

STUDENT WORKS

A RETURN TO BALANCE: FEDERAL SENTENCING REFORM AFTER THE “TOUGH-ON-CRIME” ERA

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When you were a child and you had been abused, the government wasn't there. When your stepfather abused you, the government wasn't there. When your stepbrother abused you, the government wasn't there. But, when you get a little bit of crack, the government's there.

—U.S. District Judge G. Patrick Murphy¹

I. INTRODUCTION

Our nation is at a tipping point. After decades of “tough-on-crime” rhetoric, militaristic law enforcement tactics,² and harsh

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1. Kara Gotsch, *Breakthrough in U.S. Drug Sentencing Reform: The Fair Sentencing Act and the Unfinished Reform Agenda*, THE SENT’G PROJECT 3 (Nov. 2011), http://sentencingproject.org/doc/dp_WOLA_Article.pdf [hereinafter *Breakthrough in Reform*]. Judge Murphy expressed his frustrations with the excessive sentence he was required to give Eugenia Jennings for possessing thirteen grams of cocaine. *Id.* Because Ms. Jennings, a child abuse victim and drug addict, had two prior convictions for selling small amounts of crack cocaine, she was classified as a career offender, resulting in a mandatory sentence of twenty-two years. *Id.*

2. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 72–78 (2012). The August 9, 2014 shooting of Michael Brown by a police officer brought the issue, *inter alia*, of police militarization into the spotlight. Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES (Aug. 14, 2014), http://www.nytimes.com/2014/08/15/us/ferguson-missouri-in-wake-of-clashes-calls-to-demilitarize-police.html?_r=1. After protests erupted following the shooting, law enforcement officers responded to the protests with militaristic tactics. *Id.*

sentencing schemes, lawmakers are beginning to rethink and restructure existing laws. The United States has only five percent of the world's population, but the highest rate of incarceration—holding twenty-five percent of the world's prisoners.³ Federal prisons alone house approximately 210,000 incarcerated persons.⁴ Of those federal prisoners, nearly fifty percent are imprisoned for drug offenses.⁵

This astronomical rate of incarceration has come at a great cost to the United States. Incarcerating Americans costs federal and state governments about \$80 billion per year.⁶ As of 2012, the annual cost of housing one federal prisoner was “\$21,006 for minimum security, \$25,378 for low security, \$26,247 for medium security, and \$33,930 for high security.”⁷ The cost of mass incarceration does not, however, come solely in the form of financial costs. Mass incarceration weakens communities, tears families apart, and perpetuates a vicious cycle of poverty and criminality.⁸ Notably, the current state of criminal justice has resulted in major racial disparities in incarceration and sentencing rates.⁹ Although any discussion of mass incarceration is incomplete without an examination of disparate racial consequences, racial disparity is not the main focus of this Article. These realities have led to a shift in criminal justice policies and sentencing.¹⁰

3. *Smart on Crime: Reforming the Criminal Justice System for the 21st Century*, DEPT OF JUST. 1 (Aug. 2013), <http://www.justice.gov/ag/smart-on-crime.pdf> [hereinafter *Smart on Crime*]; *The Prison Crisis*, ACLU, <https://www.aclu.org/safe-communities-fair-sentences/prison-crisis> (last visited Apr. 16, 2015).

4. *Statistics*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Apr. 16, 2015). From 1980 to 2000, federal and state prisoners totaled more than two million. ALEXANDER, *supra* note 2, at 60.

5. *Inmate Statistics: Offenses*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Apr. 16, 2015).

6. This amount is based on 2010 budgets. *Smart on Crime*, *supra* note 3, at 1.

7. Nancy La Vigne & Julie Samuels, *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions*, URB. INST. JUST. POL'Y CENTER 2 (Dec. 2012), <http://www.urban.org/UploadedPDF/412693-The-Growth-and-Increasing-Cost-of-the-Federal-Prison-System.pdf>.

8. *Smart on Crime*, *supra* note 3, at 1.

9. See generally ALEXANDER, *supra* note 2 (providing an in-depth examination of the racial consequences of the decades-long tough-on-crime approach to law enforcement).

10. *Breakthrough in Reform*, *supra* note 1, at 4–6; e.g., Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014); Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013); Memorandum from Eric H. Holder, Attorney Gen., U.S. Dep't of Justice, to the U.S. Attorneys & Assistant Attorney Gen. for the Crim. Div., *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases*

Tough-on-crime rhetoric has dominated the political and criminal justice spheres for decades.¹¹ Evidence demonstrates, however, that harsh sentencing schemes are overburdening the prison system and are not punishing the people that sentencing statutes were aimed at punishing.¹² Thus, advocates of federal sentencing reform are growing in numbers. Where tough-on-crime rhetoric was once the norm, lawmakers are now hearing calls to be “smart on crime,” and advocates of the “overcriminalization” movement are similarly seeking change.¹³ While opponents of sentencing reform maintain that current sentencing structures combat crime and place high-level, violent offenders behind bars,¹⁴ the evidence indicates that harsh sentencing schemes are ineffective at reducing crime¹⁵ and result in unjust prosecutions.¹⁶ It may be difficult to determine the full extent of

(Aug. 12, 2013), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> [hereinafter *Holder Memo*]; *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants*, DEP'T OF JUST. (Apr. 23, 2014), <http://www.justice.gov/opa/pr/2014/April/14-dag-419.html> [hereinafter *Clemency Initiative*]; *U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences*, U.S. SENT'G COMM'N (July 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

11. ALEXANDER, *supra* note 2, at 42–72; Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, THE SENT'G PROJECT 1 (Sept. 2007), http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

12. See *infra* Part III (providing an overview of the impacts of current sentencing schemes).

13. Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 611 (2011).

14. Letter from Charles E. Grassley, Senator, et al., to Senate Colleagues, *Letter Opposing Portions of the Smarter Sentencing Act* (May 12, 2014), available at <http://sentencing.typepad.com/files/senators-letter-to-colleagues-on-ssa.pdf>; Letter from William P. Barr, Former U.S. Attorney Gen., et al., to Harry Reid, Majority Leader & Mitch McConnell, Minority Leader, U.S. Senate, *Federal Criminal Sentencing Reform* (May 12, 2014), available at <http://www.judiciary.senate.gov/imo/media/doc/Hatch%20Record%20Submission.pdf> (urging Congress to maintain the current sentencing regimen). *Contra* Letter from Human Rights Watch, to Charles E. Grassley, Senator, Jeff Sessions, Senator, & John Cornyn, Senator, U.S. Senate, *RE: May 12th “Dear Colleague” Letter on Opposition to the Smarter Sentencing Act* (May 23, 2014), available at <http://www.hrw.org/news/2014/05/23/letter-senators-grassley-sessions-and-cornyn-regarding-concern-about-their-oppositio> [hereinafter *Letter to Senators*] (responding to Senator Grassley's letter with empirical data indicating that his concerns were unfounded).

15. THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 155–56 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter *GROWTH OF INCARCERATION*].

16. Paul Larkin, *The Extent of America's Overcriminalization Problem*, THE HERITAGE FOUND. (May 9, 2014), http://www.heritage.org/research/reports/2014/05/the-extent-of-americas-overcriminalization-problem#_ftnref4.

the problem because no agency—aside from the Department of Justice—collects data on prosecutions, and according to some scholars, the Department of Justice has “no interest in identifying instances in which it or one of the U.S. Attorney’s Offices” unjustly prosecuted someone.¹⁷

Historically, conservative politicians have backed stringent sentencing laws;¹⁸ however, some of the loudest calls for reform are heard from the right, as bipartisan efforts have been undertaken to enact sentencing reforms.¹⁹ More specifically, the Smarter Sentencing Act aims to reform federal sentencing laws by amending statutory mandatory minimum sentences, broadening safety valves, and making the Fair Sentencing Act retroactive,²⁰ while the Justice Safety Valve Act makes sweeping changes with regard to judicial sentencing discretion.²¹

Part II of this Article provides a history of the development of federal sentencing schemes by reviewing the traditional role of the judiciary and the Separation of Powers Doctrine in the criminal law context; examining how the mid-twentieth century’s tough-on-crime policies led to mandatory minimum-drug sentenc-

17. *Id.*

18. ALEXANDER, *supra* note 2, at 45–50; GROWTH OF INCARCERATION, *supra* note 15, at 72.

19. *E.g.*, Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014); Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013); see *Complete List of Supporters*, FAMILIES AGAINST MANDATORY MINIMUMS (July 2014), <http://fammm.org/wp-content/uploads/2014/02/SSA-Support-July-2014.pdf> (listing supporters of the Smarter Sentencing Act, which include conservative organizations); Editorial Bd., *Texas Leads the Way in Needed Criminal Justice Reforms*, WASH. POST (Jan. 28, 2014), http://www.washingtonpost.com/opinions/texas-leads-the-way-in-needed-criminal-justice-reforms/2014/01/28/83919b72-879d-11e3-916e-e01534b1e132_story.html [hereinafter *Texas Leads the Way*] (discussing criminal justice reforms in Texas).

