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Prison, Money, and Drugs: The Federal Sentencing System Must be More Critical in Balancing Priorities Before it is Too Late

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COMMENT

PRISON, MONEY, AND DRUGS: THE FEDERAL SENTENCING SYSTEM MUST BE MORE CRITICAL IN BALANCING PRIORITIES BEFORE IT IS TOO LATE

By: Whitley Zachary

ABSTRACT

America is currently facing a major crisis with prison overcrowding and operating costs that exceed the annual budget. In the 1980s, the federal government began a “war on drugs” and Congress passed a number of drug statutes that carried mandatory minimum penalties for offenders. Since then, the federal prison population began to grow exponentially and has now reached a practically unsustainable level. The marginal changes made thus far are simply not enough to address the problem.

Since 1984, the federal sentencing system has struggled to efficiently and effectively balance mandatory minimum sentences with the sentencing guidelines. Mandatory minimum sentences should be abolished, and all authority transferred to the Sentencing Commission. The Commission needs to comprehensively reevaluate and reformulate all sentencing guidelines free from the control of the mandatory sentences.

Nevertheless, a complete reform of the sentencing system will take quite some time and more immediate relief is necessary. In the interest of alleviating the strain of the prison population and its costs, the Commission and Congress need to first eliminate the mandatory sentences for drug offenses and begin developing alternatives to incarceration for those whose offenses do not warrant imprisonment or who are in need of treatment.

The Comment discusses the federal sentencing system and how mandatory minimum sentences spurred by the “war on drugs” have created a culture of incarceration that cannot be sustained by prison facilities or budgets. The sentencing system needs comprehensive reform that eradicates mandatory minimums and values treatment as well as punishment.

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I. INTRODUCTION

The prison population in America is the largest in the world.¹ While making up only 5% of the world’s population, America accounts for nearly 25% of the world’s prison population.² Federal prisons cost billions of dollars a year, and costs continue to rise.³ Half of all federal prisoners are serving sentences for drug offenses.⁴ Many aspects of the federal sentencing system are complicated and difficult

1. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all&_r=0.

2. *Id.*

3. REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, U.S. SENTENCING COMM’N 82 (Oct. 2011), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> [hereinafter 2011 REPORT].

4. *Statistics*, BUREAU OF PRISONS, <http://www.bop.gov/about/statistics/> (last visited Sept. 15, 2014).

to understand, but the fact that there is something drastically wrong with this picture is not one of them.⁵

In 1984, after ten years of careful consideration and debate, the federal government introduced the Sentencing Reform Act.⁶ Congress decided on two different approaches: creating a dual sentencing system made up of sentencing guidelines promulgated by an expert commission and mandatory minimum sentencing statutes.⁷ The coexistence of these two sentencing schemes has been less than ideal, resulting in an overly complex system and mass incarceration.⁸

Since the 1980s, Congress has emphasized harsh mandatory sentences, particularly for drug offenses.⁹ As a result of this “war on drugs,” federal prisons began to fill up with drug offenders facing long sentences.¹⁰ Unfortunately, a large majority of these prisoners were low-level drug offenders rather than the major traffickers and kingpins that the federal government was intent on defeating.¹¹ Over time, several changes have been made to the laws and policies of the criminal justice system in the search for fairness and justice.¹² Yet still, harsh drug laws continue to punish many more low-level offenders than kingpins while the massive prison population drains government funds.¹³

This Comment will discuss how dire circumstances in the federal criminal justice system require radical reform in order to produce necessary and timely results. Part II will look at the two components of the federal sentencing system: the sentencing guidelines and the mandatory minimum sentences. Part III will discuss how the national

5. See Erik S. Siebert, Comment, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 867 (2010).

6. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 16 (Aug. 1991) [hereinafter 1991 REPORT].

7. *Id.* at 8.

8. Siebert, *supra* note 5, at 867.

9. MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 1 (2007).

10. *Id.*

11. See *id.* at 12.

12. Siebert, *supra* note 5, at 868. (addressing eight major changes in the article: Sentencing Reform Act of 1984; Anti-Drug Abuse Act of 1986; Sentencing Guidelines of 1987; Anti-Drug Abuse Act of 1988; Violent Crime Control and Law Enforcement Act of 1994; Feeney Amendment of 2003; and Judicial Sentencing Reform).

13. *Role Adjustment of Drug Offenders in Each Drug Type*, U.S. SENTENCING COMM’N, http://isb.ussc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table40 (2012); Maggie E. Harris, Comment, *The Cost of Mandatory Minimum Sentences*, 14 FL. COASTAL L. REV. 419, 420 (2013) (“Prison budgets have grown into the billions while legislatures have cut important state funding budgets for education, healthcare, and infrastructure.”); Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 951 (2001) (“Programs unrelated to the criminal justice system have had their budgets slashed as prison budgets grow.”).

prison population, and the huge expense at which it comes, is disproportionately due to low-level drug offenders. Part IV will review recent and proposed legislation aimed at improving this inefficient system, as well as shifts in policy directives. Part V will propose a possible approach to timely and comprehensive reform of the federal sentencing system.

II. THE FEDERAL SENTENCING SYSTEM

The United States has long struggled with the federal sentencing system and, unfortunately, the struggle continues.¹⁴ As recently as the 1980s, the United States had an indeterminate system, meaning multiple governmental bodies shared the responsibilities inherent in sentencing.¹⁵ Congress defined a maximum; judges imposed a sentence according to that maximum; and the parole board decided when a defendant had served enough of that sentence.¹⁶ Congress assigned only the maximum time that could be sentenced for a specific offense.¹⁷ Judges would consider all relevant facts and circumstances in a case to determine what the actual sentence should be, ranging anywhere from fines or probation to the upward maximum set by Congress.¹⁸ Once the defendant had served a certain portion of the assigned sentence (usually around a third of the sentence) the parole board could then decide whether they should be paroled or released early for good behavior.¹⁹

During that time, the primary focus of the American criminal justice system was the rehabilitation of offenders, and prisons were expected to further that purpose.²⁰ However, people began to lose faith in the rehabilitative system, and the focus of sentencing shifted to a retribution theory.²¹ Retribution theory relies on the premise that if sentences will be proportionate to the seriousness of the crime offenders will be deterred from committing more serious crimes.²² Along with this shift in focus came a general disfavor for the vast discretion of judges to give lenient sentences and the power of parole boards to release prisoners before their sentences were fully served.²³ Propo-

14. Siebert, *supra* note 5, at 918 (“The powers behind sentencing reform have engaged in a twenty-five year struggle to alter the federal drug sentencing laws. . . [u]ntil the previous message or a rational substitute takes its place, further stagnation is on the horizon.”).

15. 1991 REPORT, *supra* note 6, at 7–8.

16. Mascharka, *supra* note 13, at 940.

17. *Id.*

18. Siebert, *supra* note 5, at 869.

19. *Id.*

20. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 5 (2013).

21. *Id.*

22. *Id.* at 9.

23. Siebert, *supra* note 5, at 869–71; ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 4 (1987).

nents for a determinate system of sentencing believed that “wide-open judicial discretion and parole actually exacerbated the problems of controlling crime.”²⁴

A. *The Sentencing Reform Act of 1984*

In 1984, Congress passed the Comprehensive Crime Control Act, which included the Sentencing Reform Act (“SRA”).²⁵ The SRA provided for the development of sentencing guidelines that would further the basic purposes of criminal punishment.²⁶ In addition to identifying the basic purposes of punishment as deterrence, incapacitation, just punishment, and rehabilitation, the SRA outlined three major objectives:

- (1) to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system;
- (2) to establish reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders; and
- (3) to create proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.²⁷

More concisely, the goal of the SRA was to increase consistency and reduce disparity in the federal sentencing system.²⁸

In addition to creating a uniform system, the SRA abolished parole to create honesty in sentencing.²⁹ Originally, parole boards were utilized to assess prisoners and their state of rehabilitation, as well as control prison populations and overcrowding.³⁰ The parole board’s role in determining sentence length was becoming unpopular because it added to the inequality of sentence length for similar offenders.³¹ Ideally, the existence of guidelines and structure in sentencing would render the parole boards unnecessary.³² The new guidelines were designed to directly control the prison populations beginning at the sentencing stage.³³

Effectively throwing out the indeterminate system, the SRA delegated authority to the Sentencing Commission (“Commission”), an independent and permanent body whose principal focus was the

24. 1991 REPORT, *supra* note 6, at 7.

25. Sentencing Reform Act, Pub. L. No. 98-473, Title II, ch. II, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

26. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 2 VOL. 1, at 1 (2013) [hereinafter USSG MANUAL].

