

## A RETURN TO REHABILITATION: MANDATORY MINIMUM SENTENCING IN AN ERA OF MASS INCARCERATION

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### I. INTRODUCTION

In 2013 Senators Richard Durbin (D-IL), Patrick Leahy (D-VT), and Mike Lee (R-UT) introduced the Smarter Sentencing Act to decrease mandatory minimum sentences for federal drug crimes and enlarge the existing safety valve for federal drug offenses.<sup>1</sup> The Smarter Sentencing Act reduces the statutory minimum sentence of specific federal drug offenses and permits judges to deviate from mandatory minimum sentences for controlled substance offenses under certain circumstances.<sup>2</sup> Similarly in 2013, Senators Leahy and Rand Paul (R-KY), as well as Representatives Bobby Scott (D-VA) and Thomas Massie (R-KY), introduced the Justice Safety Valve Act.<sup>3</sup> The Justice Safety Valve Act would give judges more discretion in sentencing by permitting judges to sentence offenders below the mandatory minimum sentence when such sentence would not meet one of the requisite goals of punishment.<sup>4</sup> Both acts aim to deter crime through more efficient means while reducing federal prison expenditure and the federal inmate population.

The Smarter Sentencing Act and the Justice Safety Valve Act counteract policies that accompanied what many consider an unsuccessful War on Drugs by abandoning mandatory minimum sentencing in favor of increased judicial discretion. Mandatory minimum sentencing initially developed out of concerns stemming from the amount of judicial discretion found in indeterminate sentencing methods. Mandatory minimum sentencing promised an egalitarian form of sentencing by requiring judges to impose a mandatory

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1. . Smarter Sentencing Act, S. 1410, 113th Cong. (2013); *see also Frequently Asked Questions About S. 1410, The Smarter Sentencing Act of 2013*, FAMILIES AGAINST MANDATORY MINIMUMS (August 1, 2013), <http://famm.org/wp-content/uploads/2013/08/FAQ-S.-1410-Durbin-SV-bill-8.1.pdf> (last visited Dec. 27, 2014).

2. . S. 1410; *see also* FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 1.

3. . Justice Safety Valve Act, S. 619, 113th Congress (2013); *see also Frequently Asked Questions About S. 619/H.R. 1695, The Justice Safety Valve Act of 2013*, FAMILIES AGAINST MANDATORY MINIMUMS (Aug. 23, 2013), <http://famm.org/wp-content/uploads/2013/07/FAQ-Paul-Leahy-Justice-Safety-Valve-Act-of-2013-8.23.13.pdf> (last visited Dec. 27, 2014).

4. . In order to deviate from the mandatory minimum sentence, the judge must determine if the minimum sentence would fulfill the goals of punishment listed at the current safety valve, 18 U.S.C. § 3553(a). According to the proposed Justice Safety Valve Act, a judge may deviate from the mandatory minimum if the mandatory minimum would keep the public safe, provide a just punishment for the crime, provide rehabilitation, and deter others from committing crimes. *See* Sentencing Reform Act, 18 U.S.C. § 3553(a) (2006); *see also* S. 619.

sentence regardless of race or class. Proponents of mandatory minimums argued that strict mandatory minimums would have a considerably larger deterrent effect than their indeterminate sentencing counterpart. Accordingly, the Federal Sentencing Guidelines and specific federal and state drug offenses proliferated mandatory minimum sentences, which mathematically attach specific sentences to certain offenses.

Scholars coined the “severity revolution” as an era of destructive penal policy that would be integral to the War on Drugs.<sup>5</sup> During the “severity revolution,” politicians, the media, and the public urged strict, mandatory sentences to punish drug users and low-level drug dealers. Rather than addressing the health and psychological problems associated with drug abuse, penal policy of the era sought to deter crime associated with drugs and curb overall drug use through mandatory minimum sentencing.<sup>6</sup> The logic was simple: if all drug users and dealers were locked in jail, crime and drug use would no longer be an issue. These penal policies yielded a disparate impact on both poor and minority populations.<sup>7</sup>

The federal government’s involvement with drug policy traces back to the end of the nineteenth century and has been dominated by efforts to eliminate drug use through incarceration.<sup>8</sup> The War on Drugs followed this trend. In the 1970s, the Nixon Administration determined that 1.3% of the American population was addicted to drugs.<sup>9</sup> In response, federal legislators enacted a prohibition on drugs as well as non-negotiable mandatory minimum sentences for all drug users and distributors.<sup>10</sup> Rather than addressing the root causes of drug sales and abuse, these policies exacerbated America’s drug epidemic. Drug demand, use, and associated violence increased throughout the 1980s,<sup>11</sup> and, in turn, America’s prison population dramatically rose.<sup>12</sup>

Fortunately, no one seriously debates the damaging effects associated

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5. . Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1481 (2004) (citing Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217 (2001)).

6. . *Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use*, DRUG POLICY ALLIANCE (Mar. 2011), [http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf) (last visited Dec. 27, 2014).

7. . See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press, 2006) (Alexander argues that penal and drug policies engendered throughout the War on Drugs are tantamount to a revival of Jim Crow era laws. American drug policy has specifically targeted poor, black communities leading to mass unemployment, social neglect, and economic abandonment).

8. . CELINDA FRANCO, CONG. RESEARCH SERV., R41448, *DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 3* (2010) (citing U.S. DOJ, BJS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1992* (Jan. 1995)).

9. . J. JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 19* (Temple University Press, 2nd Ed. 2012).

10. . *Id.*

11. . FRANCO, *supra* note 8.

12. . *Id.*

with the penal policy of the War on Drugs. After the proliferation of these policies, most notably mandatory minimum sentences, the prison population skyrocketed.<sup>13</sup> The total prison population increased by approximately 116%, and the population of incarcerated drug offenders increased by approximately 532%.<sup>14</sup> Such extreme incarceration based on mandatory minimum sentences for drug offenses has neither deterred crime nor drug use. After the extensive use of mandatory minimum sentencing, the United States accounts for a quarter of the world's prison population, but only five percent of the world's total population.<sup>15</sup>

Through its steadfast commitment to the mandatory-minimum model, the War on Drugs inflicted steep fiscal and social costs on the American population. Federal expenditure for drug prohibition enforcement was estimated to be at approximately \$17.1 billion in 2008.<sup>16</sup> When aligned with an ever-growing prison population, these costs have led corrections spending to become the second-fastest growth area of state budgets, behind only Medicaid.<sup>17</sup> The War on Drugs has similarly inflicted damaging social costs on poor and minority communities.

The once-accepted mandatory-minimum model is no longer a tenable option for curbing crime and drug use. The Smarter Sentencing Act and the Justice Safety Valve Act aim to reverse the destructive policies of the War on Drugs and counteract the economic and social costs of the mandatory-minimum model by granting judges increased discretion in sentencing. This paper will begin by providing a historical analysis of American drug policy and the costs associated with the War on Drugs. Next, it will discuss the modern proliferation of mandatory minimum sentences and their envisioned goals. A comparative analysis of the effects of mandatory minimum sentences over the past three decades with their intended goals at proliferation will demonstrate that mandatory minimum sentences have not served their purpose. Rather, they have exacerbated the very concerns they were intended to solve and contributed to massive economic and social costs. While neither serving as an adequate deterrent to criminal behavior nor reducing recidivism rates, mandatory minimum sentences have contributed to sweeping prosecutorial discretion and racial inequality in sentencing. Lastly, this paper will outline the beneficial features of the Justice Safety Valve Act and Smarter Sentencing Act and advocate for continued efforts to undo the destructive effects of mandatory minimum sentencing and mass incarceration.

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13. ., ALEXANDER, *supra* note 7 at 8. Prior to the War on Drugs, in 1972, only 350,000 people were being held in prisons compared to approximately 2 million when book was written. The prison system was so small prior to the War on Drugs that main-stream criminologists seriously believed the end of prisons was inevitable. *Id.*

14. . FRANCO, *supra* note 8 at 8.

15. . GRAY, *supra* note 9, at 19.

16. . Jeffrey A. Miron, *Budgetary Implications of Drug Prohibition* 10 (February 2010) (unpublished research summary), available at [http://scholar.harvard.edu/files/miron/files/budget\\_2010\\_final\\_0.pdf](http://scholar.harvard.edu/files/miron/files/budget_2010_final_0.pdf).

17. . GRAY, *supra* note 9, at 32.