20. S. 1410 § 3 (referring to the Fair Sentencing Act of 2010, S. 1789, 111th Cong. (2010)); Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. § 3 (2013) (same). Since the writing of this Article, the Smarter Sentencing Act and Justice Safety Valve Act have been reintroduced in Congress. The Justice Safety Valve Act of 2015 mirrors the 2013 version. *Compare* Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013), *with* Justice Safety Valve Act of 2015, S. 353, 114th Cong. (2015). While there has been a slight change to section two of the Smarter Sentencing Act of 2015, the 2015 versions of the Acts contain substantially the same amendments to 18 U.S.C. § 3553(f) (2012) as the earlier versions. *Compare* Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014) (including two criminal history categories), *with* Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015) (increasing the number of criminal history points to two, thus including only one criminal history category). Although this Article cites to the earlier versions of the Smarter Sentencing Act and Justice Safety Valve Act, the Author maintains that the analysis and conclusion would remain identical if referencing the 2015 versions.

21. S. 619 § 2; Justice Safety Valve Act of 2013, H.R. 1695, 113th Cong. § 2 (2013).

es; and lastly, exploring how shifts in caselaw and policy led to changes in federal crack-cocaine sentences and built momentum for reform movements. Part III explores the various effects that mandatory minimum-drug sentences have had on judicial discretion, the criminal justice system, and communities of color. Parts IV and V analyze the changes proposed by the Smarter Sentencing and Justice Safety Valve Acts and the potential effects of said changes. Part VI proposes that the Smarter Sentencing and Justice Safety Valve Acts will contribute to a more balanced federal criminal justice system. This Article propounds, however, that while the Justice Safety Valve Act rightly returns sentencing discretion to the judiciary, the proposed amendment goes too far and risks returning the federal criminal justice system to the disparate state it was in prior to the enactment of harsh sentencing schemes.

II. HISTORY

The criminal-sentencing pendulum has swung from “indeterminate sentencing” schemes²² to a severely punitive approach and is now beginning to swing toward a more balanced, empirically based approach to criminal justice.²³ This Part briefly examines the Separation of Powers Doctrine and the traditional role of the judiciary; the development of tough-on-crime rhetoric; the enactment of mandatory minimum sentences²⁴ for drug offenses; and finally, recent developments in caselaw, policy, and statutes regarding sentencing schemes.

A. Separation of Powers and the Traditional Role of the Judiciary

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be

22. GROWTH OF INCARCERATION, *supra* note 15, at 71.

23. *Id.* at 1 (providing an in-depth, empirically based look at “causes of the dramatic rise in the prison population and the societal dynamics that supported those . . . causes”).

24. The oldest mandatory minimum sentences were enacted in 1790 for acts of piracy. 18 U.S.C. §§ 1651–1661 (1790).

pronounced the very definition of tyranny.”²⁵ The Separation of Powers Doctrine is one of the core constitutional protections of fairness and aims to maintain a balance of power by providing a mechanism by which each branch of government provides checks and balances to the others.²⁶ Each branch was created under a separate article of the Constitution: Article I, the legislative branch; Article II, the executive; and Article III, the judicial.²⁷ This protection is especially important in the criminal context due to the deprivation of life, liberty, and property.²⁸ Because of the gravity of the criminal context, the Constitution affords criminal defendants “certain procedures and standards of fairness.”²⁹ The Doctrine ensures that each branch “play[s] a distinct role in criminal proceedings, and that each branch has the means to check the power of the other branches during such proceedings.”³⁰

The Doctrine recognizes a “threat of discriminatory enforcement” by the legislative and executive branches, and thus assigns the judiciary the task of checking the power of the other two branches.³¹ Article III judges are appointed for life and are provided salary protections for the purpose of encouraging independence from the other branches and impartiality in decision-making,³² while the legislature’s task of satisfying the general public³³ is not a catalyst for impartiality. Further, although federal prosecutors are not altogether answerable to the masses,

25. Michael P. Allen, *Terri’s Law and Democracy*, 35 STETSON L. REV. 179, 184 (2005) (citing THE FEDERALIST NO. 47, at 249 (Madison) (George W. Carey & James McClellan eds., Liberty Fund, Inc. 2001)).

26. U.S. CONST. arts. I–III; Kieran Riley, *Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. PUB. INT. L.J. 285, 285 (2010).

27. U.S. CONST. arts. I–III.

28. Riley, *supra* note 26, at 285–86.

29. *Id.* at 285. One of these procedures is a trial by a jury of peers. U.S. CONST. amend. VI.

30. Riley, *supra* note 26, at 285.

31. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014 (2006).

32. *Id.*

33. See Evan Bernick & Paul Larkin, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUND. (Feb. 10, 2014), <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms?ac=1> (describing the “trust” Americans have in legislators to make “moral and empirical decisions” regarding sanctions).

they do have professional incentives to secure convictions of accused defendants.³⁴

Starting in the late 1800s, the purpose of incarceration “drastically shifted” from punishment premised on retribution to rehabilitation.³⁵ This shift was premised on the belief that sentencing should be tailored to the individual, requiring “flexibility and increased judicial discretion.”³⁶ The goal was that “the punishment should fit the offender and not merely the crime.”³⁷ Under the indeterminate sentencing scheme, statutes defined crimes, provided for broad ranges of permissible sentences, and allowed judicial discretion in imposing sentences.³⁸ To help determine what sentence was appropriate for each defendant, judges “considered all the circumstances surrounding a particular offense and determined the sentence based in part on aggravating or mitigating factors.”³⁹ The wide latitude in sentencing discretion, coupled with the availability of parole, led to large sentencing disparities.⁴⁰ A desire for uniformity eventually led to the twentieth century’s sentencing reform movements,⁴¹ and the nation’s changing attitude toward drug crime ushered in harsher mandatory minimum sentencing.⁴²

B. The Tough-on-Crime Era

Due to the growing criticisms of indeterminate sentencing, which included unwarranted disparities, risk of racial bias, possible undue leniency in individual cases, and a lack of standards,⁴³ sentencing schemes underwent major changes.⁴⁴ From 1975 to the mid-1980s, the reform movement focused primarily on making sentencing procedures and outcomes more fair, predictable, and consistent, and focused on solving “racial and other unwar-

34. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–34 (2001).

35. Riley, *supra* note 26, at 289.

36. *Id.*

37. *Id.* (quoting *United States v. Grayson*, 438 U.S. 41, 45 (1978)).

38. GROWTH OF INCARCERATION, *supra* note 15, at 71–72.

39. Riley, *supra* note 26, at 289–90.

40. *Id.* at 290.

41. *Id.*

42. See *infra* Part II(C) (describing the enactment of mandatory minimum sentencing).

43. GROWTH OF INCARCERATION, *supra* note 15, at 72.

44. *Id.*

ranted disparities.”⁴⁵ Mechanisms for solving these issues included “various kinds of comprehensive sentencing and parole guidelines and statutory sentencing standards.”⁴⁶

Around the same time, fear of drug crime was taking hold,⁴⁷ and a focus on cracking down on street crime was growing.⁴⁸ These fears were further intensified by “sensationalist media accounts.”⁴⁹ President Nixon called for a “war on drugs” and announced that illegal drugs were “public enemy number one.”⁵⁰ Yet, it was not until Ronald Reagan campaigned heavily on the themes of crime and welfare that the two issues came to the forefront.⁵¹ For example, President Reagan famously described the “welfare queen” as a woman who had “80 names, 30 addresses, 12 Social Security cards” and a “tax-free income . . . over \$150,000.”⁵² These anecdotes were targeted toward working-class and poor whites and were almost always coupled with promises to be “tougher on crime.”⁵³ During the Reagan Administration, steps were taken primarily to harshen sentences for drug and violent crimes.⁵⁴ These steps included mandatory minimum sentences, three-strike laws, truth-in-sentencing, and life without parole.⁵⁵ Federal law enforcement shifted from a focus on white-collar crime to street crime, specifically drug enforcement.⁵⁶ Traditionally, combatting street crime was not the responsibility of the federal government, but rather that of state and local law enforcement; this renewed focus initially caused “confusion and

45. *Id.* at 73 (quotations omitted).

