

**DEMOCRATIC VIEWS  
ON  
CRIMINAL JUSTICE REFORMS  
RAISED BEFORE  
THE OVER-CRIMINALIATION TASK FORCE  
& THE SUBCOMMITTEE ON CRIME, TERRORISM,  
HOMELAND SECURITY, AND INVESTIGATIONS**

**SUBMITTED BY  
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&  
OVER-CRIMINALIZATION TASK FORCE**

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## I. INTRODUCTION

I have been an elected official for 36 years, both at the state and federal level. When it comes to crime policy, we have a choice - we can reduce crime or we can play politics. For far too long, government officials have chosen to play politics by enacting so-called "tough on crime" slogans such as "three strikes and you're out" or "you do the adult crime, you do the adult time." As appealing as these policies may sound, their impacts range from a negligible reduction in crime to an increase in crime.

I believe in the First Law of Holes: when you find yourself in a hole, the first thing you should do is stop digging. Clearly, our policies and laws have not---and are not---working.

All of the slogans and soundbites have achieved is the highest incarceration rate in the world, with 5% of the world population, the U.S. has 25% of its prisoners. And adding insult to injury, several recent studies have concluded that our incarceration rate is so high that it has a counterproductive effect---the slogans and soundbites are adding to crime, not preventing it. The situation is so acute in the minority community that the Children's Defense Fund labels our present incarceration problem as the "Cradle-to-Prison Pipeline."

During my 15-year tenure in the Virginia General Assembly, starting first in the House of Delegates in 1978 and then in the Senate in 1983, I sponsored laws critical to Virginians in healthcare, education, employment, economic development, crime prevention, social services, and consumer protection. I am particularly proud to have sponsored the Neighborhood Assistance Act, which provides tax credits to businesses for donations made to approved social service and crime prevention programs. I have seen firsthand how investments in opportunities and communities are the most powerful crime prevention weapons we have as lawmakers.

When I was elected to the U.S. House of Representatives in November 1992, I became the first African American elected to Congress from the Commonwealth of Virginia since Reconstruction and only the second African American elected to Congress in Virginia's history.

During my service on the Committee on the Judiciary, on which I am the Ranking Member of the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations and a member of the Subcommittee on the Constitution and Civil Justice. I also serve on the Committee on Education and the Workforce, on which I am a member of the Subcommittee on Early Childhood, Elementary and Secondary Education and the Subcommittee on Health, Employment, Labor, and Pensions.

In my more than 20 years of service in Congress thus far, I have championed the rights and civil liberties contained in the U.S. Constitution and the Bill of Rights for all Americans, specifically leading and joining efforts to pass comprehensive juvenile justice reform and criminal justice reform. Much like the legislative efforts I sponsored in Virginia, the ones I have

sponsored and supported in Congress are based upon programs that are proven, by statistics, to work—programs that improve resources to state and local governments and services, opportunities, and alternatives to individuals.

Over this past session of the 113th Congress, our Subcommittee, historic bi-partisan Over-Criminalization Task Force, and our full Committee has had the benefit of hearings, including with the relevant federal stakeholders in our criminal justice system, and the reports submitted but also the equal and important benefit of quantitative and qualitative information in the public domain by academics, nonpartisan research organizations, advocacy groups, community organizers, and Americans around the country. We have asked for their input to help identify the drivers of this over-criminalization problem and for their recommendations for reform.

As I have begun to reflect on my transition from the Committee on the Judiciary to the Committee on Education and Workforce, which will take effect in the 114th Congress, I wanted to examine the policies we have engaged in over the past several decades; the unintended consequences those policies have had on our fellow Americans, our criminal justice system, and our Constitutional scheme; the reforms states have successfully implemented to address catalysts and issues similar to ours; and recommendations for the executive, judicial, and legislative branches as well as for those to whom we are all accountable—the American people.

Although the full Task Force did not come to conclusions, I hope this will be a starting point for the 114<sup>th</sup> Congress. Thank you in advance for your time and consideration. It is my sincere hope that this capstone of my time as Ranking Member of the Subcommittee on Crime will form a cornerstone for a more fair, just, and effective federal criminal justice system.

## II. FEDERAL CRIMINAL LAW AND POLICY

### A. MAJOR FEDERAL CRIMINAL LEGISLATION

#### 1. HISTORICAL CONTEXT

Over the past 40 years, federal criminal laws and policies have led to a dramatic increase in the number of people prosecuted and incarcerated federally, the length of their sentences, and the financial and human costs that they---and we as a society---face upon their the conclusion of their sentence.

Former U.S. Attorney General Ed Meese observed:

Congress frequently criminalizes crimes after notorious incidents that have received extensive media attention. This type of ‘feel-good’ legislation often causes the public to feel that ‘something is being done’ and creates the illusion of greater crime control [despite the fact that] the chances of the legislation working to reduce crime are exceedingly low, and in some cases the chances of it doing harm are very high.<sup>1</sup>

As we saw then and continue to see today, Congress reacts to media sensationalism of a graphic crime story by passing new laws that impose harsh criminal penalties in an understandable rush to “do something” politically. The intellectually easiest solution that holds the greatest public appeal and appeases fear and retribution is to fill up the nation’s prisons.

The Anti-Drug Abuse Act of 1986 (“ADAA”) established a mandatory minimum sentencing regime for federal drug crimes keyed to the weight and type of drug involved in the offense.<sup>2</sup> In passing the ADAA, Congress assumed that the weight of the drugs involved would be a good proxy for culpability and role.<sup>3</sup> It was intended to target cases implicating uniquely federal interests---to wit, those with an international or significant interstate component or those that would in appropriate for states to investigate and prosecute, such as those involving allegations of state-level corruption.<sup>4</sup> It was Congress’s intent to target kingpins, masterminds, and major criminal operatives, while leaving lower-level offenders to the states.<sup>5</sup>

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<sup>1</sup> Edwin Meese III, *The Dangerous Federalization of Crime*, WALL ST. J., Feb. 22, 1999.

<sup>2</sup> See 18 U.S.C. § 960; 21 U.S.C. § 841 (2014).

<sup>3</sup> Sen. Robert Byrd, 132 Cong. Rec. 27, 193-94 (Sept. 30, 1986).

<sup>4</sup> 132 Cong. Rec. S. 14,300 (Sept. 30, 1986); see also 132 Cong. Rec. 22,993 (Oct. 11, 1986) (statement of Rep. LaFalce) (“the bill... acknowledge[s] that there are differing degrees of culpability in the drug world. Thus, separate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers”); H.R. Rep. No. 9-845, 99th Cong., 2d Sess., 11-17 (1986) (construing penalty provisions of a comparable bill (H.R. 5394) similarly).

<sup>5</sup> *Id.*

Twenty years ago, in 1994, the largest federal crime bill in the history of the United States was signed into law: The Violent Crime Control and Law Enforcement Act of 1994.<sup>6</sup> It provided for 100,000 new police officers, \$9.7 billion in funding for prisons and \$6.1 billion in funding for prevention programs.<sup>7</sup> It also provided for “boot camps” for delinquent minors, who would receive harsher treatment under the law.<sup>8</sup> It implemented a federal assault weapons ban.<sup>9</sup> Most significantly, it imposed tougher and longer prison sentences and expanded the federal death penalty to include over 60 new federal death penalty offenses and created new federal crimes, including immigration, hate crimes, sex crimes, and gang-related crimes.<sup>10</sup> It also overturned a section of the Higher Education Act of 1965, which had previously permitted prison inmates to receive a Pell Grant for post-secondary education while incarcerated.<sup>11</sup> The bill’s rollback of this provision effectively eliminated the ability of lower-income prison inmates to receive college educations during their term of imprisonment, thus ensuring the education level and employment prospects of most inmates remained unimproved during and after their period of incarceration. The bill incentivized states to punish people more severely in exchange for a share of their federal pot of money for hiring and prisons.<sup>12</sup> Unsurprisingly, 28 states and the District of Columbia enacted strict sentencing laws, which have had the intended effect of putting more people in prison for longer under the belief that that would lower crime, recidivism rates, and improve public safety.<sup>13</sup>

To put this legislation in the appropriate historical context, it was one year after: (1) the mass shooting at 101 California Street in San Francisco, in which a gunman killed 8 people and wounded 6 others at the law firm located there, before killing himself; 1993 Waco siege and other high-profile instances of violent crime. Public perception and sentiment were reflected in “tough on crime” approaches on both sides of the aisle rather than examining the facts, which demonstrated that the nation’s high murder and violent crime rates had already peaked and were headed downward.<sup>14</sup>

The reason I voted against VCCLEA at the time was because its provisions were not evidence-based and it also did not support prevention programs sufficiently that are proven to reduce crime. For example, social programs such as midnight basketball and other prevention initiatives were mischaracterized in the political arena as spending federal money so that crackheads could play basketball in the middle of the night. But what that simplistic and inaccurate rhetoric left out was the fact that every time midnight basketball was funded in a

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<sup>6</sup> Pub. L. 103-322, 108 Stat. 1796 (1994).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Carrie Johnson, *20 Years Later, Parts Of Major Crime Bill Viewed As Terrible Mistake*, NPR, Sep. 12, 2014, 20 Years Later, Parts Of Major Crime Bill Viewed As Terrible Mistake, available at <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>.

<sup>14</sup> *Id.*

neighborhood, the crime rate plummeted.<sup>15</sup> Midnight basketball ended up saving more money than it spent because it averted funding needed for jails and prisons, but that part was left out of the debate.<sup>16</sup> Another reason I voted against VCCLEA was due to what I viewed as the overfederalization of offenses already encapsulated in the federal criminal code or already prosecuted by states as well as the overcriminalization of excessive, counterproductive, and discriminatory mandatory sentences and enhancements.

These omnibus federal statutes, in addition to many others, focused on retribution, incapacitation, and one-size-fits-all justice rather than proportionality, individualized determinations, and rehabilitation.

Although it was a laudable goal to target high-level violent offenders, kingpins, leaders, managers, and organizers of criminal syndicates to make communities safer, blunt sentencing policies such as those reflected in our federal criminal laws have gone too far and swept in too many nonviolent, low-risk individuals for far too long, many of who have been sentenced to life without parole terms without any chance of rehabilitation. The data demonstrates that we are actually less---not more---safe as a result of these policies.

## **2. FEDERAL MANDATORY PENALTIES FOR DRUG CASES**

The federal code currently contains 195 mandatory minimum sentences.<sup>17</sup> Although mandatory penalties represent only 4 percent of the total number of the approximately 5,000<sup>18</sup> criminal statutes, they represent a significant share---approximately 34 percent of those in federal prison (75,500 of the more than 219,000 inmates in federal prison are serving a mandatory sentence).<sup>19</sup>

### **(I) DRUG QUANTITY: AGGREGATION AND CONSPIRACY**

Our federal drug laws provide for mandatory minimum penalties of 5-, 10-, 20-years, and life without parole based solely on the quantity of the drug mixture at issue.<sup>20</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Federal Mandatory Minimums* (2012), FAMILIES AGAINST MANDATORY MINIMUMS, available at <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

<sup>18</sup> Alison M. Smith & Richard M. Thompson II, CONGRESSIONAL RESEARCH SERVICE, *Mem. to Crime, Terrorism, Homeland Sec. & Investigations Subcomm. (H. Judiciary), Criminal Offenses Enacted from 2008 – 2013* (June 23, 2014) [hereinafter 2014 CRS Report], available at <http://freebeacon.com/wp-content/uploads/2014/08/CRS-Report-Up-Dated-New-Crimesfinal-1.pdf>; see also *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options 1* (Jan 22, 2013) [hereinafter 2013 CRS Report], CONGRESSIONAL RESEARCH SERVICE, available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>

<sup>19</sup> U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) [hereinafter 2011 Mandatory Penalties Congressional Report], available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

<sup>20</sup> 21 U.S.C. §§ 841, 846, 952, 953, 960, 963.

There are many ways to reach these triggering amounts. Law enforcement and the prosecution can aggregate multiple sales.<sup>21</sup> They can also engage in what are known as “reverse stings” in which an undercover agent will solicit targets to participate in a robbery or purchase reaching that threshold.<sup>22</sup> Moreover, because conspiracy to commit an offense carries the same culpability as the underlying crime in the federal system, law enforcement and prosecutors may use conspiracy charges to increase the quantity of drugs for which a defendant is responsible or to add in weapons enhancements, even if the defendant did not possess the drugs or guns.<sup>23</sup> This is because a defendant may be treated as a co-conspirator if he knowingly and willingly entered into an agreement with one or more people to commit a crime if he knew or reasonably could have foreseen the amount.<sup>24</sup> This leads to absurdly long sentences that defy commonsense. For example, the girlfriend of a drug dealer who agrees to deliver five grams of heroin one time could ostensibly be held responsible for the entire 100 kilograms of heroin and the firearms that her boyfriend had hidden in his house.

