Minister of Justice, Uta-Maria Kuder, on the Occasion of the Dinner with the U.S. American Delegation on 19 February 2013 at the Castle of Schorrsow*, 27 FED. SENT’G REP. 46, 46 (2014). The Minister of Justice for Mecklenburg-Western Pomerania in Germany observed:

We proceed from the assumption that only an extremely small part of the detainees will be incarcerated for a very long time or even for ever [sic]. Most of them will be released over the short or long term. And then they will be our neighbors again . . . . We need a penal system characterized by respect, transparency and consistency. We are in need of a penal system where people are released

- who at least have the feeling that they had been treated fairly,
- who had been treated in a human and civilized way,
- who were offered chances, although sometimes they had not been taken advantage of.

[We also] need a well-established transition management on the way to freedom, which means on the way back into the community.

*Id.*

115. Council of Eur. Comm. of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to the Members States on the European Prison Rules* (Jan. 11, 2006), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d8d25](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d8d25).

aspects of community life inside the prison . . . Thus, for example, provisions for health and safety, working hours and even involvement in national social security systems should mirror that for workers on the outside . . .<sup>116</sup>

While the Norwegian implementation of this rule may be unusually robust, these excerpts highlight that the normality principle is one that could—and arguably should—be adapted to apply to *all* correctional systems. It remains, however, important to bear in mind that any prison environment is inherently abnormal and that there is a high degree of variation in how successfully normality can be implemented, even within Norwegian prisons.<sup>117</sup>

Given the comparative nature of this inquiry and the SPP, it is particularly important to stress that the current focus on humanity and normality implemented throughout the Scandinavian region “is a relatively recent development . . . first employed in response to serious challenges that mirrored those still observed in other Western countries today.”<sup>118</sup> As recently as the 1990s, Norwegian prisons experienced a greater degree of violence and reflected a more retributive perspective than they do today.<sup>119</sup> The prospects of successfully applying an increased focus on normality in other correctional systems are therefore both present and promising. The SPP, which seeks to do exactly this and will be the focus for the remainder of the Article, is designed to learn from the approaches taken in all three Scandinavian countries, although much of the emphasis has settled on Norway.

#### IV. THE SCANDINAVIAN PRISON PROJECT

The SPP’s goal was to provide American correctional officers an opportunity to develop a new penal environment inside a single housing unit of a Pennsylvania prison based on what they learned during an intensive and immersive cultural exchange in Scandinavia.<sup>120</sup> The model for this “bottom-up” effort was operational policies in correctional facilities and the guiding philosophies of Scandinavia.<sup>121</sup> To accomplish this, a group of individuals from the Pennsylvania Department of Corrections (“PA DOC”) traveled to Scandinavia in the summer of 2019 to

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116. See Council of Eur., *Revised Rules and Commentary to Recommendation CM/REC(2006)2 of the Committee of Ministers to the Members States on the European Prison Rules* (2006) (Oct. 8, 2018), <https://rm.coe.int/pc-cp-2018-15-e-rev-3-epr-2006-with-changes-and-commentary-08-10-18/16808e4ac1>.

117. Berit Johnsen, Per Kristian Granheim & Janne Helgesen, *Exceptional Prison Conditions and the Quality of Prison Life: Prison Size and Prison Culture in Norwegian Closed Prisons*, 8 EUR. J. CRIMINOLOGY 515, 523, 526 (2011).

118. Høidal, *supra* note 102, at 58.

119. *Id.* at 59.

120. Discussed in more detail below, the SPP is a partnership between Drexel University (United States), the University of Oslo (Norway), Kriminalomsorgen (Norway), Kriminalvården (Sweden), Kriminalforsorgen (Denmark), and the Pennsylvania Department of Corrections (United States).