27. Sentencing Reform Act, 98 Stat. 1987.

28. VON HIRSCH ET AL., *supra* note 23, at 9.

29. USSG MANUAL, *supra* note 26, at 2–3.

30. VON HIRSCH ET AL., *supra* note 23, at 69.

31. USSG MANUAL, *supra* note 26, ch. 1, pt. A(i)(3).

32. VON HIRSCH ET AL., *supra* note 23, at 12.

33. FRASE, *supra* note 20, at 9.

sentencing system.³⁴ The Commission was responsible for creating sentencing guidelines that would reflect the new stated purposes of the sentencing system.³⁵ The Commission would also study past practices, review implementation of the guidelines, and refine the guidelines after evaluation.³⁶ Additionally, the Commission would complete periodical reviews and submit reports to Congress.³⁷ Through this evolutionary and systematic approach, the Commission could ensure that the guidelines would be effective and achieve the intended results.³⁸ Lastly, the Commission was expected to advise Congress about any relevant sentencing issues.³⁹

After the Commission was appointed in 1985, it issued the first set of guidelines in April 1987.⁴⁰ In developing these initial guidelines, the Commission conducted extensive hearings, deliberated, and considered a substantial amount of public comments.⁴¹ They were immediately challenged as unconstitutional, though the Supreme Court upheld their constitutionality in *Mistretta v. United States*.⁴² Although the guidelines were originally mandatory, they were designed to provide structure in sentencing rather than to replace judicial discretion entirely.⁴³ The Commission intended for the guidelines to be used in all ordinary circumstances to produce consistently appropriate sentences.⁴⁴ In extraordinary circumstances, a judge could deviate from the guidelines but would be required to provide an explanation for why it was justified.⁴⁵

In 2005, the Supreme Court found the mandatory nature of the guidelines to be unconstitutional in *United States v. Booker*.⁴⁶ The guidelines were established as advisory from that point forward.⁴⁷ Eliminating the mandatory nature of the guidelines would protect judges from being reversed simply for handing down a sentence not within the sentencing range set by the Commission.⁴⁸ The Court felt that an advisory guideline system would “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing

34. Sentencing Reform Act, Pub. L. No. 98-473, Title II, ch. II, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 & 28 U.S.C.).

35. USSG MANUAL, *supra* note 26, at 1.

36. VON HIRSCH ET AL., *supra* note 23, at 7.

37. 2012 U.S. SENT’G COMM’N, ANN. REP. 10 [hereinafter 2012 REPORT].

38. *Id.* at 2, 10.

39. *Id.* at 18.

40. Siebert, *supra* note 5, at 873.

41. USSG MANUAL, *supra* note 26, at 2.

42. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

43. See 1991 REPORT, *supra* note 6, at 25; VON HIRSCH ET AL., *supra* note 23, at 8.

44. VON HIRSCH ET AL., *supra* note 23, at 8–9.

45. *Id.*

46. *United States v. Booker*, 543 U.S. 220 (2005); USSG MANUAL, *supra* note 26, at 12.

47. *Booker*, 543 U.S. at 247.

48. Siebert, *supra* note 5, at 907.

disparities while maintaining flexibility sufficient to individualize sentences where necessary.”⁴⁹

B. *Mandatory Minimum Sentences*

While the Commission was being established, Congress passed the Anti-Drug Abuse Act of 1986 (“ADAA”).⁵⁰ Through this Act, Congress reintroduced mandatory minimum sentences for drug offenses.⁵¹ Consequently, the Commission had to carefully write its guidelines in compliance with the sentences mandated by Congress.⁵² Nevertheless, if a situation arose where the guidelines conflicted with a statutory sentence, the statute would control.⁵³

As a response to public demand and fear from a perceived “crack epidemic,” the ADAA established mandatory minimum sentences for offenses concerning commonly abused drugs.⁵⁴ The ADAA created a tiered system with minimum sentences assigned to the particular type and quantity of the drug involved.⁵⁵ Subsequently, Congress continued to pass statutes with mandatory minimum sentences at an alarming rate, and sixty were in place by 1991.⁵⁶ While these new statutes covered a broader range of offenses, Congress seemed focused primarily on drug offenses.⁵⁷ Of the sixty statutes passed, only four had frequent convictions, which were for drug- or weapon-related offenses.⁵⁸ The use of mandatory minimum sentences signified a shift away from the rehabilitative model, heading toward retribution as a main objective.⁵⁹

C. *Overlap and Conflict*

While mandatory minimum sentences are not a new phenomenon, it is surprising how quickly Congress was willing to reintroduce them.⁶⁰ This surprise is amplified by the fact that the federal government previously used mandatory minimums specifically targeting drug crimes, but they were repealed for ineffectiveness.⁶¹ In the 1950s, Congress attempted to deter drug-related crimes with severe

49. *Booker*, 543 U.S. at 264–65.

50. Anti-Drug Abuse Act, Pub. L. 99-570, 100 Stat. 3207 (1986); Siebert, *supra* note 5, at 871–73.

51. Siebert, *supra* note 5, at 872.

52. 1991 REPORT, *supra* note 6, at 115.

53. *Id.*

54. Mascharka, *supra* note 13, at 941.

55. *Id.*

56. *Id.* at 942; 1991 REPORT, *supra* note 6, at 10.

57. Mascharka, *supra* note 13 at 941; Omnibus Anti-Drug Abuse Act, Pub. L. No. 100-690(a), 102 Stat. 4377 (codified as amended at 21 U.S.C. §§ 846, 863 (1994)).

58. 1991 REPORT, *supra* note 6, at 10–11.

59. 2011 REPORT, *supra* note 3, at 23.

60. *Id.* at 23–24.

61. Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851 (1995).

mandatory penalties created by the Narcotic Control Act.⁶² Ultimately, these laws were considered unacceptable because the results were unjust and unsuccessful.⁶³ Then in 1970, Congress repealed the drug-related mandatory minimum penalties almost entirely in pursuit of more just and appropriate sentencing.⁶⁴ Congress should have been more wary of reenacting this type of statute, not to mention as hastily as it did.⁶⁵

The Sentencing Commission's guideline system and the mandatory minimum sentencing system have always coexisted and technically do not interfere with each other.⁶⁶ Unfortunately, the Commission and guidelines have never been able to operate as initially designed by Congress.⁶⁷ Because Congress passed the ADAA before the Commission finished its initial set of guidelines, those mandatory minimum sentences had to be incorporated as the baseline for other sentences.⁶⁸ The ADAA and other statutory penalties affected the entire development of the initial set of guidelines.⁶⁹

Congress specifically gave the Commission the authority to recommend sentencing modifications that the Commission found necessary "to carry out an effective, humane, and rational sentencing policy."⁷⁰ Accordingly, the Commission has continually discussed mandatory minimums and their effectiveness in reports to Congress.⁷¹ The Commission has consistently advised Congress that the guidelines alone would be more effective than keeping them both in place.⁷² Because the Commission cannot tell Congress to discard the mandatory sentences, the secondary recommendation is that if Congress does decide to enact statutes with mandatory minimum sentences, those sentences should: "(1) not be excessively severe, (2) be narrowly tai-

62. 2011 REPORT, *supra* note 3, at 22.

63. Oliss, *supra* note 61, at 1851–52.

64. *Id.* at 1852; 2011 REPORT, *supra* note 3, at 22.

65. Mascharka, *supra* note 13, at 939 ("In 1970, Congress responded to the concerns of prosecutors, wardens, and families of those convicted, repealing virtually all provisions imposing mandatory minimum sentences for drug violations. Congress commented that lengthening prison sentences 'had not shown the expected overall reduction in drug law violations.'" (footnote omitted)); Mary Price, *Everything Old is New Again: Fixing Sentencing by Going Back to First Principles*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 80 ("The House Judiciary Committee passed the laws in less than one week, without hearings, debate, or study.").

66. 1991 REPORT, *supra* note 6, at 21.

67. Oliss, *supra* note 61, at 1892.

68. Siebert, *supra* note 5, at 872.

69. Mascharka, *supra* note 13, at 942 (describing the interference as an early "no confidence vote" in the Commission and its forthcoming guidelines).

70. 2012 REPORT, *supra* note 37, at 7.

71. *Id.* See also 2011 REPORT, *supra* note 6, at 1; 1991 REPORT, *supra* note 6, at 62–63.

72. 2012 REPORT, *supra* note 37, at 7, 18; 2011 REPORT, *supra* note 3, at 61; 1991 REPORT, *supra* note 6, at 121–23.

lored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.”⁷³

Nevertheless, since the 1980s Congress has defended the presence of mandatory minimum penalties in the federal sentencing system.⁷⁴ It is doubtful that these mandatory sentences are either less than overly severe or narrowly tailored enough to only apply when such punishment is warranted.⁷⁵ In any case, it is apparent that in the last thirty years the federal government has failed to construct a coherent and efficient sentencing system, but not for lack of trying.⁷⁶

To the contrary, Congress has micromanaged the Commission and prevented it from making significant changes to streamline the federal sentencing scheme.⁷⁷ Since 1991, the Commission has repeatedly proposed alternatives and changes to the mandatory minimum sentencing system, including reducing disparities, but Congress has punted on significant action.⁷⁸ The entanglement of mandatory minimums and sentencing guidelines has only been further complicated by every change made by Congress along the way.⁷⁹ Congress regularly orders the Commission to incorporate changes to mandatory minimums regarding length, criteria, and safety valves, but fails to address the fundamental flaws with the system.⁸⁰

The coexistence of mandatory minimum sentences and the sentencing guidelines is exhausting and complicated. Fortunately, the original motive behind leaving it up to a Sentencing Commission to implement insightful, well-designed guidelines is as promising today as it was thirty years ago.⁸¹ But impulsive congressional enactment of mandatory minimum sentences has overpowered the federal sentenc-

73. 2012 REPORT, *supra* note 37, at 19.