## **(II) PRIOR CONVICTIONS: MANDATORY SENTENCING ENHANCEMENTS - 21 U.S.C. § 851**

The mandatory sentencing enhancement provided for in 21 U.S.C. § 851(a) was designed to provide a powerful tool for prosecutors for use in cases against “big fish” defendants considered leaders, supervisors, and managers who were repeat drug offenders.<sup>25</sup> This enhancement is based on the existence of the defendant’s past drug convictions and is triggered **only if** prosecutors **choose** to file a prior felony information with the court.<sup>26</sup> If a prosecutor decides to notify the court of one prior conviction, the defendant’s mandatory minimum sentence will be doubled.<sup>27</sup> If the prosecutor decides to notify the court of two prior convictions for a defendant facing a ten-year mandatory minimum sentence, the mandatory minimum increases to life and there is no parole in the federal system.<sup>28</sup> The judge is statutorily bound to impose the enhanced mandatory minimum even if he or she disagrees with it.<sup>29</sup> If the prosecutor decides not to file these notices with the court, the enhancement does not apply.

There is no limit on how old the prior “felony drug offense” must be nor the quality and character of that prior offense (e.g., a decades-old diversionary disposition for simple marijuana possession for personal use), which results in unfair applications of the enhancement to unintended victims.<sup>30</sup>

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<sup>21</sup> See, e.g., *United States v. Pressley*, 469 F.3d 63 (2d Cir. 2006); *United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003).

<sup>22</sup> Victoria King, *Appellate judges question ATF's use of 'reverse stings' at hearing*, LA TIMES, Nov. 20, 2014, available at <http://www.latimes.com/local/california/la-me-stash-house-stings-20141121-story.html>.

<sup>23</sup> See, e.g., 21 U.S.C. § 963

<sup>24</sup> *Id.*

<sup>25</sup> 21 U.S.C. §§ 841, 851.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

### **(III) FIREARMS: MANDATORY CONSECUTIVE SENTENCES - 18 U.S.C. § 924(C)**

This provision was enacted in response to public fear over street crime, civil unrest, and the shooting of Martin Luther King, Jr.<sup>31</sup> The day after the assassination of Robert F. Kennedy, § 924(c) was proposed as a floor amendment to the Gun Control Act of 1968 and the Omnibus Crime Control and Safe Streets Act of 1968.<sup>32</sup> **It passed that same day with no congressional hearings or prior legislative deliberation.**<sup>33</sup> There was only a speech by the provision's sponsor that this would "persuade the man who is tempted to commit a federal felony to leave his gun at home."<sup>34</sup> Given how the statutory language has been interpreted, we have gotten far away from that intent to deter conduct.

If a weapon was involved, in **any** way, in a drug offense, prosecutors can threaten to add in mandatory sentences under 18 U.S.C. § 924(c) that must run consecutively to any other sentence that is imposed.<sup>35</sup> The first § 924(c) conviction imposes a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime.<sup>36</sup> Second and subsequent convictions (even in the same indictment) each carry 25-year consecutive sentences, which result in grotesquely long sentences for drug defendants.<sup>37</sup>

In the decades since the enactment of § 924(c), Congress has amended this provision several times, transforming it into one of the most draconian punishments. It was amended from a mandatory minimum of 1 year to mandatory minimums of 5-, 7-, 10-, 15-, 25-, 30-years and life in prison that are required to run consecutive to any and all other counts of convictions.<sup>38</sup>

This can lead to absurd results, such as a situation where a hunting rifle is found in the closet in a basement of the house at which a defendant was visiting for several minutes to deliver drugs.

### **(IV) ARMED CAREER CRIMINAL ACT - 21 U.S.C § 924(E)**

Section 924(e) of title 21 of the United States Code, referred to as the Armed Career Criminal Act ("ACCA"), provides that any person who is prohibited from possessing a firearm and also has three previous convictions for a "violent felony" and/or "a serious drug offense," all committed on different occasions, will face a mandatory minimum of 15 years in prison.<sup>39</sup>

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<sup>31</sup> See 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 18 U.S.C § 924(c).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 21 U.S.C. § 924(e) (2014) (§ 922(g) prohibits possession of a firearm by convicted felons, fugitives, unlawful users of controlled substances, those committed to a mental institution, aliens without legal status, and those convicted of domestic violence offenses).

Typically, prior drug convictions, including ones from state court, will suffice to trigger this mandatory minimum. Similar to § 924(c), the possession of this firearm can be constructive possession—that is, if there is a firearm found on the premises of where the defendant was visiting or in the car in which the defendant was traveling, even if the firearm was not the defendant’s.<sup>40</sup> Among drug defendants with a weapon involved in their offense, those who went to trial were 2.5 times more likely to receive consecutive sentences for § 924(c) charges than those who pled guilty.<sup>41</sup>

## **B. DEPARTMENT OF JUSTICE POLICIES**

Since 2003, relevant DOJ policy has been set by the “Ashcroft Memo,” which mandated that all federal prosecutors “must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.”<sup>42</sup> The memo defined the “most serious offenses” as those that “generate the most substantial sentence under the Sentencing Guidelines,” unless a mandatory minimum sentence or a consecutive sentence would create a longer sentence.<sup>43</sup>

In May 2010, Attorney General Eric Holder modified the mandates in the Ashcroft Memo.<sup>44</sup> While the Ashcroft Memo mandated that federal prosecutors “must” charge and pursue the most serious offenses, Attorney General Holder clarified that, in 2010, the “most serious offense” would depend on “the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.”<sup>45</sup>

Thereafter, Attorney General Holder issued a memorandum in 2013 (“Holder Memo”) revising the DOJ’s policy on charging mandatory minimum sentences and recidivist enhancements for certain drug cases.<sup>46</sup> He instructed all federal prosecutors to “ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug

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<sup>40</sup> 18 U.S.C. § 924(c).

<sup>41</sup> U.S. Sentencing Comm’n, 2012 Sourcebook of Federal Sentencing Statistics, “Fig. A: Offenders in Each Primary Offense Category, Fiscal Year 2012” (2012) [hereinafter 2012 Sourcebook of Federal Sentencing Statistics], available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012>.

<sup>42</sup> Mem. from John Ashcroft, Attorney General, to All Federal Prosecutors 2 (Sept. 22, 2003), available at [http://www.justice.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm).

<sup>43</sup> *Id.* Outlined in the memo were six limited exceptions in which prosecutors in certain, specific circumstances may decline to charge or pursue the most serious offense: (1) if the sentence would not be affected; (2) if a “fast-track” program is agreed to using “charge bargaining”; (3) if post-indictment circumstances cause a prosecutor to determine that the most serious offense is not readily provable; (4) if it is necessary to obtain “substantial assistance”; (5) if statutory enhancements are available; or (6) if other exceptional circumstances exist. *Id.* at 2-4.

<sup>44</sup> Mem. from Eric Holder, Attorney General, to All Federal Prosecutors (May 19, 2010) [hereinafter Holder 2010 Memo], available at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf>.

<sup>45</sup> *Id.* at 2.

<sup>46</sup> Mem. from Eric Holder, Attorney General, to All Federal Prosecutors (Aug. 12, 2013) [hereinafter Holder 2013 Memo], available at <http://www.justice.gov/oip/docs/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

traffickers.”<sup>47</sup> The Holder Memo stressed that long sentences for low-level drug offenders do not promote public safety or deterrence, but instead have resulted in heightened prison costs and reduced spending on other criminal justice initiatives.<sup>48</sup>

Moreover, the Holder Memo also instructed prosecutors to “decline to charge the quantity necessary to trigger a mandatory minimum sentence” only if the defendant: (1) was not involved in the use of violence; (2) was not an organizer, leader, manager or supervisor within a criminal organization; (3) did not have significant ties to a large-scale drug trafficking organization; and (4) did not have a significant criminal history.<sup>49</sup>

Additionally, when considering whether a sentencing enhancement under 21 U.S.C. § 851 is appropriate, the Holder Memo dictates that prosecutors should consider a number of factors, including whether the defendant was an organizer within a criminal organization, whether the defendant was involved in the use or threat of violence, and whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants.<sup>50</sup>

To summarize, proponents argue that mandatory minimums: (1) help eliminate disparities in sentencing by providing uniformity, certainty, and predictability of outcomes; (2) ensure that offenders are appropriately deterred, incapacitated, and punished; (3) encourage guilty pleas and cooperation with law enforcement; and (4) target sophisticated, violent recidivists.<sup>51</sup>

When prosecutors choose to pursue charges or enhancements carrying mandatory penalties and the defendant is convicted, the judge has no choice but to impose that mandatory term of incarceration. Thus, prosecutors, in effect, sentence defendants at the time they decide which charges and enhancements to bring.

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<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 3.

<sup>51</sup> U.S. Sentencing Comm’n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ch.2 (1991) [hereinafter 1991 Mandatory Penalties Congressional Report], available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/special-report-congress>; see also 2011 Mandatory Penalties Congressional Report.

### III. THE CASE FOR REFORM: THE NUMBERS

With only five percent of the world's population America has 25% of the world's prisoners;<sup>52</sup> one in 99 American adults is incarcerated;<sup>53</sup> and one in thirty is under the supervision of the criminal justice system.<sup>54</sup>

Between 1970 and 2010, the number of people incarcerated in the United States increased by 700% even though the U.S. population only grew by 32%.<sup>55</sup> The federal inmate population has grown from 24,252 in 1980 to 209,771 in 2010 and its current population exceeds 219,000.<sup>56</sup>

The federal prison population has grown at a rate three times higher than state prison populations in the past 10 years.<sup>57</sup> Even though state incarceration rates have been declining since 2011,<sup>58</sup> the federal prison population continues to grow. This is due not only to the increase in federal criminal laws themselves but their increased enforcement. The federal criminal code has increased to approximately 5,000 crimes, about double what it was in 1970 and one third more than 1980, such that in 2010, 100,366 persons were charged with federal crimes in 2010, up from 83,963 in 2000, 66,341 in 1990, and 39,914 in 1980.<sup>59</sup> Four hundred and fifty-two (452) new federal criminal offenses were enacted between 2000 and 2007, 439 were enacted between 2008 and 2013---averaging 68.5 new crimes per year.<sup>60</sup>

As a threshold matter, even before an adjudication on the merits, our federal courts are releasing on bond only half of those it used to; the rest are detained until the resolution of their hearing, trial, and/or sentencing, which contributes to correctional costs. In 1984, before

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<sup>52</sup> American Civil Liberties Union, *Mass Incarceration Problems 1*, available at [https://www.aclu.org/files/assets/massincarceration\\_problems.pdf](https://www.aclu.org/files/assets/massincarceration_problems.pdf).

<sup>53</sup> Pew Center on the States, *One in 100: Behind Bars in America 2008* 19 (2008) [hereinafter Pew 1 in 100 Report], available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2008/one20in20100pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2008/one20in20100pdf.pdf).

<sup>54</sup> Pew Center on the States, *One in 31: The Long Reach of American Corrections 1* (2009) [hereinafter Pew 1 in 31 Report], available at <http://www.convictcriminology.org/pdf/pew/onein31.pdf>.

<sup>55</sup> *Penalties: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (May 30, 2014) (statement of Marc Levin, Esq. Policy Director, Right on Crime Initiative, Texas Public Policy Foundation) [hereinafter Levin Over-Criminalization Task Force Statement] at 3.

<sup>56</sup> E. Ann Carson, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2013* (2014), <http://www.bjs.gov/content/pub/pdf/p.13.pdf>; 2011 Mandatory Penalties Congressional Report.

<sup>57</sup> See generally E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012 Advance Counts* (2013); E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admissions and Releases 1991-2012* (2013); William J. Sabol et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2006* (2007).

<sup>58</sup> *Id.* The state prison population in the United States decreased by 2.1 percent in 2012, following a 1.5 percent decrease in 2011 and a 0.2 percent decrease in 2010.

<sup>59</sup> U.S. Courts, *Judicial Facts & Figures*, Tbl. 5.1, available at [www.uscourts.gov/uscourts/Statistics/JudicialFactsandFigures/2012/Table501.pdf](http://www.uscourts.gov/uscourts/Statistics/JudicialFactsandFigures/2012/Table501.pdf); see also Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals & Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005).

<sup>60</sup> See 2013 CRS Report at 1; see also 2014 CRS Report at 1.

passage of the Bail Reform Act, 74% of defendants were released on bond; in 2013, just 34% were released.<sup>61</sup>

The federal code currently contains 195 mandatory minimum sentences.<sup>62</sup> Although mandatory penalties represent only 4% of the total number of the approximately 5,000 criminal statutes, they represent a significant share---approximately 34% of those in federal prison (75,500 of the more than 219,000 people in federal prison are serving a mandatory sentence).<sup>63</sup> No federal mandatory penalty (sentence, enhancement, consecutive charge) has been repealed in the last forty years. Indeed, the fault is bipartisan: every administration and each Congress on a bipartisan basis, at least in some instances, has supported mandatory penalties.<sup>64</sup>

The data from BOP and the Sentencing Commission demonstrate that the two primary engines of federal overincarceration are drug and immigration offenses.<sup>65</sup>

Far and away, drug offenses are the largest determinant of the growth in the BOP's population.<sup>66</sup> Drug convictions alone comprise about 2/3 of the increase in the federal prison population.<sup>67</sup> Since 1980, our federal prison population has increased 1000%; the average federal sentence has doubled; and the average federal drug sentence has tripled.<sup>68</sup> Federal inmates represent 2/3 of the 3,278 people in this country serving life without parole for nonviolent offenses.<sup>69</sup> Of these, 96% are serving life without parole for drug crimes.<sup>70</sup> A distant but growing second, immigration offenses are the second largest driver for BOP growth.<sup>71</sup> Immigration cases continue to make up the bulk of the caseload in five districts: Arizona; Southern District of Texas; Western District of Texas; Southern District of California; and New Mexico.<sup>72</sup> Many defendants face longer periods of imprisonment than are necessary to serve the purposes of

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<sup>61</sup> *Agency Perspectives: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) (statement of David E. Patton, Executive Director, Federal Defenders of New York, Eastern & Southern Districts of New York) at 3 [hereinafter Patton Over-Criminalization Task Force Statement].

