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The Sobering Failure of America's "War on Drugs": Free the P.O.W.s

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COMMENTS

THE SOBERING FAILURE OF AMERICA’S “WAR ON DRUGS”: FREE THE P.O.W.S

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INTRODUCTION

If we cannot destroy the drug menace in America, then it will surely in time destroy us. I am not prepared to accept this alternative [W]e must rehabilitate the drug user if we are to eliminate drug abuse and all the antisocial activities that flow from drug abuse.¹

The drug war has failed. In the United States, 85% of inmates are “substance-involved.”² Empirical evidence shows drug and alcohol abuse is a driving force behind a significant majority of the prison population arriving to these state-paid, iron-barred motels. Yet, annually the United States spends \$81 billion in incarceration costs reacting to drug-addicted defendants by imposing ineffective criminal penalties.³ If we continue these misguided efforts, the wasted tax payer dollars will be miniscule compared to the thousands of lives lost through substance abuse related deaths and the deprivation of freedom inside our prisons.

In 1971, President Richard Nixon declared a “War on Drugs,”⁴ in response to deteriorating neighborhoods and a five-fold increase in

1. President Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971) (transcript available at <https://www.presidency.ucsb.edu/node/240245>).

2. *Addiction, Substance Use and the Justice System*, CTR. ON ADDICTION, <https://www.centeronaddiction.org/newsroom/position-statements> (last updated Apr. 14, 2017) [hereinafter *Addiction, Substance Use and the Justice System*] (concluding that inmates are considered substance-involved if they “met the clinical criteria for addiction or substance abuse in the year prior to their arrest . . . had histories of illicit drug use or treatment for alcohol problems; were under the influences of alcohol or other drugs at the time of their crime; committed their offense to get money to buy drugs; were incarcerated for an alcohol or other drug law violation; or shared a combination of these characteristics”).

3. See Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 817–18 (2017).

4. See Nixon, *supra* note 1 (highlighting how President Nixon’s use of the word “attack” six times in his speech reinforces the analogy that drugs are an aggressive enemy of the United States). Following President Nixon’s 1971 speech, the so-called “War on Drugs” became a popular name to describe the increased legislative efforts to tame the use of drugs and related violent crime in America. See *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Dec. 3, 2018) (describing President Nixon’s declaration of the “War on Drugs” and the ensuing increase in “the size and presence of federal drug control agencies”).

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narcotic deaths from 1960-70.⁵ President Nixon believed the economic principles of supply and demand apply equally to the drug world and emphatically stressed to Congress that targeting the supply of traffickers was not enough.⁶ As a result, Nixon advocated for a double-edged approach to combatting the drug epidemic, which involved (1) snuffing out the demand for drugs by providing treatment for people who were drug addicts, and (2) working with international agencies to mitigate the supply.⁷ Additionally, Nixon recognized the irrefutable correlation between drug use and crime and directed his efforts toward investing money in rehabilitating people in the bondage of drug addiction.⁸

In the United States, each time the pendulum swings between political parties, the approach to penalties in the criminal justice system follows swiftly behind. Congress ping pongs between enacting more mandatory minimum penalties and abolishing mandatory minimum sentences, which are only to be resurrected in the future.⁹ Criminal justice policies also volley back and forth as a result of political party changes in executive departments. For example, during Barack Obama's presidency, Attorney General Eric Holder sent a memorandum to all federal prosecutors reversing a policy that required prosecutors to bring charges with the most severe possible sentence.¹⁰ Subsequently, during Donald Trump's presidency, Attorney General

5. *See id.* (describing how narcotic related deaths in New York City increased from 200 deaths annually to over 1,000 from 1960 to 1970, demonstrating the rise of drug addiction in the United States at that time).

6. *See id.*

7. *See id.* (discussing the various sources of drug addiction in the United States during the rise of the War on Drugs and presenting potential solutions to combatting the sale and use of drugs).

8. *Id.*

9. *See, e.g.,* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 161–62 (New York: Basic Books ed., 2017) (presenting the historical interconnection between politics, power and crime, and how it fuels the “historical precedent for . . . [a] cyclical overreaction” to crime followed by more lenient policies).

10. *See* Memorandum from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, Dep’t Policy on Charging & Sentencing (May 19, 2002), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> (noting prosecutors should consider “an individualized assessment” of charges to ensure the charge fits with the unique circumstances of each defendant’s case).

Jeff Sessions sent a memorandum reversing the memorandum by Holder, and instead, directed prosecutors to “charge and pursue the most serious readily provable offense . . . including mandatory minimum sentences.”¹¹

Since the 1980s, criminal justice policy in the United States has been significantly more punitive.¹² As a result of harsher sentencing policies, in the same time the United States’ population has grown by 35%,¹³ the prison population has grown by 800%.¹⁴ It is evident that the pernicious policies implemented over the past forty years have been knee-jerk reactions to underlying societal issues such as drug

11. Memorandum from Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Dep’t Policy on Charging & Sentencing (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

12. See Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada’s Imprisonment Rate*, 40 L. & SOC’Y REV. 325, 326–27 (2006) (contrasting incarceration trends in Canada with the United States, by highlighting policies such as three-strikes sentencing, mandatory minimum penalties, habitual offender laws, and truth-in-sentencing, which are characterized as “evidence of increasing punitiveness”).

13. See *Public Data, Population in the U.S.*, GOOGLE, https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&hl=en&dl=en (last updated Sept. 9, 2018) (reporting data from U.S. Census Bureau which found the population in the United States increased from 235.8 million in 1984 to 318.6 million in 2014, equating to a 35% population increase over thirty years).

14. 160 CONG. REC. 6,489 (2014) (noting a statement from Senator Booker on the criminal justice system). “This Nation has seen this county have an 800[%] increase in the Federal prison system over the last 30 years. Think about that—an 800[%] increase. We not have the very ignominious distinction of the globe for leading the planet Earth in a country that incarcerates its own citizens. In fact, America is just 5[%] of the globe’s population, but we have 25[%] of the world’s imprisoned people, and I tell that is not because Americans have a greater proclivity for criminality, it is because our legal system is not a just system.” *Id.*; see also Letter from Thomas M. Susman, Director of Gov’t Aff., to Chairman Leahy & Ranking Member Grassley (Dec. 19, 2013) (on file with the American Bar Association), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013dec9_smart_ersentencingacts_1.pdf (finding the 790% increase in the federal prison population, occurring between 1980 and 2013, has been partly attributed to mandatory minimum sentences).

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addiction,¹⁵ violent crime rates,¹⁶ and racism.¹⁷ In a congressional report, Congress admitted that mass incarceration has caused a serious economic burden and has taken an adverse toll on humanity.¹⁸ Additionally, inmates with mental illness are disproportionately represented in the prison population.¹⁹ A common definition of insanity is doing the same thing over and over expecting different results. The United States' criminal justice policy shares this characteristic: Congress repeatedly enacts overly punitive mandatory sentences, expecting decreased crime rates after decades of failed results. If we treated these continuously failing criminal sentencing policies the same as repeat offenders, we would cease to have tolerance for them and put them behind bars for life.²⁰ Ideally, policies are enacted to deter

15. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 751–52 (2005) (discussing the use of a “get-tough” perspective on crime to soothe societal concerns about drug use).

16. See *id.* at 747 (explaining how politicians in the 1960s used public concern about violent crime to justify tough crime sentencing policies).

17. See 160 CONG. REC. 6,490 (2014) (“African Americans and Whites have no difference in drug usage whatsoever, but an African American who chooses to use marijuana is 3.7 times more likely to be arrested for that usage than someone who is White . . . [D]rug sentences for African-American men were 13.1[%] longer than those for White men. Usage has no difference, but arrest rates are dramatically higher for African-American men. In fact, for all crimes, when you start breaking the actual data down, you see patterns of discriminatory impact that are unacceptable in a nation this great.”).

18. See H. REP. NO. 115-699, at 23–24 (2018) (explaining the rising costs of the growing prison population is “becoming a real and immediate threat to public safety” and if the federal prison spending is not reduced, “there will continue to be fewer and fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention and intervention programs. . . .” (quoting the Department of Justice’s Criminal Division in 2013)).

19. See generally Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers*, U.S. DEP’T OF JUST. OFFICE OF JUST. PROGRAMS BUREAU OF JUST. STATISTICS, (July 1999), <https://static.prisonpolicy.org/scans/bjs/mhtip.pdf> (discussing the prevalence of incarcerated mentally ill individuals as of 1999).

20. See, e.g., *id.* (highlighting the prevalence of mentally ill individuals in prisons).

crime.²¹ They do not.²² Policies are enacted to lower crime rates.²³ They do not. Enacted policy aims to be proportionate and fair.²⁴ It is not.²⁵ With these concerns in mind, Congress will not achieve meaningful solutions to criminal justice policy by repeatedly implementing the same practices that produce minimal, if any, improvement.

Since Congress enacted the Sentencing Reform Act of 1984 (“SRA”), which led to the U.S. Sentencing Commission (“Commission”), the use of parole to evaluate inmates’ rehabilitation was jettisoned. Determinate confinement has become the default remedy for mental health issues and drug addiction.²⁶ Mandatory minimum sentencing has historically been reserved for the most severe criminal offenses.²⁷ However, currently there are over 170 federal provisions that include mandatory minimum sentences.²⁸ The conversation about criminal justice reform has been exhausted for decades and, like many other political issues, is in a perpetual state of tug-of-war contingent upon which political party has the majority in Congress or Executive claim. The current criminal justice system requires unsustainable operation costs without a notable decrease in

21. See U.S. SENTENCING GUIDELINES MANUAL (U.S. SENT’G COMM’N 2016), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> [hereinafter USSG] (asserting the goal of criminal law is to punish and control crime).

22. See, e.g., NAT’L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 4–5 (Jeremy Travis et al. eds., 2014) (concluding that the “incremental deterrent effect” of increasing prison sentences is “modest at best”).

23. USSG, *supra* note 21, at 4.

24. See *id.* at 3 (showing the goal of Congress is to allow the criminal justice system to produce fair and proportional in sentences).