74. *Id.* at 18–19; 2011 REPORT, *supra* note 3, at 57–61. *See also* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 100 (1999) (noting that the SRA’s passage began a pattern of Congress rejecting the Commission’s continued attempts to relax mandatory sentencing’s role because lawmakers “do[] not trust the Commission and the judiciary to develop an effective and just sentencing scheme on their own. More tangibly and troublesomely, these laws limit the ability and skew the efforts of the Commission and the judiciary to take full advantage of their special institutional capacities to develop the best possible sentencing guideline system.”).

75. 2012 REPORT, *supra* note 37, at 19.

76. Siebert, *supra* note 5, at 867–68.

77. Price, *supra* note 65, at 85–86 (Congress has been “intimately involved in influencing sentencing guideline amendments” and has passed “a series of ‘directives’ to the Commission telling where and how to amend the guidelines.”).

78. *See* 1991 REPORT, *supra* note 6, at 121–27; *see* 2011 REPORT, *supra* note 3, at 345–69.

79. *See generally*, Oliss, *supra* note 61, at 1882.

80. *Id.* at 1888.

81. Price, *supra* note 65, at 92–93. USSC Reports to Congress continue to express “belief[s] that a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act.” 2012 REPORT, *supra* note 37, at 7.

ing system.⁸² Congress needs to take a step back and allow the Commission to take over. The Commission has suggested alternative ways for Congress to develop a better system without resorting to mandatory minimum statutes.⁸³ Because this complicated dual system is not likely to ever succeed, these statutes should be repealed and the Commission given a chance to operate as intended.⁸⁴

III. PRISON, MONEY, AND DRUGS

Basic issues of public policy require that sentencing be carried out in a way that is clear and justified.⁸⁵ However, it hardly seems justifiable that the U.S. prison population has increased almost seven-fold since 1970.⁸⁶ These unprecedented numbers, along with the devastating cost of sustaining them, should more than evidence that it is time to reevaluate whom we lock up and for how long.⁸⁷ As a nation, America has the harshest sentencing practices and highest incarceration rates in the world.⁸⁸ Although the United States is home to less than 5% of the world's population, it incarcerates almost 25% of the world's prisoners.⁸⁹

A. Mass Incarceration

America's prison population began to rapidly increase in the late 1970s as a tough-on-crime movement began to gain momentum.⁹⁰ Prior to this initiative, the country's incarceration rates were similar to those of other major industrialized nations.⁹¹ In its wake, the national incarceration rate is 751 prisoners per 100,000 people, while the world median is only 125 prisoners for every 100,000 people.⁹²

The incarceration rate is not the only relevant factor into the massive prison population; the length of prison sentences also plays an

82. Oliss, *supra* note 61, at 1878. Even though mandatory minimum statutes were essentially incorporated into the guidelines, they often trump the guidelines where there is a difference and call for harsher sentences than the guidelines would in a particular situation. Price, *supra* note 65, at 91.

83. 1991 REPORT, *supra* note 6, at 127.

84. See Mascharka, *supra* note 13, at 974–75; Price, *supra* note 65, at 92–93. See also Steven Nauman, Note, *Brown v. Plata: Renewing the Call to End Mandatory Minimum Sentencing*, 65 FLA. L. REV. 855, 883–84 (2013).

85. FRASE, *supra* note 20, at 81; 1991 REPORT, *supra* note 6, at 17–18.

86. FRASE, *supra* note 20, at 5.

87. *Id.*

88. Liptak, *supra* note 1.

89. *Id.*

90. *Id.*

91. *Id.*; Jon Fasman, *Why Does America Have Such a Big Prison Population?*, ECONOMIST, Aug. 14, 2014, available at <http://www.economist.com/blogs/economist-explains/2013/08/economist-explains-8>.

92. *Id.* Russia's rate is closest at 627 prisoners for every 100,000 people, while England's is 151, Germany's is 88, and Japan's is 63. *Id.*

important role.⁹³ The national rate at which inmates are being admitted into prisons is actually lower than some European countries, but total incarceration continues to be so much higher in America due to its much longer prison sentences.⁹⁴

A major source of both the elevated number of prisoners and increased sentence length is the passionately fought “war on drugs.”⁹⁵ To control illegal drugs, the federal criminal justice system has focused on harsh punishments for drug offenders.⁹⁶ In 1980, jails and prisons across the country housed about 40,000 drug offenders.⁹⁷ Today, the number of inmates in jails and prisons across the country for drug crimes has grown to almost 500,000, more than ten times higher.⁹⁸

The incarceration pandemic plaguing the U.S. as a whole is strongly represented in the federal criminal justice system specifically.⁹⁹ The Bureau of Prisons (“BOP”) has more than 200,000 total inmates and is exceeding capacity by 38%.¹⁰⁰ Similar to the nationwide growth spurt, the federal inmate population doubled in the 1980s from 24,000 to 58,000 and continued to rise at alarming rates in the years following.¹⁰¹ As the BOP receives more new inmates than it releases every year, overcrowding is only expected to worsen.¹⁰²

B. *The Cost of Incarceration*

While the prison population alone should be enough to provoke reform, the cost of mass incarceration is particularly vexing.¹⁰³ Across the country, prisons and jails drained almost \$60 billion in 2012 alone.¹⁰⁴ Annual BOP operations costs are constantly rising, having

93. See 1991 REPORT, *supra* note 6, at 115–17. Since 1990, there has been a 36% increase in the average length of prison sentences in the U.S. Rachel Myers, *Extreme Sentencing*, ACLU, Aug. 13, 2012, <https://www.aclu.org/blog/criminal-law-reform/extreme-sentencing> (last visited Sept. 15, 2014).

94. Liptak, *supra* note 1.

95. *Id.*

96. See *id.*; 2011 REPORT, *supra* note 3, at 72–73.

97. MAUER & KING, *supra* note 9, at 2.

98. *Id.*

99. Fasman, *supra* note 91.

100. *Statistics*, BUREAU OF PRISONS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Sept. 15, 2014) [hereinafter *Statistics*]; REPORT FROM THE CRIMINAL DIVISION TO THE U.S. SENTENCING COMMISSION, U.S. DEP’T OF JUSTICE 5 (July 23, 2012), available at <http://www.justice.gov/criminal/foia/docs/2012-annual-letter-to-the-us-sentencing-commission.pdf> (annual report commenting on the operation of the sentencing guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission’s work as required by the SRA) [hereinafter CRIMINAL DIVISION REPORT].

101. *Statistics*, *supra* note 100; 1991 REPORT, *supra* note 6, at 118.

102. 2011 REPORT, *supra* note 3, at 83.

103. Mascharka, *supra* note 13, at 949 (Not only has it cost billions to construct enough prisons to house the prisoners, but also the annual cost of a federal inmate is approximately \$24,000.).

104. *Why Should I Care?*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/sentencing-101/the-facts/> (last visited Sept. 15, 2014).

increased from \$1.3 billion in 1991 to over \$6 billion by 2010.¹⁰⁵ Currently, the Department of Justice (“DOJ”) devotes a quarter of its budget to incarcerating offenders.¹⁰⁶ This seems particularly imprudent considering that half of BOP inmates are nonviolent drug offenders.¹⁰⁷

Regrettably, the growing prison costs reduce the budget allocations in other important areas, like crime-fighting personnel and equipment.¹⁰⁸ According to a DOJ report, “the trend of greater prison spending crowding out other criminal justice investments dates back at least a decade and has caused significant redistribution of discretionary funding among the Department’s various activities.”¹⁰⁹ In 2012, the DOJ had to reduce funding for state, local, and tribal justice assistance programs to 8% of its budget, dropping those funds to their lowest level in the past fifteen years.¹¹⁰ This decrease in available funds is directly related to the increase in the costs of incarceration.¹¹¹

C. Prominence in Drug Offenses

The incarceration surge of the 1980s was jump-started by the SRA and the reintroduction of mandatory minimums, demonstrating the focus on the “war on drugs.”¹¹² Drug arrests have more than tripled in the last twenty-five years, with a record high of 1.8 million arrests in 2005.¹¹³ During the 1990s, 79% of the growth in drug arrests was attributable solely to marijuana possession.¹¹⁴

Unfortunately, exponential growth occurred in incarceration as well as arrests: the national number of inmates locked up for drug offenses in prison or jail has increased 1,100% since 1980.¹¹⁵ Currently, drug offenders account for just under 50% of the federal inmate popula-

105. *Id.*; 2011 REPORT, *supra* note 3, at 83.

106. *Oversight of the Department of Justice: Before the Subcomm. on Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations*, 113th Cong. 8 (2013) (statement of Michael E. Horowitz, Inspector Gen., U.S. Dep’t of Justice) [hereinafter *Statements*].

107. THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS, SENTENCING PROJECT 1 (2004), http://www.sentencingproject.org/doc/publications/inc_federal_prisonpop.pdf.

108. OFFICE OF THE ASSISTANT ATTORNEY GENERAL, REPORT TO THE U.S. SENTENCING COMMISSION 4 (July 23, 2012), *available at*, <http://www.justice.gov/criminal/foia/docs/2012-annual-letter-to-the-us-sentencing-commission.pdf> [hereinafter AAG REPORT].