121. While the primary emphasis was on the Norwegian model, as discussed in this Part, visits to Sweden and Denmark demonstrated variation within the Scandinavian countries and provided additional opportunities to explore how challenges in the United States that were not as pressing in Norway (e.g., gang violence) were addressed and additional inspiration for potential change (e.g., adapting older facilities and infrastructure).



experience and to critically examine “Scandinavian penal exceptionalism” as implemented today.<sup>122</sup>

In 2013, the current secretary of the PA DOC, John Wetzel, participated in a trip organized by the Vera Institute of Justice and Prison Law Office to correctional facilities in Germany and the Netherlands for this purpose.<sup>123</sup> Upon returning, he later wrote:

There are clearly fundamental differences between how Germany and the Netherlands deliver their correctional services compared with how we deliver them in the United States. One stark difference is the cost. The European model, with lower inmate populations but equivalent staffing levels per facility, is significantly more costly. In the facilities we visited, there are also fewer gang-involved inmates compared with ours. That being said, it is clearly possible to adapt things from the “European approach” and apply them to what we do in the United States.<sup>124</sup>

Although recognizing that these European practices were grounded in an ideal<sup>125</sup> and a reality that diverged sharply from those in the United States, Secretary Wetzel identified several areas, including officer training, risk assessment, and the use of transitional housing units in which the European programs he observed could become models for similar efforts underway in Pennsylvania. Yet, he also asked the questions that so many people, including comparativist researchers, pose:

What could I possibly learn from European prisons? . . . Was all this too good to be true? So many concepts embraced and successfully implemented. How could this be so different from our system? Are inmates so different in Europe? Clearly, access to guns is quite different in the United States and Europe, so some difference in murders could be expected. What about other violent crimes? Are Europeans inherently less violent than Americans?<sup>126</sup>

This experience apparently percolated in his mind because he seized the opportunity to identify and develop further “legal transplants” in the form of the SPP several years later.

In 2017, Halden Prison’s Governor Are Høidal visited Pennsylvania’s State Correctional Institution at Chester (“CHS”).<sup>127</sup> At the invitation of Drexel University and the PA DOC, he spoke to incarcerated people and staff before a showing of the documentary *Breaking the Cycle*, which chronicled reciprocal visits by a pair of American

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122. See, e.g., Pratt, *Scandinavian Exceptionalism, Part I*, *supra* note 87, at 119; Pratt, *Scandinavian Exceptionalism, Part II*, *supra* note 87, at 275.

123. John Wetzel, *Lessons in Transforming Lives in Prison*, 27 FED. SENT’G REP. 28, 28 (2014).

124. *Id.* at 29.

125. *Id.* at 28 (“The first thing that struck me, as we were being briefed by a German criminal justice professor in anticipation of touring European facilities the following day, was the notion: ‘Do no harm.’ Simply put, I would call this their ‘prime directive.’”).

126. *Id.*

127. Samantha Melamed, *From Norway, Pennsylvania’s Prisons Appear Cruel and Unusual*, PHILA. INQUIRER (Oct. 4, 2017), <https://www.inquirer.com/philly/news/crime/coming-from-norway-pennsylvanias-prisons-appear-cruel-and-unusual-20171004.html>.



and Norwegian correctional leaders. The conversations about the film inspired a dialogue between an international and multidisciplinary research team led by Drexel University and the University of Oslo, and correctional officials in Pennsylvania and Scandinavia.<sup>128</sup> Secretary Wetzel invited the research team to work with staff at CHS to determine what Scandinavian principles could work on a Pennsylvania housing unit. Thus, the foundation for the SPP was laid.

SPP consists of three phases: (1) a formal cultural exchange; (2) implementation and reform; and (3) active evaluation. Each will be discussed in turn.

#### Phase One: A formal cultural exchange

During the summer of 2019, a staff delegation from CHS and the PA DOC central office traveled to Scandinavia and visited several correctional facilities. In addition to attending regular workshops and focus groups, the Pennsylvania correctional officers were assigned to one of three Norwegian prisons. They wore Norwegian uniforms and performed jobs that were similar to their responsibilities at CHS. Each was assigned to and worked closely with Norwegian mentors over the span of several weeks to gain hands-on experience and to develop their own understanding of Scandinavian penal practices. PA DOC leadership from CHS and the central office also visited prisons in Denmark and Sweden.