25. See Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 12–13 (2015) (discussing drug sentences in practice may be longer than necessary to accomplish the underlying goals of “safety, justice, and deterrence”).

26. See Obama, *supra* note 3, at 821 (discussing the criminal justice system still serves as the automatic response to mental illness and drug addiction).

27. See ARTHUR W. CAMPBELL, LAW OF SENTENCING 114 (3rd ed. 2004) (explaining mandatory incarceration historically was the required sentence for crimes such as murder and driving while under the influence).

28. William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 2012 WIS. L. REV. 85, 102.

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crime rates.²⁹ Unlike many other political issues, criminal justice reform has bipartisan support.³⁰ Despite this united recognition for change, meaningful reform fails at the federal level and defies logic at every opportunity.³¹

This Comment proposes the rehabilitative purpose of criminal penalties was abandoned for ill-advised reasons and the injustices the determinative model of sentencing aims to resolve have not come to fruition. Shifting focus to rehabilitating drug-addicted defendants would not only meet all the purposes of criminal punishment, but would save an untold number of lives. Part I aims to bring inherently flawed sentencing policies to justice by examining their evolution. Part II will critically analyze how such policies have measured up to their purposed objectives. Part III seeks to draw attention to the current costs and

29. See, e.g., Micheal Tonry, *Why Crime Rates are Falling throughout the Western World*, in CRIME AND JUSTICE, WHY CRIME RATES FALL AND WHY THEY DON'T 5–6 (Michael Tonry ed., 2014) (noting that whatever causes crime rates to change, it is something other than changes in imprisonment rates and sentencing laws).

30. See, e.g., Obama, *supra* note 3, at 829 (discussing how recent criminal reform bills have received support from both Democrats and Republicans); see also Davis Richardson, *As Private Prisons Surge Under Trump, Koch Brothers Launch Prison Reform Initiative*, OBSERVER (Jan. 24, 2018, 6:02 PM), <http://observer.com/2018/01/private-prisons-surge-koch-brothers-prison-reform-initiative/> (highlighting an emphasis on prison reform programs during President Trump's term and noting that even the notorious right-wing billionaire Koch Brothers are backing reform).

31. See e.g., Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. (died in Congress), reintroduced as Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (died in Congress), reintroduced as Smarter Sentencing Act of 2015, S. 502, 114th Cong. The Smarter Sentencing Act of 2014 passed in the Senate Judicial Committee with a 13-5 vote, but failed to get a favorable vote to pass through the Senate. John Malcom, *The Case for the Smarter Sentencing Act*, HERITAGE (July 28, 2014), <https://www.heritage.org/crime-and-justice/commentary/the-case-the-smarter-sentencing-act>. Despite broad support, the Smarter Sentencing Act of 2014 was not brought the floor for a vote. S. 1410 (113th): Smarter Sentencing Act of 2014, <https://www.govtrack.us/congress/bills/113/s1410>. Republican majority house leader, Mitch McConnell, was concerned that if they voted on sentencing reform so close to an election, there could be Republican colleagues of his in Congress who would be vulnerable to their constituents. James Hohmann, *The Daily 202: Why Criminal Justice Reform May Actually Get Done This Year- if These Two Hurdles Can Be Overcome*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2016/05/09/daily-202-why-criminal-justice-reform-may-actually-get-done-this-year-if-these-two-hurdles-can-be-overcome/572ff07c981b92a22d6c6553/?utm_term=.6ffb7ae6cca6.

future repercussions of perpetuating these policies. Lastly, Part IV suggests a new approach to criminal justice policy that will decrease spending and most importantly, save lives.³²

I. THE EVOLUTION OF SENTENCING POLICY IN THE UNITED STATES

Pre-Revolutionary War, the penalty for a felony was death and the penalty for a misdemeanor was public flogging and dismemberment.³³ Following the Revolutionary War, public opinion evolved considerably and society generally believed people were curable, capable, and deserving of rehabilitation.³⁴ Fundamental in the rehabilitative approach to sentencing was the Quaker philosophy, which characterized social conditions as the cause of a crime and prisons as curative institutions.³⁵

A. *The Development of Indeterminate Sentencing and the Rehabilitative Model*

In the late 1800s, the rehabilitative model in criminal justice functioned under a two-fold approach to indeterminate sentencing.³⁶ First, judges used the “medical” sentencing model.³⁷ Under this model, judges determined a “diagnosis” of an offender’s “condition” based on “any and all evidence” that was “relevant and necessary” (including offender life history) and sentenced offenders to an indeterminate term of imprisonment by establishing a maximum length of sentence.³⁸ Second, under the direction of the correctional institution, the offender’s rehabilitation progress would dictate how long the offender

32. See Obama, *supra* note 3, at 859 (characterizing drug abuse as a “public health problem”).

33. CAMPBELL, *supra* note 27, at 6–7.

34. United States v. Scroggins, 880 F.2d 1204, 1206–07 (11th Cir. 1989).

35. See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1039–40 (1991) (discussing that the Quakers viewed crime as the “product of society, rather than a result of inherent sinfulness”).

36. *Scroggins*, 880 F.2d at 1207.

37. *Id.*

38. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J. L. & PUB. POL’Y 1, 8 n.39 (2013).

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stayed before being released back into society.³⁹ Ultimately, a parole board decided whether an offender had been "reformed" and could be released.⁴⁰

Congress created the U.S. Parole Commission in 1948 and gave it the responsibilities of deciding federal parole releases and the conditions of those releases.⁴¹ In 1949, in *Williams v. New York* the Supreme Court echoed that rehabilitation was the proper purpose of confinement and sentences must be individualized in order to accomplish effective offender rehabilitation.⁴² In reaching their sentencing decisions, judges could consider the offenders' individual characteristics, including the propensity for rehabilitation.⁴³ However, opponents argued this indeterminate model was unfair because it could render inconsistent sentences when different offenders with the same criminal background commit the same offense.⁴⁴ Under this model, sentences varied across federal districts.⁴⁵

The fallacy with critiquing inconsistent sentencing is this is precisely what should happen in a functioning system of individualized sentencing. In these inconsistent cases, judges were not sentencing offenders based solely on offense and criminal history; rather, sentences were decided based on a variety of personalized factors.⁴⁶ No two

39. *Id.* at 8; *see also Scroggins*, 880 F.2d at 1207.

40. *Scroggins*, 880 F.2d at 1207; *see also* Parole Act of 1910, ch. 387, 36 Stat. 819, 819–21, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (current version at 18 U.S.C. §§ 3551-3742 (2006)).

41. *See generally* 18 U.S.C. §§ 4201-4218, *repealed by* Smarter Sentencing Act of 1984, Pub. L. No. 98-473, tit. II § 218(a)(5), Oct. 12, 1984, 98 Stat. 2027.

42. *Williams v. New York*, 337 U.S. 241, 247–48 (1949).

43. Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J. L. & POL'Y 345, 367 (2016).

44. *See, e.g.,* Marvin E. Frankel, *The Quest for Equality in Sentencing*, 25 ISR. L. REV. 595, 595 (1991) (indicating the fundamental principles of consistency and fairness in sentencing were undermined during "half of the twentieth century . . . in the United States").

45. *See id.* at 599, for a discussion of a study indicating the lack of consistency in sentences by fifty judges from the Second Circuit.

46. *See id.* at 596-97 ("[The] three interrelated concepts were the basic determinants of our sentencing law and practice: (1) That criminal sentences were for rehabilitation, not merely or mainly for punishment; (2) That sentences should therefore be indeterminate, permitting of suitable judgments as to when and whether rehabilitation had been accomplished; and (3) That sentences should fit the individual

sentences could be “consistent” when tailored to each offender’s individual characteristics and rehabilitation potential. Thus, sentences based on the crime charged and criminal history would inherently yield inconsistent sentences.

B. The Shift to Determinative Sentencing with a Punitive Purpose

If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.⁴⁷

Robert Martinson’s *What Works? Questions and Answers About Prison Reform* is one of the most influential pieces of literature advocating for reform and opposing the rehabilitative model of sentencing.⁴⁸ In the 1970s, Martinson published several studies that concluded the rehabilitative approach had no effect on recidivism.⁴⁹ Prior to Martinson’s findings, the medical model of sentencing was criticized by penological experts during the 1960s and 70s.⁵⁰ These critics argued, as mentioned above, that indeterminate sentences were unjust because sentences were administered inconsistently across judicial districts. Additionally, critics argued indeterminate sentences were ineffective because “[n]obody knows how to rehabilitate people in prison.”⁵¹ These critiques prompted a Congressional investigation

criminals, not merely or mainly the crime, and that sentences should, as a corollary, have broad sentencing discretion.”).

47. Twelfth Report of the Standing Committee on Justice and the Solicitor General on *Crime Prevention in Canada: Toward a National Strategy 2* (Ottawa: Queen’s Printer 1993), <http://preventingcrime.ca/wp-content/uploads/2015/05/HornerReport1993.pdf>.

48. Jefferson-Bullock, *supra* note 43, at 371–72.

49. *Id.* at 371.

50. See generally Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 35–36 (1974) (presenting various arguments against the medical model, specifically the ineffectiveness of using medical surgery and drugs alone to treat offenders); see also James R. Thompson & Gary L. Starkman, Book Review, 74 COLUM. L. REV. 152, 152 (1974) (reviewing MARVIN E. FRANKEL, CRIMINAL SENTENCING: LAW WITHOUT ORDER (1973)) (discussing Marvin Frankel’s thoughts about the inherent problem in the 1970s with awarding judges broad power and discretion to determine sentences for offenders).

51. Frankel, *supra* note 44, at 597.

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on federal sentencing, which concluded the rehabilitative approach was impractical, and emphasized how little we know “about human behavior to . . . rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.”⁵² Consequently, with the enactment of the SRA, Congress shifted away from a rehabilitative approach toward a punitive one.⁵³ The era of indeterminate sentencing and rehabilitation ended with disastrous results.⁵⁴ Even worse, Martinson “subsequently retracted his earlier findings” as a result of his *fully developed* study that found rehabilitation does work, but this time his research was completely ignored.⁵⁵

In 1984, the Commission was established under the SRA and was responsible for promulgating sentencing guidelines.⁵⁶ The sentencing guidelines were based on a determinate sentencing model.⁵⁷ Under this model, offenders are sentenced to a determinate term of incarceration, and the need for the U.S. Parole Commission was abolished.⁵⁸ During development of the Federal Sentencing Guidelines, drafters grappled with various perceptions of the purposes for criminal punishment.⁵⁹ Most agreed the ultimate goal is crime control.⁶⁰ Secondary objectives were debatable.⁶¹ Some argued that punishment should be scaled to the

52. *Scroggins*, 880 F.2d at 1207 (citing S. REP. NO. 98-225, at 40 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3223).