<sup>62</sup> See Families Against Mandatory Minimums, *Federal Mandatory Minimums* (2012), available at <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

<sup>63</sup> 2011 Mandatory Penalties Congressional Report.

<sup>64</sup> See Families Against Mandatory Minimums, *Federal Mandatory Minimums* (2012), available at <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

<sup>65</sup> Julie Samuels, Nancy La Vigne & Samuel Taxy, URBAN INSTITUTE, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 11 (Nov. 2013) [hereinafter *Stemming the Tide*].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Heather C. West & William J. Sabol, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2007* (2008); 2012 Sourcebook of Federal Sentencing Statistics at tbl. 6.57; U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ch. 2 (2004) [hereinafter 15 Year Report on Federal Sentencing].

<sup>69</sup> American Civil Liberties Union, *A Living Death: Life without Parole for Nonviolent Offenses* 11 (2013) [hereinafter *A Living Death*].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at fig. 2

<sup>72</sup> *Id.* at 11.

sentencing as upon the conclusion of their sentence, they will be transferred to DHS custody for further detention prior to removal proceedings.<sup>73</sup>

**There is no parole in the federal system.**<sup>74</sup> This means that mandatory sentencing policies result in excessive prison terms with no institutional mechanism to provide relief in terms of a shorter sentence.

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, mandatory minimums have proliferated over the past twenty years.<sup>75</sup> Between 1991 and 2011, the number of mandatory minimum penalties more than doubled, from 98 to 195.<sup>76</sup> There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the federal prison population.<sup>77</sup> This growth "is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates."<sup>78</sup>

Based upon its data analysis, the Commission found that "offenses carrying mandatory minimum sentences have played a significant role" in driving the dramatic increase in the federal prison population over the past two decades.<sup>79</sup> The number of offenders in the custody of the BOP who were convicted of violating a statute carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent.<sup>80</sup> Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing — who had not received relief from that mandatory sentence — increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.<sup>81</sup>

The number of inmates housed by the BOP tripled from 1991 to 2012: from 71,608<sup>82</sup> to 217,815 inmates.<sup>83</sup> The rapid and unchecked growth of the federal prison population had led to "significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective."<sup>84</sup>

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<sup>73</sup> *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 733 (E.D. Va. 2005).

<sup>74</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-471, 98 Stat. 1987 (1984).

<sup>75</sup> 2011 Mandatory Penalties Congressional Report at 71.

<sup>76</sup> *Id.*

<sup>77</sup> 2013 CRS Report at 51.

<sup>78</sup> *Id.*

<sup>79</sup> 2011 Mandatory Penalties Congressional Report at 81-82.

<sup>80</sup> *Id.* at 81.

<sup>81</sup> *Id.*

<sup>82</sup> Allen J. Beck & Darrell K. Gilliard, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 1994* 1 (1995).

<sup>83</sup> 2011 Mandatory Penalties Congressional Report at 83.

<sup>84</sup> *Id.* (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Comm'n (Mar. 17, 2011)); *Brown v. Plata*, 563 U.S. \_\_\_, 131 S.Ct. 1910, 1923 (2011) (finding the "exceptional" overcrowding in

Federal prisons are currently operating at between 35-40% above their rated capacity, which is projected to increase to 55% by 2023.<sup>85</sup> Prison staffing has not kept up with population growth such that the ratio has increased from 4:1 in FY 2000 to 5:1 in FY 2014.<sup>86</sup> Since FY 2000, the inmate-to-staff ratio has increased from about four-to-one to a projected five-to-one in FY 2014.<sup>87</sup> Barring any meaningful changes in policy and practice, this untenable status quo will be the norm for the coming decade: the BOP projects that, through 2020, federal prisons will be overcrowded by at least 33 percent overall, with the population exceeding system capacity by at least 50,000 people each year.<sup>88</sup>

Despite the DOJ OIG identifying the BOP's increasingly severe prison capacity issues as a "programmatic material weakness" in every Performance and Accountability Report it has issued for 7 consecutive years (since 2006), the BOP's prisons have gone from being 36 percent over rated capacity in FY 2006 to being 39 percent over rated capacity in FY 2011, with BOP projecting a 15 percent increase in its inmate population by 2020.<sup>89</sup>

Because drug offenders comprise approximately one-third<sup>90</sup> of the offenders sentenced federally every year and approximately half of the federal inmates already incarcerated in the BOP,<sup>91</sup> so they are extremely important to the size and nature of the federal prison population, according to the Commission.

Second only to drug offenders, immigration offenders comprise 31.2 percent of offenders entering the federal system in fiscal year 2013, 24,972.<sup>92</sup> Offenders convicted of immigration offenses are overwhelmingly male (93.6%) and Latino (95.4%).<sup>93</sup> Almost all of them (99.4%) plead guilty,<sup>94</sup> and the average sentence for an immigration offense is 16 months.<sup>95</sup> The Commission "agrees that this is an important area for federal sentencing policy" and plans to "study . . . the guidelines applicable to immigration offenses among its proposed priorities for the next amendment cycle."<sup>96</sup>

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the California prison system was the "primary cause of the violation of a Federal right" and affirming a decision requiring the prison system to reduce the population to 137.5% of its capacity).

<sup>85</sup> Stemming the Tide at 1.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> U.S. Gov't Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* (Sept.2012), available at <http://www.gao.gov/products/GAO-12-743>.

<sup>90</sup> U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics* S-12 (2014) [hereinafter 2013 Sourcebook of Federal Sentencing Statistics].

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at S-14-15.

<sup>94</sup> *Id.* at S-26.

<sup>95</sup> *Id.* at S-29.

<sup>96</sup> *Agency Perspectives: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) (statement of Chief Judge Patti B. Saris, Chair, United States Sentencing Commission) [hereinafter Saris Over-criminalization Task Force Statement] at 4.

Accordingly, the exponential growth in our federal prison population has caused a corresponding dramatic spike in correctional spending. Consequently, the federal prison budget has increased from \$1.36 billion for fiscal year 1991<sup>97</sup> to well over \$6 billion this year.<sup>98</sup> Each dollar spent on federal corrections is a dollar that not only does not go to education, health care, national security, but is also one that deprives the DOJ of its funding for victim services, staffing, investigation, and prosecution.<sup>99</sup>

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<sup>97</sup> Pub. L. No. 101-515, 104 Stat. 2101, 2114 (1990).

<sup>98</sup> *Agency Perspectives: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) (statement of Timothy J. Heaphy, U.S. Attorney, Western District of Virginia, Dep't of Justice, at 6).

<sup>99</sup> *Id.*

## **IV. THE CALL FOR REFORM: THEIR EFFECT**

The application of our existing federal laws and policies infringe upon our fundamental Constitutional liberties and principles, contravene legislative intent, devastate our communities, and cannibalize federal funding for programs proven to reduce crime and improve public safety.

### **1. CONSTITUTIONAL**

#### **A. FEDERALISM/10<sup>TH</sup> AMENDMENT/OVERFEDERALIZATION**

In 1998, the American Bar Association convened a blue-ribbon, sixteen-member Task Force on the Federalization of Criminal Law, to review the effect of increasing federal criminal jurisdiction.<sup>100</sup>

As a threshold matter, the ABA Task Force Report noted that federal prosecutions accounted for only five percent of prosecutions nationwide, and that “state law enforcement is still the critical component in dealing with the crime that threatens the most people.”<sup>101</sup>

Despite the fact that the number of federal prosecutions paled in comparison to state ones, the ABA Task Force counseled the DOJ that “state governments are neither incapable nor unwilling to exercise their traditional responsibility to protect the lives and property of citizens,” and exhorted Congress to “reflect long and hard before it enacts legislation which puts federal police in competition with the states.”<sup>102</sup> This is because the Framers of the Constitution limited federal power and deferred generally to state police power out of concerns regarding centralized criminal law enforcement, which they feared could carry “potentially dangerous consequences.”<sup>103</sup>

Even though the Congressional intent in passing many federal crimes is to target violent crime and respond politically to high-profile cases in the media, the ABA Task Force concluded, after its exhaustive analysis, that “[i]ncreased federalization is rarely, if ever, likely to have any appreciable effect on the categories of violent crime that most concern Americans, because in practice federal law enforcement can only reach a small percentage of such activity.”<sup>104</sup>

In fact, the ABA Task Force concluded, there are “important, practical, adverse consequences that flow from inappropriate federalization,” including:

- serious problems for the administration of justice in this country, because even when prosecuted only occasionally, inappropriately federalized crimes threaten

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<sup>100</sup> See Am’n Bar Ass’n, Criminal Justice Section, *The Federalization of Criminal Law 1* (1998) [hereinafter ABA Federalization Report].

<sup>101</sup> *Id.* at 4.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 26-27.

<sup>104</sup> *Id.* at 18.

- fundamental allocations of responsibility between state and federal authorities;
- potential relegation of “less important” prosecutions to the state level, which undermines citizen confidence in state and local law enforcement mechanisms;
- possible creation of inappropriately disparate results for defendants guilty of similar behavior;
- creation of unreviewable federal prosecutorial discretion; and
- overall, an unwise allocation of scarce resources needed to meet the genuine issues of crime.<sup>105</sup>

Rather than spend finite federal resources on prosecuting cases that could be brought in either state or federal courts, the ABA Task Force counseled lawmakers to invest those resources “in already-existing state systems which bear the major burden in investigating and prosecuting crime.”<sup>106</sup> This can be accomplished by “refocusing” the national role in fighting crime on the general principles to guide lawmakers in determining whether to create a new federal crime.<sup>107</sup>

In particular, the Task Force identified four criteria for consideration in determining whether federalize an offense:

- offenses against the federal government or its inherent interests;
- criminal activity with substantial multi-state or international aspects;
- criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; or
- serious, high-level, or widespread state or local government corruption<sup>108</sup>

It therefore opined that “to create a federal crime, a strong federal interest in the matter should be clearly shown, that is, a distinctly federal interest beyond the mere conclusion that the conduct should be made criminal by some appropriate governmental entity.”<sup>109</sup>

The Federalist Papers clearly explain that “the ordinary administration of criminal and civil justice” belongs “to the province of the State governments.”<sup>110</sup> The Tenth Amendment embodies the Founding Fathers’ vision of states as laboratories for innovation and democracy.<sup>111</sup> It also functions as a check on the power of and interference with the core internal affairs of the individual states by what-was-intended-to-be a limited national government.<sup>112</sup>

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<sup>105</sup> *Id.* at 50.

<sup>106</sup> *Id.* at 55-56.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 49.

<sup>110</sup> Alexander Hamilton, THE FEDERALIST NO. 17.

<sup>111</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>112</sup> ABA Federalization Report at 25-26.

At present, federal sentencing policy, particularly in terms of its drug and gun policies, encroach on state prerogatives and conflict with local choice.<sup>113</sup> States are closer to their constituents and better reflect their distinct views on criminal justice issues (e.g., marijuana decriminalization) at a time when federal policies may be in direct conflict.<sup>114</sup> The decision to take what could be a state case “federal” effectively overrides a state’s decision that certain drug-related conduct should not be a crime in the first place or should not be enforced or should be subject to a far more lenient punishment or is not how the state would prioritize its law enforcement resources.<sup>115</sup>

As the criminal law has become more and more federalized, it now accounts for the prosecution of more and more local gun and drug offenses, the kind of street crime that had traditionally been the state’s bailiwick.<sup>116</sup> Nevertheless, in this time of strained resources, it is unclear why DOJ focuses on crimes that can and are investigated, prosecuted, and sentenced by the states rather than those crimes that have a uniquely federal focus.

## **B. SEPARATION OF POWERS**

Our current federal criminal laws and policies also infringe upon bedrock Constitutional principles of separation of powers among the three co-equal branches in order to provide a check and balance against the accumulation of too much power in one branch. The federal judiciary was designed to be an independent one---not democratically-elected or accountable---to serve as a bulwark against the tyranny of the majority against an unpopular and powerless minority targeted by the majority as represented by the legislature, who passes the laws, and the executive, who enforces them.<sup>117</sup>

Judges and juries have much more information as to the incident- and offender-specific facts of the case, yet mandatory sentencing policies prevent the judge and jury from considering these facts. Mandatory sentencing policies eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and the offender irrelevant.<sup>118</sup>

Supreme Court Justice Anthony Kennedy expressed a view shared by many jurists that our sentencing policies are “misguided” because they result in the “transfer of sentencing discretion from a [federal] judge [nominated by the President, vetted and confirmed by the

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<sup>113</sup> James A. Strazzella & William W. Taylor III, *Federalizing Crime: Examining the Congressional Trend to Duplicate State Laws*, 14 CRIM. JUST. 4 (1999) [hereinafter Strazzella & Taylor]; ABA Federalization Report at 15, 27 (1998).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Bruce A. Ragsdale, *The Federal Courts in Our Constitutional Democracy: A history of the federal judiciary*, 12 INSIGHTS ON LAW AND SOCIETY (2011), available at [http://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/12/fall/the\\_federal\\_courts\\_in\\_our\\_constitutional\\_democracy.html](http://www.americanbar.org/publications/insights_on_law_and_society/12/fall/the_federal_courts_in_our_constitutional_democracy.html).