#### Phase Two: Implementation & reform

The PA DOC team returned home to develop a plan to adapt and implement Scandinavian principles and practices for a single residential unit at their home institution. Nothing was off-limits in the discussions about what should be changed and how. Potential reform ideas included changes to the physical infrastructure of the unit, the number of incarcerated persons housed in each cell, cell and unit furnishing, officer training, communication options, meals, officer-incarcerated person fraternization

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128. Independent of the research project and exchange, the Swedish public broadcaster (“SVT”) is creating a documentary about the experience of the American officers in the SPP. A July 2020 trailer for the film is available. SVT, *Prison Project: Little Scandinavia (extended trailer)*, YOUTUBE (Jul. 2, 2020), <https://www.youtube.com/watch?v=gTC1KI0STIY>.

The Norwegian prisons, as well as officers and other staff at each participating prison, were selected by their respective superiors. In Norway, Ila Prison and Detention Facility, Ringerike Prison, and Romerike Prison (“unit Ullersmo”) were all proposed as “mentor prisons” by the head of the International Unit at The Directorate of Norwegian Correctional Service, Mr. Kim Ekhaugen. It was also suggested that Bergen Prison and Halden Prison, as well as the University College of Norwegian Correctional Service (“KRUS”), should be involved in providing an overview of the NCS’s approach. All five prisons, as well as KRUS, accepted the invitation to participate. In the months leading up to the exchange, the research team worked closely with the NCS both to plan the logistics of the exchange and to distribute information to both staff and incarcerated people at the participating institutions. For example, posters were placed both in living units and in hallways, and information meetings were held with staff at all three mentoring prisons. Importantly, however, the exact nature of the exchange, including what information should be shared, the role of officers, and voluntary activities at each facility for the Americans was a decision left to each prison. This was done to ensure that the NCS could present their correctional system in a way that felt authentic and appropriate to them.

policies, and other aspects that impact the experience of living in or working on the unit in keeping with their observations and experiences in Scandinavia.<sup>129</sup>

### Phase Three: Active supervision and evaluation

In the final phase of the SPP, the unit will be staffed by the officers who participated in Phases 1 and 2, as well as newly trained staff. To ensure a fair and transparent selection of incarcerated individuals, as well as to set the foundations for a causal evaluation of the SPP, PA DOC will employ a lottery to allow all eligible incarcerated men at the facility to have an equal chance to participate in the SPP. Officers from Scandinavian correctional agencies will ideally, if travel restrictions allow, visit and collaborate with the SPP staff to ensure fidelity to the adapted Norwegian model. Additionally, during this period the research team will collect data on the changes to the climate and culture on the SPP, as well as on other outcomes considered relevant to assessing the longer-term impact of the suite of changes inherent in the SPP (e.g., rule infractions, recidivism).

## V. EXPLORING THE EXCHANGE

### A. Overview

Formal exchanges, especially those that are intended to lead to reciprocal exchange of ideas that may challenge cultural and professional norms and identities, may take a variety of forms. As discussed earlier,<sup>130</sup> “transplant” programs or ideas may be animated by several goals, including cost, legitimacy, ideology, or mission. The overarching goals of the SPP exchange were to (1) provide the PA DOC, and the staff at CHS in particular, with an understanding, obtained through a combination of lectures and experiential learning, of how the Scandinavian correctional services operate; (2) encourage participants to critically reflect on the American penal system and the specifics of supervision at CHS; and (3) facilitate the PA DOC team’s development of new policies and practices for the SPP unit.

The PA DOC delegation consisted of the superintendent of CHS, a deputy superintendent, a unit manager, eight frontline officers chosen by the facility leadership, an institutional parole agent, and two representatives from the PA DOC statewide leadership team based at its central office.