46. *Id.*

47. See *Breakthrough in Reform*, *supra* note 1, at 1–2 (noting the emergence of crack cocaine, the public’s concern with and misunderstanding of the substance, and the federal government’s response to this concern). But see ALEXANDER, *supra* note 2, at 49 (writing that at the time President Reagan officially declared a war on drugs, “less than [two] percent of the American public viewed drugs as the most important issue facing the nation”).

48. See ALEXANDER, *supra* note 2, at 48–50 (discussing the Reagan Administration’s promise to “enhance the federal government’s role in fighting crime”).

49. *Breakthrough in Reform*, *supra* note 1, at 2.

50. ALEXANDER, *supra* note 2, at 47.

51. *Id.* at 48.

52. *Id.* The term welfare queen became code for “lazy, greedy, black ghetto mother.” *Id.* (quotations omitted).

53. *Id.*

54. *Id.* at 49.

55. GROWTH OF INCARCERATION, *supra* note 15, at 73.

56. ALEXANDER, *supra* note 2, at 48–49 (citing KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 47 (1997)).

controversy” over “whether the FBI and federal government should be involved in street crime.”⁵⁷

Although the war on drugs was a rhetorical term, it often looked as though war was, in fact, being waged.⁵⁸ Federal money was pumped into state and local law enforcement agencies, and those agencies received training, equipment, and intelligence from both the DEA and the Pentagon.⁵⁹ In 1997, local police departments received “1.2 million pieces of military equipment” from the Pentagon.⁶⁰ One retired police chief stated, “I was offered tanks, bazookas, anything I wanted.”⁶¹

Interestingly, at the time the war on drugs was waged, drug use was actually on the decline.⁶² Despite the decline, arrests for drug offenses continued to rise at astronomical rates.⁶³ Some commentators note that asset forfeiture laws—which permitted federal law enforcement authorities to keep and use “any and all proceeds from asset forfeitures” and permitted state and local law enforcement agencies to keep up to eighty percent of seized assets—provided perverse incentives for law enforcement agencies to focus on drug crimes rather than more serious offenses.⁶⁴

C. The 1980s: Ushering in Strict Mandatory Sentencing Schemes

The 1980s saw the passage of monumental legislation, including the Sentencing Reform Act of 1984, which established the Federal Sentencing Commission (the Commission),⁶⁵ and the Anti-Drug Abuse Act of 1986, which established mandatory minimum sentences for certain drug offenses.⁶⁶

57. *Id.* at 48.

58. *Id.* at 72–78.

59. *Id.* at 73–74 (citing Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INST. 8 (July 17, 2006), <http://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america>).

60. *Id.* at 73.

61. *Id.* (citing Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES (Mar. 1, 1999), <http://www.nytimes.com/1999/03/01/us/soldiers-of-the-drug-war-remain-on-duty.html?src=pm&pagewanted=1>).

62. Mauer & King, *supra* note 11, at 4.

63. *Id.*

64. ALEXANDER, *supra* note 2, at 77–79; Mauer & King, *supra* note 11, at 5.

65. *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012).

66. 21 U.S.C. § 841(b)(1)(A)–(C) (2012).

In an effort to curb sentencing disparities, the Commission was charged with writing guidelines for judges to use in determining sentences for defendants convicted of federal crimes.⁶⁷ Despite being directed to provide “nonincarcerative punishments for most nonviolent and nonserious first offenses, and to be guided by a prison population constraint policy,” the Commission established mandatory sentencing guidelines “that greatly increased both the percentage of individuals receiving prison sentences and the length of sentences for many offenses.”⁶⁸ The guidelines were intended to increase transparency, uniformity, and proportionality in furtherance of the purposes established in 18 U.S.C. Section 3553(a)(2).⁶⁹

Soon after, the Reagan Administration enacted the Anti-Drug Abuse Act of 1986.⁷⁰ The 1986 Anti-Drug Abuse Act became one of two “principal modern federal statutes” that imposed mandatory minimums.⁷¹ The Act established statutory mandatory minimums of five and ten years, depending on the kind and amount of drugs.⁷² A first-time offender could be sentenced to twenty years if death or serious bodily harm occurred as a result of the drug use.⁷³ Additionally, Congress mandated that “drug trafficking” be determined by the weight of the drug, resulting—perhaps inadvertently—in large numbers of low-level offenders being sentenced under “trafficking.”⁷⁴

The Act reflected the proliferation of the era’s tough-on-crime policies.⁷⁵ There was such pressure to pass the 1986 Anti-Drug Abuse Act that it was passed hurriedly and with little preparation.⁷⁶ It “was expedited through Congress, passing without the usual subcommittee hearings, markups of bills, and amendments

67. *Dorsey*, 132 S. Ct. at 2326.

68. GROWTH OF INCARCERATION, *supra* note 15, at 77–78.

69. *Dorsey*, 132 S. Ct. at 2326; *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH 35 (Dec. 2013), http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf [hereinafter *Offer You Can't Refuse*].

70. 21 U.S.C. § 801 (2012); *Offer You Can't Refuse*, *supra* note 69, at 24.

71. Bernick & Larkin, *supra* note 33.

72. 21 U.S.C. § 841(b)(1)(A)–(B).

73. *Id.* See *infra* Part IV(A) for a more detailed explanation of 21 U.S.C. § 841(b)(1)(A) and (B).

74. *Offer You Can't Refuse*, *supra* note 69, at 25.

75. *Id.* at 24.

76. *Id.* at 24 n.35.

passed at the committee level.”⁷⁷ Further, mandatory minimum-triggering drug quantities were “based on anecdotal evidence” rather than empirical evidence or expert input.⁷⁸ Between 1980 and 2000, the total population of incarcerated persons skyrocketed from about 300,000 to upward of two million.⁷⁹ Of those, half-a-million “are incarcerated for a drug offense today, compared to an estimated 41,000 in 1980.”⁸⁰

D. Shifts in Policy

From the mid-1990s to present, the United States has been in a “period of drift” with regard to federal sentencing.⁸¹ Since 2000, a string of cases has loosened the grip of legislative control on sentencing. For example, in *Apprendi v. New Jersey*,⁸² the Supreme Court held that all facts, aside from a prior conviction, that increase a sentence beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt.⁸³ The Court found it “unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”⁸⁴ In 2004, the Court extended *Apprendi* in *Blakely v. Washington*⁸⁵ to include sentences within the statutory maximums by finding that *any* factor leading to a greater sentence than the crime the defendant was convicted of, or pleaded guilty to, had to be proved to a jury beyond a reasonable doubt.⁸⁶

In the seminal case of *United States v. Booker*,⁸⁷ the Court applied *Apprendi* to the Guidelines and found them to be consti-

77. *Id.* (citing U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (1995); *Hearing on Proposed Guideline Amendments for Public Comment Before the U.S. Sentencing Commission* (Mar. 22, 1993) (testimony of Eric E. Sterling, President, Criminal Justice Policy Foundation)).

78. *Id.*

79. ALEXANDER, *supra* note 2, at 59.

80. *Breakthrough in Reform*, *supra* note 1, at 1.

81. GROWTH OF INCARCERATION, *supra* note 15, at 73.

82. 530 U.S. 466 (2000).

83. *Id.* at 476. This stands opposed to the judicial fact-finding of sentencing factors by a preponderance of the evidence. *Id.* at 468–69.

84. *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252 (1999)) (quotations omitted).

85. 542 U.S. 296 (2004).

86. *Id.* at 301.

87. 543 U.S. 220 (2005).

tutional so long as they were advisory.⁸⁸ Specifically, the Court struck 18 U.S.C Section 3553(b)(1), which required courts to sentence an offender “within the applicable Guidelines range.”⁸⁹ The *Booker* decision took a step toward “restor[ing] the judiciary to its traditional role in criminal sentencing.”⁹⁰ Some commentators note that, since *Booker*, there “has been a return to the type of inconsistency that existed before that statute became law,” resulting in fears that the type of disparate sentencing that prompted Congress to act in the first place will return.⁹¹ Despite changing the Guidelines from mandatory to advisory, the holding did not apply to statutory mandatory minimums.⁹²

Cases following *Booker* reinforced federal judges’ ability to sentence outside the Guidelines by establishing new standards of appellate review.⁹³ For example, in *Rita v. United States*,⁹⁴ the Court held “that a sentence within the Guidelines[] recommend[ed] range could be presumed reasonable because a judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission’s judgment in general.”⁹⁵ Thus, the Supreme Court directed appellate courts to use a “reasonableness” standard of review.⁹⁶ Additionally, in *Gall v. United States*,⁹⁷ the Court held that appellate courts “could not presume that a sentence outside the [range recommended by the Guidelines] was unreasonable,” thus, effectively “reducing the degree of appellate review to a more deferential abuse of discretion standard.”⁹⁸

88. Erwin Chemerinsky, *Making Sense of Apprendi and Its Progeny*, 37 MCGEORGE L. REV. 531, 540 (2006). Although the Guidelines are no longer mandatory, the majority of judges still rely on them. Crystal S. Yang, *Have Inter-Judge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker* 17 (Coase-Sandor Inst. for Law & Econ. Research, Working Paper No. 662, 2014), available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1650&context=law_and_economics.