<sup>118</sup> *Id.*

Senate] to an Assistant U.S. Attorney, often not much older than the defendant.”<sup>119</sup> This is troubling because the federal prosecutor is not a neutral observer, but, much to the contrary, the adversary in the proceeding, pursuing charges and convictions. That being the case, it is even more concerning that due to these mandatory penalties, “courts are required to reach passively as automatons and to impose a sentence which the judge may personally deem unjust.”<sup>120</sup>

Judges are then impotent to mitigate sentences based upon relevant facts of the offender (role in the offense, *mens rea*, motive, mental illness, addiction, and other mitigating factors), incident (the government’s role in facilitating the crime or influencing the quantity), and comparison to similar cases and are forced to impose sentences they find irrational, unfair, and troubling.<sup>121</sup>

The prosecutor is empowered with broad discretion to direct investigations, instigate charges against a defendant, amass evidence of crime, and seek convictions as an adversary in the trial process.

Manipulation of defendants’ sentencing exposure during the investigation phase, for example, by influencing the type and quantity of drug, has been identified as a significant source of disparity.<sup>122</sup> Shifting discretion and sentencing power leads to resultant disparities due to the exclusive perspective of one stakeholder---the prosecutor---as opposed to a more-informed holistic consideration that includes the judge, defense counsel, probation officer, and victim.

### **C. DE FACTO TRIAL PENALTIES ERODE THE RIGHT TO JURY TRIAL**

The existence and increasing use of mandatory minimums, enhancements, and consecutive counts have eroded defendants’ exercise of their Constitutional right to a jury trial due to the threatened sentences several times greater if they do not plead guilty.<sup>123</sup> The data bear out how routine and coercive this practice of “trial penalties” has become.<sup>124</sup>

Prosecutors have been most prolific about using their leverage in drug cases. In 1980, of the 6,343 persons charged with federal drug crimes, nearly 25% went to trial.<sup>4</sup> In 1990, three times the number of people were charged -- 19,271 -- and only 16.9% went to trial.<sup>5</sup> By 2010, 28,756 people were charged with federal drug crimes, and only 2.9% went to trial.<sup>6</sup> From 1980 to 2010, the percentage of federal drug cases resolved by plea increased from 68.9 to 96.9%, where it remained as of 2012.<sup>125</sup>

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<sup>119</sup> Speech by the Hon. Anthony M. Kennedy at the Am’n Bar Ass’n Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp\\_08-09-03.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html).

<sup>120</sup> *Id.*

<sup>121</sup> 15 Year Report on Federal Sentencing at 547-55.

<sup>122</sup> *Id.* at 50, 82.

<sup>123</sup> Human Rights Campaign, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* at 1-3 (2013).

<sup>124</sup> *Id.*

<sup>125</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online tbl.5.24.2010 (2010).

A mere 30 years ago, the trial rate in federal court was **five times higher** than it is today.<sup>126</sup> As the Supreme Court stated two years ago in *Lafler v. Cooper*, “criminal justice today is for the most part a system of pleas not a system of trials.”<sup>127</sup>

In the federal criminal justice system today, a mere 2.7% of defendants exercise their right to a jury trial.<sup>128</sup> Compared to what the trial rate used to be in the U.S. and as analyzed against historic rates and against other countries, Human Rights Watch, in its 2013 report “An Offer You Can’t Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty,” has warned that this 2.7% trial percentage is a “historically low rate” that “reflects an unbalanced and unhealthy criminal justice system.”<sup>129</sup>

Human Rights Watch found, based upon its federal sentencing data analysis, that

plea bargaining as practiced in U.S. federal drug cases raises significant human rights concerns. It is one thing for prosecutors to offer a modest *reduction* of otherwise proportionate sentences for defendants who plead guilty and accept responsibility for their offense . . . . But the threat of a large trial penalty is unavoidably coercive and contrary to the right to liberty and to a fair trial. In some cases, the sentences imposed on drug defendants who refused to plead are so disproportionately long they qualify as cruel and inhuman.<sup>130</sup>

The disparity between the sentence offered in exchange for a plea versus after trial (and a mandatory sentencing enhancement is filed) is dramatic. In 2012, the average sentence of federal drug offenders convicted after trial was 3 times higher (16 years) than that received after a guilty plea (5 years and 4 months).<sup>131</sup>

The threat of mandatory minimum sentences, enhancements, or consecutive charges aid the ability of federal prosecutors in extracting information and guilty pleas.<sup>132</sup> In effect, our current federal sentencing policies impose a “trial penalty” on those defendants who exercise

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<sup>126</sup> Hindelang Criminal Justice Research Ctr., Univ. at Albany, Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (Kathleen Maguire ed.) [hereinafter Trial Statistics Report], *available at* <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (showing that in 1980, out of a total of 36,560 defendants “disposed of in U.S. District Courts,” 6,816 defendants were convicted or acquitted after trial (18.6%), whereas the corresponding numbers for 2010 were 2,746 out of a total of 98,311 (2.7%)).

<sup>127</sup> **Error! Main Document Only.** 132 S. Ct. 1376, 1388 (2012).

<sup>128</sup> Trial Statistics Report.

<sup>129</sup> An Offer You Can’t Refuse at 11.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2.

<sup>132</sup> Stephanos Bibas, *Symposium: Examining Modern Approaches to Prosecutorial Discretion: The Need for Prosecutorial Discretion*, 19 Temple Pol. & Civil Rights L. Rev. 374 (2010) (“What we need to watch out for in practice, then, are the forces that push prosecutorial discretion in the wrong direction, away from the public’s sense of justice . . . . The press of business pushes prosecutors to use their discretion to coerce pleas and threaten higher punishments for those who refuse to bargain . . . . Without the practical press of business, prosecutors would be freer to exercise discretion to suit justice. The trick, then, is not to abolish discretion but to counteract the agency costs that in practice drive a wedge between discretion and justice.”)

their constitutional rights to trial by jury, proof beyond a reasonable doubt, and other trial-related guarantees.<sup>133</sup> Our federal courts do not view defendants as unconstitutionally coerced to forego their right to a trial if they plead guilty to avoid a staggering sentence or that they have been vindictively punished for exercising their right to trial when prosecutors make good on their threats to seek much higher mandatory penalties for them because they refused to plead.<sup>134</sup>

Among drug defendants who were eligible for a sentencing enhancement because of prior convictions, those who went to trial were 8.4 times more likely to have the enhancement applied than those who pled guilty.<sup>135</sup> Among first-time drug defendants facing mandatory minimum sentences who had the same offense level and no weapon involved in their offense, those who went to trial had almost twice the sentence length of those who pled guilty (117.6 months versus 59.5 months).<sup>136</sup>

As described by one federal judge:

To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.<sup>137</sup>

The legislative history of § 851 also demonstrates how its current application contravenes Congressional and DOJ intent. Congress passed this provision in 1970 to convert what was then an automatic penalty increase to a discretionary increase at DOJ's request because the automatic increases (to 5 years for one prior offense and 10 years for two) were seen as excessive in too many cases.<sup>138</sup> Congress had in mind what DOJ asked it to create – a provision that would allow federal prosecutors to seek the enhancement only for hardened, professional drug traffickers.<sup>139</sup> But over the past two decades, at the direction of DOJ, prosecutors have used § 851 enhancements for an entirely different purpose against defendants who are not hardened, professional drug traffickers.<sup>140</sup>

Even proponents of severe sentences cannot reasonably claim that severity should be determined almost exclusively by an accused person's decision to exercise the constitutional right to a jury trial. And yet that is the result of granting so much unchecked power to prosecutors.

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<sup>133</sup> An Offer You Can't Refuse at 2.

<sup>134</sup> Patton Over-Criminalization Task Force Statement at 5.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *United States v. Kupa*, 976 F. Supp. 2d 417, 419-20 (E.D.N.Y. 2013).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

When the prosecutor files a § 851 enhancement (and does not withdraw it), the judge must automatically apply the enhanced mandatory minimum so long as the conviction or diversionary disposition is established. The following cases in which judges were forced to impose mandatory life sentences illustrate the misuse of § 851 enhancements:

Sherman Chester,<sup>141</sup> a 27-year-old former athlete, had his mandatory minimum sentence for being a street-level drug dealer, enhanced from 10 years to mandatory life without parole because he chose to go to trial, and the prosecutor filed two § 851 enhancements for minor convictions (possession of a plastic bag with cocaine residue and possession of 0.25 grams of cocaine, a personal use amount) punished with probation and house arrest. Except for the leader of the 9-person conspiracy, all of Mr. Chester's co-defendants, including those more culpable than he, received lower sentences and have been released. The sentencing judge stated: "This case is an illustration of the difficulties and problems that result from the application of mandatory minimum sentences. This man doesn't deserve a life sentence, [but I cannot] legally keep from giving it to him."<sup>142</sup> To date, Mr. Chester has already served over 20 years.<sup>143</sup>

Kenneth Harvey<sup>144</sup> was a courier who was paid \$300 to bring 501 grams of crack from Los Angeles to Kansas City. He had no gun and no record of violence. The prosecutor offered a sentence of 15 years in exchange for a guilty plea, but when Harvey chose to go to trial, filed § 851 enhancements based on one prior conviction that barely qualified as a felony or a conviction, and one for selling 2.23 grams of crack. In sentencing Mr. Harvey to federal prison "for the remainder of his life," the judge criticized that the priors "were not deemed serious enough to merit imprisonment and appear to be only technically within the statutory punishment plan" and attributed them to Mr. Harvey's youth and "immaturity of judgment" at the time.<sup>145</sup> The judge "[did] not think [the statutory life minimum] was fully understood or intended by Congress in cases of this nature, but there [was] no authority that [he] knew of that would permit a different sentence by [him]."<sup>146</sup>

Olivar Martinez-Blanco<sup>147</sup> argued that the "government filed the two § 851 notices" -- for convictions that occurred when he was 22 and 24 years old, addicted to drugs, and involved small amounts of drugs -- "to coerce him into entering a plea," that "his codefendants received lesser sentences but were more culpable," and that "the mandatory life sentence was cruel and unusual."<sup>148</sup> The sentencing judge agreed that "the mandatory life imprisonment was 'savage, cruel and unusual,'" but that "its hands were tied" and "it regretted its lack of discretion in determining the sentence."<sup>149</sup>

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<sup>141</sup> *Sherman Chester*, Families Against Mandatory Minimums, available at <http://famm.org/sherman-chester/>.

<sup>142</sup> See *Kupa*, *supra*, n. 137.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *United States v. Martinez-Blanco*, 351 Fed. Appx. 339, 340 (11th Cir. 2009).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Robert Riley<sup>150</sup> was a 40-year-old “flower child” when he was sentenced to mandatory life for selling a miniscule amount of LSD on blotter paper weighing just over 10 grams and the prosecutor’s filing of § 851 enhancements based on prior convictions involving small amounts of drugs. The judge stated that “[i]t’s an unfair sentence,” and later wrote, “[t]here was no evidence presented in Mr. Riley’s case to indicate that he was a violent offender or would be in the future,” and “[i]t gives me no satisfaction that a gentle person such as Mr. Riley will remain in prison the rest of his life.”<sup>151</sup>

Melissa Ross<sup>152</sup> was a young woman who played a minor, non-violent role in her boyfriend’s crack dealing. At first, she was subject to a sentence of 10 years to life imprisonment. The prosecutor acknowledged that she was a “minor participant” and offered her a three-year sentence if she would plead guilty to misprision of a felony, but when she chose to go to trial, filed an § 851 enhancement based on a no contest plea six years earlier to simple possession of crack, with deferred adjudication which did not result in a conviction in state court. The judge stated that the prosecutor had “vindictively filed the § 851 enhancement because Petitioner asserted her constitutional right to trial by jury,” that it was “a gross miscarriage of justice,” and that “[p]rosecutorial discretion is a bedrock of the American criminal justice system. It takes on even greater importance when Congress limits judicial discretion through statutory minimum sentences. The § 851 enhancement should be used to protect the public from those defendants with a serious history of felony drug offenses, not as a cudgel to force minor participants like [Ross] to accept a plea.”<sup>153</sup>

In many other cases, the use of § 851 enhancements is “invisible” because prosecutors successfully used the enhancement to obtain guilty pleas -- by threatening to file it until the defendant pleads guilty or by withdrawing it when the defendant pleads guilty.<sup>154</sup> Typically, there are no statistics or requirement to collect information on scenarios like these even though these heavy-handed negotiations, if they can even be called that, represent routine business in federal courts.<sup>155</sup>

However, one federal judge (a former federal prosecutor himself) was so disturbed and frustrated by the “invisible” use of § 851 enhancements that he set out the facts illustrating how pretextual and punitive these trial penalties were.<sup>156</sup> The lead defendant was charged with being part of a conspiracy to distribute cocaine and faced a 10-year mandatory minimum. The prosecutor initially offered a plea agreement of roughly 9 to 11 years in prison, which the

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<sup>150</sup> A Living Death at 87.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* As an experienced district judge in the District of Colorado has observed, “How many times is a mandatory sentence used as a chip in order to coerce a plea? They don’t keep records.... That’s what the public doesn’t see, and where the statistics become meaningless.” Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011 (quoting Judge John L. Kane Jr. and noting that he believes the use of mandatory sentences to coerce pleas is “very common”).