After several planning meetings at CHS, the formal exchange began in June of 2019. The three-week program can be divided into three elements, each of which are discussed in detail below. Considered broadly, activities in the first week focused on the Norwegian correctional system and ideology. During this time, the

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129. All policies developed by the officers and considered necessary to implement this ideology have been approved by PA DOC and an entire living unit at this prison has been significantly modified for the SPP. Although delayed by the (still ongoing as of the time of this writing) global pandemic, most policy changes and major structural changes have been completed; any remaining modifications will be completed by the end of 2020.

130. See, e.g., Miller, *supra* note 62, at 842.

entire group traveled together to visit several NCS facilities across Norway. In the second week, the leadership team traveled to Sweden and Denmark to examine their respective approaches to corrections, while the officers began to obtain first-hand experience by working with assigned mentor officers at Ringerike, Ila and Romerike Prisons. In the final week, the officers continued to work in their assigned facilities, while the remaining leadership focused on meeting with policy-makers and others. The research team facilitated regular workshops, during which the American staff were encouraged to synthesize their experiences and to start working on plans to formalize policy and implement other changes to the unit.

The program is perhaps best viewed through the eyes of its core participants. The interview excerpts below come from our interviews with participants as they entered, experienced, and later reflected on the exchange.

### *B. Watching Change Emerge*

During the three weeks of the exchange, the research team had unfettered access to the formal exchange. This afforded important insights into how legal transplants can be identified, modified, and adopted in practice. The researchers collected data on the PA DOC team’s experience during the exchange, and these multi-method data included, but were not limited to, pre- and post-exchange surveys on prison climate in Norway and the United States, systematic field observations during site visits and while the officers were working in the Norwegian prisons, semi-structured interviews, and daily audio diaries by the PA DOC personnel. The quotations used below are drawn from those audio diaries and were recorded by each individual privately using a handheld recorder at the conclusion of each day (and occasionally during a field experience). The recordings were provided anonymously to the research team and are thus identified here solely by a tracking number disconnected from the person’s name. This invaluable data source helps provide a fuller picture of what happened during the exchange and will provide context for the changes underway and those yet to come.

The first week of the exchange emphasized the theoretical and practical foundations of the modern NCS. For the entire delegation, this was their first exposure to the Norwegian prison system and to the Norwegian society in general, apart from some pre-trip reading. As noted above, one officer, after this week of experiential learning, commented on both the overwhelming magnitude of the differences observed between Bergen and Chester, as well as the opportunities for changes at home:

Say the initial, initial feeling for that was, oh, my gosh. Are you serious? This is really nice. Then I thought, wow, I don’t know, we can’t do this, and then I came back and said, no, alright, take a deep breath, I think we can, there are parts of this we can take away and we can actually do this. And already, already the wheels are spinning.<sup>131</sup>

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131. Interview with Lee, a pseudonym for a Pennsylvania corrections leader (June 6, 2019).

During this phase, the group first spent a day at KRUS, the NCS's correctional training academy where Norwegian officers spend two years blending classroom instruction and fieldwork to obtain their diploma. The Americans participated in a series of lectures discussing the fundamental principles underlying the Norwegian approach to punishment and incarceration, as well as a demonstration of conflict resolution and physical restraint techniques from an American and Norwegian perspective. In considering the differences in the processes of educating new Norwegian officers, one American noted:

[T]he level of training and knowledge that these people get is [not] an equivalent. It can't even be. It's incomparable. I mean, they go through two years of extensive training on various aspects, all different types of practical and scenario textbooks type situations. They are two years away in comparison. We go to the academy for about five weeks. We are . . . after that five weeks we are on probation. I work for a year. We do a lot of on-the-job training. And after you come out of the academy, you are expected to perform and do your job to the best of your ability.<sup>132</sup>