109. *Id.*

110. *Id.*

111. *See id.*

112. *A Storied Past*, BUREAU OF PRISONS, <http://www.bop.gov/about/history/> (last visited Sept. 15, 2014); Liptak, *supra* note 1.

113. MAUER & KING, *supra* note 9, at 2 (“Nearly a half-million (493,800) persons are in state or federal prison or local jail for a drug offense, compared to an estimated 41,100 in 1980.”).

114. *Id.*

115. *Id.*

tion.¹¹⁶ That is a total of nearly 100,000 persons serving drug sentences in federal prison.¹¹⁷ Due to the combined effect of mandatory minimum sentencing and the abolition of parole, drug offenders are serving much longer sentences than before.¹¹⁸ Drug offenders served an average sentence of twenty-two months in 1986, but are now serving an average of sixty-two months.¹¹⁹

Even with recent amendments and increased exceptions, the presence of mandatory minimum sentences in drug offenses remains strong.¹²⁰ In 2010, two out of every three defendants whose conviction carried a mandatory minimum penalty were in fact drug offenders.¹²¹ Of those drug offenders, half of the mandatory minimum sentences they were subject to were ten-year penalties.¹²² In light of these numbers, the Commission believes that the mandatory penalties are more far-reaching than Congress intended them to be.¹²³

D. *Effects on Society*

Unfortunately, the effects of mass incarceration cannot be restricted to the offenders and taxpayer dollars alone.¹²⁴ Incarceration, especially for extremely long sentences, has a devastating effect on the families of inmates.¹²⁵ One in every twenty-eight children has an incarcerated parent, yielding an estimated 1.7 million minor children in 2007.¹²⁶ Incarcerated drug offenders are more likely than violent offenders to have minor children.¹²⁷ Tragically, almost 70% of parents in federal prisons were the primary source of financial support for their children at the time they were arrested.¹²⁸ Not only do these children have to face the obstacles of growing up with that parent absent, but also the cost of raising them has to be redirected to other sources.¹²⁹

116. *Statistics*, BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Sept. 15, 2014).

117. *See* 2011 REPORT, *supra* note 3, at 268.

118. MAUER & KING, *supra* note 9, at 7.

119. *Id.* at 8.

120. *See* 2011 REPORT, *supra* note 3, at 268 (In 2010, more than half of the drug offenders incarcerated in the BOP were subject to a mandatory minimum penalty at sentencing.).

121. *Id.* at 261.

122. *Id.*

123. *Id.* at 262.

124. *See, e.g.*, Harris, *supra* note 13, at 433 (Lengthy prison sentences “are not only costly to taxpayers but also to the families of inmates.”). *See also* Nauman, *supra* note 84, at 877.

125. *See* LAUREN E. GLAZE & LAURA M. MARUSCHAK, DEP’T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 4–5 (2008).

126. *See id.* at 1.

127. *Id.* at 4.

128. *Id.* at 17.

129. SUSAN D. PHILLIPS & JAMES P. GLEESON, CENTER FOR SOCIAL POLICY & RESEARCH, CHILDREN, FAMILIES, AND THE CRIMINAL JUSTICE SYSTEM 2–4 (2007).

The downfalls of this system do not go unnoticed either. More than half of Americans report that they oppose mandatory minimum sentences for nonviolent crimes and that they value preventing recidivism over requiring incarceration.¹³⁰ Families Against Mandatory Minimums report that 84% of Americans also agree that “some of the money that we are spending on locking up low-risk, nonviolent inmates should be shifted to strengthening community corrections programs like probation and parole.”¹³¹

Furthermore, a large number of drug offenders also have drug dependency and substance abuse problems and need treatment for these issues.¹³² Drug courts are an interesting new approach that is steadily growing and is specifically designed to help drug offenders.¹³³ In 1989, the first drug court was created in Miami-Dade County with the mission to provide a treatment alternative to incarceration for nonviolent drug users facing criminal charges.¹³⁴ There are varying models of these specialized court-based programs, but most comprehensive models involve offender assessment, judicial interaction, monitoring and supervision, graduated sanctions and incentives, and treatment services.¹³⁵

Channeling eligible defendants who are struggling drug addicts into treatment rather than the prison system is a much better use of resources, particularly if the treatment is successful.¹³⁶ As of June 2012, the number of drug courts had reached over 2,700 and were present in every U.S. state and territory.¹³⁷ Research concerning the effectiveness of these drug courts is constantly being generated, but reports have been positive thus far.¹³⁸ Studies show that drug court graduates have a lower recidivism rate than offenders generally.¹³⁹ The costs that are avoided by keeping these individuals out of prison are not

130. *Why Should I Care?*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/the-facts/#the-cost> (last visited Sept. 15, 2014) [hereinafter *Why Should I Care?*]; PEW CENTER ON THE STATES, *TIME SERVED* 5 (2012) [hereinafter *Time Served*].

131. *Why Should I Care?*, *supra* note 130; *TIME SERVED*, *supra* note 130, at 130.

132. *See generally* GLAZE & MARUSCHAK, *supra* note 125.

133. *See* DOUGLAS B. MARLOWE, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, *RESEARCH UPDATE ON ADULT DRUG COURTS 1–2* (2010); RYAN S. KING & JILL PASQUARELLA, SENTENCING PROJECT, *DRUG COURTS: A REVIEW OF THE EVIDENCE* 1 (2009).

134. KING & PASQUARELLA, *supra* note 133, at 1.

135. *See id.*

136. Harris, *supra* note 13, at 446 (“According to the Rand Corporation, ‘[t]reatment of substance abusers is eight to nine times more cost-effective than long sentences.’”).

137. *About NADCP*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/about-nadcp> (last visited Sept. 15, 2014).

138. *See* KING & PASQUARELLA, *supra* note 133, at 19.

139. MARLOWE, *supra* note 133, at 1–2.

insignificant and should at least encourage the consideration of increasing the availability of the programs.¹⁴⁰

Time has proven that guaranteed harsh sentences have little deterrent effect on drug offenders.¹⁴¹ Traditional punishment theories, like retribution in particular, tend to be less effective for drug offenders.¹⁴² There must be a more effective and cost-efficient way to address low-level, nonviolent drug offenders that focuses on treatment and rehabilitation.¹⁴³ It may be too soon to know the limitations of drug courts, but development of these programs or similar alternatives to incarceration may be a viable option for combating this culture of incarceration.¹⁴⁴ Even if only a portion of drug offenders are candidates for or will benefit from treatment, it would be a more effective approach to stop treating all drug offenders as equal.¹⁴⁵ Unacceptable incarceration levels require that the sentencing system evaluate treatment and imprisonment as distinctly separate options for drug offenders.

IV. PAST ATTEMPTS TO REFORM

For as long as the prison population has been a concern, people have made or have attempted to make changes to reduce the burden.¹⁴⁶ Changes are constantly being proposed from many different directions.¹⁴⁷ However, the recent changes seem to be marginal adjustments and current proposals seem to take the same timid approach. By looking at past actions taken to reform this atrocious

140. KING & PASQUARELLA, *supra* note 133, at 8.

141. VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (Nov. 2010), available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

142. See Mascharka, *supra* note 13, at 948–49.

143. For example, “75% of Drug Court graduates remain arrest-free at least two years after leaving the program,” and every \$1 invested saves taxpayers “as much as \$3.36 in avoided criminal justice costs alone.” *Quick Facts*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/the-facts-with-sources/> (last visited Sept. 15, 2014).

144. In 2012, only 10% of all federal offenders “received probation or home confinement.” *Id.* Increased availability of drug court programs should increase the possibility of offenders qualifying for alternatives to imprisonment.

145. See MAUER & KING, *supra* note 9, at 14–18.

146. See William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 307 (2011); Vikrant P. Reddy & Marc A. Levin, *Conservatives Welcome Eric Holder to the Criminal-Justice-Reform Bandwagon*, NAT’L REV. ONLINE (Aug. 13, 2013, 11:11 AM), <http://www.nationalreview.com/node/355661/>; Anthony Papa, *Mandatory Minimum Sentencing and Potential Pardons by President Obama*, HUFFINGTON POST (Aug. 26, 2013, 4:27 PM), http://www.huffingtonpost.com/anthony-papa/serving-15-to-life-under-_b_3806933.html.

147. See DRUG POLICY ALLIANCE, *Bipartisan Bill to Reform Mandatory Minimums Introduced in U.S. House*, DAILY CHRONIC (Oct. 31, 2013), <http://www.thedailychronic.net/2013/26097/bipartisan-bill-reform-mandatory-minimums-introduced-u-s-house/>; see also Reddy & Levin, *supra* note 146.

system, it should be apparent that similar incremental changes will not produce the necessary relief.¹⁴⁸

A. Legislative Adjustments

As the harsh effects of the mandatory minimum sentences attached to drug offenses have become increasingly difficult to ignore, Congress has begun to take remedial action. Although the remedies have produced real, positive results for those benefitting from the adjustments or exceptions, a problem of this magnitude demands a much bolder reformation in order to make a crucial difference.¹⁴⁹ This system needs changes that will affect the whole rather than scattered individuals.