<sup>155</sup> Patton Over-Criminalization Task Force Statement at 5.

<sup>156</sup> *Id.*

defendant turned down to review the evidence against him and consider trial. As the trial approached, the prosecutor informed the defendant that if he went to trial the government would file a prior felony information containing both of his prior marijuana convictions, resulting in mandatory life sentence without parole if he was convicted. The prosecutor did not offer the initial 9 to 11 year plea deal, but an offer that was approximately 3 years longer, the price of the lead defendant reviewing the evidence against him and weighing whether to exercise his right to a jury trial. That same prosecutor considered the co-defendant to have played a minor role in the conspiracy, yet charged him with a 10-year mandatory minimum. To persuade him to plead guilty, the prosecutor agreed to a roughly five-year prison term and threatened the filing of a mandatory enhancement that would lead to a 20-year mandatory minimum if the co-defendant went to trial.

The pretextual and punitive bases became clear when, at sentencing, the judge questioned the prosecutor about the threatened sentencing enhancements. Although the prosecutor claimed that the decision was based on an “individualized assessment” of the defendants and considerations of “the seriousness of the defendant’s crimes, the defendant’s role in those crimes, the duration of the crimes, and whether the defendant threatened communities and society as a “whole,”<sup>157</sup> the judge was not persuaded, responding:

That sounds nice, but actions speak louder than words. Whatever the result of the “individualized assessment” with regard to [the lead defendant], he was indisputably stuck with a prior felony information - and a life sentence - only if he went to trial, and he was indisputably not stuck with it only if he pled guilty. Despite the government’s patter, there was only one individualized consideration that mattered in his case, and it was flat-out dispositive: Was [he] insisting on a trial or not? If he was, he would have to pay for a nonviolent drug offense with a mandatory life sentence, a sentence no one could reasonably argue was justified.<sup>158</sup>

Trial by jury---and the free exercise of that right---breathes life into the Constitution’s insistence that ordinary citizens operate as a check on the government’s power to deprive individuals of life or liberty and embodies the Framers’ commitments to restraining government overreach in a direct, responsible, and transparent way. This overwhelming leverage exacerbates the existing disparity in information, staff, and resources between federal prosecutors and counsel for the defense, which is overwhelmingly court-appointed.

Indeed, “[o]ur current federal “system of pleas” is not rooted in fundamental Constitutional values[,] [f]or the first half of our country’s history, pleas were looked upon with disfavor, and at times found to be constitutionally suspect.”<sup>159</sup>

Even with the checks and balances that trials provide, mistakes are still made. The Innocence Project’s data reveals that in the past decade over 300 people have been conclusively

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<sup>157</sup> See *Kupa*, 976 F. Supp. 2d at 419-20.

<sup>158</sup> *Id.*

<sup>159</sup> *Patton Over-Criminalization Task Force* at 4.

proven innocent through the use of DNA evidence, including 18 people who were sentenced to death, has demonstrated this point beyond any doubt.<sup>160</sup> But perhaps one of the most shocking statistics to those not familiar with the criminal justice system is that over 10 percent of those conclusively shown to have been innocent *had pleaded guilty*.<sup>161</sup>

As United States District Judge Jed Rakoff noted in a recent speech entitled, “Why Innocent People Plead Guilty,” if even a small fraction of accused persons are wrongfully convicted, the real numbers are staggering.<sup>162</sup> For example, even a mere 0.5% error rate in the federal courts would mean that more than 1,000 innocent people are currently incarcerated in federal prisons.

Indeed, criminal trials are a defining feature of our constitutional democracy.

[They] are vital not just for the case at hand but for the lessons they teach all of us, including defense lawyers and prosecutors. They teach us that cooperating witnesses sometimes lie. Law enforcement agents sometimes make mistakes. Defendants are sometimes improbably foolish but not criminally malevolent. In a system where plea bargaining is the central means of resolving cases, those truths rarely come to light. There is a reason the great legal scholar John Henry Wigmore famously said that cross-examination---not plea bargaining---“is the greatest legal engine ever invented for the discovery of truth.”<sup>163</sup>

## 2. UNINTENDED CONSEQUENCES

In addition to the significant infringement of Constitutional rights, the manner in which these statutory mandatory minimums, enhancements, and consecutive counts are applied directly contravene their legislative history and intent, leading to unintended, harsh, and disparate consequences.

In 2009, Congress directed the Commission to evaluate the effect of mandatory minimum penalties on federal sentencing.<sup>164</sup> In response to that directive, and based on its own statutory authority, the Commission reviewed legislation, analyzed sentencing data, studied scholarship, and conducted hearings. It published the Mandatory Minimum Report in October 2011 and has continued to perform relevant sentencing data analysis since the report was published.<sup>165</sup>

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<sup>160</sup> Maddy deLone, *What 300 DNA Exonerations Mean for Criminal Justice Reform*, INNOCENCE PROJECT (2012), <http://www.innocenceproject.org/docs/ipw2012/letter.php>.

<sup>161</sup> *When the Innocent Plead Guilty*, Innocence Project, [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php).

<sup>162</sup> Patton Over-Criminalization Task Force Statement at 6.

<sup>163</sup> *Id.* at 7.

<sup>164</sup> Div. E of the Nat’l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2843 (2009).

<sup>165</sup> 2011 Mandatory Penalties Congressional Report at 345-46.

## A. THE FAILURE OF DRUG QUANTITY AS A PROXY FOR ROLE AND CULPABILITY

Under federal criminal law, the exclusive determinant as to whether a mandatory minimum drug offense applies is the quantity of the drug mixture involved.<sup>166</sup> It is not a defendant's role in the offense that triggers the federal mandatory minimum, enhancement, or consecutive count.<sup>167</sup> This is because Congress relied on flawed testimony that the weight of the drug mixture would serve as an accurate proxy for role---and hence culpability---in a criminal enterprise.<sup>168</sup> The triggering amounts for the drug mandatory minimums were set in order to capture only kingpins, leaders, managers, organizers, and other high-level, sophisticated players in the drug organization.<sup>169</sup>

Once again, the data bears out the flaws and injustices that have resulted from relying exclusively on drug quantity as a proxy for role and culpability for the offense.

First and foremost, the Sentencing Commission's research has found that the quantity of a drug mixture involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. As the Commission explained "[a] courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization" or "an offender convicted as part of a drug conspiracy can be held responsible for all the drugs trafficked as part of the conspiracy even if that offender personally handled a much smaller quantity or had a minor role in the conspiracy."<sup>170</sup>

Second and relatedly, although the statutes carrying five and 10-year mandatory minimum sentences, enhancements doubling these mandatory minimums (even up to life), and consecutive mandatory firearms were meant by Congress to apply only to the most serious and dangerous offenders – kingpins, cartel heads, leaders, organizers, and managers of drug trafficking organizations engaged in violent acts---they have applied far more indiscriminately, capturing mostly low-level, nonviolent offenders.<sup>171</sup>

As one former U.S. Attorney observed, "the public simply does not realize how many low-level guys are in [federal] prison . . . . We lock up the lowest fruit in drug conspiracies. I once asked another U.S. Attorney with 30 years as a prosecutor how many times he'd put a major drug player in prison. He said he could count them on one hand."<sup>172</sup> This is because "kingpins

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<sup>166</sup> *Id.*

<sup>167</sup> *Saris Over-Criminalization Task Force Statement* at 8.

<sup>168</sup> *Agency Perspectives: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) (Statement of Judge Irene Keeley, Chair of the Committee on Criminal Law) [hereinafter Keeley Over-Criminalization Task Force Statement at 11-13].

<sup>169</sup> 2011 Mandatory Penalties Congressional Report at 24 (citing 132 Cong. Rec. 27,193-94 (Sept. 30, 1986); H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986)) (internal footnotes omitted).

<sup>170</sup> *Saris Over-Criminalization Task Force Statement* at 8.

<sup>171</sup> *Patton Over-Criminalization Task Force Statement* at 3.

<sup>172</sup> *An Offer You Can't Refuse* at 17.

are, by definition, few in number, and they are not the drug defendant whom we see most frequently in federal court.”<sup>173</sup>

In fiscal year 2012, 60% of convicted federal drug defendants were convicted of offenses carrying mandatory minimum sentences.<sup>174</sup> This, of course, does not account for how many others were originally charged with offenses carrying mandatory sentences but were able to plea bargain to other charges that did not carry those sentences. Commonsense tells us that not all or even most of those defendants could have been drug lords; the more likely explanation is that they represent the easily replaceable steady supply of low-level foot soldiers in the drug war, not the generals or commanders themselves. This is supported by more detailed federal sentencing data. In 2011, the Sentencing Commission reported that only 3.1% of drug defendants were actually organizers or leaders and only 10.9% were importers or high-level suppliers.<sup>175</sup> The most common role was courier (23%) and the third most common was street-level dealer (17.2%),<sup>176</sup> which the Commission has recognized is a role “many steps down from high-level suppliers and leaders of drug organizations.”<sup>177</sup>

Relying on the current “safety valve” to mitigate the unintended application of these mandatory penalties is an insufficient remedy because the “safety valve” applies too narrowly. “Safety valve” applies in only 24% of total drug cases it should apply in 93% of drug cases as only 7% of those charged were considered leaders, supervisors, or managers for whom this enhancement was intended.<sup>178</sup> Indeed, the overwhelming majority of those receiving drug mandatory minimums are couriers, mules, and street-level dealers.<sup>179</sup> More than half of federal drug offenders sentenced in FY 2011 were in the lowest criminal history category.<sup>180</sup> In fact, 84% of them had no weapon involvement.<sup>181</sup> Less than 8% of federal prisoners are violent offenders.<sup>182</sup>

Third, research demonstrates that mandatory sentencing policies generate arbitrary and unwarranted disparities among offenders who are guilty of similar behavior.<sup>183</sup> Specifically for

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<sup>173</sup> Keeley Over-Criminalization Task Force Statement at 13.

<sup>174</sup> 2012 Sourcebook of Federal Sentencing Statistics at tbl. 43 “Drug Offenders Receiving Mandatory Minimums in Each Drug Type,” available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/Table43.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table43.pdf)

<sup>175</sup> 2011 Mandatory Penalties Congressional Report at app. D, fig. D-2.

<sup>176</sup> *Id.*

<sup>177</sup> *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences, Hearing Before the Committee on the Judiciary, United States Senate*, at 5 (Sept. 18, 2013) (statement of Judge Patti B. Saris, Chair U.S. Sentencing Comm’n), attached to Letter from The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary & Sen. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary (Nov. 26, 2013).

<sup>178</sup> 2012 Sourcebook of Federal Sentencing Statistics at tbls. 37, 39, 40, 44.

<sup>179</sup> U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine & Federal Sentencing Policy 20-21*, 85 (2007).

<sup>180</sup> *Stemming the Tide* at 11.

<sup>181</sup> *Id.*

<sup>182</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Federal Criminal Case Processing Statistics.

<sup>183</sup> *Restoring Mandatory Guidelines: Hearing Before the U.S. Sentencing Comm’n*, Feb. 9-10, 2009 (testimony of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia at Tr. 235, 260-65).

drug offenses, mandatory minimums are triggered by the drug quantity, which leads to the “cliff effect” in which the Commission’s determination of quantity thresholds carry huge consequences.<sup>184</sup> Thus, the defendant who is convicted of possessing one-tenth of a gram under the threshold avoids the mandatory minimum while someone else who has one-tenth of a gram more of the same substance receives a mandatory minimum sentence---all without any consideration of drug purity or role in the offense.<sup>185</sup>

This myopic focus on drug quantity ignores other highly relevant information that supports findings about the offender’s personal culpability, including the purity of the drug mixture, the offender’s compensation for his participation, the offender’s degree of autonomy and decision-making in the scheme, whether the offender supervised, trained, or recruited others, and the actions for which the offender is directly responsible.<sup>186</sup>

Drug quantity punishes the low-level nonviolent courier with the same mandatory minimum sentence as the cartel’s kingpin if they are charged with possessing the same amount of drugs. All of these practices lead to disparate punishments among offenders who are guilty of similar behavior, which is a critical flaw in the argument that lessening judicial discretion and increasing determinacy (through the guidelines and mandatory minimums) would eliminate the perceived disparities under the previous federal sentencing system.<sup>187</sup> Equality requires decision-makers to treat like cases alike, but, just as importantly, dissimilar cases differently.<sup>188</sup> The charging and sentencing under a mandatory minimum regime has exacerbated disparities by widening the gap between sentences imposed in similar cases and blindly applying the same mandatory minimum sentence in blatantly dissimilar cases.