89. *Booker*, 543 U.S. at 259.

90. Riley, *supra* note 26, at 294.

91. Bernick & Larkin, *supra* note 33.

92. Yang, *supra* note 88, at 13–14.

93. Riley, *supra* note 26, at 295–96.

94. 551 U.S. 338 (2007).

95. Yang, *supra* note 88, at 15 (quoting *Rita*, 551 U.S. at 347–50) (quotations omitted).

96. *Rita*, 551 U.S. at 350.

97. 552 U.S. 38 (2007).

98. Yang, *supra* note 88, at 3 (citing *Gall*, 552 U.S. at 52–53).

Most recently, in *Alleyne v. United States*,⁹⁹ the Court applied the principle in *Apprendi* to include facts that increase mandatory minimums because “[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime.”¹⁰⁰ More specifically, the Court wrote:

A fact that increases a sentencing floor . . . forms an essential ingredient of the offense. . . . Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant’s “expected punishment has increased as a result of the narrowed range[,]” and “the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.”¹⁰¹

Justice Thomas concluded that Congress’ intention in linking increased mandatory minimums was to heighten the punishment and wrote: “[d]efining facts that increase a mandatory statutory minimum . . . enables the defendant to predict the legally applicable penalty from the face of the indictment.”¹⁰²

Alleyne prompted Attorney General Eric Holder to issue the memorandum directing federal prosecutors to refrain from charging mandatory minimum-triggering quantities if the defendant meets specific criteria. These criteria include: (1) the defendant did not use violence in the commission of the crime; (2) the defendant is not a leader in a criminal organization; (3) the defendant is not tied to “large-scale drug trafficking organizations” or gangs; and (4) “the defendant does not have a significant criminal history . . . evidenced by three or more criminal history points.”¹⁰³

E. The Fair Sentencing Act and Calls for Reform

At the time mandatory minimum-drug sentences were passed in the 1980s, the United States was at the height of the war on drugs and there was a lot of fear, concern, and misunder-

99. 133 S. Ct. 2151 (2013).

100. *Id.* at 2160 (citing *Harris v. United States*, 536 U.S. 545 (2002) (Breyer, J., concurring)).

101. *Id.* at 2161 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 522 (2000) (Thomas, J., concurring)).

102. *Id.*

103. *Holder Memo*, *supra* note 10.

standing about crack cocaine.¹⁰⁴ As a result of the hurried passage of the 1986 Anti-Drug Abuse Act,¹⁰⁵ the mandatory minimum-triggering quantities were set too low, and statutes originally aimed at catching drug kingpins inadvertently applied to street-level dealers who “wield[ed] little decision-making authority, and ha[d] limited responsibility.”¹⁰⁶ This effectively removed the connection between the “defendants’ roles and culpability.”¹⁰⁷

Additionally, the impact of the sentences was racially disparate.¹⁰⁸ For example, it is estimated that two-thirds of people who use crack cocaine are white or Hispanic.¹⁰⁹ Despite constituting only one-third of users, blacks made up seventy-nine percent of federal crack offenders in 2010.¹¹⁰ As awareness of the disparate impacts grew, the Commission issued reports on the impacts of crack sentencing and urged reform.¹¹¹ In 2007, the Commission lowered the average sentence guideline for crack offenses by fifteen months.¹¹² Although the amendment did not change statutory sentences, it began paving the way for Congress to make changes to federal sentencing schemes.¹¹³ The combination of the Commission’s expertise in sentencing and “extensive research and data collection” provided legislators on both sides of the aisle with a “factual foundation” on which to base potential reforms.¹¹⁴

The Fair Sentencing Act was negotiated and debated for months in the Senate before “a compromise version” passed both houses of Congress.¹¹⁵ In 2010, President Obama signed the Fair Sentencing Act into law.¹¹⁶ The Act increased the quantity of crack cocaine needed to trigger the mandatory minimum sentence, thereby reducing the sentencing disparity between crack

104. See *Breakthrough in Reform*, *supra* note 1, at 1 (discussing the societal concerns of the time); *supra* Part II(B) (same).

105. *Supra* text accompanying notes 76–77.

106. *Breakthrough in Reform*, *supra* note 1, at 3 (citing U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 99–100 (2002)).

107. *Id.*

108. *Id.*

109. *Id.* at 4.

110. *Id.*

111. *Id.*

112. *Id.* at 5.

113. *Id.*

114. *Id.*

115. *Id.* at 6.

116. Fair Sentencing Act of 2010, S. 1789, 111th Cong. (2010).

and powder cocaine.¹¹⁷ Specifically, the crack-to-powder-cocaine ratio was reduced from 100:1 to 18:1.¹¹⁸ At the time of its passage, the Commission estimated that almost three thousand people each year would receive shorter sentences under the statutory amendments.¹¹⁹ The Act was an attempt to remedy the harsh punishments for “low-level [crack-cocaine] offenses.”¹²⁰ The legislation was a monumental step away from mandatory minimum sentences. It was the first time in forty years that a mandatory minimum was eliminated by Congress.¹²¹

Despite significantly reducing the disparities between crack- and powder-cocaine, the compromise “fell short of the [changes sought] for two decades.”¹²² Advocates for reform looked to the Fair Sentencing Act as the flagship for “a broader movement to address disproportionate punishment and ensure a fairer justice system.”¹²³

Building on this momentum, state and federal legislators, policy groups, and various other groups have begun to enact and advocate for sentencing reform.¹²⁴ States have begun making successful changes. Since 2000, “several hundred state laws” were enacted that make sentencing “less rigid and less severe.”¹²⁵ For example, Texas—led by Republican governor Rick Perry—has become a model for criminal justice reform.¹²⁶ Texas legislators became weary of the cost of maintaining and constructing prisons “to warehouse non-violent offenders.”¹²⁷ The State enacted programs that gave drug courts more power, “revamped” parole, and made reintegration after release easier by making it harder for employers to find out about former prisoners’ criminal records.¹²⁸

117. *Id.* The triggering amount was increased to twenty-eight grams. *Id.*

118. GROWTH OF INCARCERATION, *supra* note 15, at 74.

119. *Frequently Asked Questions: The Fair Sentencing Act of 2010*, S. 1789 *Federal Crack Reform Bill*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/08/FAQ-Fair-Sentencing-Act-4.13.pdf> (last visited Apr. 16, 2015) [hereinafter *Frequently Asked Questions*].

120. *Breakthrough in Reform*, *supra* note 1, at 1.

121. *Id.* at 6.

122. *Id.* at 1.

123. *Id.*

124. *Supra* note 10 (listing examples of various acts and actions by groups advocating reform).

125. GROWTH OF INCARCERATION, *supra* note 15, at 73.

126. *Smart on Crime*, *supra* note 3, at 1; *Texas Leads the Way*, *supra* note 19.

127. *Texas Leads the Way*, *supra* note 19.

128. *Id.*

Reform movements seek effectiveness, rationality, efficiency, and fairness within the criminal justice system.¹²⁹ Two overlapping movements have emerged. First, the Overcriminalization Movement aims for “proper allocation of sovereign enforcement authority and priorities, fidelity to traditional [requirements] of criminal culpability, and the streamlining of criminal codes.”¹³⁰ Second, the Smart on Crime Movement “emphasizes fairness and accuracy in the administration of criminal justice; alternatives to incarceration and traditional sanctions; effective preemptive mechanisms for preventing criminal behavior, the transition of formerly incarcerated individuals to law-abiding and productive [citizens]; and evidence-based assessments of costliness, efficiency, and effectiveness of criminal justice policies.”¹³¹ The Smart on Crime Movement has proven to be successful, resulting in popularity with policymakers.¹³²

As the debate regarding mandatory minimum sentences continues, those in support of mandatory sentencing make several arguments: “mandatory minimum sentences reflect a societal judgment that certain offenses demand a specified minimum sanction”; legislators are better able than judges to decide the proper penalty for specific crimes; mandatory minimum sentences address sentencing disparity and “unduly lenient sentences” resulting from too much judicial discretion; lastly, mandatory minimum sentences prevent crime.¹³³

Opponents of mandatory minimum sentences counter these arguments with arguments of their own: mandatory minimum sentences have not eliminated disparities;¹³⁴ mandatory minimum sentences have not eliminated discretion, but have merely shifted discretion from judges to prosecutors—judges are required to impose mandatory minimum sentences, while prosecutors can

129. Fairfax, *supra* note 13, at 597–98.

130. *Id.* at 598. This includes a concern with the lack of a *mens rea* requirement in numerous federal statutes. Evan Bernick, Paul Larkin, Jr. & Jordan Richardson, *Is Congress Addressing Our Overcriminalization Problem? Reviewing the Progress of the Overcriminalization Task Force*, THE HERITAGE FOUND. 2 (Aug. 12, 2014), <http://www.heritage.org/research/reports/2014/08/is-congress-addressing-our-overcriminalization-problem-reviewing-the-progress-of-the-overcriminalization-task-force?ac=1>.