The group subsequently traveled to Bergen on the west coast of Norway, where they visited Bergen and Bjørgvin prisons as well as the Lyderhorn halfway house. The time at Bergen emphasized the development of the NCS's system of values; the time at Lyderhorn focused on the reentry process and how incarcerated individuals are prepared to return to the community. As Bergen was their first time behind the walls of a Norwegian prison, many officers were struck by the differences in the design of the facility layout as well as aspects of culture that were observed. For example, one officer emphasized the layout of the unit:

The first unit that I went to . . . really stuck out to me because even inside their very open, less restrictive prison, this was kind of a special spot. It pretty much mirrored our, our honor block. . . . It was really cool to see how, even though we're so different, there are still a ton of similarities . . .<sup>133</sup>

Others were more struck by the manner in which the staff and incarcerated individuals interacted. After a visit to the Bjørgvin juvenile detention facility, one officer observed that, beyond the design of the building, one meaningful difference was that,

there is a lot of time, manpower and money that's being put out for the juvenile offenders . . . . I believe it was three—I believe it was three officers just for the three to four inmates that are there . . . [the youth in detention] have a lot more freedom, depending on how far along you are inside the process. . . .

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132. Interview with Johnson, a pseudonym for a Pennsylvania correctional officer (June 4, 2019).

133. Interview with Peters, a pseudonym for a Pennsylvania correctional officer (June 5, 2019).

So that really surprised me because in normal juvenile facilities in the US, it's nothing like that.<sup>134</sup>

Back in the Oslo area, the visit to Halden Prison—perhaps unsurprisingly considering the outsized role the facility has played in the global conversation about Norwegian corrections—produced dramatic and perhaps transformational reactions. Upon reflection on the overall experience inside the facility, one officer emphasized the tensions between security and prison climate, noting that:

Everything that you saw emulated normalcy. There was nothing really other than the lock on their doors and the housing units that would state, you know, oh, this is a prison. You didn't feel like a prison. It felt like, um, other than the wall, which had no barbed wires or sensors on them, really, cameras in certain places. But others, there were none. And like in the visitor's areas, private visiting with your family, a whole cottage-like green spaces . . . . But every activity from the time they wake up to going to bed, togetherness is encouraged. That's a reoccurring theme that I'm hearing, togetherness. The officers with the inmates together and training and school and leisure activity, sharing mealtimes. Yes, it makes it less likely for people to commit offenses against each other. And it makes for very much more relaxed environment.<sup>135</sup>

At this point, and as reflected in the commentary, this officer found the lack of overt, formal security to be both innovative and potentially risky, especially when compared to their experiences in Pennsylvania. Other officers were more struck by some of the unusual (even in Norway) vocational training opportunities offered at Halden. When reflecting on what was made available, one officer commented: “We visited the cooking school. . . . The inmates have a sound studio, I was surprised about that. They have wood shop; they have metal shop. A sound studio is something I've never heard of.”<sup>136</sup> These opportunities were in some ways more similar to community-based educational and vocational programs in the United States and less like training programs for incarcerated persons. One of the leadership team members commented on the differences in the prison experiences as reflected in the visitation arrangements:

What surprised me the most today was when I learned that visitors are actually allowed to have conjugal visits . . . . But when I really think of the concept the wife or the partner is not incarcerated, did nothing, and should not be denied that privilege from hers, from his or her significant other. And I see it as a good thing. I was just surprised by it.<sup>137</sup>

In the second week of the program, the correctional officers began to work in each of their assigned mentor prisons, spending their day shadowing a mentor and

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134. *Id.*

135. Interview with Michaels, a pseudonym for a Pennsylvania correctional officer (June 7, 2019).

136. Interview with Foster, a pseudonym for a Pennsylvania correctional officer (June 7, 2019).

137. Interview with Kellogg, a pseudonym for a Pennsylvania corrections leader (June 7, 2019).

observing the day-to-day operations of the correctional facility. One officer recapped a typical day, which included a detailed staff discussion of individual inmates, in which officers provided valuable input on inmate transfers and furlough decisions, as follows:

There was this meeting we had at nine, a little after nine, that we attended, lasted about an hour. . . . The contacts, the staff, and maybe even the primary officer. The key word is the contacting officer. . . . We, there was some paperwork that they have submitted. They were basically giving them feedback from it. So, they went through it and it's a lot going on with that because still, once they give their opinion about each and every inmate on this particular list, if they want to transfer to another, a low-risk institution, you know, if they're qualified because you can give your input, you know, based off their behavior or ethics or what have you and it can be granted or somebody wanted to go on furlough. We all get together, sit around this table once a week and discuss this.<sup>138</sup>

Another officer commented on the ratio of staff-to-incarcerated persons and how that arrangement facilitates a very different role for officers than what they observed at home:

They are actually only assigned four inmates to the team at one time. They go through the risk and danger and risk assessments and things of that nature to find out what they can do in regards to getting these guys on a more personable level and get them to the point where so they can have contact with a human contact with outsiders.<sup>139</sup>

In their reflection, one officer emphasized a situation in which the differential approach to staffing became very apparent—recounting an afternoon in which they unexpectedly exercised alongside a group of Norwegian staff and incarcerated men:

The inmates were doing circuit training and we were invited to come do it with them. . . . I was welcomed by both staff and the inmates. The inmates were pretty excited to have me in there to see me die. [laughs] I basically died. [laughs] I was sweating all over the place. . . . But yeah, the training was really fun. The inmates were extremely supportive of one another. But afterwards, none of them came up and made fun of me or anything like that.<sup>140</sup>

The degree of control and autonomy provided to the incarcerated men made an impact on the group of officers working there. For example, one officer noted that:

One thing that stood out to me today, which was very impressive, is on multiple units, specifically we were on [letter] unit, the inmates can leave their key

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138. Interview with Robins, a pseudonym for a Pennsylvania correctional officer (June 18, 2019).

139. Interview with Lucas, a pseudonym for a Pennsylvania correctional officer (June 6, 2019).

140. Interview with Daniels, a pseudonym for a Pennsylvania correctional officer (June 14, 2019).

in their cell and they leave it unlocked when they went to school, we couldn't find one inmate, we found one, and he was very nice showed us his cell, but we couldn't find one that was locked. So, the trust factor, even between the inmates, far exceeds the trust factor that I've seen at SCI Chester.<sup>141</sup>

While the officers spent their days at the three mentor facilities, the leadership teams traveled to two other Scandinavian nations. In Denmark, the team spent time at Enner Mark prison, located in East Jutland. After that facility visit, one participant reported that “[o]ne of the things that obviously [matters] in this correctional system, the belief system, is that the more normal you are, the better you're going to be as a human being.”<sup>142</sup> Another indicated that their “perception of the staff is they were more, a little bit, they still had the Scandinavian vibe, but they were a little bit more strict.”<sup>143</sup> After a discussion of the security measures, many of which were seemingly familiar, a PA DOC leadership team member noted that there are still meaningful differences:

Only first names are used by staff and inmates because Danes do not embrace titles. Their belief is that no one is better than anyone else. Upon further discussion they prescribe to a life of friends and family in a “cozy” environment which drives the mission of the prison system.<sup>144</sup>

A visit to Kumla Prison, a maximum-security facility located outside of Örebro, Sweden, also provided the leadership with a different perspective on incarceration in Scandinavia:

We went and saw the max, the maximum-security unit, which was the prison within a prison we had to go through the entire metal detector process. . . . [Staff] talked about how they feel completely safe, even though they're with the worst of the worst. . . . They had all the of the normal Scandinavian model amenities in there. . . . But it still was all, all there even for the max security people.<sup>145</sup>

To some, this level of security and control was the most familiar of all the prisons: “This particular facility certainly seems to—from the manner of the corrections officials or the warden—seems to have that feel of Pennsylvania corrections or how we do some things.”<sup>146</sup> The need to balance security and normality, some participants indicated, was clear. For example, one noted that, while the security-driven restrictions and opportunities at Kumla “kind of rings [true] to what I'm accustomed to. . . . [It] kind of goes with, you know, being in that maximum-security modality. But for them to meet it halfway in the middle, they've done a

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141. Interview with Howard, a pseudonym for a Pennsylvania correctional officer (June 11, 2019).