1. Violent Crime Control and Law Enforcement Act of 1994

In light of the harsh consequences of the mandatory minimums for low-level drug offenders, Congress began considering changes, and the safety valve was introduced.¹⁵⁰ Despite popular support for reform, proposed minimum-sentence exemptions for low-level, nonviolent offenders failed.¹⁵¹ Instead, Congress passed the Violent Crime Control and Law Enforcement Act in 1994, incorporating a safety valve provision permitting judges to depart from the mandatory minimums for some eligible low-level, nonviolent drug offenders.¹⁵²

The safety valve aimed to excuse drug offenders from the applicable mandatory minimum sentence in specific circumstances.¹⁵³ Judges could now disregard the mandatory minimum and determine a sentence based on the applicable sentencing guidelines if the defendant fit the following criteria: no more than one criminal history point;¹⁵⁴ unarmed and nonviolent during the offense; did not cause death or serious injury during the offense; not a leader or engaged in criminal enterprise; and provided all the information he or she had regarding the offense to the Government.¹⁵⁵ If the defendant met all these re-

148. See Siebert, *supra* note 5, at 911–12.

149. *Id.* at 911 (“Left with a system in which the executive is functionally inept, Congress is too politically frightened to take action, and . . . the current sentencing laws have taken on a lifeless form gasping for breath.”).

150. 2011 REPORT, *supra* note 3, at 34.

151. See *id.* at 34–35.

152. Violent Crime Control and Law Enforcement Act, Pub. L. 103-322, § 80001, 108 Stat. 1796, 1985–86 (1994).

153. § 80001(a).

154. *Id.*; see also USSG MANUAL, *supra* note 26, at 369. Defendants are assigned criminal history points according to § 4A1.1 for prior criminal history. The total number of points determines the defendant’s criminal history category, which is used to calculate what sentence should be imposed for the current charge.

155. § 80001.

quirements, a judge could sentence according to the guideline, which was specifically amended to provide for this situation.¹⁵⁶

The safety valve may appear effective in limiting mandatory minimum sentencing, but it was essentially a compromise in an otherwise unsuccessful proposal.¹⁵⁷ But instead of directly exempting a certain class of offenders from the mandatory minimums, Congress merely created an exception for individuals.¹⁵⁸

2. Fair Sentencing Act of 2010

In 2010, Congress passed the Fair Sentencing Act (“FSA”) to alleviate the unnecessary harshness of some mandatory minimum drug sentences.¹⁵⁹ The FSA particularly targeted the absurd disparity that existed between the amounts of powder and crack cocaine possession necessary to trigger mandatory minimum sentences.¹⁶⁰ The powder-cocaine-to-crack-cocaine ratio was 100:1, meaning that, while a defendant charged with possession of crack cocaine could be subject to a mandatory ten-year sentence, a defendant who possessed powder cocaine would need 100-times more drugs to be subject to the same mandatory ten-year sentence.¹⁶¹ While not absurd for drugs to have different triggering quantities based on dangerousness, this disparity was extreme for two drugs with the same chemical composition.¹⁶² Furthermore, because such small amounts of crack cocaine triggered the mandatory sentences, severe penalties impacted low-level offenders more often than high-level drug traffickers or kingpins.¹⁶³

The FSA’s reform of the disparate sentencing for powder and crack cocaine was long-awaited, and the Commission had been making recommendations for years before this first step toward closing the gap was successful.¹⁶⁴ While it did not entirely eliminate the disparity, the FSA reduced the difference in the triggering quantities to 18:1.¹⁶⁵ The FSA itself was progress, but the act was not expressly retroactive.¹⁶⁶ In order to provide justice for as many people as possible, advocates

156. REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, U.S. SENTENCING COMM’N 49 (May 2007), available at http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf [hereinafter 2007 REPORT].

157. See Oliss, *supra* note 61, at 1882–84.

158. See 2007 REPORT, *supra* note 156, at 49.

159. Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

160. Anti-Drug Abuse Act, Pub. L. 99-570, § 1002, 100 Stat. 3207 (1986).

161. Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN. ST. L. REV. 503, 509 (2012).

162. See *id.* at 509–10.

163. See 2007 REPORT, *supra* note 156, at 7–8.

164. 2011 REPORT, *supra* note 3, at 29–31.

165. See Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

166. Oliss, *supra* note 61, at 1884.

for retroactivity pressed on until Congress finally decided that the new rules applied to all defendants awaiting sentencing when the FSA was passed.¹⁶⁷ The passage of this Act and its retroactive application permitted many people to avoid the unduly harsh mandatory minimum sentencing.¹⁶⁸ This marked an important victory in the pursuit of a more just sentencing system, but it far from solved the problem.¹⁶⁹

The FSA fortunately afforded many defendants a less severe sentence, but mandatory minimums still send low-level drug offenders to prison for long sentences determined by the type of drug involved.¹⁷⁰ The adjustment greatly benefits those who actually receive reduced punishments, but it does not necessarily follow that the adjustment will help alleviate the overall problem of over-incarceration. Counter-intuitively, drug offenders continue to face the harsh mandatory sentences until they are granted the exception, whereas the sentencing scheme should default them at the lower level and subject them to harsher sentences only when it would reflect their culpability.

3. Smarter Sentencing Act of 2013

The Smarter Sentencing Act (“SSA”), a bipartisan bill, was introduced into both houses of Congress in 2013.¹⁷¹ Similar to the FSA, this bill would reduce the actual sentence lengths in the mandatory minimum statutes.¹⁷² The SSA’s purpose is “to focus limited Federal resources on the most serious offenders,” and it will do so by cutting down the sentences required in the Controlled Substances Act and Controlled Substances Import and Export Act.¹⁷³

Along with reducing the mandatory sentence lengths, the bill also provides more leniency concerning criminal history points necessary

167. Maya Rhodan, *Obama Expands Mandatory Minimum Relief*, TIME (Sept. 20, 2013), <http://swampland.time.com/2013/09/20/obama-expands-mandatory-minimum-sentencing-relief/>; Memorandum to All Fed. Prosecutors, Deputy Attorney Gen. Gary G. Grindler (Aug. 5, 2010), available at <http://www.justice.gov/oip/docs/fair-sentencing-act-memo.pdf>; Memorandum to All Fed. Prosecutors, Attorney Gen. Eric H. Holder, Jr. (July 15, 2011), available at [http://www.fpd-ohn.org/sites/default/files/files/Holder%20FSA%20memo%207_15_11\(1\).pdf](http://www.fpd-ohn.org/sites/default/files/files/Holder%20FSA%20memo%207_15_11(1).pdf).

168. See Dan Zeidman, *A Call for Fairness*, ACLU (June 29, 2011, 1:03 PM), <https://www.aclu.org/blog/criminal-law-reform/call-fairness>; U.S. SENTENCING COMM’N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT (2013).

169. See generally Nauman, *supra* note 84, at 867.

170. 2012 REPORT, *supra* note 37, at 46, 51. In 2010, half of the drug offenders who were convicted of an offense with a mandatory minimum were convicted of one carrying a ten-year sentence. *Id.*

171. Smarter Sentencing Act, S. 1410, 113th Cong. (2013) (sponsored by Democrat Richard Durbin and Republican Mike Lee); Smarter Sentencing Act, H.R. 3382, 113th Cong. (2013) (sponsored by Republican Raul Labrador and Democrat Bobby Scott).

172. S. 1410; H.R. 3382.

173. See S. 1410 § 4; H.R. 3382 § 4.

before the mandatory sentence is applicable.¹⁷⁴ In light of these changes, the Commission would be required to amend their guidelines to be consistent with the decreased penalty terms.¹⁷⁵ Finally, the Attorney General would then be able to report on the effectiveness of federal criminal justice spending in light of cost savings and their alleviation of inmate overcrowding, any increased investment in law enforcement, and reductions in recidivism rates.¹⁷⁶ This bill has garnered modest support and carries an estimated 39% chance of enactment.¹⁷⁷

4. Justice Safety Valve Act of 2013

The Justice Safety Valve Act (“JSVA”), also a bipartisan bill, was introduced in both houses of Congress in 2013.¹⁷⁸ The purpose of this bill is “to amend title 18, United States Code, to prevent unjust and irrational criminal punishments,” and would do so by increasing the safety valve available for judges when they feel it is appropriate to avoid mandatory minimum sentences.¹⁷⁹

The suggested amendment adds a provision at the end of 18 U.S.C. § 3553 granting judges the authority to sentence below a mandatory minimum statute to prevent unjust punishment.¹⁸⁰ The provision requires that the court notify parties of any intent to sentence below the minimum so that they may respond and that the court must make a written statement explaining the factors that made the lower sentence necessary.¹⁸¹ This bill has gained some attention but only has an estimated 12%–16% chance of enactment.¹⁸²

Creating another safety valve is just another way to increase the exceptions that apply to an unnecessary rule. It seems that increasing exceptions is tantamount to acknowledging that the statutory punishment is not always appropriate and thus should not be discretionary. Allowing judges the ability to discern when harsh mandatory sentences are unwarranted might avoid some of the most tragic consequences, but Congress should more directly address the problem by

174. S. 1410 § 2; H.R. 3382 § 2.

175. S. 1410 § 5; H.R. 3382 § 5.

176. S. 1410 § 6; H.R. 3382 § 6.

177. Civic Impulse, LLC, *S. 1410: Smarter Sentencing Act of 2013*, GOVTRACK.US, (Sept. 15, 2014, 5:05 PM), <https://www.govtrack.us/congress/bills/113/s1410#overview>.