Because the severity of the guidelines is tied to the severity of mandatory minimums, this means that, even in those cases when mandatory minimums do not apply, the Sentencing Commission is still required to base its guideline range on and be proportionate to the relevant mandatory minimum, even when that stands in direct contravention to its own independent judgment and expertise in the matter.<sup>189</sup> Thus, just as mandatory minimums yield excessively severe sentences, so too do the guidelines. For example, the guidelines range for a nonviolent, first-time-offender, street-level dealer who distributed 300 grams of crack in one month is 10 to 12 years, which is a far greater penalty than that for the forcible rape of an adult, killing a person (involuntary manslaughter), disclosing top secret national defense information, or violent extortion of more than \$5 million involving serious bodily injury.<sup>190</sup> As recently as 2010,

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<sup>184</sup> Erik Luna, *Mandatory Minimum Sentencing Provisions Under Federal Law*, CATO INSTITUTE (May 27, 2010) [hereinafter *Cato Institute Mandatory Penalties Report*], <http://www.cato.org/publications/congressional-testimony/mandatory-minimum-sentencing-provisions-under-federal-law>.

<sup>185</sup> *Id.*

<sup>186</sup> Saris Over-Criminalization Task Force Statement at 12.

<sup>187</sup> *Cato Institute Mandatory Penalties Report*.

<sup>188</sup> *Id.*

<sup>189</sup> Keeley Over-Criminalization Task Force Statement at 8-9.

<sup>190</sup> Mark Osler, *Amoral Numbers and Narcotics Sentencing*, University of St. Thomas (Minnesota) Legal Studies Research Paper No. 13-21, 2013.

Congress called upon the Sentencing Commission to review and evaluate the array of federal mandatory minimums.<sup>191</sup>

## **B. CHARGE AND SENTENCING MANIPULATION**

Through the actions of prosecutors, agents, probation officers, or judges, the drug quantity is frequently “calculated” very differently in cases that are essentially the same.

As discussed earlier, law enforcement and prosecutors can reach the quantity threshold by aggregating multiple sales into one incident, using a confidential informant to negotiate a deal for the threshold amount, luring the offender into a conspiracy for which the offender can be held responsible for the entire drug quantity, or “charge stacking” in which a single criminal episode (a defendant is observed selling drugs over the course of a day’s shift) is divided up into multiple crimes (a defendant is charged with each and every single drug transaction instead of the day), each carrying its own mandatory sentence that can be stacked to run consecutively to produce harsher punishment. This is particularly troubling when law enforcement actively and deliberately procures further crimes through its own actions, such as by arranging for multiple purchases from the same seller or creating fictitious “reverse stings” to target defendants.

This quantity manipulation further contravenes Congressional history and intent to target kingpins and other high-level players in the drug ring.

## **C. SENTENCING INVERSION DUE TO COOPERATION BY HIGH-LEVEL DEFENDANTS**

A further injustice is that these mandatory minimums have led to “sentencing inversion,” a perversion of Congressional intent in which kingpins, cartel heads, and others in leadership positions often are able to avoid application of mandatory minimum sentences because of their ability to provide “substantial assistance” to the prosecution based upon their in-depth knowledge of the criminal syndicate.<sup>192</sup>

As a former Chair of the U.S. Sentencing Commission testified to Congress in 1993:

Who is in a position to give such ‘substantial assistance’? Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer . . . . There are few federal judges engaged in

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<sup>191</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4713, 123 Stat. 2190, 2843-44 (2009).

<sup>192</sup> *Federal Mandatory Minimum Sentencing*: Hearing Before the Subcomm. On Crime & Criminal Justice of the H. Comm. On the Judiciary, 103<sup>rd</sup> Cong. 66 at 107 (1993) (statement of Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Comm’n).

criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.<sup>193</sup>

By providing “substantial assistance” (i.e. information) on their subordinates, they are able to obtain much lower and non-mandatory sentences for themselves.<sup>194</sup> Precisely because of their low-ranking status as a courier, mule, or street-level dealer, those low-level individuals, who have no such information to trade with the prosecution and thus they will receive much higher mandatory minimum sentences---even though they are much less culpable and even though the very individuals for whom these mandatory penalties were designed to reach have escaped their grasp due to their high-level information.

How is incentivizing kingpins for “flipping down” on those less culpable and rewarding them with relief from the very punishment Congress passed just to reach them anything other than nonsensical and contrary to legislative history and intent?

#### **D. WIDELY DIVERGENT PROSECUTORIAL PRACTICES**

The Sentencing Commission’s analysis of federal sentencing data in conjunction with “interviews with prosecutors and defense attorneys in thirteen districts across the country revealed widely divergent practices with respect to charging certain offenses that triggered significant mandatory minimum penalties.”<sup>195</sup>

“[P]articularly acute” were the discrepancies with respect to 851 enhancements for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence.<sup>196</sup>

Whether a defendant eligible for a § 851 enhancement actually received a § 851 enhancement depends more on the federal district than the offender or the conduct itself. “For unknown and unknowable reasons, federal prosecutors have been applying massive numbers of § 851 enhancements in many districts and not in others.”<sup>197</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Saris Over-Criminalization Task Force Statement at 6.

<sup>196</sup> *Id.*

<sup>197</sup> *United States v. Young*, 960 F. Supp. 2d 881, 903 (N.D. Iowa 2013) (summarizing the disparity as “stunningly arbitrary”); 2011 Mandatory Penalties Congressional Report at 253, 255 (reporting a “lack of uniformity” in the application of § 851 enhancements, with prosecutors in some districts filing § 851 enhancements in over 75% of cases in which the defendant was eligible for the enhancement while prosecutors in other districts filing no § 851 enhancements in any case in which the defendant was eligible).

The “statistics . . . reveal jaw-dropping, shocking disparity” in the use of § 851s across districts.<sup>198</sup> For example, a defendant in the Northern District of Iowa “who is eligible for a § 851 enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska,” and a defendant in the Eastern District of Tennessee is “3,994% more likely to receive” the enhancement than in the Western District.<sup>199</sup> Mandatory life sentences based on § 851 enhancements are disproportionately concentrated in a few districts. In the past three years, two districts (Illinois Central, and Florida Northern) have had 1.2 percent of all federal drug trafficking cases, but have generated 24 percent of all mandatory life sentences.<sup>200</sup> “In six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty” while other districts were more selective in their filing.<sup>201</sup>

Similarly, the Sentencing Commission’s analysis revealed vastly different policies in different districts in the charging of cases under section 924(c) of title 18 of the United States Code for the use or possession of a firearm during a crime of violence or drug trafficking felony. In that statute, different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. Again, depending on the judicial district, divergent and contradictory policies applied “as to whether and when [prosecutors] would bring charges under this provision and whether and when they would bring multiple charges under the section, which would trigger far steeper mandatory minimum penalties.”<sup>202</sup> To illustrate this geographic disparity, in fiscal year 2013, “just 16 districts accounted for 49.7 percent of all cases involving a conviction under section 924(c), even though those districts reported only 30.0 percent of all federal criminal cases that year[,] . . . 36 districts reported 10 or fewer cases with a conviction under that statute” while others reported none despite having offenders who qualified.<sup>203</sup>

### **E. UNWARRANTED SENTENCING DISPARITIES AMONG OFFENDERS WHO ARE GUILTY OF SIMILAR BEHAVIOR**

It is difficult---if not impossible---to craft a statutory minimum that can apply fairly to every case. Unlike the Sentencing Guidelines, which are applied by judges on a case-by-case basis, allowing for a holistic consideration of the culpability and dangerousness of the offender, specific facts about the offense, and other factors, mandatory minimums typically identify an exclusive aggravating factor that triggers the application of these penalties.<sup>204</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> U.S. Sent’g Comm’n, *Fiscal Year 2010 Monitoring Dataset*; U.S. Sent’g Comm’n, *Fiscal Year 2011 Monitoring Dataset*; U.S. Sent’g Comm’n, *Fiscal Year 2012 Monitoring Dataset*.

<sup>201</sup> 2011 Mandatory Penalties Congressional Report at 255.

<sup>202</sup> *Id.* at 113-14.

<sup>203</sup> Saris Over-Criminalization Task Force Statement at 6.

<sup>204</sup> Cato Institute Mandatory Penalties Report.

To be clear, there are cases in the application of the mandatory minimum, enhancement, or consecutive count will seem appropriate and reasonable **given the specific facts of that case**. When that happens, judges are not concerned that the sentence was also called for by a mandatory sentencing provision because the sentence is fair, proportional, and justified.<sup>205</sup>

But those cases are few and far between. As discussed in greater detail above, these penalties were intended by Congress to target only kingpins and other high-level players but have applied much more broadly, sweeping in tens of thousands of low-level couriers, mules, street-level dealers, and addicts whose cases illustrate the severity, irrationality, and cruelty of mandatory penalties.

In her congressional testimony five years ago, United States District Judge Julie Carnes (former Chair of the Criminal Law Committee) provided a specific example of how disproportionately severe sentences may result mandatory penalties associated with drug offenses.<sup>206</sup> As discussed earlier, a § 851 enhancement doubles the applicable mandatory minimum (triggered by quantity of the drug mixture) if the defendant has a qualifying prior offense.

If the defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a twenty-year sentence (double the 10-year mandatory minimum based on drug quantity) may be just.<sup>207</sup> The amount of drugs may be a valid indicator of market share, and thus culpability, for leaders of drug manufacturing, importing, or distributing organizations.<sup>208</sup> The purity of the drugs also provides an indicator of how high up in the organization this individual is as would that individual's wealth.<sup>209</sup>

Now, assume that the § 851 enhancement is filed against another defendant: a manual laborer who is hired along with 10 other laborers to offload the cargo from a boat.<sup>210</sup> The quantity of drugs in the boat will easily qualify for a ten-year mandatory sentence.<sup>211</sup> This is so even though in cases of employees of these organizations or others on the periphery of the crime, the amount of drugs with which they are involved is often merely fortuitous.<sup>212</sup> A courier, unloader, or watchman may receive a fixed and often low fee for his work, and not be fully aware of the type or amount of drugs involved and may have little awareness and no control over the actions of other members.<sup>213</sup> Further, assume that the low-level defendant has one prior conviction for

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<sup>205</sup> Keeley Over-Criminalization Task Force Statement at 11.

<sup>206</sup> *Mandatory Minimums and Unintended Consequences*, Hearing Before the Subcomm. On Crime, Terrorism, & Homeland Security of the H. Comm. On the Judiciary, 111<sup>th</sup> Cong. 39 (2009) (statement of Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States) at 43.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

distributing a small quantity of marijuana, for which he served no time in prison.<sup>214</sup> Finally, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his family.<sup>215</sup>

This defendant will now be subject to a twenty-year mandatory minimum *sentence-but should he receive the same sentence as the kingpin?*<sup>216</sup> It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.<sup>217</sup>

Examining another powerful mandatory penalty---the consecutive counts under 924(c)---also illustrates how disproportional these drug sentences are in comparison to sentences imposed for violent offenses.

Weldon Angelos, a first-time 24-year-old offender with two young children, received a 55-year prison sentence for his participation in two \$350 marijuana deals.<sup>218</sup> His sentence was enhanced by 3 mandatory consecutive counts for the gun he had carried at the drug deals and the guns that were found inside his home when a search warrant was executed.<sup>219</sup> Those counts had to run consecutive not only to the drug sentence but also to each other.<sup>220</sup> As such, the government recommended a 62-year prison term (no less than 7 years for drug distribution followed by 55 years for the three stacked mandatory consecutive counts of possessing a firearm in connection with a drug offense).<sup>221</sup> Because the 3 § 924(c) penalties are mandatory minimums, the judge in *Angelos* was unable to impose a lesser punishment and later denounced the sentence he was forced to impose as "cruel, unjust, and irrational."<sup>222</sup>

For purposes of comparison and perspective, the same day that this judge imposed a 660-month sentence upon Mr. Angelos, he followed the prosecution's recommendation and sentenced the second-degree murderer of an elderly woman to 262 months (21 years, 10 months).<sup>223</sup> *Mr. Angelos' sentence was almost three times longer than the second-degree murderer's and more than double the sentence for an aircraft hijacker (293 months), terrorist who detonated a bomb in a public place (235 months), a hate crime offender who attacked a minority with the intent to kill and inflicted permanent or life-threatening injuries (210 months), second-degree murderer (168 months), or rapist (87 months), as provided for in the sentencing guidelines.*<sup>224</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Keeley Over-Criminalization Task Force Statement at 13.

<sup>218</sup> See *Weldon Angelos*, Families Against Mandatory Minimums, <http://famm.org/weldon-angelos/>; Pamela Manson, *Utah record producer wants 55-year firearms sentence cut*, THE SALT LAKE TRIB., Sep. 15, 2008, [http://www.sltrib.com/News/ci\\_10469683](http://www.sltrib.com/News/ci_10469683)

<sup>219</sup> *Weldon Angelos*, Families Against Mandatory Minimums, <http://famm.org/weldon-angelos/>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Hearing on the Subject of Mandatory Minimum Sentences Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111<sup>th</sup> Cong. (2009) (Statement of the Honorable Judge Julie E. Carnes, Chair of the Criminal Law Committee on Behalf of the Judicial Conference, at 18).