142. Interview with Martin, a pseudonym for a Pennsylvania corrections leader (June 13, 2019).

143. Interview with Pearson, a pseudonym for a Pennsylvania corrections leader (June 13, 2019).

144. Interview with Wood, a pseudonym for a Pennsylvania corrections leader (June 13, 2019).

145. Interview with Pearson, a pseudonym for a Pennsylvania corrections leader (June 14 & 15, 2019).

146. Interview with Martin, a pseudonym for a Pennsylvania corrections leader (June 14, 2019).



phenomenal job.”<sup>147</sup> By spending time in these facilities, participants appeared to observe both similarities and challenges for the project.

The complex dynamic between the staff and incarcerated men, tempered by the sometimes competing needs of security and normality, is reflected in the officers’ reports from their weeks working in the three mentor correctional facilities, as well as the management’s reports from the facilities in Denmark and in Sweden. For example, a member of the PA DOC leadership team, despite noting these fundamental differences in how high-security facilities are managed, observed that “some of the same living arrangements and facilities offered inside prisons in Norway seemed similar to [reentry facilities in Pennsylvania] where there are kitchens and common areas with TVs in a setting where the person is able to control their environment.”<sup>148</sup> They noted, however, larger distinctions in how staff in each study differently “understand that interactions and ability to communicate effectively allow staff to control violence.”<sup>149</sup> These similarities, several participants reported, could serve as building blocks for their efforts to reform a unit at CHS after the trip concluded. Similarly, one officer, comparing the honor block at CHS to a Norwegian housing unit, suggested that “even though we’re so different, there are still a ton of similarities.”<sup>150</sup>

As noted above, the leaders and officers from the PA DOC returned from Scandinavia and continued working on the SPP unit. They reflected on what they had learned and actively looked for legal transplants that might flourish and take root in Pennsylvania.<sup>151</sup> In early March 2020, the SPP unit had a “soft” opening when six individuals sentenced to life imprisonment moved onto what is colloquially known as the “Little Scandinavia” unit. These six men are working with the SPP staff to refine the new policies, develop plans for self-governance, and will serve as peer mentors to the residents who will be randomly selected in Phase 3. The goal was for this pilot period to last for approximately two months. As of this writing in November 2020, however, that period has been prolonged because of the ongoing global COVID-19 pandemic.

#### CONCLUSION

In cataloging the deep and longstanding problems of American prisons in Part I of this Article, it quickly becomes clear that fundamental reform is a daunting proposition. But the prospect for such change is neither hopeless nor quixotic, especially in light of the useful models for international policy exchanges described in Parts II and III. Academics and reformers have been traversing the

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147. *Id.*

148. Interview with Pearson and Wood, pseudonyms for Pennsylvania corrections leaders (June 11, 2019).

149. *Id.*

150. Interview with Andrews, a pseudonym for a Pennsylvania correctional officer (June 6, 2019).

151. A discussion of the adaptations they may actually embrace when the unit is fully operational is beyond the scope of this exchange-focused Article.

globe to study innovative prison practices for more than 200 years. This approach of learning across borders is reflected in the aims of the Scandinavian Prison Project, outlined in Parts IV and V. The SPP, among others, represents an intensive effort to adapt and learn from one distinct model of corrections.

In many ways, the SPP program was developed to provide the participants with the first-hand experience necessary to identify opportunities that might serve as viable “legal transplants.”<sup>152</sup> As demonstrated by the participants’ reflections, these opportunities took the form of philosophical approaches to supervision, specific policies, and inspiration for new ideas. At the same time, the SPP also provided a framework to cultivate these transplanted ideas, allowing them to take hold (and ideally to grow) in their new environments.