53. *See id.* at 1208 (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” (citing to 28 U.S.C.A. § 994(k) (West Supp. 1989))).

54. *Jefferson-Bullock*, *supra* note 43, at 373.

55. *Id.* at 378–79.

56. *Saris*, *supra* note 25, at 4; *see also* 18 U.S.C.S. § 3551 (LEXIS through Pub. L. No. 115–269).

57. *See Scroggins*, 880 F.2d at 1208 (noting that under the determinate model of sentencing offenders were required to “serve the full length of [their] term”).

58. *Id.*

59. USSG, *supra* note 21, at 4.

60. *Id.*

61. *Id.* (“Some argue that appropriate punishment should be defined primarily on the basis of the principal of ‘just deserts.’ . . . Others argue that punishment should be imposed primarily on the basis of practical ‘crime control’ considerations.”).

offender's culpability and resulting harm.⁶² Others argued punishment should be guided by the method most likely to effectively lessen the likelihood of future crime, by either deterring others or incapacitating the defendant.⁶³

C. The Ebb and Flow of Mandatory Minimum Sentencing Policy and the War on Drugs

The Narcotics Control Act of 1956, Congress's first legislative response to drug crime, mandated lengthy minimum sentences for most drug importation and distribution offenses.⁶⁴ Mandatory minimum sentences undermine justice by preventing prosecutors and judges from tailoring the punishment to the individual and the circumstances of their offense.⁶⁵ The theory behind mandatory sentences is individuals are likely to be deterred from violating the law if there is a pre-determined length of sentence for specific violations.⁶⁶ Subsequently, increasingly longer sentences failed to create the expected reduction in drug law violations.⁶⁷ Additionally, some argued "severe penalties, which do not take into account individual circumstances and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain."⁶⁸

These increasing concerns led to the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which repealed the statutory mandatory sentencing provisions for drug offenses.⁶⁹ Then,

62. *Id.*

63. *Id.*

64. See Narcotics Control Act, Pub. L. No. 84-728, tit. I, § 103 (1956).

65. CAMPBELL, *supra* note 27, at 114.

66. See *id.* at 114–23 (discussing underlying policies behind imposing mandatory minimum sentences).

67. See S. REP. NO. 91-613 at 2 (1969) (explaining longer criminal sentences do not necessarily reduce drug related crimes).

68. H.R. REP. NO. 1444, 91st Cong., 2d Sess. at 11 (1970) (discussing mandatory minimum sentences leading to a reluctance to prosecute some violations where the penalties are perceived to be disproportionate with the seriousness of the offense).

69. Pub. L. No. 91-513, 84 Stat. 1236 (1970); see also PFAFF, *supra* note 9, at 162 (discussing the Comprehensive Drug Abuse Prevention and Control Act in which Texas representative, George H. W. Bush, defended abolishing almost all the existing

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the late 1980s and early 1990s saw an increase in drug use and violent crime.⁷⁰ During this time, drug abuse was rated as the number one public concern.⁷¹ The consensus in Congress, in response to the concerns surrounding drug abuse, was that the United States was facing a national security crisis.⁷² Apparently law makers had amnesia about the minimal effectiveness mandatory minimum sentencing had on deterrence and fairness.

Following the Comprehensive Drug Abuse Prevention and Control Act, Congress passed the Anti-Drug Abuse Act of 1986.⁷³ This new piece of legislation imposed harsh mandatory minimum penalties were imposed on drug traffickers.⁷⁴ Ten-year mandatory minimum penalties were assigned to first time trafficker offenders, and twenty-year mandatory minimum sentence were given to repeat trafficker offenders.⁷⁵ But two years after the Act's passage, drug-related violence was still on the rise. Consequently, Congress passed the Anti-Drug Abuse Act of 1988 to increase the existing mandatory penalties and add new ones.⁷⁶

When Congress enacted the SRA in 1984, the basic purpose was to "combat crime through an effective, fair sentencing system."⁷⁷ Congress sought honesty, reasonable uniformity, and proportionality in sentencing.⁷⁸ The SRA was designed to achieve these goals through a structured set of guidelines to help determine appropriate sentences.⁷⁹

federal mandatory minimum for drug crimes and then as vice president and president he helped reintroduce and expand federal mandatory drug sentences).

70. Saris, *supra* note 25, at 3 (observing that the contributing factor to the increase in violent crime during that time was the sale of drugs).

71. William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a 'War on Drugs' Era*, 28 WAKE FOREST L. REV. 305, 315 (1993).

72. *See id.* (detailing the "[g]laring headlines, dramatic footage . . . and regular [news] reports . . . chronicl[ing] various battles in the war on drugs" during the 1980s).

73. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

74. *See generally id.*

75. Pub. L. No. 99-570 § 1302(a)(1)(G).

76. *See* Wilkins, Jr. et al, *supra* note 71, at 316 (discussing Congress' desire to "enact[] a number of new mandatory penalties and strengthen[] some that were already in place" in response to public safety concerns in the late 1980s).

77. USSG, *supra* note 21, at 3.

78. *Id.*

79. *Id.*

As a result, the Commission was created to author the guidelines and to submit amendments to the existing guidelines.⁸⁰ Originally, Congress envisioned the guideline-writing process to be evolutionary, achieved through continued research on the effectiveness of each guideline.⁸¹ Then, the Commission could make modifications and revisions to the guidelines through the amendments to Congress.⁸² These amendments would automatically take effect 180 days after submission, unless a law was enacted to the contrary.⁸³ The Commission relied upon empirical data to create these guidelines.⁸⁴ Pre-guideline sentencing averages were used to establish offense values,⁸⁵ but the guidelines departed from empirical data when required by federal statutes.⁸⁶ If Congressional data exposed inconsistencies in treatment for offenses with apparently equivalent behavior, it was departed from to fix any inconsistencies.⁸⁷

Congress's intent for the Sentencing Commission was to create an independent and expert agency, located within the Judiciary, that was answerable to all branches of government.⁸⁸ The Commission is comprised of seven voting members and two non-voting members.⁸⁹ Additionally, there cannot be more than four members of the same political party and three of the members must be federal judges.⁹⁰ The members are appointed by the President and confirmed by Congress for six-year staggered terms.⁹¹ The two non-voting members are the Chair

80. *Id.* at 1.

81. *Id.* at 2.

82. *Id.*

83. *Id.*; *see also* 28 U.S.C. § 994(p).

84. USSG, *supra* note 21, at 5.

85. *Id.*

86. *Id.*; *see, e.g.*, Pub. L. No. 99-570.

87. USSG, *supra* note 21, at 5 (discussing that Congressional data revealed economic crimes were punished less severely than similarly equivalent behavior).

88. *See id.* at 13-14 (discussing the intent behind the creation of the Commission).

89. *Id.* at 1.

90. CRIMINAL PRACTICE MANUAL, 3 CRIM. PRAC. MANUAL § 103.3 (West 2018).

91. 28 U.S.C. § 992(a)-(b) (Supp. IV 1986).

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of the United States Parole Commission and the Attorney General.⁹² In theory, the creation of the Commission was a progressive step forward. However, the Commission's effectiveness has been selectively undermined by laws unsupported by empirical evidence, experience, or analysis.⁹³

D. Tension Between Judicial, Congressional, and the Commission's Power to Determine Drug Crime Sentencing

Although Congress attempted to create a neutral body to make decisions on criminal sentencing, in practice, this body has not operated independently. For example, two years after the Commission was created, Congress passed statutory mandatory minimum sentencing for drug and firearms offenses with penalties often exceeding the penalties in the guidelines, resulting in inconsistency between the Commission's prescribed penalties and the federal statute.⁹⁴ These mandatory penalties were in "conflict both in practice and spirit with a guideline system."⁹⁵ The impact of these incongruent directives is longer sentences and an increase in other penalties in the guidelines to avoid "cliffs" between the Commission's guidelines and Congress's statutory mandatory minimum sentences.⁹⁶ As stated by a former Chair of the Commission, William K. Sessions III, "Some directives have been appropriate reflections of congressional oversight that highlighted general policy concerns, while others invaded the detailed work of the Commission."⁹⁷ As a result, the Commission felt obligated to add

92. *Organization*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Dec. 3, 2018).

93. *See* Sessions III, *supra* note 28, at 102 (pointing to the Commission's reports on sentencing disparities as evidence of the ineffectiveness of the SRA, which was enacted to "reduce unwanted disparities in sentencing"); *see also* Joe B. Brown, *The Need to Educate Congress About Mandatory-Sentences*, 8 FED. SENT. R. 18, 18 (1995) (noting that "Congress clearly intended in 1984 that the Commission have real input and control over sentence length, but the overuse of mandatory sentences has made Commission control ineffective").

94. *See* Session III, *supra* 28, at 93.

95. *Id.*

96. *Id.*

97. *Id.* at 94.

additional aggravating factors, which increased penalties to deter Congress from enacting additional mandatory minimum penalties.⁹⁸

During the war on drugs, the statutory penalties for crack cocaine as opposed to powder cocaine were increased by a ratio of 100 to 1.⁹⁹ However, these penalties were inherently discriminatory.¹⁰⁰ The late Harvard criminal law professor, William J. Stuntz, opined, “Persistent bias occurred with respect to the contemporary enforcement of drug laws where, in the 1990s and early 2000s, blacks constituted a minority of regular users of crack cocaine but more than 80% of crack defendants.”¹⁰¹ In *United States v. Blewett*, the Sixth Circuit held, “the federal judicial perpetuation of the racially discriminatory mandatory minimum crack sentences for those defendants sentenced under the old crack sentencing law . . . would violate the Equal Protection Clause”¹⁰² Since then, these racially motivated laws have been amended by the Fair Sentencing Act.¹⁰³ As a result of this amendment, the current penalty for crack, as opposed to powder cocaine, is now an 18 to 1 ratio.¹⁰⁴ However, the Fair Sentencing Act was not applied retroactively.¹⁰⁵ This means there are thousands of inmates sentenced prior to the Fair Sentencing Act who are required to remain incarcerated to complete these unjust sentences.¹⁰⁶

When Congress enacted these racially biased statutory penalties for crack cocaine, the Commission advocated for an amendment and issued

98. *Id.* Aggravating factors are facts or circumstances that increase the severity or culpability of a criminal act, which can include: recidivism, lack of remorse, amount of harm to the victim, committing the crime in front of a child.