## II. HISTORICAL PERSPECTIVE ON AMERICAN DRUG POLICY: THE WAR ON DRUGS

The federal government's extensive involvement in drug regulation is newly developed. The first drug prohibitionist laws in America were state and local ordinances, which limited the commerce of substances such as opium and marijuana.<sup>18</sup> Not until the early twentieth century were America's first federal drug laws passed. The Pure Food and Drug Act was passed in 1906 and aimed to educate consumers as opposed to prohibit drug use.<sup>19</sup> Morphine and opium were widely used as painkillers during the Civil War and were also available as patent medicines marketed as "cure-alls." Their widespread availability led to rampant narcotics addiction. The Pure Food and Drug Act sought to combat narcotics addiction by focusing on the health of the user, educating about the harmful substances, and ensuring honest information in the open market place. "The Pure Food and Drug Act of 1906 led directly to the demise of the patent medicine industry, not by prohibiting these substances, but simply by requiring that all medications contain accurate labeling of their contents."<sup>20</sup>

The Harrison Narcotics Act of 1914, which required registration and payment of heavily inflated taxes before anyone could import, sell, or distribute opium, cocaine, or any other illicit substance,<sup>21</sup> marked the demise of non-prohibitory drug laws, like the Pure Food and Drug Act. In *Webb v. United States* the Supreme Court determined that it was illegal for doctors to prescribe prescription drugs for individuals suffering from symptoms of withdrawal.<sup>22</sup> The Harrison Narcotics Act combined with the Supreme Court's ruling in *Webb* forced drug addicts to turn to the black market. "Thus [the United States] was launched into wide-scale criminal activity, both by sellers, to make inflated underground profits, and by users, to obtain the money to buy the now higher-priced drugs."<sup>23</sup>

Since the passage of the Harrison Narcotics Act in 1914, the federal government has continually passed strictly prohibitionist drug laws.<sup>24</sup> Legislators have continuously reaped political benefits by passing stricter laws with

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18. . *Id.* at 21. These laws "were fundamentally racist laws aimed at perceived threats to white women from drug usage by black, Mexican, and Chinese men." *Id.*

19. . *Id.* Ironically, America's first federal drug law did not prohibit drug use and rather focused on education of substances. Thus, the law has been coined the "most effective law dealing with psychotropic substances in U.S. history." *Id.*

20. . *Id.* at 22. This act was combined with education efforts aimed at teaching people the harm of using such substances.

21. . *Id.*

22. . 249 U.S. 96 (1919).

23. . GRAY, *supra* note 9, at 22.

24. . Concededly, there have been instances of politicians urging social reforms and addressing poverty as a means to reducing crime and drug abuse, such as Lyndon Johnson advocating for antipoverty legislation in his presidential campaign against Barry Goldwater. ALEXANDER, *supra* note 7, at 45-46.

harsher sentences.<sup>25</sup> For example, with both the Boggs Act of 1951 and the Narcotic Control Act of 1956, Congress simply usurped previous strict drug laws with stricter sentences for drug offenses in order to be perceived as tough-on-crime.<sup>26</sup>

America's trend of strict prohibitory drug laws continued when President Richard Nixon entered office. President Nixon was the first American president to formally declare a War on Drugs.<sup>27</sup> After determining that approximately 1.3% of the American population was addicted to narcotics, Nixon sought policies to counteract drug use through strict drug prohibition. The Nixon administration proliferated nonnegotiable mandatory-minimums for drug distribution. Similarly, "[t]he Comprehensive Drug Abuse Prevention and Control Act of 1970 consolidated prior antidrug legislation and established schedules of illicit drugs."<sup>28</sup>

While the War on Drugs was championed by both conservatives and liberals, advocacy of prohibitionist drug policies reached its pinnacle in the 1980s, during the election and tenure of President Ronald Reagan.<sup>29</sup> Reagan campaigned on tough-on-crime policies, while also calling for an end to America's welfare system.<sup>30</sup> Despite Reagan's promise to decrease federal intrusion on state and local governments, "Reagan promised to enhance the federal government's role in fighting [street] crime," which was typically a major responsibility of state and local government.<sup>31</sup> Immediately into Reagan's presidency the Justice Department shifted its focus from white-collar crime to street crime, specifically drug enforcement.<sup>32</sup>

Between 1980 and 1984, FBI antidrug funding increased from \$8 million to \$95 million. Department of Defense antidrug allocations increased from \$33 million in 1981 to \$1,042 million in 1991. During that same period, DEA antidrug spending grew from \$86 to \$1,026 million, and FBI antidrug allocations grew from \$38 to \$181 million.<sup>33</sup>

Unfortunately, at the same time budgets for drug prevention, treatment, and education were significantly cut.<sup>34</sup>

Surprisingly, this massive increase in federal drug enforcement spending came prior to the devastating emergence of crack cocaine on urban streets in

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25. . GRAY, *supra* note 9, at 26-27.

26. . Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (repealed 1970); Narcotics Control Act, Pub. L. No. 84-728, 70 Stat. 567, 568-69 (1956) (repealed 1970).

27. . GRAY, *supra* note 9, at 27.

28. . *Id.*

29. . ALEXANDER, *supra* note 7, at 47. Reagan officially declared his administration's War on Drugs in October 1982. *Id.* at 49.

30. . *Id.* at 48-49.

31. . *Id.*

32. . *Id.*

33. . *Id.* at 49 (citing Katherine Beckett, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 53 (Oxford University Press, 1997); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, 1980-1984 (1990)).

34. . *Id.*

1985. Crack cocaine is a crystalized form of powder cocaine that was remarkably cheaper, more accessible, and more easily produced than its counterpart. Due to these unique features, crack cocaine became highly profitable, spurring the crack epidemic. David Kennedy, a notable criminologist, observed, “[c]rack blew through America’s poor black neighborhoods like the Four Horsemen of the Apocalypse’ leaving behind unspeakable devastation and suffering.”<sup>35</sup> The emergence of crack cocaine coincided with a dramatic shift from an industrial to a service economy.<sup>36</sup> Poor urban communities were hit especially hard by the decrease in manufacturing job opportunities, and by 1987, “when the drug war hit high gear, the industrial employment of black men had plummeted to 28 percent.”<sup>37</sup> The emergence of crack cocaine had devastating effects on poor, urban communities as falling employment rates increased incentives to distribute drugs, specifically crack cocaine. A spike in crime related to drug use and distribution quickly followed the drug market growth. While other countries, in comparison, responded to the crack-cocaine epidemic with successful health-based drug policies and drug decriminalization,<sup>38</sup> the crack cocaine epidemic provided a justification to escalate America’s War on Drugs.

The Anti-Drug Abuse Act was passed in the House of Representatives in 1986. The proposed legislation, “allocated \$2 billion to the antidrug crusade, required the participation of the military in narcotics control efforts, allowed the death penalty for some drug-related crimes, and authorized the admission of some illegally obtained evidence in drug trials.”<sup>39</sup> The bill was passed later that year, after the Senate proposed even harsher sanctions. The Anti-Drug Abuse Act of 1986 mandated a minimum sentence of 5 years for possession of 5 grams of crack cocaine, yet also mandated the same sentence for the possession of 500 grams of powder cocaine, a 100:1 disparity.<sup>40</sup> The Anti-Drug Abuse Act of 1986 preceded the even harsher Anti-Drug Abuse Act of 1988, which in part eliminated federal student loans for anyone convicted of a drug offense.<sup>41</sup> America’s strict penal drug policy continued well into the 1990s and beyond. Politicians on both sides of the aisle continued to advocate for increased spending on mass incarceration and drug enforcement.<sup>42</sup> “As

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35. . *Id.* at 51 (citing DAVID M. KENNEDY, DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 10 (2011)).

36. . *Id.* at 50.

37. . *Id.* at 50-51 (citation omitted).

38. . *Id.* at 51. For example, Portugal responded to drug abuse by decriminalizing possession of drugs and shifting drug policy focus to drug treatment and prevention. This health-based and treatment approach to drug abuse corresponded in plummeting abuse and addiction rates, as well as decreasing crime rates. *Id.*

39. . *Id.* at 53.

40. . Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (1986).

41. . Anti-Drug Abuse Act of 1988, 21 U.S.C. § 1501 (1988) (repealed 1997) (civil penalties for drug offenders, authorized public housing eviction for tenants who allow drug related activity near the premises, and eliminated federal benefits, such as student loans, for anyone convicted of a drug offense).