178. Justice Safety Valve Act, S. 619, 113th Cong. (2013) (introduced by Republican Rand Paul and Democrat Patrick Leahy); Justice Safety Valve Act, H.R. 1695, 113th Cong. (2013) (introduced by Democrat Bobby Scott and Republican Thomas Massie).

179. S. 619; H.R. 1695.

180. S. 619 § 2; H.R. 1695 § 2.

181. S. 619 § 2; H.R. 1695 § 2.

182. Civic Impulse, LLC, *S. 619: Justice Safety Valve Act of 2013*, GOVTRACK.US, (Feb. 23, 2014, 4:31 PM), <https://www.govtrack.us/congress/bills/113/s619#overview>; Civic Impulse, LLC, *H.R. 1695: Justice Safety Valve Act of 2013*, GOVTRACK.US, (Feb. 23, 2014, 4:31 PM), <https://www.govtrack.us/congress/bills/113/hr1695#overview>.

repealing the mandatory minimums rather than create more exceptions to the rule.

5. Major Drug Trafficking Prosecution Act of 2013

The Major Drug Trafficking Prosecution Act (“MDTPA”) was introduced to the House of Representatives by Democrat Maxine Waters in 2013.¹⁸³ The purpose of the act is “to concentrate federal resources aimed at the prosecution of drug offenses on those offenses that are major,” listing multiple congressional findings concerning mandatory minimums, disparate sentencing, severity of punishment for drug offenses, and costs of incarceration.¹⁸⁴

Specific proposals of this bill are to require written Attorney General approval before prosecuting an offender under the Controlled Substances Act or the Controlled Substances Import and Export Act if the amount of the substance is less than the amount specified in the statute.¹⁸⁵ Written approval would also be required to prosecute an offender for substances containing cocaine or cocaine base if the amount is less than 500 grams, ensuring that resources are better expended punishing major traffickers.¹⁸⁶ Most significantly, the bill proposes amending the Controlled Substances Act and Controlled Substances Import and Export Act to remove all mandatory minimum sentence provisions.¹⁸⁷

The MDTPA directly addresses the problems stemming from mandatory minimum sentences for low-level drug offenders but unfortunately lacks strong support.¹⁸⁸ Not only does the bill have an estimated 1% chance of being enacted, but Waters has proposed it three previous times since 1999, each time failing to push it through the congressional committee.¹⁸⁹

B. Executive Adjustments

Although most of the mandatory minimum reform debate takes place in the legislature, the executive branch plays a role in the struggle as well.¹⁹⁰ Attorneys general have participated through directives for federal prosecutors concerning mandatory minimums, and the cur-

183. Major Drug Trafficking Prosecution Act, H.R. 3088, 113th Cong. (2013).

184. § 2.

185. § 3.

186. § 3.

187. § 4.

188. Civic Impulse, LLC, *H.R. 3088: Major Drug Trafficking Prosecution Act of 2013*, GOVTRACK.US, (Feb. 22, 2014, 3:38 PM), <https://www.govtrack.us/congress/bills/113/hr3088#overview>; H.R. 2303, 112th Cong. (2011).

189. *Id.*; H.R. 1466, 111th Cong. (2009); H.R. 1978, 107th Cong. (2001); H.R. 1681, 106th Cong. (1999).

190. Siebert, *supra* note 5, at 881.

rent Attorney General is certainly active.¹⁹¹ Mandatory minimum sentences deprive judges of discretion, but there has always been an opportunity for prosecutorial discretion to affect sentencing through charging.¹⁹² For at least the last twenty years, Department of Justice attorneys have admitted to exercising that discretion by not charging mandatory minimums in every case where the facts support them.¹⁹³

1. Past Attorneys General Announcements

Mandatory minimum sentencing has been complicated for as long as it has been in place.¹⁹⁴ Particularly, the use of these sentences has been at issue with nonviolent drug offenses and also in determining when it is appropriate to apply the harsh prison sentences. It has been common for the Attorney General to issue directives for federal prosecutors concerning the implementation of a specific policy.¹⁹⁵

In 1993, Attorney General Janet Reno issued a memo introducing a policy that would have prosecutors make their charging decisions based on “an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.”¹⁹⁶ This policy directive essentially allowed prosecutors to use their own discretion when deciding whether a defendant should be subject to a mandatory minimum for nonviolent drug crimes.¹⁹⁷

Then, in 2003, Attorney General John Ashcroft issued another memo to federal prosecutors. Ashcroft’s memo explicitly stated that it superseded any previously issued policy directives.¹⁹⁸ The new instructions required federal prosecutors to charge the most serious and readily provable offense in all cases.¹⁹⁹ Exceptions to the rule provided that a prosecutor was not required to pursue the most serious offense if: (1) the sentence length would not be affected; (2) the case was a part of a fast track program authorized by the Attorney General; (3) a post-indictment reassessment shows that the offense is no longer readily provable; (4) the defendant has provided substantial assistance; or (5) if a statutory enhancement would not be practical.²⁰⁰

191. See Alan Vinegrad, *Justice Department’s New Charging, Plea Bargaining and Sentencing Policy*, 243 N.Y. L.J. 3 (2010).

192. 2011 REPORT, *supra* note 3, at 96–97.

193. 1991 REPORT, *supra* note 6, at 103.

194. See Harris, *supra* note 13, at 440–41.

195. Vinegrad, *supra* note 191.

196. *Id.*

197. *Id.*

198. Memorandum to All Fed. Prosecutors, Attorney Gen. John Ashcroft (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm. [hereinafter Ashcroft Memo].

199. *Id.*

200. *Id.*

However, these exceptions required the written or documented senior attorney approval.²⁰¹ Also, any downward departures for sentencing that a prosecutor conceded must be disclosed to the court so they could be recorded.²⁰² Ashcroft focused on protecting honesty in sentencing and treating defendants with fairness and consistency, stating: “Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.”²⁰³

While the policy determinations from the Attorney General do not change the law or applicable sentences, they can significantly alter how the laws are used against defendants.²⁰⁴ Prosecutors retain tremendous control over the ultimate punishment of a defendant in the face of applicable mandatory minimums because charges brought against a defendant already have a minimum sentence attached.²⁰⁵ Prosecutors may exercise the sort of discretion that Congress intended mandatory minimums to supersede.²⁰⁶

The directives also demonstrate how the focus of the criminal justice system can shift at certain times. Attorney General Reno focused on carefully determining whether a defendant was deserving of a lengthy prison sentence through “individual assessments.”²⁰⁷ However, Attorney General Ashcroft shifted that focus back to applying the laws as strictly and uniformly as possible.²⁰⁸

2. Current Attorneys General Announcements

Although Ashcroft shifted focus away from the “individual assessment” directed by his predecessor Reno, he would be overruled by the next policy directive. In 2010 Attorney General Eric Holder sent a memo reinstating the “individual assessment” for determining whether mandatory minimum sentences fit the circumstances, were consistent with the federal code, and maximized resources.²⁰⁹

Then, in 2013, *Alleyne v. United States* established that for mandatory minimums or additional enhancements to be applicable the prosecutor had to include them as elements in the charge.²¹⁰ The Supreme Court held that “any fact that increases the statutory mandatory minimum sentence is an element that must be submitted to

201. *Id.*

202. *Id.*

203. *Id.*

204. Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 387 (2010).

205. *Id.*

206. Nauman, *supra* note 84, at 884–85.

207. Vinegrad, *supra* note 191.

208. *Id.*

209. Holder Memo 2010, *supra* note 141.

210. *Alleyne v. United States*, 133 S. Ct. 2151, 2153 (2013).

the jury and found beyond a reasonable doubt.”²¹¹ This requirement bolsters the prosecutor’s control over sentencing.²¹² With the discretion of federal prosecutors once again centrally operative, Holder has issued another memo directing their focus.²¹³

In order to reduce the imposition of mandatory minimum sentences for low-level, nonviolent drug offenders, Holder has refocused the charging policy.²¹⁴ In drug crimes based on type or quantity, prosecutors will continue to use “individualized assessments” to determine what charges are appropriate and, if certain criteria are met, decline to charge the defendant with the amount that would trigger the mandatory sentence.²¹⁵ The prosecutor should decline to charge the triggering quantity if the defendant meets all of the following: (1) the defendant’s conduct did not involve violence, credible threats, weapons, minors, death or serious injury; (2) defendant is not an organizer, leader, manager or supervisor in a criminal organization; (3) defendant does not have significant ties to organized drug trafficking, gangs, or cartels; and (4) defendant does not have a significant criminal history.²¹⁶

Along with instructions to be more critical before applying mandatory minimum sentences, Holder has pushed for sentencing reform.²¹⁷ In August 2013, Holder spoke before the American Bar Association calling for “sweeping, systemic change” to the judicial system.²¹⁸ Holder stated that the Obama Administration plans to cease filing charges that carry mandatory minimums against nonviolent and non-gang-affiliated drug offenders, subject to the criteria defined in the charging policy.²¹⁹

While talks of major reform are gaining much attention, Holder has not acted alone in his efforts to spark a movement.²²⁰ President Barack Obama has not only supported Holder’s call for sentencing reform but also has acted to remedy injustices in drug sentencing.²²¹ In December 2013, President Obama issued thirteen pardons and com-

211. *Id.*

212. See Holder Memo 2010, *supra* note 141.

213. Ryan J. Reilly, *Eric Holder Says the Justice System He Leads is Broken. Can He Fix It?*, HUFFINGTON POST (Nov. 1, 2013 4:14 PM), http://www.huffingtonpost.com/2013/10/31/eric-holder-criminal-justice-reform_n_4158667.html.