<sup>224</sup> *Id.*

Judges are thus required to impose mandatory minimums, enhancements, and/or consecutive counts that result in sentences grossly disproportionate to the specific facts and offender. A sentence that does not permit consideration and mitigation due to extenuating and unique circumstances is inherently excessive, disproportionate, and unfair.

Justice, proportionality, and rationality require treat like cases alike, but, just as importantly, dissimilar cases differently. Mandatory penalties create and exacerbate disparities by widening the gap between sentences imposed in similar cases and blindly applying the same mandatory minimum sentence in blatantly dissimilar cases. They undermine the very virtues they purport to uphold: uniformity, fairness, and predictability.

#### **F. LACK OF EMPIRICAL BASIS FOR AND/OR NARROW TAILORING OF MANDATORY MINIMUMS, ENHANCEMENTS, AND CONSECUTIVE COUNTS DESIGNED TO TARGET HIGH-LEVEL, VIOLENT CAREER CRIMINALS**

Yet another way mandatory minimums, enhancements, and consecutive counts sweep in low-level offenders for whom these severe penalties were never intended is how expansive the sweep of the types of “felony drug offense” predicates that will trigger the Armed Career Criminal Act (mandatory minimum of 15-years in ammunition or firearm possession cases if the offender has 3 prior convictions involving drug or guns) and § 851 enhancement (which doubles the mandatory minimum, including up to life, in drug cases).<sup>225</sup>

On the surface, the definition itself is broad, applying to drug offenses punishable by more than one year. A “felony drug offense,” defined as “an offense that is punishable by imprisonment for more than one year ... that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”<sup>226</sup>

In practice, this definition sweeps in the following:

- simple possession of drugs,<sup>227</sup>
- misdemeanors in states where misdemeanors are punishable by more than one year, such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont<sup>228</sup>
- diversionary dispositions where the defendant was not convicted in state court,<sup>229</sup>

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<sup>225</sup> 18 U.S.C. § 924(e).

<sup>226</sup> 21 U.S.C. § 802(44).

<sup>227</sup> See *Lopez v. Gonzalez*, 549 U.S. 47, 54 & n.4 (2006); 2011 Mandatory Penalties Congressional Report at 353.

<sup>228</sup> 2011 Mandatory Penalties Congressional Report at 353.

<sup>229</sup> See *United States v. Rivera-Rodriguez*, 617 F.3d 581, 609-10 (1st Cir. 2010); *United States v. Meraz*, 998 F.2d 182, 183-84 (3d Cir. 1993); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992); *United States v. Cisneros*, 112 F.3d 1272, 1281-82 (5th Cir. 1997); *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Ortega*, 150 F.3d 937, 948 (8th Cir. 1998); *United States v. Norbury*, 492 F.3d 1012, 1015 (9th Cir. 2007); *United*

- no limit on how old the conviction or diversionary disposition can be
- no distinction between violent (i.e. whether harm occurred or was threatened) and nonviolent offenses
- no consideration if the offense was committed due to mental health and/or substance abuse issues

It is unsettling that predicate offenses like these can form the basis for mandatory minimums, enhancements, and consecutive counts that operate as de facto life sentences without parole in the federal system, with judges powerless to mitigate their severity in light of extenuating facts, circumstances, and offender-specific characteristics.

## **G. DISPROPORTIONATE RACIAL IMPACT**

Nationwide, our criminal laws and policing practices have had a disproportionate impact on people and communities of color. One in every nine African-American men between the ages of 20 and 34 is incarcerated.<sup>230</sup> One in three African-American men and one in six Latino men will spend some part of their lives in prison.<sup>231</sup> These numbers are far higher in segregated and impoverished communities.<sup>232</sup> Here, in Washington, D.C., three out of four African-American men, and nearly all of those living in the poorest neighborhoods can expect to find themselves behind bars at some point in their life.<sup>233</sup>

To begin with, let us start our discussion by focusing here on treatment as criminal defendants only in the federal system: defendants of color are more likely to receive mandatory penalties and longer sentences as compared to their White counterparts in similar cases, controlling for other variables.

On the state level, state “policymakers are now more aware of the[ ] human costs [of mandatory penalties], such as the disproportionate impact on people of color.”<sup>234</sup>

In the federal system, the Sentencing Commission’s analyses of federal sentencing data revealed the disproportionate racial impact that mandatory penalties have had.<sup>235</sup>

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*States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013); *United States v. Fernandez*, 58 F.3d 593, 600 (11th Cir. 1995).

<sup>230</sup> *Tackling Overincarceration in Maryland*, American Civil Liberties Union of Maryland, [http://www.aclu-md.org/our\\_work/tackling\\_mass\\_incarceration\\_in\\_maryland](http://www.aclu-md.org/our_work/tackling_mass_incarceration_in_maryland).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See generally Washington Lawyers’ Committee for Civil Rights & Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011: Implications for Civil Rights and Criminal Justice in the Nation’s Capital* (2013), [http://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](http://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf).

<sup>234</sup> Ram Subramanian, Rebecka Moreno & Sharyn Broomhead, VERA Institute of Justice, *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends* 8 (internal citations omitted) (2014) [hereinafter Vera Institute Review of State Reforms], <http://www.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2013-v2.pdf>.

<sup>235</sup> *Agency Perspectives: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) (Statement of Chief Judge Patti B. Saris, Chair, United States Sentencing Commission, at 6).

Study after study demonstrates that people of all races use, traffick, transport, manufacture, sell, and distribute all types of drugs at the same rate.<sup>236</sup> Our country's three largest racial populations in 2013<sup>237</sup> was 62.6% White, 17.1% Latino, and 13.2% African American. If drug offenses were evenly targeted, investigated, and sentenced, we would expect the rates of arrest, charging, and application of mandatory data to correspond with census data.

But it does not.

Consider arrests: of the 1.7 million drug arrests in 2010 nationwide, half were for marijuana, and most of those were for mere possession.<sup>238</sup> To that end, the arrest rates for African-Americans and Whites are 716 and 192 per 100,000, respectively; African-Americans were arrested at nearly four times the rate of Whites, despite similar rates of marijuana use across both populations.<sup>239</sup>

Turning to charging mandatory penalties in the federal system, the racial composition of offenders receiving a mandatory minimum penalty was 24.5% White, 28.1 % African-American, and 44.9 % Latino.<sup>240</sup>

That racial disparity becomes even more stark once we examine which offenders qualified for relief from the application of the mandatory penalty due to the limited "safety valve" mechanism, which requires prosecutorial support: White offenders in 18.9% of eligible cases, African-American offenders qualified in 11.0% of eligible cases, and Latino offenders in 45.5%.<sup>241</sup> "Because of this, although African-American offenders in 2013 made up 25.2 % of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 33.7 % of the drug offenders still subject to that mandatory minimum at sentencing."<sup>242</sup>

Or consider the fact that, according to analyses by the U.S. Sentencing Commission, the disparity between crack and powder cocaine sentences has inflicted a disproportionate and discriminatory impact on African-Americans. African-Americans and Whites use crack at the

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<sup>236</sup> Drug Policy Alliance, *The Drug War, Mass Incarceration and Race* (2014), [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_July2014.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_July2014.pdf); see also Jamie Fellner, Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States* (2009), [http://www.hrw.org/sites/default/files/reports/us0309webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0309webwcover_1.pdf); Jamie Fellner, *Race, Drugs, & Law Enforcement in the United States*, 20:2 STANFORD L. & POL'Y REV. 257, 266 (2009) [hereinafter *Race, Drugs & Law Enforcement*], [www.hrw.org/sites/default/files/related\\_material/8\\_Fellner\\_FINAL.pdf](http://www.hrw.org/sites/default/files/related_material/8_Fellner_FINAL.pdf).

<sup>237</sup>The percentages for each race were comprised of those respondents who identified exclusively as those races and does not include those who identified as multi-racial. *State & County Quick Facts*, U.S. Census Bureau (Dec. 3, 2014, 2:42 PM), available at <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>238</sup> American Civil Liberties Union, *The War on Marijuana in Black and White* 12 (2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at figs. 21& 23.

<sup>241</sup> 2011 Mandatory Penalties Congressional Report at xxviii.

<sup>242</sup> Saris Over-Criminalization Task Force Statement at 7.

same rate, but nearly 80% of defendants convicted federally of crack cocaine offenses were African-American, and their sentences were, on average, over two years longer than sentences for powder cocaine offenses.<sup>243</sup>

While African Americans constituted 24% of all federal offenders, they were 31% of those affected by statutory trumps.<sup>244</sup> Notably, African-Americans were 48% of the offenders who appeared to qualify for a charge under § 924(c) but 56% of those who were charged under the statute and 64% of those convicted under it.<sup>245</sup> In 2000, just 20% of offenders who used a firearm received the statutory enhancement, 35% received the guideline enhancement, and 49% received neither.<sup>246</sup> And, as in 1995, African Americans were disproportionately represented among those offenders who actually received the statutory enhancement.<sup>247</sup>

Data show that 65.4% of the defendants receiving mandatory life sentences for federal drug offenses<sup>248</sup> in recent years are African American, a percentage that is vastly disproportionate to the portion of African Americans in the nation (13.2%),<sup>249</sup> of all federal defendants (20%)<sup>250</sup> and of all federal drug defendants (25%).<sup>251</sup>

As shown in the Figure<sup>252</sup> below, taken from the Sentencing Commission's *Fifteen Year Review*, as one would reasonably expect, the passage of mandatory minimums, enhancements, and consecutive counts correlate with longer federal sentences on the whole. But no one---not even the Sentencing Commission---expected that average federal sentences for African American offenders would soar dramatically above the average sentences for Whites and Latinos once these mandatory penalties were in place.

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<sup>243</sup> Race, Drugs & Law Enforcement at 266.

<sup>244</sup> *The Sentencing Reform Act of 1984: 25 Years Later: Public Hearing Before the United States Sentencing Comm'n* (2009) (statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, at 9), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090709-10/Nachmanoff\\_testimony\\_updated.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090709-10/Nachmanoff_testimony_updated.pdf).

<sup>245</sup> 15 Year Report on Federal Sentencing at 90.

<sup>246</sup> *Id.* at 89-90.

<sup>247</sup> *Id.*

<sup>248</sup> 2011 Mandatory Penalties Congressional Report at app. D tbl. D-9.

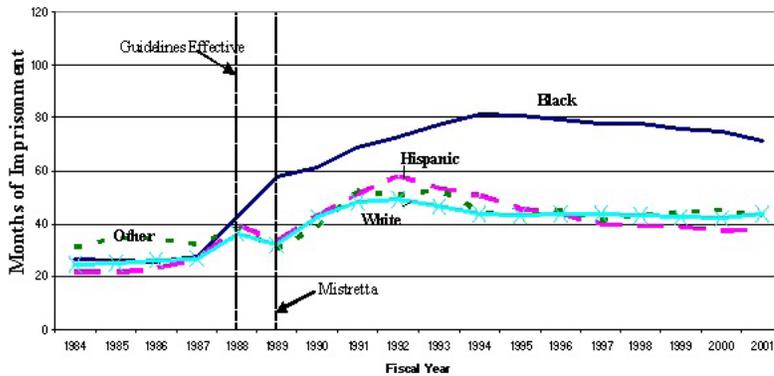
<sup>249</sup> *State & County Quick Facts*, United States Census Bureau, available at <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>250</sup> 2012 Sourcebook of Federal Sentencing Statistics at tbl. 4.

<sup>251</sup> *Id.*

<sup>252</sup> 15 Year Report on Federal Sentencing at fig. 4-2.

**Figure 4.2: Estimated Time Served by Various Racial and Ethnic Groups 1984-2001**



In the words of the Sentencing Commission when confronting this disturbing data:

The evidence shows that if unfairness continues in the federal sentencing process, it is more an ‘institutionalized unfairness’ built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. . . . Today’s sentencing policies, crystallized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on African-American offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to the guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.<sup>253</sup>

Much disparity today arises from the faulty way the guidelines and mandatory minimum statutes define and rank the seriousness of different types of crimes and the dangerousness of different types of offenders. Policies based on false premises and unwarranted stereotypes have resulted in sentencing rules having a severe adverse impact against African American offenders - what scholars have called “institutionalized” or “embedded” or “entrenched” bias.<sup>254</sup>

We must first consider whether race is a factor in the decision to target, detain, and arrest a suspect, the law enforcement officer has infused the process with a layer of racial discrimination even before the prosecutor has an opportunity to exercise his or her discretion. Indeed, courts have upheld race as a legitimate factor in the decision to stop and detain a suspect.<sup>255</sup> For

<sup>253</sup> 15 Year Report on Federal Sentencing at 135.

<sup>254</sup> See generally The Sentencing Project, *To Build a Better Criminal Justice System: 25 Experts Envision the Next 25 Years of Reform* (Marc Mauer & Kate Epstein eds., 2012), [http://sentencingproject.org/doc/publications/sen\\_25\\_eassys.pdf](http://sentencingproject.org/doc/publications/sen_25_eassys.pdf).