42. . GRAY, *supra* note 9, at 28.

of the fiscal year 1999, the Office of National Drug Control Policy was overseeing a drug control budget of \$17.8 billion.”<sup>43</sup>

### III. THE FISCAL AND SOCIAL COSTS OF THE MODERN AMERICAN PENAL STATE

The proliferation of strict sentencing policies throughout the War on Drugs led to the massive growth of America’s penal state, a state of mass incarceration. Just prior to Nixon declaring America’s first War on Drugs, mainstream criminologists fully believed that the incarceration state was ending and that prison construction should halt.<sup>44</sup> In 1972, prior to the introduction of mandatory minimum sentences, only 350,000 people were incarcerated throughout the entire country. Subsequent decades would be marred by a shockingly unexpected prison expansion that was, “unprecedented in human history.”<sup>45</sup>

Between 1973 and 1983, the total prison population in the United States, doubled to approximately 660,000.<sup>46</sup> “In two short decades, between 1980 and 2000, the number of people incarcerated in our nation’s prisons and jails soared from roughly 300,000 to more than two million.”<sup>47</sup> By 2007, the nation’s penal state population – including incarceration, probation, and parole – swelled to over seven million people.<sup>48</sup> “The average rate of incarceration for all countries around the world is about 145 for every 100,000 residents.”<sup>49</sup> By 2009 the United States incarcerated approximately *five times* the world average, or 756 per every 100,000 residents.<sup>50</sup> The United States accounts for less than five percent of the world’s population, but incarcerates twenty-five percent of the world’s prisoners.<sup>51</sup> To put this massive prison population in a historical perspective, the United States has more individuals under correctional supervision than Stalin’s gulags<sup>52</sup> and imprisons more of its black population than in South Africa, at the peak of apartheid.<sup>53</sup>

The major cause of the increase in the prison population was the rise in drug offense convictions and associated mandatory minimum sentencing. Between 1985 and 2000, drug offense convictions accounted for “two-thirds

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43. . *Id.*

44. . ALEXANDER, *supra* note 7, at 8.

45. . Marc Mauer, RACE TO INCARCERATE, 17-18 (2006).

46. . GRAY, *supra* note 9, at 29 (citing N.Y. CNTY. LAWYERS’ ASS’N, REPORT AND RECOMMENDATIONS OF THE DRUG POLICY TASK FORCE 5 n.7 (1996)).

47. . ALEXANDER, *supra* note 7, at 60.

48. . *Id.* One in every 31 adults was incarcerated in America in 2007. *Id.*

49. . GRAY, *supra* note 9, at 29.

50. . *Id.*

51. . *Id.* at 30. America’s prison population accounts for six times more than the entire European Union in 1999, even though they had 100 million more citizens. Throughout the entire period mentioned, California has accounted for more people incarcerated than France, Great Britain, Germany, Japan, Singapore, and the Netherlands combined. *Id.*

52. . Adam Gopnik, *The Caging of America: Why do We Lock Up So Many People?*, THE NEW YORKER, January 30, 2012, available at <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

53. . ALEXANDER, *supra* note 7, at 6.

of the rise in the federal inmate population and more than half of the rise in state prisoners."<sup>54</sup> In 1980 an estimated 41,100 people were incarcerated in state or federal prison for a drug offense.<sup>55</sup> By 2007, the number of incarcerated drug offenders saw an 1100 percent increase, to approximately 500,000 people.<sup>56</sup> There are simply more people incarcerated in America today for drug offenses than the entire prison population in 1980.

The effects of the current state of incarceration have been devastating economically. In 2008, federal spending for enforcement of prohibitionist drug policies was \$17.1 billion,<sup>57</sup> while federal, state, and local spending was an astonishing \$48.7 billion.<sup>58</sup> The Office of National Drug Control Policy reported that President Obama's federal drug control budget in 2013 was \$25.6 billion.<sup>59</sup> The American public has spent over one trillion dollars fighting the War on Drugs,<sup>60</sup> yet has seen little, if any, benefit in return.

The consequences of the War on Drugs reach far beyond fiscal concerns to immense social consequences. The War on Drugs has resulted in systematic oppression of poor, minority communities. Studies have shown that race is not a significant factor in determining if a person is more likely to sell or use drugs. In fact, "[s]tudies show that people of all colors use and sell illegal drugs at remarkably similar rates."<sup>61</sup> However, the demographic of America's prisons paint a very different picture. The shocking reality of the racial imbalance in America's prison system is that one in every three black males can expect to go to prison in their lifetime.<sup>62</sup> These statistics become more stark when focused primarily on major cities. In Washington, DC three of every four black men can expect to be incarcerated.<sup>63</sup>

Academics have even coined drug policies of the War on Drugs as New Jim Crow laws because of the systematic oppression mass incarceration produces.<sup>64</sup>

Depending on the State in which one lives, an 18-year-old with a first-time conviction for felony drug possession now may be barred from receiving welfare benefits for life, prohibited from living in public housing, denied

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54. . *Id.* at 61 (citing MAUER,, *supra* note 45, at 33).

55. . MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007).

56. . *Id.*

57. . Miron, *supra* note 16, at 10. Other estimates put federal spending on drug prohibition at \$15.6 billion. See GRAY, *supra* note 9, at xii.

58. . GRAY, *supra* note 9, at xii.

59. . OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL BUDGET: FY 2013 FUNDING HIGHLIGHTS 2 (2012), available at <http://www.whitehouse.gov/ondcp/the-national-drug-control-budget-fy-2013-funding-highlights>.

60. . GRAY, *supra* note 9, at xii.

61. . ALEXANDER, *supra* note 7, at 7.

62. . MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 43 (2007). In comparison, one in six Hispanic males and one in seventeen white males can expect to be incarcerated in their lifetime. *Id.*

63. . ALEXANDER, *supra* note 7, at 6-7.

64. . See generally, *Id.*



student loans to attend college, permanently excluded from voting, and if not a citizen, be deported. The irony of these barriers is that many only pertain to drug offenses, not to people convicted of murder, rape, or other serious offenses.<sup>65</sup>

Incarceration leaves individuals with immense barriers to reintegration into communities and employment, leading to a cycle of recidivism.

The rise of privatized prisons and unions has further entrenched the prison industrial complex as private prisons and corrections unions maintain a stronghold on federal budgets through political action committees and lobbying funds.<sup>66</sup> Furthermore, federal prison funding, prison construction, and prison employment opportunities have become a source of economic development for rural communities. "The amount of money spent to build and operate prisons during the 1990s alone proved an irresistible lure for rural communities."<sup>67</sup> The prison industrial complex has become deeply ingrained throughout American communities making drug and penal policy reform all the more difficult.

Since the Nixon Administration initially determined that 1.3% of the population was addicted to narcotics, the United States has spent over one trillion dollars in prohibitionist drug policies with strict mandatory sentencing regimes. Yet, 1.3% of the American population remains addicted to narcotics.<sup>68</sup> The results of the War on Drugs have devastated poor, urban communities and provided a massive fiscal burden on taxpayers, as America has developed into the largest penal state in human history.

#### IV. HISTORICAL AMERICAN SENTENCING POLICY: REHABILITATION AND DISCRETION

Up until the latter part of the twentieth century, mandatory minimum sentencing regimes were a very uncommon exception to sentencing methods that focused on judicial discretion and rehabilitation.<sup>69</sup> Traditionally, Congress exacted criminal statutes with accompanying maximum sentences, in which judges had discretion to impose sentences up to the maximum penalty prescribed.<sup>70</sup> Mandatory minimums, on the other hand, statutorily bind judges into imposing a specific sentence for certain criminal offenses.<sup>71</sup> While mandatory minimum sentences were relatively rare until the late twentieth

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65. . Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. OF CRIM. L. 607, 610 (2005).

66. . JACOBSON, *supra* note 62, at 64-69.

67. . *Id.* at 70.

68. . GRAY,, *supra* note 9, at 19.

69. . Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 938-39 (2001).

70. . Marc Miller & Daniel J. Freed, *Editor's Observations: The Chasm Between the Judiciary and Congress Over Mandatory Minimum Sentences*, 6 FED. SENT'G REP. 59, 59 (1993).

71. . Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167, 167 (1993).

century, they are not a modern development, but rather have been part of the American penal code since 1790. Back then Congress enacted statutory mandatory minimum sentences for piracy.<sup>72</sup> “Other early-American mandatory penalties were imposed for refusing to testify before Congress, failing to report seaboard saloon purchases, and causing a ship to run aground by use of false light.”<sup>73</sup>

Prior to the proliferation of mandatory minimums, federal sentencing was based primarily upon rehabilitation and utilitarian rationales; thus, judges held significant discretion in sentencing. Congress mandated the maximum penalty associated with specified criminal conduct, and judges could impose a penalty anywhere up to the maximum. Judges were free to implement a sentence in accordance with retributivist goals, mitigating factors, and the factual circumstances surrounding the crime. The premise of this rehabilitation model was to ensure just punishment that best contributed to the needs of society, criminals had incentives for improvement, and experts could determine the growth and development of an incarcerated individual.<sup>74</sup> Judges and qualified experts were granted power to determine if an individual was successfully rehabilitated and able to contribute as a productive member of society.<sup>75</sup>

## V. RISE OF MANDATORY MINIMUM SENTENCING

Indeterminate sentencing premised upon rehabilitative justifications first came under serious attack in the 1950s.<sup>76</sup> Critics argued that the indeterminate sentencing gave judges unchecked and sweeping discretion, thus, threatened the criminal justice system as a whole.<sup>77</sup> Rather than having sentencing based in law, sentencing was based on the whims of individual judges.<sup>78</sup> Judicial discretion in sentencing, critics maintained, was untenable and flawed aspect of an ideal criminal justice model. Accordingly, Congress

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72. . Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851 (1995) (citing Crimes Act of 1790, ch. 9, §3, 1 Stat. 112, 113 (1790) (codified as amended at 18 U.S.C. §§ 1651, 1652 (1988))).

73. . See Mascharka, *supra* note 69, at 939-40 (citing U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 10 (1991)).

74. . Gilles R. Bissonnette, “Consulting” *The Federal Sentencing Guidelines After Booker*, 53 UCLA L. REV. 1497, 1502 (2006) (citing Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 3 GEO. L.J. 395, 396 (2005); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 796-97 (2005)).

75. . Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1317-18 (2005) The federal grant started a parole system that granted certain officials with the power to execute the rehabilitative goals of sentencing. *Id.*

76. . See Bissonnette, *supra* note 74, at 1502 (citing Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 798 (2005)).

77. . Bowman, *supra* note 75, at 1318.

78. . Bissonnette, *supra* note 74, at 1502-03 (citing MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) (arguing that indeterminate sentencing was unthinkable in a “government of laws, not of men,” and that the unchecked and sweeping power given to judges was “terrifying and intolerable for a society that professes devotion to the rule of law.” *Id.*)).

began attaching mandatory minimum sentences to certain drug offenses in the 1950s.<sup>79</sup>

Congress reacted to what it perceived to be an increase in drug usage by young Americans and responded to the public outcry for drug control with harsher sentencing regimes.<sup>80</sup> The Boggs Act, passed in 1951, was a comprehensive drug control measure that contained mandatory minimum sentences for narcotics crimes.<sup>81</sup> Its mandatory minimum sentencing regime included a mandatory two years for the first offense, five years for the second offense, and ten years for the third narcotics offense.<sup>82</sup> In 1956, Congress steepened these mandatory punishments with the Narcotics Control Act.<sup>83</sup>

State governments followed the trend of imposing mandatory minimum sentences. "Many states dismantled or amended their indeterminate-sentencing regimes in favor of systems with mandatory minimum sentences, presumptive sentences, and sentencing guidelines – each of which was aimed at severely curtailing judicial discretion in sentencing."<sup>84</sup> State sentencing reforms included the dissolution of parole boards and the creation of "truth-in-sentencing" systems where incarcerated criminals were required to serve most, if not all of their statutorily mandated sentence.<sup>85</sup>

The initial, congressional push for mandatory minimum sentences for drug crimes was short-lived. Prosecutors, prison wardens, and families of the convicted lamented that the strict mandatory minimum sentences were not serving a justifiable purpose. Congress responded with the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>86</sup> This act repealed the mandatory minimum sentences proliferated in the 1950s and re-instituted indeterminate sentencing to give judges back the discretion to respond to the particular needs of each defendant and the circumstances of each case. "Congress commented that lengthening prison sentences 'had not shown the expected overall reduction in drug law violations.'"<sup>87</sup> Unfortunately, this action by Congress would soon become obsolete with the Sentencing Reform Act.

In 1975, Senator Edward Kennedy (D-MA) proposed a bill to address the concern the racial disparities in indeterminate sentencing.<sup>88</sup> Sen. Kennedy argued that the rehabilitative goals of indeterminate sentencing were certainly justifiable but racial minorities were receiving much higher sentences

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79. . See Mascharka, *supra* note 69, at 939.

80. . Oliss, *supra* note 72, at 1851.

81. . Boggs Act of 1951, Pub. L. No. 82-235, 65 Stat. 767 (repealed 1970).

82. . *Id.*

83. . Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567, 568-69 (repealed 1970).

84. . Bissonnette, *supra* note 74, at 1503.

85. . See Bowman, *supra* note 75, at 1318.

86. . Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 (1994 & Supp. IV 1999)).

87. . Mascharka, *supra* note 69, at 939 (quoting S. REP. No. 91-613, at 2 (1969)).

88. . Jonathan Chiu, Comment, *United States v. Booker: The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1315 (2005).

than their white counterparts of similar crimes under similar circumstances.<sup>89</sup> Sen. Kennedy's bill was the first to call for the establishment of a federal sentencing commission, foreshadowing the installment of the official Federal Sentencing Commission less than ten years later.<sup>90</sup>

As crime and drug use steadily increased throughout the 1970s and into the 1980s, determinate sentencing was a bipartisan response in which both liberal and conservative politicians could rally behind. Liberals, like Sen. Kennedy, urged for equality in sentencing as sentencing disparities between racial minorities and whites dramatically increased. Law-and-order conservatives argued that indeterminate sentencing was not sufficiently deterring criminal behavior<sup>91</sup> and that judicial discretion and the parole system led to an increase in crime.<sup>92</sup> Bipartisan support for determinate sentencing culminated with the creation of the Sentencing Reform Act of 1984.

Democrat Senators Kennedy and Joseph Biden (D-DE) and Republican Senators Orrin Hatch (R-UT) and Strom Thurmond (R-SC) proposed the Sentencing Reform Act to the Senate in 1984.<sup>93</sup> These Senators had three, main goals behind the Act.<sup>94</sup> First, a determinate sentencing method would ensure convicted criminals served a greater portion of their sentence, as opposed to the lenient parole system.<sup>95</sup> Second, the Sentencing Reform Act would create uniformity in sentencing and limit the inherent disparity in sentences that indeterminate sentencing created.<sup>96</sup> Lastly, the Act would impose different sentences for crimes of differing severity, such that a crime with a higher degree of severity will correspond with a more severe sentence.<sup>97</sup> The Sentencing Reform Act sought to accomplish these goals by abolishing the federal parole system and establishing the Sentencing Commission to create and oversee federal sentencing guidelines.

The Sentencing Commission's specific job was to 'rationalize the sentencing rules, to bring to bear the latest scientific studies in effectuating all of the purposes of punishment, and to do the kind of legwork in determining the appropriate sentencing practices that Congress had been unable or unwilling to do.'<sup>98</sup>

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89. . M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 540 (2005).

90. . Bissonnette, *supra* note 74, at 1503.

91. . Conservatives argued that indeterminate sentencing hampered deterrence of crimes even though in the 1970s Congress agreed that the strict mandatory minimum sentences that proliferated in the 1950s did not serve their intended purpose of deterring crime.

92. . Chiu, *supra* note 88, at 1315.

93. . Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

94. . Bissonnette, *supra* note 74, at 1504.

95. . *Id.*

96. . *Id.*

97. . *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2005).

98. . Bissonnette, *supra* note 74, at 1504-05 (citing Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 573-74 (2005)).