214. *Id.*

215. Memorandum to the U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div., Attorney Gen. Eric H. Holder, Jr. (August 12, 2013), *available at* <http://www.popehat.com/wp-content/uploads/2013/08/holder-mandatory-drug-minimums-memo.pdf> [hereinafter Holder Memo 2013].

216. *Id.*

217. Reilly, *supra* note 213.

218. *Id.*

219. Reddy & Levin, *supra* note 146.

220. See Reilly, *supra* note 213.

221. Bruce Dixon, *Holder & Obama Are Playing Us on Mandatory Minimums, the Drug War and Mass Incarceration*, FINAL CALL (Aug. 23, 2013), http://www.finalcall.com/artman/publish/National_News_2/article_100698.shtml.

mutated sentences for eight people serving long sentences for drug offenses.²²² The defendants whose sentences were commuted had already served over fifteen years, and some of those pardoned had already completed their harsh mandatory sentences.²²³

Attorney General Holder's change in federal prosecutors' policies is a step in the right direction, but it does not amount to real change absent more concrete actions.²²⁴ The new charging policy signifies a decision to enforce the law more prudently, but it should not be misinterpreted as anything more than a change in attitude.²²⁵ Any step toward a fair and just sentencing system should not be discounted, but as long prison sentences are being blithely imposed there is still a long way to go.

C. Proposed Adjustments

Throughout years of debate over federal sentencing reform, a number of scholarly articles have proposed a variety of different approaches that typically focus on three different aspects: (1) returning to an emphasis on discretion;²²⁶ (2) strengthening the exceptions so that unintended consequences may be more consistently avoided;²²⁷ and (3) moving away from mandatory sentences and towards implementation of well-drafted guidelines.²²⁸

Proponents of the safety valve intended it to herald an important step towards a better sentencing system, but some criticize it as too narrow.²²⁹ Even those in favor of an improved or expanded safety valve agree the current exceptions clearly fall short of making a significant impact.²³⁰ To secure fairer sentences for low-level drug offenders, one proposed amendment to the safety valve provision would expand the statutory definition of low-level offenders from the currently narrow scope of eligibility requirements.²³¹ If a judge determined that a particular defendant met a sufficient number of factors,

222. Michael Doyle, *Obama Issues Pardons, Commutes Sentences*, MIAMI HERALD, (Dec. 19, 2013), <http://www.miamiherald.com/2013/12/19/3828028/obama-issues-pardons-commutes.html>.

223. *Id.*

224. Jonathan Caulkins, *A Critique of Eric Holder's New Mandatory Minimum Sentencing Initiative*, AM. MAG., (Sept. 23, 2013), <http://www.american.com/archive/2013/september/a-critique-of-eric-holders-new-mandatory-minimum-sentencing-initiative/>.

225. *Id.*

226. See Nauman, *supra* note 84, at 883; see also Simons, *supra* note 204, at 379; see also Harris, *supra* note 13, at 422.

227. See Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U.L. REV. 1471 (2000).

228. See generally, Price, *supra* note 65; Siebert, *supra* note 5; Oliss, *supra* note 61; Mascharka, *supra* note 13; Harris, *supra* note 13.

229. *Safety Valves*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/projects/federal/us-congress/safety-valves/> (last visited Sept. 15, 2014).

230. *Id.*; see generally, Froyd, *supra* note 227.

231. Froyd, *supra* note 227, at 1500.

then the safety valve would apply and the judge could forego the mandatory sentence and sentence according to the guidelines.²³² While an expansion of the safety valve or other exception would surely make fairer sentences available to more offenders, approaches of this type fail to address the real issue. First, unless eliminated outright, mandatory sentences would continue looming unnecessarily over every offender. Second, mandatory sentences and Congress's past directives for harsh sentencing continue to infect the guidelines, requiring the judge to nevertheless impose a sentence likely longer than necessary.

Proposed reforms commonly focus on restoring discretion within the sentencing system but vary in whether that discretion would be most efficient in the hands of judges or prosecutors. Approaches that focus on judicial discretion seem to include a restriction or repeal of mandatory sentences and the continued existence of advisory guidelines.²³³ Because the guidelines are advisory, judicial discretion will undoubtedly factor into whether mandatory sentences are repealed.²³⁴ Nevertheless, the state of the guidelines should play a more central role in determining the necessity of comprehensive revision. Accordingly, judicial discretion is a component of the solution but cannot stand alone as the solution.

On the other hand, approaches focusing on prosecutorial discretion are based on the continued prominence of mandatory sentences.²³⁵ Proposals suggest that reforming prosecutorial practices for fairness, rationality, and consistency will make sentencing more efficient.²³⁶ If the mandatory sentences must continue to be an integral part of the system, then this approach may be appropriate. However, mandatory sentences should not be a necessary concession in forming a solution. Increasing prosecutors' discretion in selecting whom shall remain subject to mandatory sentences is a precarious solution in an adversarial criminal justice system.

Many proposals suggest that the necessary approach to finding a solution requires abandoning mandatory minimum statutes to allow the guidelines to serve their original purposes. However, proposals that suggest scrapping the mandatory sentences entirely usually include an alternative of limiting their presence, perhaps because full repeal seems too radical.²³⁷ Complete repeal of the mandatory sentences in drug offenses is often mentioned as a possibility or request while focusing on the role of the Commission.²³⁸ One scholar

232. *Id.*

233. Nauman, *supra* note 84, at 883–84; Harris, *supra* note 13, at 448–50.

234. Nauman, *supra* note 84, at 884.

235. *Id.* at 884–89; Simon, *supra* note 204, at 387.

236. Simon, *supra* note 204, at 387.

237. *See, e.g.*, Oliss, *supra* note 61, at 1892.

238. *Id.*; Mascharka, *supra* note 13, at 974; Harris, *supra* note 13, at 450.

discusses the original directives given to the Commission in the SRA and suggests that implementing those directives may be enough to effectuate change.²³⁹

Another scholar focuses on the Commission and other qualified experts taking control of sentencing policies, but the discussion does not clearly address what steps would be taken at the outset.²⁴⁰ Other proposals include amending the guidelines and combating over-politicization by keeping Congress out of the Commission's work.²⁴¹ While the Commission taking control of the sentencing system and its policies is a major component, it will lack the power to effectively reform without repeal of mandatory minimum sentences.²⁴² In order to address the current issues of prison overcrowding and deficient budgets, reform must come soon but will only remain hindered as long as the harsh sentencing laws remain in effect.

V. MEANINGFUL CHANGE

The mandatory minimum sentencing system has had negative implications since its inception.²⁴³ This negative impact has been most damaging through the application of mandatory minimums in drug offenses.²⁴⁴ Since Congress began attaching long mandatory sentences to these offenses, drug offenders have filled American prisons.²⁴⁵ Many of the inmates behind bars because of these overly harsh sentences were convicted of low-level, nonviolent drug crimes.²⁴⁶ But this problem has become so acute that it threatens to devastate on a national level if something is not done soon.²⁴⁷ "From the White House to Congress, there is a growing consensus that mandatory minimums are an abject failure, wasting billions of tax dollars and destroying communities," said Jasmine Tyler of the Drug Policy Alliance.²⁴⁸

There is nothing new about the suggestion that reforms need to be made to the sentencing system or drug offense sentencing in particular, but efforts are too minor to make the sort of impact that is desper-

239. Price, *supra* note 65, at 92–93 ("There are several directives embedded in the criminal code by the SRA that have lain dormant or been underutilized. If dusted off and taken seriously, these directives could arm the Sentencing Commission with enough authority to address some of the worst problems with guideline sentences.").

240. See Mascharka, *supra* note 13, at 974–75.

241. Siebert, *supra* note 5, at 911–18.

242. See *supra* note 82 and accompanying text.

243. 1991 REPORT, *supra* note 6, at 28.

244. See *id.* at 43.

245. Mascharka, *supra* note 13, at 936.

246. *The Paul-Leahy "Justice Safety Valve Act of 2013" S.619 2, FAMILIES AGAINST MANDATORY MINIMUMS* (2013), <http://www.famm.org/repository/files/justice%20Safety%20Valve%20Act%20Primer%20S.%20619.pdf>.

247. See *id.*

248. DRUG POLICY ALLIANCE, *supra* note 147.

ately needed.²⁴⁹ Instead of adjusting the length of mandatory terms, reducing triggering quantity disparities, creating loopholes, and shifting policy directives, the system itself needs comprehensive change or society will suffer and resources will dwindle.