131. Fairfax, *supra* note 13, at 597–98.

132. *Id.* at 598.

133. Bernick & Larkin, *supra* note 33.

134. *Fair Sentencing Act*, ACLU, <https://www.aclu.org/fair-sentencing-act> (last visited Apr. 16, 2015).

choose what crimes to charge; mandatory minimum sentences do not reduce crime;¹³⁵ they are disproportionate to the crimes committed;¹³⁶ finally, they are not cost-effective.¹³⁷

III. EFFECTS OF MASS INCARCERATION AND THE NEED FOR LEGISLATIVE SENTENCING REFORM

*There is little convincing evidence that mandatory minimum sentencing, truth-in-sentencing, or life without possibility of parole laws had significant crime reduction effects. But there is substantial evidence that they shifted sentencing power from judges to prosecutors; provoked widespread circumvention; exacerbated racial disparities in imprisonment; and made sentences much longer, prison populations much larger, and incarceration rates much higher.*¹³⁸

The war on drugs and a focus on retributive punishment rather than treatment¹³⁹ has resulted in astronomical increases in the number of people held in federal and state prisons and the amount of money spent on housing incarcerated persons. Although Congress intended to combat high-level, violent drug traffickers when it enacted harsh mandatory sentencing schemes, the evidence demonstrates that such schemes have affected low-level, nonviolent offenders.¹⁴⁰ This Part reviews the effects of mandatory minimums, specifically for drug offenses.

Under current laws, federal prisons house over 210,000 people.¹⁴¹ Approximately half are drug offenders.¹⁴² The war on drugs has fueled this astounding increase in prison population.¹⁴³ Although Congress enacted mandatory minimum-drug sentences in

135. GROWTH OF INCARCERATION, *supra* note 15, at 131, 156; *Letter to Senators*, *supra* note 14.

136. Bernick & Larkin, *supra* note 33.

137. *Id.*

138. GROWTH OF INCARCERATION, *supra* note 15, at 101–02.

139. Public opinion has moved from approval of punishment to providing treatment for drug abusers. *America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine*, PEW RES. CENTER 1 (Apr. 2014), <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf>.

140. 2013 *Sourcebook of Federal Sentencing Statistics*, U.S. SENT'G COMM'N tbls.37, 39, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013> (last visited Apr. 16, 2015) [hereinafter 2013 *Sourcebook*].

141. *Historical Information*, FED. BUREAU OF PRISONS, <http://www.bop.gov/about/history/> (last visited Apr. 16, 2015).

142. *Inmate Statistics: Offenses*, *supra* note 5.

143. *Breakthrough in Reform*, *supra* note 1, at 1.

an effort to go after high-level drug traffickers,¹⁴⁴ the quantities set by Congress were too low.¹⁴⁵ As a result, nine out of ten drug offenders are low- or mid-level participants in the drug business.¹⁴⁶ This has subsequently resulted in a twelve-fold increase in the number of people incarcerated for drug offenses since 1980.¹⁴⁷

Mandatory minimums have also resulted in drug offenders serving much lengthier sentences than prior to the 1986 Anti-Drug Abuse Act.¹⁴⁸ While changes in sentencing laws were enacted to combat crime and improve public safety, studies have found that lengthy prison sentences “cannot be justified on the basis of their effectiveness in preventing crime.”¹⁴⁹

An increase in the number of incarcerated persons has logically led to an increase in the amount of money needed to house such persons. In 2014, nearly one-quarter of the Department of Justice’s budget was spent on federal prisons.¹⁵⁰ This equates to \$6.8 billion¹⁵¹ and without significant reform, this number will continue to grow.¹⁵²

The current sentencing system has been described as “an unbalanced regime in which the legislative and executive branches share incentives and tacitly cooperate with each other, to the exclusion and increasing marginalization of the judiciary.”¹⁵³ It is the judiciary’s responsibility to “protect individual defendants from unjust application of the rule of the majority.”¹⁵⁴ Thus, judg-

144. *Offer You Can’t Refuse*, *supra* note 69, at 25. One former United States Attorney said that he could “count on one hand” the number of times he put a “major drug player in prison.” *Id.* at 17 (withholding the attorney’s name).

145. *Breakthrough in Reform*, *supra* note 1, at 3.

146. *2013 Sourcebook*, *supra* note 140, at tbl.40.

147. *Breakthrough in Reform*, *supra* note 1, at 1. This includes both federal and state offenders. *Id.* at 2; accord Mauer & King, *supra* note 11, at 9–10 (comparing the number of drug offenders incarcerated in 1980 and 2003).

148. Mauer & King, *supra* note 11, at 2.

149. GROWTH OF INCARCERATION, *supra* note 15, at 130, 156 (examining specifically “policy changes that fueled the growth” of prison populations).

150. *Summary: Fiscal Year 2014 Omnibus Appropriations Bill*, U.S. SENATE COMMITTEE ON APPROPRIATIONS 5–7 (Jan. 13, 2014), <http://www.appropriations.senate.gov/sites/default/files/Full%20Committee%20Summary.pdf>.

151. *Id.* at 6.

152. Michael E. Horowitz, Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2013*, DEPT OF JUST. (Dec. 20, 2013), <http://www.justice.gov/oig/challenges/2013.htm>.

153. Riley, *supra* note 26, at 286 (citing Stuntz, *supra* note 34, at 510).

154. *Id.* at 304.

es should have the power to make final sentencing decisions for individuals.¹⁵⁵ This requires consideration of individual facts, underlying intent, and the conduct underlying the crime.¹⁵⁶

Logically, when judges are mandated to impose a specific sentence, the ability to treat each defendant as an individual is lost.¹⁵⁷ Federal judges have taken issue with their inability to impose individualized sentences.¹⁵⁸ One frustrated judge conducted a comparison between the defendant's fifty-five year sentence for selling marijuana while possessing a gun—which was not used during the sale—with other possible sentences, and found that his sentence was “a longer sentence than [the defendant] would have received if he had hijacked a plane, beaten someone to death in a fight, detonated a bomb in an aircraft, or provided weapons to support a foreign terrorist group.”¹⁵⁹

As it stands, prosecutors essentially make final sentencing decisions by deciding what charges to file.¹⁶⁰ This decision “dramatically impacts the length of any prison term to which the defendant is sentenced[] because the charge dictates the Guidelines range and the application of a statutory mandatory minimum sentence.”¹⁶¹ Although prosecutors do not have absolute discretion, they are provided a “presumption of regularity.”¹⁶² Further, unless supported by a “proper legal basis,” federal trial courts have no power to remove charges filed by a prosecutor.¹⁶³ Thus, charging decisions are rarely reviewed by appellate courts,¹⁶⁴ providing prosecutors with “enormous power.”¹⁶⁵

155. *Id.*

156. *Id.* at 305.

157. *Id.* (describing that ability as “essential to a fair criminal sentencing system”).

158. *Id.* at 306.

159. *Id.*

160. *Id.* at 298. Prosecutors previously “played no role in sentencing.” *Offer You Can't Refuse*, *supra* note 69, at 31.

161. Riley, *supra* note 26, at 298.

162. Ellen S. Podgor, *Ethics in Criminal Advocacy*, Symposium, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1516–18 (2000) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1076 (1997)).

163. *Id.* at 1518 (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Zabawa*, 39 F.3d 279, 284–85 (10th Cir. 1994)).

164. *Id.* at 1516.

165. *Id.*; Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199, 2234 (2014).