99. *Id.*

100. *See* *United States v. Blewett*, 719 F.3d 482, 484 (6th Cir.) (discussing the unfair impact of the Fair Sentencing Act on racial minorities), *vacated*, 746 F.3d 647 (6th Cir. 2013).

101. *Id.* (quoting WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 184 (2011)).

102. *Id.*

103. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at scattered sections of 21 and 28 U.S.C.).

104. *Blewett*, 719 F.3d at 484.

105. *Id.*

106. *See id.* at 484–85 (reporting that 30,000 inmates were serving out crack sentences in 2011, which is 15% of the federal prison population).

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a report to Congress recommending the penalties be "equalized."¹⁰⁷ "For the first and only time in history," Congress rejected the Commission's suggested amendment to a statutory penalty.¹⁰⁸ Congress failed to consider the suggestion of the Commission, which is the expert body Congress created for the specific purpose of ensuring federal sentencing is fair and proportional.¹⁰⁹ Further, Congress declined to reappoint any of the commissioners who suggested this particular amendment, and within a couple years the Sentencing Commission had no remaining commissioners.¹¹⁰

Today, the Commission has four open seats. President Trump has recently announced four nominees to the Commission, including William Otis.¹¹¹ Otis has been the leading opponent of bipartisan criminal justice reform for years.¹¹² Another nominee, Judge Henry E. Hudson, is an infamously "tough-on-crime judge," nicknamed "Hang 'Em High" Henry.¹¹³ If confirmed by the Senate, these nominees will most likely perpetuate outdated beliefs about sentencing and will make sentencing reform extremely difficult.

Congressional mandatory minimum sentences and the Commission's specific directives from Congress undermine the congressional intent of the Sentencing Commission in two ways: (1) the mandatory minimum sentences, which increase penalties, are implemented without the support of any empirical research negating the Commission's ability to set justified sentences, and (2) the Congressional directives undermine the Commission's ability to act as the expert body in the field of sentencing, preventing the Commission

107. Sessions III, *supra* note 28, at 94-5.

108. *Id.* at 95 (noting this rejected amendment also included an accompanying amendment for money laundering).

109. *Id.*; *see also* USSG, *supra* note 21, at 6 (discussing the Commission's desire to achieve a "more honest, uniform, equitable, proportional, and therefore effective sentencing system").

110. Sessions III, *supra* note 28, at 95.

111. *Statement on Nomination of William Otis to U.S. Sentencing Commission*, Famm (Mar. 1, 2018), <http://famm.org/famm-statement-on-nomination-of-william-otis-to-u-s-sentencing-commission/>.

112. *See id.* (observing "Mr. Otis's outdated views" and urging the Senate to reject him as a candidate).

113. Charles Fain Lehman, *Trump Announces Tough-on-Crime Nominees to Sentencing Commission*, FREE BEACON (Mar. 2, 2018, 3:55 PM), <http://freebeacon.com/issues/trump-announces-tough-crime-nominees-sentencing-commission/>.

from fulfilling its intended role.¹¹⁴ However, the Commission is not the only body of experts who have lost the power to regulate sentencing. Judges have traditionally been tasked with considering a defendant's the history and characteristics, along with the nature and circumstances of the offense, when selecting an appropriate sentence.¹¹⁵ However, a judge's ability to decide what sentence is "sufficient, but not greater than necessary" is frustrated by mandatory statutory sentencing terms and the guidelines created by the Commission.¹¹⁶ As a result, judges often depart from the guidelines when necessary to "mitigate unwarranted sentencing harshness."¹¹⁷ In response, Congress enacted the PROTECT Act of 2003, to combat the quickly increasing number of judge-initiated "downward departures" by requiring the Attorney General to report such departures to Congress.¹¹⁸ Also, the PROTECT Act amended the SRA's "minimum" requirement of three federal judges, on the seven-member Commission, to a "maximum" of three federal judges, to reduce judge's discretionary power.¹¹⁹

E. How Punitive Are Mandatory Minimum Sentences?

In the United States, many people are uneducated about how punitive sentencing penalties have become. The Commission's data from 2016 reveals that the average sentence length of offenders, sentenced under the mandatory minimum penalty, was 138 months; this staggering figure is over twice the average sentence of offenders who were not subjected to the mandatory minimum penalty.¹²⁰ The Commission also found the average sentence for offenders not

114. Sessions III, *supra* note 28, at 104.

115. U.S.C. § 3553(a)(1).

116. *See generally id.* at § 3553(a) (discussing what factors should be considered by judges when determining an appropriate sentence).

117. *See* Skye Phillips, *Protect Downward Departures: Congress and the Executive's Intrusion into Judicial Independence*, 12 J. L. & POL'Y 947, 1011 (2004).

118. *See* Sessions III, *supra* note 28, at 95-96 (detailing the impact of the PROTECT ACT of 2003 on federal sentencing).

119. *Id.* at 96.

120. U.S. SENT'G COMM'N, QUICK FACTS ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2016), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY16.pdf [hereinafter U.S. SENT'G COMM'N, QUICK FACTS].

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convicted of any offense, sentenced under the mandatory minimum penalty, was twenty-eight months.¹²¹ This data suggests Congress's statutory mandatory minimums have influenced guideline increases, resulting in sentences twice the length recommended by the Commission.

However, there are a couple ways an offender can escape a mandatory term: (1) an offender who has case-related information to provide the government, which helps the government in a substantial way, or (2) an offender with no prior criminal history (safety valve provision).¹²² Based on the Commission's data from 2016, almost 40% of offenders convicted of an offense carrying a mandatory minimum sentence were able to evade the mandatory minimum penalty, of that percentage: 18.8% received relief by providing the government with substantial assistance; 14.3% received relief solely through the statutory safety valve provision; and 5.5% received relief through the statutory safety valve provision and by providing substantial assistance to the government.¹²³ Therefore, 60% of offenders convicted of crimes carrying a mandatory sentence are unable to escape the mandatory minimum penalty and remain subjected to that penalty at sentencing. Currently, approximately 13.5% of federal offenders are serving mandatory minimum sentences.¹²⁴ Consequently, almost 14% of federal offenders are spending twice as long in prison than the guidelines would have suggested necessary to fulfill the sentencing purpose. Some sentencing judges are forever haunted by cases that were deserving of exceptions to the statutory penalty, but their discretion was

121. *Id.*

122. *See S. 1933: Smarter Sentencing Act of 2017, 115th Congress (2017)*, FAMM (Apr. 27, 2018), <https://famm.org/s-1933-smarter-sentencing-act-2017-115th-congress/> [hereinafter *Smarter Sentencing*]. The "safety valve" is a sentencing relief tool limiting the use of mandatory minimum sentences related to drug offenses when the defendant does not have any history of violence, only one criminal history point, played a minor role in the offense, and the offense did not result in serious bodily injury or death. *See generally id.*

123. U.S. SENT'G COMM'N, QUICK FACTS, *supra* note 120.

124. *Id.*

thwarted by Congress.¹²⁵ As a result, mandatory sentences are a major contributing factor to the national mass incarceration crisis.¹²⁶

F. Second Class Citizens: The Continued Oppression of Collateral Consequences

Frequently, the end of an overly punitive sentence is just the beginning of the perpetual oppression an individual convicted of a crime will face. States impose a significant number of collateral consequences upon those convicted of crime.¹²⁷ Collateral consequences are “federal and state civil laws and regulations that restrict the activities” of people with a prior criminal conviction.¹²⁸ There are 70 million Americans with some form of criminal record.¹²⁹ Since the mid-1980s, the number of state imposed collateral consequences has expanded dramatically.¹³⁰ Some estimates figure that today’s ex-offenders could face up to “50,000 legally mandated collateral consequences, including, restrictions on housing, employment, public benefits, and immigration.”¹³¹ Moreover, twelve

125. See CAMPBELL, *supra* note 27, at 121 n. 38 (discussing U.S. District Court Judge W. Schwarzer’s experience being denied the ability to rule “justly” due to mandatory sentencing guidelines). “The law denies the judges to bring to bear their conscience and their sense of what is just, and, in a sense, makes judges clerks—or, not even that, computers, automatically imposing sentences without regard to what is just and right. And when that is allowed to happen, the rule of law is drained of the semblance of justice.” *Id.* (citing L.A. TIMES, B1 (29 January 90)); see also Byron Pitts, Jackie Jesko & Lauren Effron, *Former Federal Judge Regrets 55-Year Marijuana Sentence*, ABC NEWS (Apr. 10, 2018, 8:14 PM), <http://abcnews.go.com/US/federal-judge-regrets-55-year-marijuana-sentence/story?id=28869467> (detailing a retired Utah federal judge’s remorse over a sentence that he felt “the system forced [him] to do”).

126. CAMPBELL, *supra* note 27, at 121.

127. See John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC’Y REV. 36, 36 (2018) (exploring collateral consequences in the United States).

128. *Id.*

129. Obama, *supra* note 3, at 815.

130. Malcolm, *supra* note 127, at 36.

131. Lorelei Laid, *Doing Time Extended Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, 99 A.B.A. J. 50, 55 (2013); see also 160 CONG. REC. 6,489-90 (2014) (“We now live in a nation where the collateral consequences are profound. We know that time behind bars, even for these nonviolent

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states permanently disenfranchise convicted felons from societal privileges.¹³² Imposing collateral consequences on convicted persons impedes their forward progress and breeds recidivism.