Although, as underscored by Professor Tonry, comparative research can be employed to “put national policies and practices into cross-national contexts,”<sup>153</sup> this level of application is beyond the scope of this phase of the SPP. Instead, as Andersen and Hyatt have noted, the emphasis is exclusively on developing the micro-level elements of a robust international policy exchange.<sup>154</sup> SPP participants, both on the American and Scandinavian sides of the exchange, have a significant amount of “front line” experience and understand how correctional policy is implemented in the field (and not just as the official regulations suggest they should be). Along the secondary axis proposed in this framework, the goal of the SPP continues to focus on the more granular elements of the opportunity: SPP seeks not to change national level policy all at once but rather to create and support a “sandbox” in which Scandinavian penal transplants can be implemented and tested in a new—in this case American—context.<sup>155</sup> By emphasizing the international experiences of a small group of officers and their subsequent work in a single housing unit, the goals and the means of the first phases of the SPP can be distinguished.

To better understand which legal transplants might be identified and cultivated through the SPP, it makes sense to return to Professor Miller’s distinct taxonomy. This emphasis on the motivations for comparative exercises highlights the potential of the SPP shine a spotlight on both the entrepreneurial transplant and a legitimacy-generating transplant. We can see in the staff and leadership of CHS and NCS an entrepreneurial approach. They are, indeed, motivated by idealism and the goal of making a difference. As a group, they see the SPP as a way to improve the world and, as the Norwegians might say, make better neighbors.

The SPP primarily reflects elements of two, non-exclusive aspects of Professor Miller’s taxonomy of legal transplants: the entrepreneurial transplant and the legitimacy-generating transplant. The staff and leadership of PA DOC, CHS, and NCS are taking an entrepreneurial approach. As suggested by the model, they are,

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152. 152. See Frase, *supra* note 64, at 547–48.

153. Tonry, *supra* note 60, at 506.

154. Andersen & Hyatt, *supra* note 55, at 14.

155. *Id.*

indeed, motivated by idealism and the goal of making a difference. “[T]heir investment in the transplant is an investment in developing expertise that offers concrete payoffs,”<sup>156</sup> in terms of safer and healthier prisons for both correctional staff and incarcerated people and perhaps lower recidivism. Consistent with Professor Miller’s observation that many transplants transcend categories and that “one rarely encounters a type in pure form,”<sup>157</sup> the transplants associated with the SPP are also of the legitimacy-generating variety. Building on a Scandinavian model is also something that brings prestige. Although understandings of the source and nature of that prestige are the subjects of debate,<sup>158</sup> the current positive views in America of Scandinavian criminal justice in general and Norwegian corrections, in particular, appear a likely answer.<sup>159</sup>

The American correctional system is in crisis. The deplorable conditions in many prisons and jails pose a pervasive challenge from a practical and ideological perspective. Many correctional systems are seeking out opportunities to reform prison conditions and inject more humanity into an environment that too often can be anything but “safe, humane and productive.”<sup>160</sup> The SPP project has already generated new conversations about reform within the CHS community, among staff and incarcerated individuals alike. Being part of the “Little Scandinavia” housing unit is viewed by many as an opportunity to directly challenge the pragmatic and ideological norms that have dominated corrections in the United States for far too long.

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156. Miller, *supra* note 62, at 850.

157. *Id.* at 842.

158. *See, e.g., id.* at 854 (noting that “[e]xplanations for the sources of prestige vary” and that some scholars focus “perceptions of efficacy and global importance as the source of the prestige”).

159. *See, e.g.,* Chris Taylor, *Humans Are Basically Good: This Incredible New Book Proves It*, MASHABLE, <https://mashable.com/article/humankind-book-review/> (last visited Oct. 2, 2020) (“The evidence [supporting the Norwegian correctional system] is so incontrovertible that even officials from deeply Republican North Dakota decided to modify their prison system after a trip to Norway in 2015.”); Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> (“The treatment of inmates at Halden is wholly focused on helping to prepare them for a life after they get out.”).

160. Gibbons & Katzenbach, *supra* note 3, at 398.