A. *Abolish Mandatory Minimums in Drug Offenses Immediately*

Considering that mandatory minimum sentences have failed to produce expected results, it is likely in the best interest of the criminal justice system to abandon them entirely.²⁵⁰ Such a significant leap requires time and carefully calculated actions but should not be brushed aside. In the meantime, prison overcrowding and deficit budgets remain an immediate concern.²⁵¹ Because almost 50% of the prison population is serving sentences for drug offenses, that area of law is in foremost need of a direct and effective action.²⁵²

The sentencing system as a whole is over-complex and difficult to use, but mandatory minimums in drug offenses have clearly proved ineffective and must be discontinued.²⁵³ This harsh sentencing scheme is funneling far too many people into prison for drug offenses to serve mandatory minimum sentences that lawmakers should eradicate immediately to alleviate their crippling costs.²⁵⁴ While the Commission refines the sentencing guidelines for drug offenses, judges and prosecutors must be trusted to use their discretion in punishing defendants with appropriate and warranted sentences.²⁵⁵ Because the guidelines were written to reflect the mandatory minimums, the sentencing guidelines for all drug offenses will need to be entirely restructured.²⁵⁶

B. *Reevaluate the Current Prison Population and Budget*

Prison should be reserved for those most deserving of the punishment and those least fit to be in the community.²⁵⁷ An important factor in sentencing policy is that federal resources should be used where most necessary.²⁵⁸ Subjecting low-level drug offenders to long prison

249. Report of the Proceedings of the Judicial Conference of the United States, Judicial Conference (March 13, 1990) (published in the USSC's Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System in Aug. 1991).

250. Mascharka, *supra* note 13, at 943–44.

251. *Statements*, *supra* note 106.

252. *See supra* Part III.C.

253. 2011 REPORT, *supra* note 3, at Appendix J-17 (quoting Robert Mann, CJA Rep., Dist. of R.I.).

254. Harris, *supra* note 13, at 449–50.

255. Nauman, *supra* note 84, at 883–89 (discussing the importance of judicial and prosecutorial discretion).

256. *See Oliss*, *supra* note 61, at 1878; *see also Siebert*, *supra* note 5, at 873.

257. Mascharka, *supra* note 13, at 970.

258. CRIMINAL DIVISION REPORT, *supra* note 100, at 6.

sentences does not necessarily serve a vital purpose.²⁵⁹ The current prison population should be assessed to identify individuals who are not a threat to society and would greatly benefit from a rehabilitation-focused program.²⁶⁰ Instead of allocating resources to incarcerate drug offenders, budgets could be reassessed in order to provide more funds for drug courts, community programs, and rehabilitation.²⁶¹ Removing the least culpable offenders from the prison system and committing them instead to treatment programs would free up funding for more effective uses and would afford the offender a greater chance of recovery.²⁶²

Of course, not all drug offenders should avoid incarceration and the most serious or dangerous drug offenders should be the focus of law enforcement and prosecutors. Long prison sentences are appropriate for some offenders, but sentencing guidelines need restructuring to reflect that not all drug crimes are equal.²⁶³

C. A “New” Federal Sentencing System

Congress acted impulsively when it rushed into establishing mandatory minimums after it had just produced a well-designed, insightful plan for sentencing.²⁶⁴ The Sentencing Commission had just been created but had not been given the chance to carry out their assigned tasks.²⁶⁵ If mandatory minimums could be wholly revoked along with the instructions from Congress to have the guidelines reflect those mandatory sentences, then the sentencing system originally proposed in the SRA would be a viable solution.²⁶⁶ The Commission is entirely capable of creating the fair, effective sentencing guidelines envisioned in 1984.²⁶⁷ As it has been fulfilling its responsibilities to evaluate and review sentencing practices and data, as well as analyzing

259. Studies do not conclusively show that mandatory minimums effectively reduce drug activity, but reports instead show steady increases in the number of drug offenders arrested and the amount of drugs seized each year. Harris, *supra* note 13, at 443.

260. According to public opinion reports from FAMM, a majority of Americans believe that “some of the money that we are spending on locking up low-risk, non-violent inmates should be shifted to strengthening community corrections programs like probation and parole.” *The Facts, FAMILIES AGAINST MANDATORY MINIMUMS*, <http://famm.org/the-facts-with-sources/> (last visited Sept. 15, 2014).

261. Harris, *supra* note 13, at 446. FAMM also reports that 87% of Americans polled agreed with the statement that, “Prisons are a government program, and just like any other government program they need to be put to the cost-benefit test to make sure taxpayers are getting the best bang for their buck.” *The Facts, FAMILIES AGAINST MANDATORY MINIMUMS*, <http://famm.org/the-facts-with-sources/> (last visited Sept. 15, 2014).

262. See Harris, *supra* note 13, at 443–45 (comparing the high recidivism rates for prison releases to the recidivism rates of drug court graduates).

263. *Id.* at 449.

264. Price, *supra* note 65, at 80.

265. *Id.* at 84; Mascharka, *supra* note 13, at 942.

266. 2012 REPORT, *supra* note 37, at 7.

267. 2011 REPORT, *supra* note 3, at Appendix G-5.

the downfalls of mandatory minimums, the Commission would be able to not only address the most problematic areas quickly but also refine the entire system over time.²⁶⁸

The Commission has been often criticized for overly harsh sentences, but Congress has been directing it to update the guidelines to reflect the statutory minimums.²⁶⁹ The Commission should start at the fundamentals and ensure a consistent, fair, and effective system.²⁷⁰ Because the Commission knows what does *not* work, it is more than equipped to succeed. Moreover, now that the sentencing guidelines are advisory, unintended consequences previously experienced should prove easier to avoid.²⁷¹

VI. CONCLUSION

The federal sentencing system of the last few decades has not been particularly successful and the exponential growth of the prison population has been creating a culture of mass incarceration.²⁷² In addition to housing a disproportionately large number of prisoners, the federal government has also poured an astonishing amount of money into incarceration, and the costs continue to rise every year.²⁷³ Regrettably, a large portion of this massive growth in the federal prison system is attributable to the proclaimed “war on drugs.”²⁷⁴ Regardless of the legitimacy of this “war on drugs”, it is disconcerting that such a large portion of incarcerated drug offenders are low-level offenders, rather than major traffickers or kingpins.²⁷⁵ Recently, Attorney General Holder caught everyone’s attention by advocating for sentencing reform and instituting federal charging policies that permit avoidance of

268. The Commission submitted a report to Congress in 2011 focused on the impact of mandatory minimums, including chapters specifically addressing drug offenses. 2012 REPORT, *supra* note 37, at 7. Furthermore, “the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines.” *Id.* at 10.

269. See Ian Thomas, *Rakoff Slams US Sentencing Guidelines for Being Too Harsh*, LAW360, (May 14, 2012), <http://www.law360.com/articles/340366/rakoff-slams-us-sentencing-guidelines-for-being-too-harsh>; Paul Cassell, *Are the Federal Sentencing Guidelines for Drug Dealing Unduly Harsh?*, WASH. POST, (March 24, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/are-the-federal-sentencing-guidelines-for-drug-dealing-unduly-harsh/>; Nauman, *supra* note 84, at 870.

270. See the original objectives of the Sentencing Reform Act, *supra* Part II.B.

271. Price, *supra* note 65, at 96.

272. See Myers, *supra* note 93; Liptak, *supra* note 1.

273. See CRIMINAL DIVISION REPORT, *supra* note 100; Nauman, *supra* note 84, at 875–76.

274. Liptak, *supra* note 1; Mascharka, *supra* note 13, at 936.

275. *Quick Facts*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://fam.org/the-facts-with-sources/> (last visited Sept. 15, 2014) (“In 2012, only 6.6 percent of all federal drug offenders were considered leaders of a drug conspiracy.”) (citing to USSC, 2012 Sourcebook of Federal Sentencing Statistics Table 40); MAUER & KING, *supra* note 9, at 12.

mandatory minimums.²⁷⁶ But this charging policy is a temporary directive and, unless Congress makes substantive changes to the law, Holder's campaign for reform is just a campaign.²⁷⁷

In Holder's words: "Although incarceration has a role to play in our justice system, widespread incarceration at the federal, state and local levels is both ineffective and unsustainable."²⁷⁸ The structure of this broken sentencing system needs to be radically and comprehensively simplified by ending the use of mandatory minimum statutes.²⁷⁹ Furthermore, immediate action would alleviate prison overcrowding and deficit budgets.²⁸⁰ The Sentencing Commission, which from the outset Congress buried underneath mandatory minimums, needs the opportunity to wipe the slate clean and begin functioning as originally intended. The necessary components for restructuring the sentencing system for efficiency and intended purpose already exist, but this broken system will continue to cause more damage until the proper authorities receive the power to do so.

276. Nicole Flatow, *U.S. Attorney General to Ease Impact of Harsh Drug Sentencing Laws*, THINK PROGRESS, (Aug. 12, 2013), <http://thinkprogress.org/justice/2013/08/12/2444441/holder-sentencing-and-drugs/>; Holder Memo 2013, *supra* note 215.

277. *See* Caulkins, *supra* note 224.

278. Attorney Gen. Eric Holder, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *transcript available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

279. Reilly, *supra* note 213.

280. Harris, *supra* note 13, at 450.