The transfer of power from judges to prosecutors also received criticism from Justice Kennedy, who stated that the

transfer of sentencing discretion from a judge to an Assistant U.S. Attorney . . . is misguided. It gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge[,] . . . the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.¹⁶⁶

Additionally, commentators note that mandatory minimums' goal of uniformity is not reached because mandatory minimums have simply transferred discretion from judges to prosecutors.¹⁶⁷ Thus, disparities in incarceration endure but not from judicial discretion at the sentencing phase.¹⁶⁸ Prosecutors' charging decisions have come under scrutiny for being "affected by [racial] bias"—whether "consciously or unconsciously."¹⁶⁹ Proving racial bias is difficult, however, and courts are "reluctant to scrutinize the prosecutorial decision-making process."¹⁷⁰

The course that the United States has charted is unsustainable. Reforms should be made to combat current sentencing schemes. Furthermore, "[r]educing sentence length, particularly for drug offenders, would be the most direct way to slow the projected" federal prison population growth.¹⁷¹ The Smarter Sentencing Act reduces mandatory minimum sentences for certain drug offenses by half, provides slightly more judicial sentencing discretion, and makes the Fair Sentencing Act retroactive, while the Justice Safety Valve Act would enact sweeping change by returning judicial sentencing discretion.

166. *Offer You Can't Refuse*, *supra* note 69, at 34 (quoting Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting in San Francisco (Aug. 9, 2003)) (quotations omitted).

167. Hamilton, *supra* note 165, at 2233.

168. *Id.* at 2233–34.

169. Podgor, *supra* note 162, at 1518 (citing Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999)).

170. *Id.* at 1518–19.

171. La Vigne & Samuels, *supra* note 7, at 6.

IV. THE SMARTER SENTENCING ACT

On January 30, 2014, the Senate Judiciary Committee passed Senate Bill 1410—the Smarter Sentencing Act of 2014.¹⁷² The goal of the bipartisan bill, “supported by a strange bedfellows group of senators,”¹⁷³ is “[t]o focus limited [f]ederal resources on the most serious offenders.”¹⁷⁴ It attempts to reform federal drug-sentencing laws by: (1) reducing mandatory minimum sentences for drug offenses in half;¹⁷⁵ (2) moderately broadening drug safety valves;¹⁷⁶ and (3) applying the Fair Sentencing Act retroactively.¹⁷⁷ Furthermore, the Smarter Sentencing Act attempts to address over-criminalization of federal crimes and regulations by requiring the Department of Justice and other federal agencies “to compile and make publicly available . . . lists of all federal laws and regulations, their criminal penalties, and the intent required to violate the law.”¹⁷⁸

A. Potential Effects of Reducing Mandatory Minimum Drug Sentences

If enacted, the Smarter Sentencing Act will reduce mandatory minimum sentences for certain drug offenses to half their current lengths.¹⁷⁹ Federal law prohibits persons from manufacturing, distributing, dispensing, or possessing “with intent to manufacture, distribute, or dispense,” any controlled or counterfeit substance.¹⁸⁰ Currently, anyone who violates Subsection (b)(1)(B) is subject to a sentence of at least five years.¹⁸¹

172. *All Actions: S. 1410—113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1410/all-actions> (last visited Apr. 16, 2015).

173. *Groundbreaking Bipartisan Legislation Reforming Federal Drug Sentences Passed By U.S. Senate Judiciary Committee*, DRUG POLY ALLIANCE (Jan. 30, 2014), <http://www.drugpolicy.org/news/2014/01/groundbreaking-bipartisan-legislation-reforming-federal-drug-sentences-passed-us-senate>.

174. Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014).

175. *Id.* § 4. This amends 21 U.S.C. § 841(b)(1) (2012).

176. *Id.* § 2. This amends 18 U.S.C. § 3553(f) (2012).

177. *Id.* § 3. The Smarter Sentencing Act also *adds* new mandatory minimum sentences for sexual abuse, terrorism, and interstate domestic violence offenses. *Id.* §§ 8–10.

178. *Senate Update: Smarter Sentencing Act—S. 1410*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2014/02/Amended-S.-1410-Summary-March2014.pdf> (last visited Apr. 16, 2015).

179. S. 1410 § 4.

180. 21 U.S.C. § 841(a)(1)–(2) (2012).

181. *Id.* § 841(b)(1)(B).

Those who violate Subsection (b)(1)(A) are subject to a minimum sentence of at least ten years.¹⁸² It is important to note that an offender's criminal history and the presence of death or serious bodily injury automatically increase the minimums.¹⁸³

To help illustrate how mandatory minimum sentences function, we will examine a crack-cocaine offense. If a first-time offender is convicted of possessing 28 grams or more of crack cocaine, he must be sentenced to and serve a minimum of five years.¹⁸⁴ If he is convicted of possessing 280 grams or more of crack cocaine, he must be sentenced to and serve a minimum of ten years.¹⁸⁵ If death or serious bodily injury occur—regardless of the triggering quantity—the offender must be sentenced to and serve a minimum of twenty years.¹⁸⁶ Further, the minimums are automatically increased if an offender has a prior felony-drug conviction; thus, the minimums are increased from five to ten years, ten to twenty years, and twenty years to a life sentence.¹⁸⁷

If the Smarter Sentencing Act is enacted, the prescribed mandatory minimums will be reduced to two, five, and ten years.¹⁸⁸ As of 2012, 7,100 incarcerated persons were sentenced under the five-year mandatory minimum and 8,368 under the ten-year mandatory minimum.¹⁸⁹ Furthermore, the Department of Justice estimates that it would save a total of more than \$10.6 billion on housing incarcerated persons who are currently sentenced under the five- and ten-year mandatory minimums.¹⁹⁰ The Smarter Sentencing Act is “narrowly tailored to address one of

182. *Id.* § 841(b)(1)(A).

183. *Id.* § 841(b)(1)(A), (B).

184. *Id.* § 841(b)(1)(B).

185. *Id.* § 841(b)(1)(A).

186. *Id.* § 841(b)(1)(A), (B).

187. *Id.*

188. Smarter Sentencing Act, S. 1410, 113th Cong. § 4 (2014).

189. Dep't of Justice, *DOJ's Cost Savings Estimate for S. 1410: \$24 Billion over 20 Years*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2014/02/DOJ-SSA-Cost-Savings-Estimate-2014.pdf> (last visited Apr. 16, 2015) [hereinafter *DOJ Savings*] (excluding estimates for twenty-year mandatory minimums); *Potential Impact & Cost Savings: The Smarter Sentencing Act*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf> (last visited Apr. 16, 2015) [hereinafter *Potential Impact*] (basing these estimates on the Department of Justice's estimated cost savings).

190. *DOJ Savings*, *supra* note 189. The Department of Justice estimates saving over \$2.9 billion in the first ten years and \$7.7 billion in the second ten years. *Id.*

the most pressing problems with mandatory minimums”: disproportionately severe sentences for low-level drug offenses.¹⁹¹

B. Potential Effects of Broadening Safety Valves

Section 2 of the Smarter Sentencing Act expands safety valves.¹⁹² Currently, drug offenders facing a mandatory minimum sentence and who have one criminal history point¹⁹³ may qualify for the drug safety valve.¹⁹⁴ The safety valve permits sentencing judges to deviate from mandatory statutory sentences and impose a sentence under the Commission’s Guidelines.¹⁹⁵ To qualify for the safety valve, offenders must also meet the following requirements: (1) the offender “did not use violence or credible threats of violence”; (2) the offender did not “possess a firearm or other dangerous weapon . . . in connection with the offense”; (3) “the offense did not result in death or serious bodily injury to any person”; (4) the offender “was not an organizer, leader, manager, or supervisor of others in the offense . . . and was not engaged in a continuing criminal enterprise”; and (5) the offender “has truthfully provided . . . all information and evidence . . . concerning the offense.”¹⁹⁶ The Smarter Sentencing Act modestly broadens the safety valve by increasing the number of criminal history points from one to two.¹⁹⁷ This change would affect thousands of currently incarcerated persons per year.¹⁹⁸ For example, “[i]n 2012, 9,445 offenders received relief under the safety valve provision.”¹⁹⁹ Had persons with two criminal history points been included, 820 additional persons would have qualified.²⁰⁰ Should the Smarter Sen-

191. Bernick & Larkin, *supra* note 33, at 2.

192. Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 2 (2014).

193. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2013), available at <http://www.ussc.gov/guidelines-manual/2013/2013-chapter4> (providing a detailed description of how criminal history points are calculated).

194. 18 U.S.C. § 3553(f) (2012).

195. *Id.*

196. *Id.* These additional criteria largely overlap with the intent of Congress to focus on violent drug traffickers.

197. Compare the Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 2 (2014) (providing only slightly more discretion to judges), with the Justice Safety Valve Act of 2013, S. 619, 113th Cong. § 2 (2013) (essentially eliminating mandatory minimums).

198. *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 10 (2013) [hereinafter *J. Saris Statement*] (statement of Judge Patti B. Saris, Chair, United States Sentencing Commission).