The Sentencing Commission established maximum and minimum sentences for certain criminal offenses based upon the characteristic of the offense and the severity of the offense. In 1984 President Ronald Reagan signed the Sentencing Reform Act into law, and three years later, the Sentencing Commission announced the Federal Sentencing Guidelines.<sup>99</sup>

Federal judges held sweeping discretion over criminal sentencing for over two hundred years, yet the Sentencing Guidelines took away this discretion instantly. The implementation of the Federal Sentencing Guidelines is quite possibly the, "most significant development in judging in the federal judicial system since the adoption in 1938 of the Federal Rules of Civil Procedure."<sup>100</sup> Both the conservative and liberal sponsors praised the passage of the bill as a great shift away from judicial discretion towards fairness, uniformity, and retributivism in rigid rules. Unfortunately, Senator Kennedy's hopes that the new Guidelines would bring about racial and socio-economic equality in federal criminal sentencing would not come true. Rather, the rigid sentencing of the Federal Sentencing Guidelines has contributed to the drastic fiscal and social costs of the War on Drugs and resulted in a state of mass incarceration.

## VI. METHODOLOGY OF THE FEDERAL SENTENCING GUIDELINES

The Federal Sentencing Guidelines employ a routine and mathematical methodology for judges, prosecutors, and criminal defense attorneys to determine the sentence for a criminal defendant. The Guidelines require judges to follow this mathematical methodology in sentencing. Congress, however, often specifies the requisite mandatory minimum sentence for a crime in criminal statutes. When sentencing under the Guidelines conflicts with sentencing in an individual statute, the individual statute's sentence always controls.<sup>101</sup> While the Guidelines are no longer considered mandatory, but rather advisory, judges continually employ the Guidelines in sentencing and are required to follow the mandatory sentences of individual criminal statutes.

In determining the appropriate sentence, the Guidelines utilize a mathematical methodology. Each offense under the Guidelines is given a base level. Once the appropriate base level is determined, the judge must then take into account all adjustments. The judge, prosecutor, and defense attorney may advocate for or against any upward or downward adjustments.

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99. . Chiu, *supra* note 88, at 1315-17. In *Mistretta v. United States*, the Supreme Court held that the Sentencing Reform Act and the Federal Sentencing Guidelines were constitutional and neither an excessive delegation of legislative authority nor a violation of the separation of powers doctrine. 488 U.S. 361, 412 (1989).

100. . Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 355 (2005) (quoting Kate Stith & José A. Cabranes, FEAR OF JUDGING 2 (1998)).

101. . Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, 1988 (1984) (codified at 18 U.S.C. § 3551 (1990)).

There are a number of possible adjustments, including: hate crime motivation, vulnerable victim, official victim, terrorism, aggravating role in the offense, mitigating role in the offense, abuse of official power, or using body armor in drug trafficking crimes.<sup>102</sup> Judges are permitted to make upward or downward departures from the mandated sentence if the judge finds, “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”<sup>103</sup> Furthermore, a judge may make a downward departure if the criminal defendant substantially assisted law-enforcement authorities and the prosecutor filed the motion with the court.<sup>104</sup> The judge calculates the change in the base level from the upward or downward adjustments and determines the final offense level. The judge then measures this final offense level with the defendant’s criminal history to determine the appropriate sentence. Determining the appropriate sentence is as simple as looking at a chart and adding up the corresponding points.

## VII. THE SUPREME COURT AND THE FEDERAL SENTENCING GUIDELINES

Beginning in 2000, the Supreme Court began deciding a line of cases questioning the constitutionality of the Federal Sentencing Guidelines in light of the Sixth Amendment. In *Apprendi v. New Jersey*,<sup>105</sup> the Court held that the Sixth Amendment requires any fact, other than a prior conviction, “that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>106</sup> *Apprendi* left open to consideration the definition of “statutory maximum” sentence.<sup>107</sup> In *Blakely v. Washington*,<sup>108</sup> Justice Scalia, writing for the majority, determined that, “the ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without additional findings.”<sup>109</sup> However, *Blakely* gave no guidance in examining sentence-enhancing facts.

In *United States v. Booker*,<sup>110</sup> consolidated with *United States v. Fanfan*, the Court addressed the questions it had left open in its previous line of cases

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102. . U.S. SENTENCING GUIDELINES MANUAL ch. 3 (2012).

103. . Sentencing Reform Act, 18 U.S.C. § 3553(b)(1) (Supp. III 2003).

104. . U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

105. . 530 U.S. 466 (2000) (A 5-4 decision). In *Apprendi*, the defendant pled guilty to a firearm possession offense. The prosecutor and judge enhanced the defendant’s sentence above the statutory maximum with an upward shift in sentencing due to the hate-crime nature of the offense. The defendant was sentenced to a prison term that was two years longer than the statutory maximum. *Id.* at 469-474.

106. . *Id.*, at 490.

107. . Bissonnette, *supra* note 74, at 1512 (discussing *Apprendi*).

108. . 542 U.S. 296 (2004). In *Blakely*, the defendant argued that his Sixth Amendment rights were violated because the defendant’s sentence was beyond the statutory maximum after the judge determined the sentence-enhancing facts. *Id.* at 301.

109. . Bissonnette, *supra* note 74, at 1513 (citing *Blakely*, 542 U.S. at 303-04).

110. . 543 U.S. 220 (2005).

regarding mandatory minimum sentences and sentence-enhancing facts. Specifically, the Court tackled two major questions. First, the Court determined whether or not enhancing a defendant's sentence beyond the statutory maximum based on judge, not jury, found facts violated the Sixth Amendment.<sup>111</sup> Second, if the Court determined the first question in the affirmative, then the Court had to decide whether the Guidelines were mandatory or merely advisory.<sup>112</sup> The Court, in line with its previous Sixth Amendment jurisprudence, answered the first question in the affirmative. Justice Ginsburg concurred with the majority's opinion on the first question; however, she left the majority and joined Justices Breyer, Kennedy, O'Connor, and Rehnquist in deciding the latter question regarding the practical role of the Federal Sentencing Guidelines. Justice Breyer, writing for the majority on the practical role of the Guidelines, held that the imposition of a sentence from the Guidelines depended entirely on the mandatory nature of the Guidelines.<sup>113</sup> With that premise, the Court held that the Guidelines were "effectively advisory."<sup>114</sup> The Federal Sentencing Guidelines violated a defendant's Sixth Amendment right to a trial by jury because the Guidelines required judges to impose sentences beyond the statutory maximum if judges had a sufficient factual basis.

After the *Booker* opinion was issued, many believed that merely advisory Guidelines would create chaos within the criminal justice system and cause a return to pre-Sentencing Reform Act policy.<sup>115</sup> None of these predictions came true. Rather, judges and prosecutors continue to follow the Guidelines. "Judges are following the Guidelines over 80% of the time, despite the fact that many judges disagree with the Guidelines."<sup>116</sup> Judges continue to sentence within the Guidelines and prosecutors continue to reap the immense discretion granted by the Guidelines.

#### VIII. THE INEFFECTIVENESS OF MANDATORY MINIMUM SENTENCING

The intentions behind the installation of mandatory minimum sentencing through the Federal Sentencing Guidelines were neither malicious nor vindictive. Nonetheless, the bipartisan Sentencing Reform Act reshaped the goals of American penal policy from rehabilitative efforts into a retributive scheme. The final version of the Sentencing Reform Act outlined Congress's specific intentions in dramatically altering sentencing:

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111. . *Id.*, at 229 n.1.

112. . *Id.*, at 226-27.

113. . *Id.*, at 245.

114. . *Id.*

115. . Bobby Scott, *United States v. Booker: System Failure or System Fix?*, 160 U. PA. L. REV. 195, 200 (2011).

116. . *Id.*, at 202 (citing U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT, 3D QUARTER RELEASE 1 tbl. 1 (2011) (finding that 81% of all sentences are either within the Guidelines or a government-initiated departure); U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, tbl. 8 (2010) (showing that approximately 30% of judges think that the ranges for many drug offenses are too high)).

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>117</sup>

Surely, the goals and motivations behind the Sentencing Reform Act were legitimate. However, in light of America's current state of mass incarceration, mandatory minimum sentences have not proven to be effective. Due to the rigid nature of mandatory minimums and the elimination of judicial discretion in sentencing, the Sentencing Reform Act has exacerbated the very problems it aimed to address. In reality, mandatory minimums swept away with judicial discretion, as intended, but gave prosecutors sweeping discretion in criminal cases. Furthermore, the racial disparity in sentencing was not alleviated, but exacerbated by rigid sentencing. Lastly, mandatory minimums have not had a positive effect on deterrence, but rather, have contributed to an exceedingly costly and inefficient system of mass incarceration.