II. ASSESSMENT OF PRESCRIBED OBJECTIVES AND THEIR RESULTS

In the United States, it has been thirty-four years since the migration from the rehabilitative approach to the punitive approach in criminal sentencing. Over the past three decades, data has been collected about many different aspects of sentencing. Consequently, an informed assessment can be made about the effectiveness of sentencing by using the data on inconsistent sentencing policies. This compilation of data reveals how adequately, or inadequately, the policies have measured up to the intended goals.

A. Sentencing Purpose #1: Crime Prevention

After the implementation of mandatory sentencing in the 1980s, any reduction in the crime rate was not attributed to increased incarceration and longer sentences were deemed an ineffective approach to preventing crime.¹³³ In response to this understanding of crime prevention, in 2007 the Commission reduced sentence disparities between crack and powder cocaine by twenty-seven months and eliminated the mandatory minimum sentence for simple possession of crack cocaine.¹³⁴ Then, in 2010, Congress enacted the Fair Sentencing

offenders, reduces . . . their annual earnings by 40 percent. [] If a person is convicted for possession of controlled substances use, they become ineligible for so many benefits that we would often think we would want these very people to have. [] Former inmates can't get jobs, shelter, or loans. They often feel that no option exists other than going back to that slippery slope toward more crime.”)

132. See Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT 4 (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> (discussing how in “extreme cases” states will completely deny voting rights even to inmates who have completed their prison, probation or parole sentence).

133. See, e.g., NAT'L RES. COUNCIL, *supra* note 22, at 342 (finding that research shows longer sentences does not reduce crime or deter crime).

134. Obama, *supra* note 3, at 826-27.

Act which aided the Commission in further “reduc[ing] the sentencing disparity between crack cocaine and powder cocaine. . .”¹³⁵

Following these changes, the Commission conducted a study over a five-year period on crack cocaine offenders who had their sentences reduced by 20% as a result of this policy amendment.¹³⁶ The study compared the recidivism rates between crack cocaine offenders who served their entire sentence and crack cocaine offenders who served only 80% of their sentence.¹³⁷ There was no statistically significant difference in rates of recidivism or plea rates between these two groups.¹³⁸ In fact, the only two factors that presented any significant data for higher recidivism rates were related to youthfulness and higher past criminal history.¹³⁹ Even more astounding was the revelation that 32% of “state prison inmates reported being high on drugs at the time of their crime, and 17% committed their [convicted] crime to get money to buy drugs.”¹⁴⁰ Therefore the Commission’s study revealed three common characteristics of individuals who have a propensity to be repeat offenders: (1) age, (2) increased pattern of prior criminal activity, and (3) drug-addiction.

Therefore, with these factors in mind, an effective crime prevention tool is to implement criminal justice policies tailored to the offender’s individual characteristics and propensities. For example, more focus should be spent on empowering individuals who enter the criminal justice system at a young age. This can be accomplished by providing the younger criminal population with tools and support to prevent a life-long dependency on the incarceration system. Another possible

135. *Id.* at 827; *see also* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at scattered sections of 21 and 28 U.S.C.).

136. *See* U.S. SENT’G COMM’N, *Recidivism Among Offenders Receiving Retroaction Sentence Reductions: The 2007 Crack Cocaine Amendment 1 & 14* (May 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf (discussing a study on recidivism rates for offenders who had their sentences reduced due to the 2007 Crack Cocaine Amendment).

137. *Id.* at 14.

138. *Id.* at 14–15 (concluding the study indicated offenders who completed their entire sentence and offenders who only completed 80% of their sentence had similar rates of re-offending); *see also* Saris, *supra* note 25, at 14 (finding “plea rates for crack offenders” were the same even after “sentences were lowered.”).

139. U.S. SENT’G COMM’N, *supra* note 136, at 15.

140. NAT’L RES. COUNCIL, *supra* note 22, at 134.

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solution is to rehabilitate offenders while they are incarcerated and to provide adequate re-entry services when offenders are released. This focus on rehabilitation could decrease the number of repeat offenders, while functioning as a crime prevention tool. Lastly, rehabilitating drug-addicted offenders would be an effective way to deter future crime because these offenders often resort to committing additional crimes.

B. Sentencing Purpose #2: Deterrence

Deterrence is an important policy consideration aimed at reducing incarceration in the United States.¹⁴¹ The deterrence theory is a rationalistic one.¹⁴² Under this theory, the “individual considering commission of a crime weighs the benefits of offending against the costs of punishment.”¹⁴³ For deterrence to be effective, individuals must have “some knowledge of criminal penalties” imposed for committing a crime, in practice, however individuals usually do not have access to this type of information.¹⁴⁴

This sentencing theory—that “certainty of punishment [is] a more effective deterrent to criminal conduct than severity of punishment”—was first introduced after the Revolutionary War.¹⁴⁵ This theory is still relied on by many today. For instance, scholars analyzed the deterrent effect of California’s third-strike provision in a study on incarceration as a deterrence to crime and whether sentence enhancements resulted in a greater deterrence; however this study found only a modest deterrent effect.¹⁴⁶ Another study examining the deterrent effect of prison sentence enhancements for gun crimes also demonstrated no effect on deterrence.¹⁴⁷ Lastly, a study examining the “heightened

141. *See id.* at 132 (discussing that under the “theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending”).

142. *Id.* at 133.

143. *Id.*

144. *Id.*

145. *Scroggins*, 880 F.2d at 1206.

146. Eric Helland et al., *Does Three Strikes Deter? A Non-Parametric Estimation*, 42 J. HUM. RESOURCES 309, 309 (2007).

147. *See* Jens Ludwig & Steven Raphael, *Prison Sentence Enhancements: The Case of Project Exile*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 252 (Philip J. Cook & Jens Ludwig, eds. 2003) (discussing Project Exile, a

threat of imprisonment . . . under the jurisdiction of adult courts at the age of majority . . .” again found no deterrent effect.¹⁴⁸ Other studies demonstrate mandatory minimum sentences do not deter future crime and, in some instances, actually raise the risk of recidivism for certain offenders.¹⁴⁹ Therefore, increasing criminal penalties is not an effective mechanism to deter future crime.

There are countless studies confirming certainty of punishment is a deterrent.¹⁵⁰ This is one of the reasons that offenders in diversion programs are so successful.¹⁵¹ Offenders participating in a diversion program know violating a diversion program rule or law results in incarceration, and the inability to avoid their sentence or conviction. Moreover, the congressional idea that mandatory minimum penalties help to ensure “certainty of punishment”¹⁵² is negated by research that shows a majority of the public does not have knowledge of the precise statutory penalties.¹⁵³

program created to reduce gun-related deaths, which was found to have little effect on decreasing death rates).

148. See NAT’L RES. COUNCIL, *supra* note 22, at 136–37 (discussing a study conducted by Lee and McCrary in 2009 which looked at “individual crime histories in Florida to see whether felony offending declines sharply at age 18,” concluding a “very small and not statically significant” decline).

149. See Lin Song & Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served*, WASH. ST. INST. FOR PUB. POL’Y 6 (Sept. 1993), http://wsipp.wa.gov/ReportFile/1152/Wsipp_Recidivism-The-Effect-of-Incarceration-and-Length-of-Time-Served_Full-Report.pdf (reporting on a study from 1988 which revealed burglary and robbery offenders in Carolina prison in 1980 who were incarcerated for more than 1.2 years “had an increased risk of recidivism”).

150. See, e.g., Tonry, *supra* note 29, 28–29 (observing that “certainty and promptness of punishment are more powerful deterrent than severity,” which was confirmed by “three National Academy of Science panels . . . [and] every major survey of the evidence.”).

151. Letter from Ronald H. Levine & Knut S. Johnson, to the Hon. William H. Pryor, Response to Request for Comment on Proposed 2017-2018 Priorities 16 (July 31, 2017) (on file with the Practitioners Advisory Group) [hereinafter PAG]. Diversion programs are deferred adjudication programs that give nonviolent felony offenders with little or no criminal history tools such as behavior modification, job skills, education, and community service to redirect the offender out of the criminal justice system. See generally *id.*

152. Sessions III, *supra* note 28, at 103.

153. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 204 (2013) (noting “[n]umerous surveys have been conducted”

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In other words, people cannot make the conscious choice to refrain from crime due to severe penalties if they are ignorant to what the penalties are. Thus, the public needs to have knowledge of what the potential criminal penalties are to decide if the penalty is worth the risk of the crime. A more effective way to deter crime is to have a higher percentage of offenders in diversion-like programs where they have a certainty of punishment if they violate any rules or laws. In turn, immediate incarceration would be reserved for the most egregious violations of the law.

C. Sentencing Purpose #3: Incapacitation

Another enumerated goal of sentencing is incapacitation.¹⁵⁴ The goal of incapacitation is to remove the individual from the society that he or she offended through incarceration, thereby protecting the community from additional harm the individual may cause.¹⁵⁵ Since the imposition of excessively long sentences, scholars have conducted research about the effect incapacitation has on keeping dangerous people off the street. Scholars have found that incapacitation for the purpose of protecting the community becomes less effective as prisoners get older, because older offenders are less likely to cause additional harm.¹⁵⁶ In alignment with this finding, the Commission also conducted a study on recidivism and analyzed what factors increase or decrease recidivism.¹⁵⁷ The Commission found that the length of incarceration has little impact on rates of recidivism.¹⁵⁸ In fact, sentences that were longer than six months showed minimal changes in

examining the public's lack of knowledge of penalties and legal consequences associated with certain actions).

154. USSG, *supra* note 21, at 5.

155. Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 1 (2017).

156. Saris, *supra* note 25, at 12.

157. See U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 22 (Mar. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf (discussing the "highest recidivism rates are generally found among offenders with longer sentences" but the lowest rate of recidivism was found in offenders serving "supervised release of ten years or more").

158. See *id.* (finding rate of recidivism for sentences ranging from six months to ten years or more were all within 50% to 52%).

the rates of recidivism;¹⁵⁹ whether someone served two years or nine years, the recidivism rate was virtually the same.¹⁶⁰ Thus, longer sentences do not reduce the likelihood that an offender is going to re-offend in the future, which is what incapacitation aims to prevent. Instead, longer sentences lose their beneficial impact as time passes.