199. *Id.*

200. *Id.*

tencing Act be enacted, the estimated cost savings could be as high as \$246,985,740 over the course of twenty years.²⁰¹

C. Potential Effects of Applying the Fair Sentencing Act Retroactively

At the time of the Fair Sentencing Act's enactment, the Commission estimated that almost three thousand people would receive shorter sentences under the statutory amendments.²⁰² Currently, the Fair Sentencing Act is not retroactive.²⁰³ Only those sentenced after August 3, 2010, receive reduced sentences.²⁰⁴ The Smarter Sentencing Act would make the Fair Sentencing Act retroactive,²⁰⁵ thereby allowing thousands of federal prisoners to seek fairer sentences. Specifically, almost 8,800 incarcerated persons—87.7% of whom are black—would become eligible for sentence reductions.²⁰⁶ Furthermore, the Department of Justice estimates saving up to \$382,392,353 over twenty years.²⁰⁷ Importantly, making the Fair Sentencing Act retroactive would be another step toward racial parity in sentencing.²⁰⁸ Although this amendment has been lauded, commentators note that racial parity will not be reached until the crack-to-powder-cocaine ratio is one-to-one.²⁰⁹

D. Other Costs Saved

In 2013, federal prisons were thirty-six percent over capacity.²¹⁰ If no reforms are enacted, prison populations are estimated to continue growing by about 1,600 people per year.²¹¹ Thus, the Department of Justice estimates that, without reforms, it would

201. *DOJ Savings*, *supra* note 189. The Department of Justice reached the twenty-year estimate by simply doubling the ten-year estimate; the Department of Justice had no model for twenty-year cost savings. *Id.*

202. *Frequently Asked Questions*, *supra* note 119.

203. *Id.*

204. *Id.*

205. Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 3 (2014).

206. *Potential Impact*, *supra* note 189.

207. *DOJ Savings*, *supra* note 189. In the first ten years, \$364,697,054 would be saved, and \$17,695,299 in the second ten years. *Id.*

208. *Fair Sentencing Act*, *supra* note 134.

209. *Id.*

210. *DOJ Savings*, *supra* note 189.

211. *Id.*; *Potential Impact*, *supra* note 189 (conservatively estimating 1,600 people per year for the purposes of discussion).

need to build sixteen more prisons by the year 2023 just to maintain its current “rate of [thirty-six percent] over capacity.”²¹² One prison costs about \$350 million to build.²¹³ If the Smarter Sentencing Act is enacted, the Department of Justice estimates averting \$5.6 billion in construction costs.²¹⁴ Additionally, the Department of Justice estimates that with no reforms, “it [would] have to hire 6,778 new staff” to maintain its current staff to inmate ratio—4.72 to 1.²¹⁵ This would cost the Department of Justice \$7.117 billion over twenty years.²¹⁶

Thus, if enacted, the Smarter Sentencing Act would save over \$7.3 billion in the first ten years and over \$16.5 billion in the second ten years, for total savings and cost aversions of more than \$23.9 billion in twenty years.²¹⁷ While the estimated cost savings and decrease in numbers of incarcerated persons is an estimable goal, “[t]he reductions in human suffering are incalculable.”²¹⁸

V. THE JUSTICE SAFETY VALVE ACT

Senators Rand Paul and Patrick Leahy introduced the Justice Safety Valve Act²¹⁹ in an attempt to return judicial discretion to the sentencing process.²²⁰ Currently, there are over 180 mandatory minimums that judges must impose should an offender meet the required characteristics.²²¹ The Justice Safety Valve Act adds a new subsection to 18 U.S.C. Section 3553, which would enable

212. *Potential Impact*, *supra* note 189; *accord DOJ Savings*, *supra* note 189 (estimating how many new prisons will be needed to remain at thirty-six percent crowding).

213. *Potential Impact*, *supra* note 189.

214. *DOJ Savings*, *supra* note 189; *Potential Impact*, *supra* note 189. The Department of Justice estimates saving \$2.1 billion in the first ten years and \$3.5 billion in the second ten years. *Id.*

215. *Potential Impact*, *supra* note 189; *accord DOJ Savings*, *supra* note 189 (estimating how many new staff members will be needed to remain at current staff-to-inmate ratio).

216. *DOJ Savings*, *supra* note 189. In the first ten years, \$1.864 billion would be saved, and \$5.253 billion in the second ten years. *Potential Impact*, *supra* note 189.

217. *DOJ Savings*, *supra* note 189; *Potential Impact*, *supra* note 189.

218. *Texas Leads the Way*, *supra* note 19.

219. *Supra* text accompanying note 21.

220. See Statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm., *Introduction of S. 619, the Justice Safety Valve Act of 2013* (Mar. 20, 2013), available at http://www.paul.senate.gov/?p=press_release&id=742 (highlighting the consequences of mass incarceration and explaining the motivation for introducing S. 619).

221. See *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (last visited Apr. 16, 2015) (listing all federal sentencing statutes requiring mandatory minimums).

judges to deviate from the required mandatory minimum sentence whenever that minimum does not meet the established goals of sentencing set forth in Section 3553(a).²²² These goals are to impose sentences that are “sufficient, but not greater than necessary” to “reflect the seriousness of the offense,” “provide just punishment,” “afford adequate deterrence,” and “protect the public from further crimes of the defendant.”²²³ While the Amendment would allow judges to depart from all mandatory minimums, it would not require judges to do so.²²⁴

If enacted, the Justice Safety Valve Act could save the federal government millions of dollars. For example, 10,600 offenders were sentenced under a mandatory minimum law in 2010.²²⁵ Even if only ten percent of those persons received relief under the Justice Safety Valve Act—with an average sentence reduction of one year—the Department of Justice would save \$30.74 million.²²⁶ Families Against Mandatory Minimums calculated that by saving \$30.74 million, the Department of Justice could: (1) hire “492 entry-level Assistant U.S. Attorneys” with an average annual salary of \$62,467; (2) hire “631 entry-level U.S. Marshals” with an average annual salary of \$48,708; (3) hire “439 entry-level FBI special agents” with an average annual salary of \$69,900; and (4) purchase “61,480 bulletproof vests for law enforcement officers” at a cost of \$500 per vest.²²⁷

The Justice Safety Valve Act would do more than save money: it would return people to their homes more quickly and return judicial discretion to the sentencing process.²²⁸ If passed, the Justice Safety Valve Act would essentially eliminate mandatory minimum sentences, so long as deviating from the minimums fulfills the purposes of sentencing: fairness and justice. This change, however, could reintroduce sentencing disparities resulting from

222. Justice Safety Valve Act of 2013, S. 619, 113th Cong. § 2 (2013).

223. 18 U.S.C. § 3553(a) (2012).

224. The language of the Act states that a judge “may” issue a sentence below the statutory minimum. S. 619 § 2.

225. *How the Justice Safety Valve Act of 2013 Saves Money & Enhances Safety*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/07/JSVA-Cost-saving-potential.pdf> (last visited Apr. 16, 2015). Of those persons, almost ninety percent were incarcerated for drug offenses. *Id.*

226. *Id.*

227. *Id.*

228. See S. 619 § 2 (authorizing judges to impose shorter sentences when doing so would prevent injustice).

judicial discretion, as seen in the nineteenth and twentieth centuries.²²⁹

VI. A RETURN OF POWER TO THE JUDICIARY

The Framers of the Constitution wanted to limit governmental power—especially in criminal proceedings—by separating the powers of the government.²³⁰ Article I specifically limits the “power of Congress to act as the judiciary.”²³¹ “Over time, however, application of the [S]eparation of [P]owers [D]octrine has eroded.”²³² In its current state, the criminal justice system is unbalanced, with the legislative and executive branches in “[tacit cooperation] with each other, to the exclusion and increasing marginalization of the judiciary.”²³³ Significant change is needed to reach an equilibrium.

While the specifics of the Smarter Sentencing Act and Justice Safety Valve Act differ substantially, the goal of both bills is to return a sense of fairness to the criminal justice system.²³⁴ Both bills provide federal judges with more discretion to apply fair and just sentences.²³⁵ The Smarter Sentencing Act proposes a modest “narrowly tailored” change to address one of the more “troubling aspect[s]” of mandatory minimum sentences: specifically, severe and disproportionate sentences for non-violent, low-level drug offenders.²³⁶ The criteria provides judges with a mechanism that checks the judiciary’s power, while still permitting judges to deviate below the mandatory minimums when a situation warrants such a deviation.²³⁷

The Justice Safety Valve Act may face a more uphill battle. Because the Act theoretically applies to all mandatory minimums, its impact may be much broader. While the return of judicial discretion is imperative to achieve the balance desired by the Framers, there is potential for the unfettered judicial discretion

229. See *infra* Part VI for a more detailed discussion of the potential effects of the Justice Safety Valve Act on judicial discretion.