#### *Sweeping Prosecutorial Discretion*

One of the major purposes behind the installation of mandatory minimum sentencing was to reduce the large disparities in sentencing across federal jurisdictions by eliminating judicial sentencing discretion. Mandatory sentencing provisions require judges to impose the mandated sentence in the Guidelines regardless of varying circumstances and culpability levels.<sup>118</sup> Judges are only permitted to depart from the Guidelines under extraordinary circumstances.

The elimination of judicial discretion in sentencing resulted in sweeping prosecutorial discretion at both the state and federal levels.<sup>119</sup> Criminal law was at one point in this country's criminal judicial history the domain of states. State legislatures determined crimes and their corresponding sentences. State judges had discretion in both the charging and sentencing phases.<sup>120</sup> Beginning in the latter half of the twentieth century, the federal government began passing and enforcing broad, sweeping criminal laws.<sup>121</sup> The result was the over-federalization of criminal law. Now, through overly broad statutes such as RICO and mail and wire fraud, federal prosecutors

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117. . Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, 2017 (1984) (codified at 28 U.S.C. § 991(a) (1994)).

118. . Mascharka, *supra* note 69, at 943.

119. . *Oliss*, *supra* note 72, at 1854.

120. . JAMES A. STRAZZELLA, ABA, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW 5-7 (1998), available at [http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization\\_of\\_Criminal\\_Law.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf).

121. . *Id.* at 5-13.



have the vast tools to prosecute what was once the domain of state prosecutors and judges.<sup>122</sup> Broad prosecutorial discretion, nonetheless, has served as a mechanism to increase efficiency and deal with overwhelmingly large criminal court dockets.

With the implementation of the Federal Sentencing Guidelines combined with the over-federalization of criminal law, state and federal prosecutors can use broad federal criminal laws to compel guilty pleas.<sup>123</sup> Federal sentences are generally harsher than comparable state criminal sentences. Thus, state prosecutors can compel guilty pleas with the threat of federal prosecutorial intervention.<sup>124</sup> A criminal defendant would much rather face a more lenient state sentencing regime, than enter the domain of federal law, where prosecutors have overly broad laws accompanied by harsher, mandatory sentences. Therefore, criminal defendants choose to plead guilty to a state crime to avoid sentencing in the federal system.

Similarly, federal prosecutors can use the vast breadth of federal criminal law and its mandatory sentences to pressure criminal defendants into pleading guilty.<sup>125</sup> Federal prosecutors give criminal defendants an ultimatum: either plead guilty to a lesser charge or get charged with another crime within the vast breadth of federal criminal law that demands a longer sentence. Under the Federal Sentencing Guidelines, federal prosecutors may also offer a criminal defendant a lower sentence if the defendant provides "substantial assistance" in other criminal prosecutions.<sup>126</sup> The discretion in determining "substantial assistance" is solely up to the prosecutor and is calculated as a downward departure under the Guidelines. The prosecutor's charging discretion is done in an entirely secretive manner, with absolutely no oversight or protections for a criminal defendant.<sup>127</sup>

By eliminating judicial discretion in sentencing, the Federal Sentencing Guidelines, in tandem with the federalization of criminal law, gave prosecutors sweeping prosecutorial discretion. The reallocation of sweeping discretion to prosecutors raises considerable federalism concerns as it vitiates the traditional roles of state legislatures and prosecutors.<sup>128</sup> While there are justifications for the federalization of criminal law,<sup>129</sup> realistically, broad prosecutorial discretion acts as a tool to compel and procure guilty pleas from criminal defendants.<sup>130</sup> Such uninhibited prosecutorial discretion contrib-

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122. . *Id.* at 6-13.

123. . Oliss, *supra* note 72, at 1854-55 (citations omitted).

124. . *Id.*

125. . *Id.* at 1855.

126. . *Id.*; see also Sentencing Reform Act, 18 U.S.C. § 3553(e) (1994 & Supp. V 1999).

127. . Mascharka, *supra* note 69, at 943.

128. . STRAZZELLA, *supra* note 120, at 13-25.

129. . *Id.* at 14-17.

130. . Oliss, *supra* note 72, at 1870-77 (citations omitted). The vast breadth prosecutors maintain in charging and sentencing raises significant Due Process and Sixth Amendment concerns. By choosing to plead guilty based on the prosecutor's threat of a higher charge and sentence, criminal defendants

utes significantly to the astronomical fiscal and social costs of mass incarceration.<sup>131</sup>

### *Sentencing Disparities and Racial Inequality*

Sen. Kennedy advocated for mandatory minimum sentencing in 1975 due to the racial inequality that resulted from judicial discretion in sentencing.<sup>132</sup> Sen. Kennedy co-sponsored the Sentencing Reform Act in 1984 in hopes that mandatory minimums would ensure uniformity and reduce racial disparities in sentencing.<sup>133</sup> Unfortunately, mandatory minimum sentencing has not yielded such equality but rather has exacerbated racial disparities in sentencing. In reality, mandatory minimum sentencing has had a disparate effect on racial minorities.<sup>134</sup> Racial inequality in sentence length under the Sentencing Reform Act has increased.<sup>135</sup>

Mandatory minimums proliferated by the Federal Sentencing Commission and under criminal drug statutes have contributed greatly to racial inequality, so much so that academics consider mandatory minimum sentences part of the New Jim Crow legislation.<sup>136</sup> Multiple reasons for the increase in sentencing disparity between white and non-white populations after the Sentencing Reform Act have been posited. First, white people are more likely to plead guilty early in the adjudication process.<sup>137</sup> Second, prosecutors make downward departures in sentencing for white people and determine that white people have provided “substantial assistance” much more often than with racial minorities.<sup>138</sup>

Lastly, African-Americans, as a percentage and as a whole, are simply more likely to be prosecuted and sentenced under mandatory minimums than the white population. African-Americans account for approximately forty percent of the United States incarcerated population, while accounting for only twelve to thirteen percent of the total American population.<sup>139</sup> However, African-Americans are not more likely to commit drug offenses as both minorities and the white population sell and use drugs at remarkably similar

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are essentially punished for going to trial and relying on the adversarial system. This reality contradicts an essential feature of our criminal justice system.

131. . STRAZZELLA, *supra* note 120, at 39-40..

132. . Darmer, *supra* note 89, at 540.

133. . Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, 2017 (1984) (codified as amended at 28 U.S.C. § 991(a) (1994)).

134. . BARBARA S. VINCENT & PAUL J. HOFER, FED. J. CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* 23 (1994).

135. . *Id.*

136. . ALEXANDER, *supra* note 7, at 7.

137. . VINCENT & HOFER, *supra* note 134, at 23 (citing U.S. SENTENCING COMM., *SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 81 (1991)).

138. . *Id.*

139. . HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, U. S. DEP’T OF JUSTICE, *PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES* 19 tbl. 16 (2010), available at <http://www.bjs.gov/content/pub/pdf/pim09st.pdf>.

rates.<sup>140</sup> Mandatory minimums have not decreased racial disparities in sentencing.

The foremost example of sentencing disparity in drug-related crimes is the sentencing disparity between crack-cocaine and its counterpart, powder cocaine.<sup>141</sup> Crack-cocaine and powder cocaine are essentially the exact same drug, just in different form. Yet, crack-cocaine triggers an exceedingly higher sentence than powder cocaine. There is only one explanation behind this disparity: lawmakers view the pricier, powder cocaine as a “suburban” or upper-class drug and the cheaper, crack-cocaine as the “minority” brand.<sup>142</sup>

### *Deterrence, Recidivism, and Public Safety*

As listed above, three major objectives of the Sentencing Reform Act were to increase deterrence to commit crimes, to reduce recidivism rates, and to increase public safety.<sup>143</sup> Harsh, mandatory sentences were intended to deter criminal behavior and prevent criminals from harming the public in the future, thus, increasing public safety. However, modern criminologist theory and a broad range of evidence suggest that mandatory minimums have had little to no effect on deterrence, recidivism rates, and public safety.

The severity of the punishment does not act as a deterrent, but rather, deterrence is a function of certainty.<sup>144</sup> Simply increasing the severity of the crime by increasing the mandatory minimum sentence does not effectively deter crime, while certainty in being apprehended is a deterrent to crime. When one considers committing a crime, a potential criminal doesn't consult the Federal Sentencing Guidelines or applicable criminal statute, but rather weighs the possibility of getting caught with benefits of committing the crime. Mandatory minimums increase severity, but have no effect on certainty of apprehension. Similarly, drug users are not deterred by mandatory minimum sentences. The negative incentive of the mandatory sentence is not necessarily a thought in the mind of a drug user, and it certainly may not outweigh a drug addict's desire for addictive narcotics.