D. Sentencing Purpose #4: Proportionality and Fairness

In the early 1980s, there was a shift from the indeterminate model of sentencing to a determinate model, due to the concern that the indeterminate sentencing model resulted in inconsistencies.¹⁶¹ However, since the shift to determinate sentencing, the results have been anything but proportionate, fair sentencing.¹⁶² For example, in 2011, the Commission released a large-scale study of federal mandatory minimum penalties, which revealed that mandatory minimum penalties for drug offenses were “too severe and applied too broadly.”¹⁶³ The report also found that these penalties result in inconsistent sentencing; the precise inequity the guidelines attempt to mitigate.¹⁶⁴

One practical limitation of the determinate model for sentencing is many of the harsh penalties reserved for drug crime offenders are applied to the wrong level of offender. For example, if the main distributor and trafficker of drugs complied with the government and provided useful information, they would get a shorter sentence compared to a mere drug distributor who does not have any information to provide to the government because of their actual lack of enterprise knowledge.

159. *See id.* (concluding rates of recidivism for these sentences only differed by less than 2%).

160. *Id.*

161. Saris, *supra* note 25, at 4 (discussing the shift in sentencing ideologies in the 1980s due to concerns about “glaring disparities” in sentences).

162. PAG, *supra* note 151, at 1.

163. Saris, *supra* note 25, at 12; *see also* U.S. SENT’G COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 345, https://www.usc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf.

164. *See* Saris, *supra* note 25, at 12 (finding in depending on the district some prosecutors use “procedure[s] . . . that double mandatory minimum sentences if there is a prior conviction” and other “prosecutors do not use them at all”).

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For certain particularly severe penalty provisions, like the procedure detailed in 21 U.S.C. § 851 that doubles the mandatory minimum if there is a prior conviction, the Commission found that in some districts, prosecutors use them regularly, while in others, prosecutors do not use them at all . . . Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations . . . [but] [t]he category of offenders most often subject to mandatory minimum penalties at the time of sentencing were street-level dealers—many levels down from kingpins and organizations.¹⁶⁵

Therefore, to increase proportionality and fairness in sentencing, flexible sentences, such as less severe mandatory minimums, should be applied. The current, "one-size-fits-all" mandatory minimum sentences make the underlying goal of sentencing, proportionality and fairness, unattainable. If sentencing judges sentenced based on individual culpability, rather than other factors such as drug quantity, the result would be the ability to "promote proportionality and reduce *unwarranted* sentencing disparities."¹⁶⁶

III. NATIONAL EMERGENCY: OPIOID CRISIS

The current opioid epidemic has permeated throughout the United States like a ravenous predator. This crippling societal issue mirrors the crack cocaine epidemic of the 1980s. Since 2011, drug overdose fatalities have surpassed every other cause for injury or death in the United States.¹⁶⁷ More people die annually from drug overdoses than by gun violence, homicide, suicide, and car accidents.¹⁶⁸ In 2015 the number of deaths from drug overdose was 52,404, which is approximately 140 people per day.¹⁶⁹

Drug users often commit crimes, such as theft and selling drugs, to get money to buy drugs, resulting in drug users committing crimes at a

165. *Id.* at 12–13.

166. PAG, *supra* note 151, at 1.

167. DRUG ENF'T ADMIN., U.S. DEP'T OF JUST., 2017 NATIONAL DRUG TREATMENT ASSESSMENT SUMMARY (2017), https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf.

168. *Id.*

169. *Id.*

much higher rate to fuel their drug addiction.¹⁷⁰ The pervasive influence of drug addiction is usually the catalyst that brings most people into the criminal justice system.¹⁷¹ As a result, 85% of prison and jail inmates are classified as “substance abuse involved” for the following reasons:

[They] met the clinical criteria for addiction or substance abuse in the year prior to their arrest . . . had [a] histor[y] of illicit drug use or treatment for alcohol problems; were under the influence of alcohol or other drugs at the time of their crime; committed their offense to get money to buy drugs; were incarcerated for an alcohol or other drug law violation; or shared a combination of these characteristics.¹⁷²

Currently in the United States, almost half a million people are in prison for drug related offenses.¹⁷³ As a result of this staggering statistic, the Department of Justice’s budget to house prisoners has tripled in the last decade, depleting funds for successful re-entry and rehabilitation programs.¹⁷⁴ Despite evidence indicating massive levels of incarceration have not made society safer, the United States continues to spend \$80 billion of tax payer money to confine prisoners every year.¹⁷⁵ Drug offenders account for 46% of the federal prison population.¹⁷⁶ The cost to house one nonviolent drug offender for a

170. See NAT’L RES. COUNCIL, *supra* note 22, at 133-34 (discussing the influence of personality traits and drug addiction on “self-control” and crime).

171. See *generally id.* at 134.

172. *Addiction, Substance Use and the Justice System*, *supra* note 2.

173. See Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POL’Y INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> (observing more than two million individuals are incarcerated in the U.S. and 20% of incarcerated individuals are serving time for a drug related crime).

174. Sally Q. Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Deputy Attorney General Sally Q. Yates Delivers McNamara Memorial Lecture at Fordham University (Nov. 14, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-mcnamara-memorial-lecture-fordham>.

175. See Obama, *supra* note 3, at 815 (reporting annual costs of incarceration and noting a third of adults in the U.S. have “some form of criminal record.”).

176. *Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Oct. 27, 2018).

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mandatory sentence of ten years exceeds \$300,000.¹⁷⁷ The cost to rehabilitate offenders through treatment programs, rather than confinement, is "a fraction of the cost."¹⁷⁸ These treatment programs offer offenders the necessary tools to develop into law-abiding citizens who can learn to contribute to society and pass on these skills to members of their family and the community.¹⁷⁹ Punitive policies over the last forty years have only increased the prison population and have done little to address the underlying causes and remedies for drug addiction.¹⁸⁰ The focus needs to turn toward funding resources that extinguish the demand for drug and/or alcohol use. Rehabilitating offenders is the most effective way to keep people from going back to prison and to fight crime.

IV. FREE THE PRISONERS OF WAR

A. *Federal Sentencing Reform Bills and Their Effect*

Congressional statutes got us into this mess. The good news is that they can also get us out. One fundamental stronghold of the governmental structure in the United States is to ensure just policies are executed by checks and balances between the branches of government. Currently, prosecutors have the sole power to decide whether to bring charges carrying mandatory minimum sentences, and judges cannot police this power.¹⁸¹ Due to mandatory sentencing statutes enacted by Congress, the power to determine an appropriate sentence has been taken out of the hands of judges and parole boards, and placed into the hands of prosecutors. This is an ill-fated direction for sentencing policy and contravenes the fundamental principles of our governmental structure.

177. See NATHAN JAMES, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 9 (2016), <https://www.fas.org/sgp/crs/misc/R42937.pdf> (concluding the costs of incarceration for one year is around \$30,000 per inmate).

178. See Obama, *supra* note 3, at 860.

179. *Drug Court: Frequently Asked Questions*, SAN DIEGO CTY. DIST. ATT'Y, <http://www.sdca.org/files/Drug%20Court.pdf> (last visited Dec. 3, 2018).

180. See Sessions III, *supra* note 28, at 88–89 (discussing the "historical underpinnings" of sentencing).

181. *Justice Safety Valve Act: S. 1127/H.R. 2435, 115th Congress*, FAMM, <https://famm.org/wp-content/uploads/JSVA-Factsheet-115th.pdf> (last visited Dec. 3, 2018).

However, the Justice Safety Valve Act, if passed, can fix the current misguided sentencing structure.¹⁸² This bill will give judges authority to determine the appropriate sentence for defendants. However, the judges' authority will be checked by prosecutors because a judge operating under the Justice Safety Valve Act must notify the prosecution in advance and explain the sentencing in writing, permitting the prosecutor to appeal the judge's sentencing decision.¹⁸³ Ideally, in practice, this bill will create the checks and balances that justice demands.

Another proposed bill is the Smarter Sentencing Act of 2017, which aims to alter the existing federal drug sentencing process in five notable ways.¹⁸⁴ First, the bill will reduce overly punitive minimum sentences from the current "20-year, 10-year, and 5-year mandatory minimum drug sentences to 10, 5, and 2 years, respectively."¹⁸⁵ Next, the bill will "reduce[] the mandatory minimum life without parole sentence for a third drug offense to a minimum term of 25 years."¹⁸⁶ Third, for individuals who are prosecuted for playing a "limited role" in drug distribution (i.e. only carrying or transporting drugs), the mandatory sentence will be cut in half.¹⁸⁷ Fourth, the bill will expand the federal drug "safety valve" by applying it to those offenders with three or fewer criminal history points rather than the current one criminal history point.¹⁸⁸ Finally, this bill would make the Fair Sentencing Act of 2010 apply retroactively, reducing the jail-time of offenders prosecuted for crack cocaine prior to 2010 and allowing those who have already served more time than the new mandatory minimums the option to petition for

182. *Id.*; see also 159 CONG. REC. 6004 (2013). When this bill was first introduced in 2013, Sen. Leahy noted that a survey by the U.S. Sentencing Commission revealed nearly 70% of the 600 Federal district court judges "agreed the existing safety valve provision should be extended to all Federal offenses." *Id.*

183. *Id.*

184. *Smarter Sentencing*, *supra* note 122.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* The "safety valve" is a sentencing relief tool used that limits the use of mandatory minimum sentences related to drug offenses when the defendant does not have any history of violence, only one criminal history point, played a minor role in the offense, and the offense did not result in serious bodily injury or death. *Id.*

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release.¹⁸⁹ This proposed change under the Smarter Sentencing Act is important because the current, non-retroactive application of the Fair Sentencing Act of 2010 violates the Equal Protection Clause. It is undisputed the pre-2010 crack laws were racially discriminatory.¹⁹⁰ Therefore, offenders who were sentenced prior to 2010 are currently serving more time simply because of the date they were sentenced. As a result, in practice the Act is perpetuating the very injustice it sought to correct. Additionally, the Smarter Sentencing Act has the potential to save more than \$11 billion over a twenty-year period,¹⁹¹ yet this bill continues to die because leaders do not want to appear "soft on crime."¹⁹² However, these leaders confuse the meaning of integrity by doing the *wrong thing* (voting in opposition to a bill even though it makes sense fiscally and morally) because *everyone is looking* (afraid their "tough on crime" favored constituents will not reelect a representative who voted in favor of a crack sentence reduction).¹⁹³

189. *Id.*

190. *See id.* (noting the Fair Sentencing Act of 2010 attempts to redress the crack and powder cocaine sentencing disparities).