230. Riley, *supra* note 26, at 301.

231. *Id.*

232. *Id.* at 285–86.

233. *Id.* at 286.

234. Bernick & Larkin, *supra* note 33, at 5.

235. *Id.* at 6.

236. *Id.* at 2, 6.

237. *Id.* at 6.

seen in the nineteenth and twentieth centuries to return if the Act is passed.²³⁸ Thus, to satisfy the Separation of Powers Doctrine, the Justice Safety Valve Act should be amended to include advisory criteria for judges to consider before departing from mandatory minimums, similar to the criteria enumerated in the Smarter Sentencing Act and utilized in Attorney General Holder's new charging policies.

These criteria would provide guidance similar to the Guidelines. Providing criteria would be a tool to prevent wildly disparate sentencing. Similar to the Guidelines, these criteria would help judges deviate below mandatory minimums with "reasonable uniformity."²³⁹ The reasoning behind the advisory Guidelines would apply equally to criteria used under the Justice Safety Valve Act. More specifically, the Guidelines help "further congressional objectives," which include: (1) "providing certainty and fairness in meeting the purposes of sentencing"; (2) "avoiding unwarranted sentencing disparities"; and (3) "maintaining sufficient flexibility to permit individualized sentences when warranted."²⁴⁰ If amended to include advisory criteria, the Justice Safety Valve Act would similarly further congressional objectives while still providing the judiciary with the power constitutionally and traditionally afforded to them. Further, with the deferential standard of review mandated by cases such as *Rita* and *Gall*, it would remain difficult to appeal a sentence.

Furthermore, while appellate courts have the power to overturn improper sentencing decisions, they are bound by a high standard of review and may only reverse if the trial court abuses its discretion.²⁴¹ Should the Justice Safety Valve Act pass as is, it would be all the more difficult for appellate courts to review sentences because judges are provided no criteria on which to base their decisions. Although increased judicial discretion is necessary for the branches of government to finally reach a balance of power, the Justice Safety Valve Act is a step too far. An unbalanced government, with too much power in any one branch, con-

238. *Id.*

239. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 cmt. background (2013), available at <http://www.ussc.gov/guidelines-manual/2013/2013-1a1>.

240. *Id.*

241. *Gall v. United States*, 552 U.S. 38, 52–53 (2007).

travenes the Framers' purposeful separation of governmental powers.

VII. CONCLUSION

The federal government is operating within a broken system and an overhaul is needed. Tough-on-crime policies and mandatory minimum-drug laws have led to a lack of judicial sentencing discretion, an unsustainable prison population, massive increases in the amount of money spent on housing incarcerated persons, and communities plagued by crime and poverty.

Traditionally, federal judges enjoyed wide latitude in sentencing criminal defendants. Judges issued individualized sentences, meant to fit the defendant and not just the crime. This unfettered discretion, unfortunately, led to large sentencing disparities, and eventually prompted legislators to restructure sentencing schemes. This reform movement, coupled with the strict mandatory minimum-sentencing schemes of the 1980s, essentially stripped sentencing discretion from judges—forcing many of them to impose sentences they found excessive and fundamentally unfair—and placed it squarely in the hands of federal prosecutors. Because certain criminal charges are accompanied by mandatory sentences, prosecutors' ability to pick and choose what charges to file essentially provides them the sentencing power constitutionally and traditionally afforded the judiciary.

Additionally, although originally enacted to catch drug kingpins, Congress set mandatory minimum-triggering quantities too low. As a result, nonviolent, street-level offenders make up the majority of those sentenced under these laws. These mandatory minimums and the war on drugs have wreaked havoc on communities—particularly minority neighborhoods. The system has facilitated a cycle of poverty and criminality. Children are growing up without fathers, women without husbands. Whether in the form of jail, prison, probation, or parole, offenders are under the umbrella of the penal system. Persons with criminal records cannot vote, struggle to find housing and jobs, and often recidivate.²⁴²

The high number of incarcerated persons are expensive to house, costing the Department of Justice \$6.8 billion a year to

242. ALEXANDER, *supra* note 2, at 142, 148–54.

maintain.²⁴³ The rate of growth is unsustainable, requiring changes in sentencing policy. Importantly, a reduction in sentence length for drug offenses would be the most efficient way to decrease prison population growth.²⁴⁴ Several states have already reformed their criminal justice systems—with success.²⁴⁵ It is time for Congress to do the same.

The Executive branch has already taken action to alleviate some of the wrongs of the current system. On April 23, 2014, the Department of Justice announced its Clemency Initiative.²⁴⁶ The Initiative is aimed at “promot[ing] the most fundamental of American ideals—equal justice under [the] law.”²⁴⁷ In announcing the Initiative, Deputy Attorney General James M. Cole stated: “For our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. . . . [These] [o]lder, stringent punishments that are out of line with sentences imposed under today’s laws erode people’s confidence in our criminal justice system.”²⁴⁸ Although mandatory minimum statutes have placed more sentencing power in the hands of the Executive branch, the Executive branch is acting within its constitutional power to remedy the effects of these strict statutory schemes.²⁴⁹

To bring our criminal justice system to a state of equilibrium, the judiciary should receive more discretion in the sentencing phase. After all, the Separation of Powers Doctrine is meant to ensure that each branch of government “play[s] a distinct role in

243. *How the Justice Safety Valve Act of 2013 Saves Money & Enhances Safety*, *supra* note 225.

244. La Vigne & Samuels, *supra* note 7, at 6.

245. GROWTH OF INCARCERATION, *supra* note 15, at 73 (citing an annual report issued by the National Conference of State Legislatures). For example, high-profile changes have been made to “New York’s 1973 Rockefeller Drug Laws and the 1986 federal 100[.]1 law for sentencing crack and powder cocaine offenses.” *Id.* at 74. See *supra* text accompanying notes 126–128 (explaining Texas’s criminal reform). See also Nancy La Vigne et al., *Justice Reinvestment Initiative State Assessment Report*, URB. INST. JUST. POL’Y CENTER 1 (Jan. 2014), <http://www.urban.org/UploadedPDF/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf> (describing the Justice Reinvestment Initiative (JRI) model and reporting the experiences of seventeen participating states and the interim outcomes).

246. *Clemency Initiative*, *supra* note 10. Article II of the United States Constitution provides the Executive branch with clemency power.

247. *Clemency Initiative*, *supra* note 10.

248. *Id.* (quotations omitted).

249. *Id.* For more information on the Clemency Initiative, see *Office of the Pardon Attorney*, DEPT OF JUST., <http://www.justice.gov/pardon/index.html> (last visited Apr. 16, 2015).

criminal proceedings.”²⁵⁰ Under the current statutory scheme, the roles are muddled; the Executive branch both enforces the laws and ultimately decides sentences by choosing what charges to file. It was the Framers’ intention, however, to place sentencing power in the hands of the judiciary, so that it may protect offenders from the “unjust application of the rule of the majority.”²⁵¹

We must keep in mind that we sentence people, not numbers.²⁵² Although fixing our broken system requires much more than adjusting mandatory minimums and enhancing judicial discretion, passing the Smarter Sentencing and Justice Safety Valve Acts are two bipartisan steps in the right direction. By passing the Smarter Sentencing Act, Congress would: (1) reduce mandatory minimums for drug offenses—the driving force behind prison growth; (2) return a small amount of judicial sentencing discretion; and (3) apply the Fair Sentencing Act retroactively, thereby releasing up to 8,800 people and beginning to rectify racial disparities. The Smarter Sentencing Act would save taxpayers an estimated \$24 billion over twenty years, which would be needed to house incarcerated persons, pay staff, and construct prisons needed to maintain a population that is already overcapacity.

Furthermore, the Justice Safety Valve Act would make sweeping changes to judicial sentencing discretion by enabling judges to deviate below the mandatory minimum when justice and fairness calls for it. While the Justice Safety Valve Act has the potential to save millions of dollars, it also has the potential to go one step too far in returning judicial discretion. If true balance in the criminal justice system is to be reached, the Justice Safety Valve Act should be amended to include advisory criteria on which judges may make sentencing decisions.

250. Riley, *supra* note 26, at 285; *supra* text accompanying note 30.

251. Riley, *supra* note 26, at 304; *supra* text accompanying note 154.

252. Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279 (2007), available at <http://sentencing.nj.gov/downloads/pdf/articles/2007/Apr2007/document06.pdf>.