A RAND Drug Policy Research Center study conducted on the cost effectiveness of mandatory minimums for drug crimes found that mandatory minimums were inefficient in both cost and result.<sup>145</sup> Both conventional en-

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140. . ALEXANDER, *supra* note 7, at 7.

141. . See, e.g., Carol A. Begman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENTENCING REP. 196 (1998).

142. . See, e.g., See Mascharka, *supra* note 69, at 944 (citing George Cornell, Editorial, *Don't Neglect Treatment*, PATRIOT-NEWS, Apr. 4, 1999, Westlaw, 1999 WL 5134078).

143. . Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, 2017 (1984) (codified as amended at 28 U.S.C. § 991(a) (1994)).

144. . Mascharka, *supra* note 69, at 946 (citing JONATHAN P. CAULKINS ET AL., RAND DRUG POL'Y RESEARCH CTR., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 75 (1997); Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 308 (1991)).

145. . Mascharka, *supra* note 69, at 948 (citing CAULKINS, *supra* note 144, at 75).

forcement and treatment were found to be much more cost-effective at reducing both drug-related crime and drug consumption.<sup>146</sup> Similarly, this study noted that there is “very little difference between conventional enforcement and mandatory minimums in their effects on. . . economically motivated [drug] crime[s].”<sup>147</sup> In order to deter drug crimes, spending should go to crime control and treatment, not to the excessive costs of mass incarceration.

Mandatory minimum sentences do not reduce recidivism rates. For recidivism to be reduced, the mandatory minimum sentence must deter a repeat offender from using drugs or dealing drugs. Necessarily, the mandatory minimum did not deter the offender from the original drug offense because he or she committed the initial crime. The Federal Sentencing Guidelines respond to recidivism by increasing the sentence length. The Guidelines mandate an upward shift in the sentence if the offender is a repeat offender. As a response to recidivism, this increase in sentence length is illogical. Again, increasing the severity of the sentence does not act as a deterrent. An increased sentence could not possibly reduce recidivism rates because it does not deter criminal behavior.

Studies have even concluded that mandatory minimum sentencing has a criminogenic effect, that is they increase recidivism rates, as opposed to reducing recidivism. A 2002 meta-analysis of 117 studies measuring recidivism found that longer prison sentences were “associated with a small increase in recidivism.”<sup>148</sup> Thus, rather than spending excessive tax payer dollars on incarcerating drug offenders for lengthy sentences, such spending could be more effective if it was averted to drug treatment programs, alternative sentencing methods, and prison vocational programs to give incarcerated individuals opportunities after incarceration.

A finding that mandatory minimums increase public safety requires a showing that mandatory minimums deterred crime and reduced recidivism rates. If mandatory minimums deterred criminal behavior, less crime would result. Additionally, a decrease in recidivism rates would coincide with less crime. Logically, less crime due to deterrence and reduced recidivism would foster an increase in public safety. However, since mandatory minimums have neither deterred criminal behavior nor reduced recidivism rates, mandatory minimums have not produced a net increase in public safety.

Mandatory minimum sentences are simply not meeting the goals that Congress outlined for them. By instituting mandatory minimums, Congress determined that sentencing policy should focus on retributivism as opposed to rehabilitation. The effects of this shift have had tremendously negative economic and social impacts. Since the declaring the War on Drugs, federal,

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146. . *Id.*

147. . CAULKINS, *supra* note 144, at 68.

148. . PAULA SMITH ET AL., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES 10 (2002), available at [http://ccoso.org/library%20articles/200201\\_Gendreau\\_e.pdf](http://ccoso.org/library%20articles/200201_Gendreau_e.pdf).

state, and local governments have spent trillions on drug enforcement and mass incarceration. Mandatory minimum sentences, under this retributivist regime, exacerbate the costs of the War on Drugs by incarcerating individuals for longer periods of time. Such government spending would be better spent on rehabilitative measures. A return to rehabilitative philosophy as the core of criminal sentencing is necessary to undo the deleterious effects of mandatory minimum sentencing.

#### IX. THE JUSTICE SAFETY VALVE ACT & THE SMARTER SENTENCING ACT

On August 12, 2013, Attorney General Eric Holder delivered a speech to the American Bar Association's House of Delegates addressing what he labeled America's broken criminal justice system.<sup>149</sup> After identifying the values that define the American justice system, Holder called for a "fundamentally new approach" to criminal justice in order to address "persistent needs and unwarranted disparities."<sup>150</sup> He noted that the American criminal justice system is broken, and its current path is "far from sustainable."<sup>151</sup> Holder addressed the need for a review of America's War on Drugs and questioned the efficacy and morality of the War on Drugs. In doing so, he stated, "with an outsized, unnecessarily large prison population, we need to ensure that incarceration is used to punish, deter, and rehabilitate - not merely to warehouse and forget."<sup>152</sup> Current policies simply are not capable of addressing our current challenges. Too many Americans enter federal and state prisons for much too long periods of time. The effects of America's War on Drugs are no longer tolerable from both a fiscal and social perspective. To address these modern day challenges, Holder outlined numerous solutions and philosophies, which legislatures, judges, and both federal and state prosecutors must adopt. These include: the compassionate release for inmates who pose no threat to public safety, alternatives to incarceration, and rehabilitation programs, such as drug treatment.<sup>153</sup> Among the solutions Holder discussed was the need to rethink mandatory minimum sentencing policy. Mandatory, inflexible sentences create major discrepancies in discretion. Mandatory minimum sentencing "breed[s] disrespect for the [criminal justice] system" and destabilizes poor, urban communities.<sup>154</sup> Lastly, Holder noted that the Justice Safety Valve Act and the Smarter Sentencing Act are "promising legislation" that will deter crime, protect public safety, and ensure rehabilitation.<sup>155</sup>

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149. . Attorney General Eric Holder, Remarks at the Annual Meeting of the American Bar Association House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

150. . *Id.*

151. . *Id.*

152. . *Id.*

153. . *Id.*

154. . *Id.*

155. . *Id.*

The political mantra of being “tough-on-crime” is no longer an option. “Tough-on-crime” policies of the past did nothing to deter, protect the public, and rehabilitate prisoners, but rather cost Americans trillions of dollars in squandered revenue. For these reasons, liberals and conservatives are once again uniting to change American sentencing policy. In 2013 Republicans and Democrats joined forces and introduced the Justice Safety Valve Act and the Smarter Sentencing Act. Both Acts seek to expand safety valves and increase judicial discretion in sentencing. A safety valve is a tool for judges, prosecutors, and defendants to use when mandated sentences under the Guidelines are unjust and do not meet the purposes of criminal justice.

#### *The Justice Safety Valve Act*

Senators Patrick Leahy and Rand Paul and Representatives Robert Scott and Thomas Massie introduced the Justice Safety Valve Act in 2013.<sup>156</sup> In introducing the Justice Safety Valve Act, Senator Leahy detailed the current failures of mandatory minimum sentencing in our modern criminal justice system. Senator Leahy noted that, “The number of mandatory minimum penalties in the Federal code nearly doubled from 1991 to 2011.”<sup>157</sup> Senator Leahy then criticized Congressional actions over the past few decades as, “Congress has too often moved in the wrong direction by imposing new mandatory minimum sentences unsupported by evidence. . . Our reliance on mandatory minimums has been a great mistake.”<sup>158</sup> According to Senator Leahy, this one-size-fits-all approach to sentencing contributes to this country’s massive prison population, which continues to cost taxpayers incredible amounts of money.<sup>159</sup> Accordingly, the intended purpose of the Justice Safety Valve Act is to, “[C]ombat injustice in federal sentencing and the waste of taxpayer dollars by allowing judges appropriate discretion in sentencing.”<sup>160</sup>

The Justice Safety Valve Act would amend the current Guidelines<sup>161</sup> and add a new safety valve for mandatory minimum sentences. If the goals of punishment<sup>162</sup> are not met and the sentence is unjust, the new safety valve would permit judges to sentence criminal defendants below the mandatory minimum.<sup>163</sup> The judge must give reasonable notice to both parties, afford each party an opportunity to respond, and state in writing the reason for the

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156. . See Justice Safety Valve Act, S. 619, 113th Congress (2013).

157. . 159 CONG. REC. S2028 (Mar. 20, 2013) (statement of Sen. Leahy).