191. *Potential Impact & Cost Savings: The Smarter Sentencing Act*, FAMM, <https://famm.org/wp-content/uploads/SSA-Impact-DOJ-Cost-Savings-Estimate-2.pdf> (reporting the cost savings would be \$11,268,610,553) (last visited Dec. 3, 2018).

192. James Hohmann, *The Daily 202: Why Criminal Justice Reform May Actually Get Done This Year- if These Two Hurdles Can Be Overcome*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2016/05/09/daily-202-why-criminal-justice-reform-may-actually-get-done-this-year-if-these-two-hurdles-can-be-overcome/572ff07c981b92a22d6c6553/?utm_term=.6ffb7ae6cca6.

193. *See id.* Despite broad support, the bill was not brought to the floor for a vote. Republican majority house leader, Mitch McConnell, was concerned that if Republicans voted on sentencing reform close to an election there could be Republican colleagues in Congress who would be vulnerable to their constituents. *See generally id.* (noting whether the bill will have a chance to be passed "depends on Mitch McConnell deciding to bring the bill up for consideration"). For further support of this point, the First Step Act passed in the House by a 360–59 vote on May 22, 2018. H. ROLL CALL VOTE ON H.R. 5682 (May 22, 2018), <https://www.congress.gov/bill/115th-congress/house-bill/5682/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>. The First Step Act is a prison and sentencing reform bill that corrects some of the misguided policies discussed in this comment. President Trump, Republican and Democrat leaders, and liberal reform organizations have been pressuring McConnell to bring the bill to the Senate floor for a vote before the current term ends in the next couple of weeks. However, McConnell

Moreover, another proposed bill is the Sentencing Reform and Corrections Act, which has been proposed numerous times.¹⁹⁴ Like the Smarter Sentencing Act, this bill lowers mandatory sentences for drug convictions, broadens the safety valve exception, and makes the Fair Sentencing Act of 2010 retroactive.¹⁹⁵ Although this bill “has significant bipartisan support”,¹⁹⁶ it is likely to be struck down again. Although the bill was favorable in the Senate Judicial Committee with a sixteen to five vote,¹⁹⁷ it is not likely to receive the support required for a majority vote on the floor.¹⁹⁸ Each time the Sentencing Reform and Corrections Act has been presented to the floor for a vote, it has failed for the same reasons.¹⁹⁹ During a Committee vote in February of

received pressure from a Republican Senator who is “the leader of a small but power block of conservatives deeply opposed to any sentencing changes.” See Nicholas Fandos, *McConnell Feels the Heat From the Right to Bring Criminal Justice Bill to a Vote*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/grassley-mcconnell-criminal-justice-bill.html>. McConnell said that there will likely not be enough time left in the term to get to a vote. Consequently, there was fear the bill would not pass in the new Democratic House majority if it was tabled until the next term. *Id.* At the time of this comment’s publication, the Senate ultimately approved the First Step Act on December 18, 2018 with an 87-12 vote, which the House ratified on December 20, with a vote of 358 to 36; on December 21, President Trump signed the First Step Act into law. Erin McCarthy Holliday, *President Trump signs criminal justice reform First Step Act into law*, JURIST (Dec. 21, 2018, 03:30 PM), <https://www.jurist.org/news/2018/12/president-trump-signs-criminal-justice-reform-first-step-act-into-law/>.

194. S. 1917, 115th Cong. (2107).

195. *S. 1917: Sentencing Reform and Corrections Act of 2017 (115th Congress)*, FAMM (April 27, 2018), <https://famm.org/s-1917-sentencing-reform-corrections-act-2017-115th-congress/>.

196. Prepared Statement from Senator Chuck Grassley, Chairman Senate Judiciary Comm. on Exec. Bus. Meeting 3 (Feb. 2018), <https://www.judiciary.senate.gov/imo/media/doc/02-15-18%20Grassley%20Statement.pdf>.

197. *S. 1917: Sentencing Reform and Corrections Act of 2017 (115th Congress)*, *supra* note 196.

198. *Executive Business Meeting on S. 1917 Sentencing Reform and Corrections Act of 2017*, S. COMM. OF THE JUDICIARY, 115TH CONG. (Feb. 5, 2018) (statement of Sen. Cruz, Member, S. Comm. on the Judiciary at 01:56:54) [hereinafter Statement of Sen. Cruz], <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (noting that it is unclear whether the Sentencing Reform and Corrections Act will become a law).

199. *Id.* at 01:57:10; see generally Dara Lind, *The Criminal Justice Bill Bringing President Obama and the Koch Brothers Together, Explained*, VOX (Oct. 19, 2015, 3:36 PM), <https://www.vox.com/2015/10/1/9432017/sentencing-reform->

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2018, an amendment to the bill was proposed; this amendment, if accepted, would result in the changes needed to win the vote of the members in the Senate who historically opposed the bill.²⁰⁰ However, the Committee was unwilling to concede on the parts of the bill the amendment sought, and consequently, voted down the amendment.²⁰¹ As a result of the Committee striking down the amendment, the benefits of the bill will never be realized and the same members in the Senate are likely to vote the bill down on the floor, putting the bill against greater odds in the future.²⁰² In response to disappointment for "proposed legislation [that did] not go further," President Obama said, "better is good" because often good portions of legislation will survive and get passed into law.²⁰³ Better is progress—which criminal justice reform desperately needs.

B. Emphasis on Rehabilitating the Offender While Incarcerated

A vital step towards increasing public safety and decreasing incarcerations costs is rehabilitating offenders while they are incarcerated—"an investment in public safety that benefits all communities and taxpayers."²⁰⁴ It is important to reflect on the value of implementing policies that ensure the successful re-entry of the 96% of federal prisoners who will eventually integrate back into society.²⁰⁵ Currently, nearly half of federal prisoners are rearrested within eight years of their release for a new crime or rearrested for a violation of supervised release.²⁰⁶ Increasing the number and accessibility of

corrections-act (noting "the Sentencing Reform and Corrections Act may not get passed at all").

200. Statement of Sen. Cruz, *supra* note 198, at 01:58:04.

201. *See generally* Statement of Sen. Cruz, *supra* note 198.

202. *Id.*

203. Obama, *supra* note 3, at 828.

204. Kevin Ring & Molly Gill, *Using Time to Reduce Crime: Federal Prisoner Survey Results Show Ways to Reduce Recidivism*, FAMM 3 (June 2017), https://famm.org/wp-content/uploads/Prison-Report_May-31_Final.pdf (noting this "investment is wasted if prisoners are kept in prison so long that incarceration becomes counterproductive, weakening family ties and causing social and job skills to atrophy").

205. *Id.*

206. *Id.*

rehabilitation programs will initially result in an increase in cost.²⁰⁷ However, this initial cost is far less than the consequences of releasing non-rehabilitated offenders back into society. Rehabilitation programs are a way to decrease recidivism and deter offenders from committing crimes in the future.

The Federal Bureau of Prisons currently operates a Residential Drug Abuse Program (“RDAP”), which was created to lower the probability of recidivism and decrease prison misconduct by helping prisoners gain the tools for crime relapse prevention.²⁰⁸ RDAP is operated under a “modified therapeutic community model” where the “participants live in separate housing units.”²⁰⁹ Inmates are motivated to enroll in RDAP because of incentives like a ten-month sentence reduction upon successful completion of the program.²¹⁰ However, a recent study of federal prison inmates revealed that many inmates cannot get into the program because of the strict eligibility requirements and lengthy waiting list.²¹¹ For example, to qualify for the program the prisoner must have a history of substance abuse, 24 months or less of their sentence remaining, and no violent crime history or an immigration detainer.²¹² A more effective policy would apply to all inmates who have substance abuse problems and would incentivize inmates to participate, so more inmates can benefit from this treatment and receive the help they need while they are in prison. This would result in fewer relapses, lower recidivism, and less burden on the already overwhelmed system.

C. Criminal Justice Reform Results in the States

[O]ver the past decade, many states—including so-called “red states” like Georgia, Texas, and Alabama—have led and innovated with new approaches. By reducing sentences and

207. *See id.* at 20.

208. *Id.* at 13.

209. *Id.* at 11 (defining “modified therapeutic community model” as a separate housing unit where participants spend half of the day in the program and the other half in work, school, or vocational training).

210. *Id.*

211. *Id.* (noting that in 2016 “more than 5,000 people were waiting to enter the program”).

212. *Id.*

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reinvesting some of the savings in other public safety initiatives—especially programs that actually address substance abuse and support for those with mental illness—these states have improved outcomes, enhanced trust, and thus ultimately made better use of taxpayer dollars.²¹³

Some states have implemented novel practices to reduce their prison populations and have seen a decrease in crime rates, while saving money.²¹⁴ For example, South Carolina, Iowa, Massachusetts and Georgia have significantly decreased drug sentences, “reduc[ing] prison populations and increase[ing] public safety.”²¹⁵ “[T]he American Law Institute has made diversion and deferred adjudication part of its Model Penal Code: Sentencing project,” and many states have explored alternatives to conviction.²¹⁶

Many states have started to change the felony requirements for theft charges by increasing the property value for felony theft, which keeps low-level offenders out of prison.²¹⁷ For example, in California, the dollar amount of stolen property amounting to felony theft is \$950.²¹⁸ By contrast, in Florida, the dollar amount for a theft to be a felony is only \$300.²¹⁹ The minimum penalty for a felony conviction is one year in prison, which costs the state \$30,621 annually per inmate.²²⁰ This cost is hard to justify, especially when studies show there is no deterrent effect from raising the felony theft threshold.²²¹ In the states that have increased the requirements for what amounts to a felony, there has been no increase in property crime or larceny.²²² In fact, those states have

213. Obama, *supra* note 3, at 821.

214. See *The Justice Safety Valve Act: S. 1127/H.R. 2435 (115th Congress)*, *supra* note 181, (reporting the results in over thirty states who have reformed or eliminated their mandatory sentencing laws in the last thirty years have been increased public safety and reduced prison populations).

215. *Id.*

216. PAG, *supra* note 151, at 9.

217. See Alan Greenblatt, *What Counts as a Felony? For Stealing, States are Raising the Bar*, GOVERNING (Mar. 2018), <http://www.governing.com/topics/public-justice-safety/gov-theft-felony.html>.

218. CAL. PENAL CODE § 487 (West 2018).

219. FLA. STAT. ANN. § 812.014 (West 2018).

220. See JAMES, *supra* note 177, at 9.

221. See Greenblatt, *supra* note 217.

222. *Id.*

seen crime rates decrease at a similar rate to states that have not changed their theft laws.²²³

This is one area where states and the federal government can improve. A cost-benefit analysis could be used to determine what penalty would make the most sense when considering (1) the cost of the damage caused by the crime and (2) the proportionate penalty available for the damage caused. Also, considering most thefts are committed to get money for drugs, mandating an offender in this category to a rehabilitation program, instead of prison, could be a better option.²²⁴ Rehabilitation accomplishes two things: (1) crime control is accomplished by eliminating the offender's motivation for committing the crime (i.e. buying or selling drugs), and (2) taxpayers are saved \$30,621 in misspent funds penalizing a crime that cost the community \$300.²²⁵

V. ALTERNATIVES TO INCARCERATION

As discussed above, the *certainty of punishment* is a deterrent effect, not the *severity of punishment*. The United States Attorneys' Manual, the Criminal Justice Section Committee on Sentencing, and the American Bar Association expressly suggest using an alternative to incarceration for low-risk offenders who pose no substantial threat to the community because their crimes involve substance abuse and mental illness.²²⁶ Despite the low cost and decreased recidivism rates, only "twenty-two of the ninety-six federal districts" have implemented "alternative to incarceration programs."²²⁷ Within this small number of federal districts using alternatives to incarceration, only first-time or low-level offenders are eligible for these programs.²²⁸ Further, diversion programs have shown a decrease in recidivism among

223. *Id.*

224. *See Addiction, Substance Use and the Justice System, supra* note 2 (finding many inmates committed crimes to obtain money for drugs).

225. *See JAMES, supra* note 177, at 4, 9 ("Washington State Institute for Public Policy (WSIPP) suggests that effective rehabilitation programs can result in cost savings.").

226. *See PAG, supra* note 151, at 16 n.37, 16 n.39.

227. *Id.* at 17.

228. *Id.* at 16–17.

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program participants,²²⁹ suggesting diversion programs are how *certainty of punishment* has been successfully put into practice.

The districts utilizing diversion programs have over 70% of participants successfully completing the programs, saving the district over \$3 million in incarceration costs.²³⁰ Also, these "programs [have] reduced costs that are more difficult to quantify", such as loss of employment, recidivism, and a loss of a sense of community.²³¹ The goal of these programs is to give first time offenders an opportunity to avoid a conviction. Instead of a conviction, offenders are required to stay drug and alcohol free for at least a twelve-month period, successfully complete the program, and attend monthly meetings with pre-trial services.²³² If an offender meets the criteria, the conviction is often suspended or avoided altogether.²³³ Additionally, these programs have substantial support from those in the legal community demonstrating the popularity and success of implementing alternative options to incarceration.²³⁴

Drug courts are another substitute to incarceration and are designed to help relieve the overburdened criminal courts with drug-addicted defendants.²³⁵ Drug courts have been praised for shifting the punitive criminal penalties to a rehabilitative focus for drug-addicted defendants.²³⁶ Unlike diversion programs, offenders usually cannot avoid conviction of the offense, but they can avoid incarceration.²³⁷ In drug courts, offenders can avoid incarceration by following the strict rules of the program, meeting with the probation officer regularly, and

229. *Id.* at 18.

230. *Id.*

231. *Id.*

232. *See id.* at 17–18.

233. *Id.*

234. *Id.* at 19.

235. *See* Molly K. Webster, *Alternative Courts and Drug Treatment: Finding a Rehabilitative Solution for Addicts in a Retributive System*, 84 *FORDHAM L. REV.* 855, 857–58 (2015) (finding the success of rehabilitation programs is measured by a reduction in recidivism rates).

236. *Id.* at 858.

237. Webster, *supra* note 235, at 18; *see generally* *Drug Court: Frequently Asked Questions*, *supra* note 179 ("The program includes frequent random drug testing, judicial supervision, drug treatment counseling, educational and vocational training opportunities, and the use of court-imposed sanctions and incentives.").

abstaining from drugs and alcohol.²³⁸ The defendant is aware of the *certainty* that upon production of a positive drug test, he or she will be immediately taken into custody.²³⁹ Each time the defendant provides a positive drug test, the periods of incarceration get increasingly more punitive.²⁴⁰ The certainty of punishment makes these programs successful, along with their ability to provide defendants with rehabilitative treatment. This certainty of consequences is also a reason why probation sentences are an effective tool. When an individual is on probation substantial restrictions are placed on their liberty, which may include home detention, community confinement, and community service; if these restrictions are not followed the person is at risk of imprisonment for a minor technical violation.²⁴¹ Placing more non-violent offenders on probation, in diversion programs, and in drugs courts more effectively fulfills the purpose of sentencing, decreases incarceration costs, and provides offenders with the tools to become independent from the criminal justice system.

VI. CONCLUSION

“Just punishment” should be defined by the empirical evidence produced by the Sentencing Commission and what the public supports.²⁴² Rehabilitation, mental health treatment, drug treatment, probation, and community service are preferred over incarceration.²⁴³ The United States has taken an extreme punitive approach to effectuate crime control. This approach is ineffective and does not reduce crime. Instead, crime rates are unaffected by harsher penalties, but the prison system consumes government funds and resources while doing little to

238. *Drug Court: Frequently Asked Questions*, *supra* note 179.

239. *See generally id.*

240. *Id.* at 4.

241. *Id.*

242. Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And A Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1018 (2004) (“On the dimension of just punishment, the Guidelines generally track social norms (for example, public opinion) by providing prison sentences that are consistent with the public’s view of appropriate punishment.”).

243. *See Myths and Facts: Why Incarceration is Not the Best Way to Keep Communities Safe*, NAT’L INST. OF CORRECTIONS 8 (2016), <https://s3.amazonaws.com/static.nicic.gov/Library/032698.pdf>.

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help rehabilitate those incarcerated. We must pass fairer, smarter, more effective sentencing policies. The Smarter Sentencing Act was first introduced in 2013, then in 2014, and again in 2015,²⁴⁴ to no avail. However, the data from states that have implemented alternative options to incarceration continue to increase and expand, proving these policies are fiscally, socially, and morally beneficial. The success of these states is a result of decreasing penalties and shifting costs to rehabilitative services and community resources.

One federal district judge wrote to the Chairman of the U.S. Sentencing Commission, "In the pursuit of treating people equally, we have overdone it to the point where the cure is worse than the disease."²⁴⁵ Too much is expected out of the criminal justice system. Crime control is better situated with an increased focus on education,²⁴⁶

244. *See generally* S. 1933, 115th Cong. (2017).

245. Stephen S. Trott, Letter to Chairman of U.S. Sentencing Commission (November 9, 1994), reprinted in *Federal Sentencing Reporter* 8 (1995). In his letter to the U.S. Sentencing Commission in 1994, Hon. Stephen Trott expresses his frustration with the overly complicated guideline structure and emphatically requests that there be three changes made that would reduce the number of considerations that go into a final sentence, give the sentencing judge broader discretion, and reduce the number of appeals. *See id.*

246. Alma Gonzalez, Education: The Secret to Crime Reduction? 12, 15 (Spring 2015) (unpublished International Relations Thesis, New York University), <https://as.nyu.edu/content/dam/nyu-as/politics/documents/Gonzalez.pdf> (noting that a 1% increase in high school graduation rates correlates to a 4.26% decrease in the homicide rate and finding violent crime rates decrease significantly as higher levels of educational attainment are obtained); *see also* 161 CONG. REC. 5025 (2015) (Montana Senator Jon Tester remarks on the Every Child Achieves Act, "Nearly 80[%] of the male inmates in Montana's prison system are high school dropouts . . . Nearly three-quarters of the women in Montana jails are high school dropouts. Superintendent Juneau estimated that Montana could combine crime reduction savings and additional revenue of over \$19 million annually if we just graduated 5% more kids and incarcerated fewer of them. Nationally, . . . over 80[%] of the incarcerated population is high school drop outs.").

jobs,²⁴⁷ strong family units,²⁴⁸ mental health availability,²⁴⁹ detoxes and drug abuse treatment centers. The current approach to control crime is to punish the offender after the offense, rather than mitigating the factors that lead to offenders committing crime in the first place. Imposing harsh penalties that do nothing to alleviate the number of people who get entangled in the criminal justice system is not an effective approach to meet sentencing goals. If we allow the evidence and data to drive our policy decisions, we have a fighting chance at winning the “War on Drugs.”

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247. Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J. L. & ECON. 259, 261 (2001) (observing property crime rates increase when unemployment rates increase).

248. Patrick F. Fagan & Aaron Churchill, *The Effects of Divorce on Children*, MARRIAGE & RELIGION RES. INST. 35 (Jan. 11, 2012), <https://www.frc.org/EF/EF12A22.pdf> (noting in “Wisconsin incarceration rates of juvenile delinquents was 12 times higher among children of divorced parents than among children of married parents”).

249. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Texas, 1999) (“It is deplorable and outrageous that this state’s prisons appear to have become a repository for a great number of its mentally ill citizens. Persons who, with psychiatric care, could fit well into society, are instead locked away, to become wards of the state’s penal system. Then, in a tragically ironic twist, they may be confined to conditions that nurture, rather than abate, their psychoses.”).

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