158. . *Id.*

159. . *Id.*

160. . *Id.*

161. . Sentencing Reform Act, 18 U.S.C. § 3553 (1984).

162. . 18 U.S.C. § 3553(a)(2). The goals of sentencing include (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *Id.*

163. . See Justice Safety Valve Act, S. 619, 113th Congress (2013).

deviation from the mandatory minimum.<sup>164</sup>

The purported purpose of the Justice Safety Valve Act is to give judges increased discretion in sentencing by permitting a departure from mandatory minimum sentences. The Justice Safety Valve Act is a crucial step toward diminishing the criminal justice system's reliance upon mandatory minimums, decreasing the size of the federal prison population, and reducing federal spending on prisons. Unfortunately, the Justice Safety Valve Act remained in the Senate Committee on the Judiciary since referral on April 24, 2013, where it died.<sup>165</sup> After learning that over fifty percent of federal prisoners are incarcerated on drug offenses, Senators Leahy and Paul determined that the best course of action was to focus attention and efforts on enacting the Smarter Sentencing Act, which applies directly to drug offenses, as opposed to the Justice Safety Valve Act, which applies to all mandatory minimum sentences.<sup>166</sup>

### *The Smarter Sentencing Act*

Senators Richard Durban, Patrick Leahy, and Mike Lee introduced the Smarter Sentencing Act on July 31, 2013. Rather than adding a new safety valve like the Justice Safety Valve Act, the Smarter Sentencing Act expands the existing federal safety valve<sup>167</sup> to include drug offenses.<sup>168</sup> Currently, the safety valve permits judges to deviate from the mandatory minimum only when the defendant does not have a past criminal history or if the criminal history is very limited and does not include drug crimes.<sup>169</sup> The Smarter Sentencing Act expands the applicability of the current safety valve to criminal defendants who have more extensive criminal histories.<sup>170</sup>

The Smarter Sentencing Act also reduces mandatory minimums for certain drug offenses by at least fifty percent. The act reduces drug offenses covered by the Controlled Substances Act and Controlled Substance Import and Export Act. Specifically, twenty-year mandatory minimums are reduced to ten years; ten-year mandatory minimums are reduced to five years; and five-year mandatory minimums are reduced to two years.<sup>171</sup>

Furthermore, the Smarter Sentencing Act makes the Fair Sentencing Act's crack-cocaine sentence reduction retroactive.<sup>172</sup> Federal prisoners who have

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164. . *Id.*

165. . GOVTRACK, <https://www.govtrack.us/congress/bills/113/s619#overview> (last visited Jan. 16, 2015).

166. . Executive Business Meeting, Senate Judiciary Committee Chairman Patrick Leahy (Jan. 30, 2014), <http://www.judiciary.senate.gov/imo/media/doc/01-30-14LeahyStatement.pdf>.

167. . *See* Sentencing Reform Act, 18 U.S.C. § 3553(f) (1984).

168. . *See* Smarter Sentencing Act, S. 1410, 113th Cong. (2013).

169. . *See* 18 U.S.C. § 3553(f). The current safety valve applies when determining the sentence under the Guidelines. The safety valve is applicable when the crime permits and when the person's criminal history category is not more than 1, as calculated by the Guidelines. *Id.*

170. . *See* S. 1410.

171. . *Id.*

172. . *Id.*

been convicted and sentenced under the harsh crack-cocaine sentences prior to 2010 can retroactively seek sentence adjustments based upon the Fair Sentencing Act.<sup>173</sup> The Fair Sentencing Act of 2010 eliminated the five-year mandatory minimum for first-time possession of crack cocaine.<sup>174</sup> If a federal prisoner has not yet had their sentence decreased, the Smarter Sentencing Act permits them to apply for such a reduction.

While the Smarter Sentencing Act neither creates a new safety valve like the Justice Safety Valve Act nor eliminates any mandatory minimums, it gained significantly more traction in Congress than the Justice Safety Valve Act.<sup>175</sup> The Smarter Sentencing Act passed in the Senate Judiciary Committee in January of 2014. However, due to efforts by Republican Senators, the Act was never brought to the Senate floor for a vote and died.<sup>176</sup> Nonetheless, the traction gained by the Smarter Sentencing Act reflects a growing consensus towards significant sentencing reform. Lawmakers on both sides of the aisle have come to the consensus that mandatory minimum sentencing incarcerates too many people, for too long, at too high of a cost.<sup>177</sup> Laura Murphy of the American Civil Liberties Union defined the Smarter Sentencing Act as, “the most significant piece of criminal justice reform to make it to the Senate floor in several years.”<sup>178</sup> The Congressional Budget Office, a nonpartisan organization, concluded that the Smarter Sentencing Act would reduce prisons costs by \$4.36 billion over the next ten years.<sup>179</sup> The Department of Justice similarly estimated that the Smarter Sentencing Act would reduce prison costs by \$7.4 billion over the next ten years, and \$24 billion over the next twenty years.<sup>180</sup>

A thorough review of this matter reveals that mandatory minimum sentences have not succeeded in producing their intended results. Mandatory minimum sentences for drug offenders continue to cost this country a significant portion of its budget. Drug offenses have been disproportionately applied to minorities and have had destructive effects on poor, urban communities. While both the Justice Safety Valve Act and the Smarter Sentencing

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173. . *Id.*

174. . Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2371 (codified as amended in scattered sections of 28 U.S.C.).

175. . Jacob Sullum, *Senate Judiciary Committee Approves Major Drug Sentencing Reform*, FORBES (Jan. 30, 2014), <http://www.forbes.com/sites/jacobsullum/2014/01/30/senate-judiciary-committee-approves-major-drug-sentencing-reforms/>.

176. . Christie Thompson, *Right and Left Unite on Drug Sentencing. What Could Possibly Go Wrong?*, THE MARSHALL PROJECT (Nov. 17, 2014), <https://www.themarshallproject.org/2014/11/17/right-and-left-unite-on-drug-sentencing-what-could-possibly-go-wrong>; GOVTRACK, <https://www.govtrack.us/congress/bills/113/s1410> (last visited Jan. 16, 2015).

177. . Sullum, *supra* note 175.

178. . *Id.*

179. . CONG. BUDGET OFFICE, COST ESTIMATE OF S. 1410, SMARTER SENTENCING ACT OF 2014 (2014), available at <http://www.cbo.gov/publication/45710>.

180. . BUDGET STAFF OF THE DEPARTMENT OF JUSTICE, DEPARTMENT OF JUSTICE, COST SAVINGS TO FEDERAL GOVERNMENT OF THE SMARTER SENTENCING ACT (2014), available at <http://famm.org/wp-content/uploads/2014/02/DOJ-SSA-Cost-Savings-Estimate-2014.pdf>.



Act do not eliminate mandatory minimum sentencing entirely, both proposed bills are major steps in the right direction. Beginning to decrease the applicable mandatory minimums for drug sentences is necessary to counteract the destructive policies of the War on Drugs and decrease federal spending on incarceration. These bills would begin to alleviate much of the destructive criminal justice policies this country has enacted. Furthermore, these proposed bills and their popularity reflect an inevitable shift away from mandatory minimum sentencing back to a rehabilitative sentencing regime.

#### X. CONCLUSION: A RETURN TO REHABILITATION

The current era of mandatory minimum sentencing policy must come to an end. American criminal and sentencing policy has become a function of politics as opposed to empirically effective and economically efficient solutions. Chief Justice Rehnquist stated that mandatory minimums, "do not involve any careful consideration," but, "are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.'"<sup>181</sup> The over-criminalization and over-federalization American criminal law continues to have a disparate effect on poor, urban minorities. For both fiscally responsible and socially just reasons, the United States must revert its core sentencing philosophy back to rehabilitation as opposed to retributivism.

The Justice Safety Valve Act and Smarter Sentencing Act proposed fiscally responsible and socially just responses to the current state of mass incarceration. Their death in Congress is disconcerting given the widespread popularity and potential benefits of the proposed bills. While these bills were steps in the right direction, much more is needed to counteract the destructive effects of policies proliferated throughout the War on Drugs. In order to see true results, states must make changes to their criminal justice and sentencing policies, as federal prisons account for only a small portion of the total American prison population and prison spending.

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181. . Stephen Breyer, *Federal Sentencing Guidelines Revisited, An Address Before the University of Nebraska College of Law*, 11 FED. SENT'G REP. 180, 184 (1999).