<sup>255</sup> See, e.g., *United States v. Weaver*, 966 F.2d 391, 392 (8th Cir. 1992) (reasonable suspicion due to defendant being a “roughly dressed African-American male”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (reasonable suspicion that person is an illegal alien given person’s “Mexican appearance” near the border); *United*

defendants of color, to borrow the term from the NAACP, they are “born suspect”<sup>256</sup>---born fitting the profile and stereotype of what we have been socialized to associate as the face of crime.

After all, the decisions by law enforcement where to deploy and what offenses they should investigate all have racial ramifications. Thus, a White college student with no criminal arrest or conviction record may deal drugs to his classmates every day if he lives in a community that does not have constant police presence and resolves drug offenses with warnings, rather than with police intervention. He is a recidivist without a record. In stark contrast, a African-American college student who lives in what law enforcement has termed a “high crime” (which some would interpret as being a minority neighborhood) area may have been detained and arrested on numerous occasions even if he has not engaged in any criminal behavior. Therefore, the existence or nonexistence of an arrest or conviction record does not reflect criminality. A prosecutor without knowledge of or sensitivity to this inherent threshold bias in the system will give undue weight to these prior encounters in making those critical charging and plea bargaining decisions.

If law enforcement is targeting, investigating, and presenting cases involving minorities for prosecution at disproportionately higher rates than Whites who are guilty of similar behavior, that infuses additional institutional bias and racism into the system.

This is because one of the most important (and seemingly race-neutral) factors that prosecutors consider in bringing charges---and seeking mandatory minimums, enhancements, and consecutive counts---is whether an individual has a prior criminal record. Understandably, a prosecutor is more likely to charge and less likely to offer a favorable plea bargain to someone they view as a recidivist. But that does not account for the fact that race may affect the existence of a prior arrest and conviction record in the first place— even in the absence of **any** recidivist tendencies of the individual—due to racial profiling, conscious or not, at the patrol or arrest stage of the process, or how some elementary and middle schools have police officers on site who arrest students for infractions that typically would be punished by detention in other districts.

All too often, prosecutors’ decisions result in dissimilar treatment of defendants who are guilty of similar behavior, along race and socioeconomic class lines---even if that was not their intention. Prosecutors exercise a tremendous amount of discretion in deciding which cases to accept for prosecution, how to charge those cases, and what plea deals to offer—all without any external oversight and accountability. These decisions frequently predetermine the outcome of criminal cases, especially when they involve mandatory minimums, enhancements, and consecutive counts. Since decisions about whether to accept cases for prosecution, which

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*States v. Harvey*, 16 F.3d 109 (6th Cir. 1994) (upholding pretextual traffic stop despite police officer’s admission that he initiated the stop based on the fact that “[t]here were three young African-American male occupants in an old vehicle”).

<sup>256</sup> NAACP, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America* (2014), available at [http://naacp.3cdn.net/9312d4a4f8ed7681ff\\_fnm6b22xw.pdf](http://naacp.3cdn.net/9312d4a4f8ed7681ff_fnm6b22xw.pdf).

charges to bring, and how lenient a plea deal to offer are all made behind closed doors, prosecutors are not required to justify or explain these decisions to anyone.

The Constitution's Equal Protection Clause requires a showing that the prosecutor intentionally discriminated against the defendant, which makes it difficult, if not impossible, to prevail on selective prosecution claims under the Equal Protection Clause because unconscious racism and institutional bias may account for the disproportionate impact.<sup>257</sup>

In Canada, for comparison, where native peoples are disproportionately arrested, prosecuted, and incarcerated (although they do not disproportionately commit offenses), judges sentencing native defendants are required to consider the effect on the native community.<sup>258</sup>

The disproportionate and discriminatory impact of federal charging and sentencing policies undermines the legitimacy of the criminal justice system domestically and our human rights record globally.

After the Ferguson, Mo., grand jury failed to indict the police officer responsible for the shooting death of Michael Brown, an unarmed young African American man, who some witnesses say had his arms up and was surrendering, other nations used it to comment on and criticize the United States' record of racial discrimination.

China's state-run media issued a report on the violence between law enforcement and protesters in Ferguson to "point out the type of rights abuses the United States and its Western allies often accuse Beijing authorities of committing," specifically that "[p]olice were seen interrupting media interviews around the site, pushing and shoving journalists who did not move fast enough to escape their lines."<sup>259</sup> The Russian Foreign Ministry Human Rights Envoy Konstantin Dolgov told its state-run media that "[r]acial discrimination, racial and ethnic tensions are major challenges to the American democracy, to stability and integrity of the American society."<sup>260</sup> In reference to the United States' criticism of Russia for violating international law with its aggression in eastern Ukraine, Dolgov expressed that "[w]e may only hope that U.S. authorities seriously deal with those issues and other serious challenges in the human rights field in their own country and stop what they have been doing all along recently--- playing an aggressive mentor lecturing other countries about how to meet human rights standards."<sup>261</sup> In Geneva, the United Nations' Human Rights Commissioner Zeid Raad Hussein reiterated his concern "over the disproportionate number of blacks killed in encounters with

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<sup>257</sup> See, e.g., *Brown v. Oneonta* (2d Cir. 1999); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Yick Wo v. Hopkins* 118 U.S. 356 (1886);

<sup>258</sup> Gary Mason, *More Jail Won't Solve Canada's Aboriginal Incarceration Problem*, THE GLOBE AND MAIL, Apr. 5, 2013, available at <http://www.theglobeandmail.com/globe-debate/more-jail-wont-solve-canadas-aboriginal-incarceration-problem/article10791308/>.

<sup>259</sup> Carol J. Williams, *Ferguson Unrest Spurs Worldwide Observations About Racism in U.S.*, L.A. TIMES, Nov. 25, 2014, available at <http://www.latimes.com/world/europe/la-fg-global-ferguson-unrest-commentary-20141125-story.html>.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

police and serving time in U.S. prisons” and pointed to “a deep and festering lack of confidence in the fairness of the justice and law enforcement systems” in the United States.<sup>262</sup> Germany’s print media focused on the “brief investigation in a law enforcement culture of immunity and the widespread criticism of the state prosecutor’s provision of evidence to the grand jury.”<sup>263</sup>

## **H. MANDATORY MINIMUMS, ENHANCEMENTS, AND CONSECUTIVE COUNTS SKEW THE SENTENCING GUIDELINES**

In theory, it might appear that there would not be a connection between mandatory penalties and the advisory sentencing guidelines, since by their very definition, the sentencing guidelines would apply only in those cases in which mandatory statutory penalties do not apply.

In practice, however, our federal statutory mandatory minimums exert a powerful pull---upward---on the advisory guideline sentence range, particularly for drug offenses.<sup>264</sup>

When Congress passed the Sentencing Reform Act after years of consideration and debate and, among other things, created the Sentencing Commission, Congress charged it with the responsibility to create a comprehensive system of guideline sentencing.<sup>265</sup> The Commission was tasked with creating the guidelines for drug offenses against the backdrop of the various federal mandatory minimums for drug offenses, all of which were based upon triggering quantities.<sup>266</sup>

The Commission’s task is to establish fair, certain, rational, and proportional Guidelines. But when those guidelines are based upon mandatory minimums that themselves are not based upon sound evidence or empirical research and have proven to be flawed, it is no surprise that guidelines have been accordingly been skewed out of shape and upward by their incorporation.

The problem with this interrelatedness is, as the Commission explained in their 1991 report to Congress on mandatory minimums, the simultaneous existence of mandatory sentences and Sentencing Guidelines skews the "finely calibrated ... smooth continuum" of the Guidelines, and prevents the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.<sup>267</sup>

The very act of using mandatory minimums to set the base offense levels in the guidelines eliminates any relevance of the aggravating and mitigating factors, factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses and offenders.<sup>268</sup>

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> 1991 Mandatory Penalties Congressional Report.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

It also denies the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy.<sup>269</sup> Similarly, in 1993, Chief Justice William Rehnquist stated that "one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."<sup>270</sup> Based upon its review of the evidence and empirical research, the Commission concluded that the two systems are "structurally and functionally at odds."<sup>271</sup> Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.<sup>272</sup>

As explained by Supreme Court Justice Stephen Breyer, a former U.S. Sentencing Commissioner, this interrelatedness (1) precludes the Commission from calibrating sentences based on normatively or empirically relevant factors, such as the defendant's role or culpability for a crime; (2) distorts sentences for entire classes of crimes; and (3) thwarts the development, through research, of a rational, coherent set of punishments.<sup>273</sup>

Because the severity of the guidelines is tied to the severity of mandatory minimums, this means that, even in those cases when mandatory minimums do not apply, the Sentencing Commission is still required to base its guideline range on and be proportionate to the relevant mandatory minimum, even when that stands in direct contravention to its own independent judgment and expertise in the matter.<sup>274</sup> Thus, just as mandatory minimums yield excessively severe sentences, so too do the guidelines. For example, the guidelines range for a nonviolent, first-time-offender, street-level dealer who distributed 300 grams of crack in one month is 10 to 12 years, which is a far greater penalty than that for the forcible rape of a adult, killing a person in voluntary manslaughter, disclosing top secret national defense information, or violent extortion of more than \$5 million involving serious bodily injury.<sup>275</sup>

### **3. MANDATORY MINIMUMS, ENHANCEMENTS, AND CONSECUTIVE COUNTS ARE INEFFECTIVE DETERRENTS AND HAVE INCREASED RECIDIVISM WHILE DIMINISHING PUBLIC SAFETY**

To start, the reduction in our national crime rate is not due to mandatory penalties. Two of the most highly respected criminology scholars, Professors Michael Tonry and David Farrington, have convincingly shown that many other western countries, including Canada, experienced a rise and fall in crime rates that closely mirror those of the United States over the past several decades---yet none of those countries saw a significant increase in incarceration rates, much less

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180 (1999).

<sup>274</sup> Keeley Over-Criminalization Task Force Statement at 8-9.

<sup>275</sup> Mark Osler, *Amoral Numbers & Narcotics Sentencing*, Univ. of St. Thomas (Minnesota) Legal Studies Research Paper No. 13-21, 2013.

an increase remotely close to the quadrupling of rates in the United States.<sup>276</sup> And the vast majority of researchers agree that no matter one's view of how severe penalties ought to be, severity of punishment as a method for reducing crime is almost certainly the weakest method of those available.<sup>277</sup>

Despite proponents' beliefs that mandatory minimums deter individuals, most researchers have found no deterrent effect from mandatory sentencing policies.<sup>278</sup> Common sense tells us that most offenders are neither aware of the balance of costs and benefits to their behavior nor necessarily behave as a rational economic actor would. The Vera Institute, which has studied reform efforts in the states, concluded that "[a]lthough [mandatory minimum] laws---hallmarks of the tough-on-crime era---were typically enacted on the assumption they would help control crime by 'sending a message' to potential offenders, research has shown that enhancing the severity of punishment, when most offenders don't believe they will be apprehended, adds little deterrent value."<sup>279</sup> Research shows that the amount of punishment has no general or specific deterrent effect.<sup>280</sup> Moreover, imprisonment of drug offenders does not prevent drug crime because "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."<sup>281</sup>

Proponents of mandatory penalties argue that they are effective at reducing crime because they incapacitate the offenders for long periods of time. Incapacitation is effective only if the individual imprisoned will not be replaced by others and if the individual would not "age out" of the criminal lifestyle.<sup>282</sup> Most offenders typically "age out" of the risky criminal lifestyle such that any length of mandatory sentence beyond that does not any retributive goals.<sup>283</sup>

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<sup>276</sup> Jonathan P. Caulkins, et al., Rand Inst., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? (1997) [hereinafter Rand Mandatory Penalties Report], *available at* [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2006/MR827.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2006/MR827.pdf).

<sup>277</sup> **Error! Main Document Only.** See Nat'l Resource Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (2014) [hereinafter Growth of Incarceration] (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are "not an effective deterrent"); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, CRIME & JUSTICE 199, 202 ("[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis."); see also Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, PRISON JOURNAL 91: 48S (2011); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?* 10 CRIMINOLOGY & PUB. POL'Y 13, 37 (2011); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUSTICE: A REVIEW OF RESEARCH 28-29 (2006); Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. OF PUB. ECON. 2043 (2004) ("[I]t is unlikely that the dramatic increase in drug imprisonment was cost-effective").

<sup>278</sup> Valerie Wright, The Sentencing Project, *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* 9 (2010) [hereinafter Deterrence in Criminal Justice Report], <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

<sup>279</sup> Vera Institute Review of State Reforms at 8.

<sup>280</sup> Deterrence in Criminal Justice Report.

<sup>281</sup> 15 Year Report on Federal Sentencing at 134.

<sup>282</sup> Cato Institute Mandatory Penalties Report.

<sup>283</sup> *Id.*

Proponents argue that mandatory minimums are necessary to induce defendants to cooperate in investigations. But the research demonstrates that the rate of cooperation in mandatory minimum cases is comparable to the average in all federal cases.<sup>284</sup>

A Rand Institute study found that mandatory minimums for nearly all drug offenders are not cost-effective, although long sentences for major international drug kingpins trafficking enormous quantities were found to be cost-effective (i.e. in those extremely rare cases when they are prosecuted and convicted).<sup>285</sup> In economic terms, we are not getting a good return on our investment out of our existing federal sentencing policies. Our federal criminal sentencing policy has reached the point at which we are experiencing diminishing returns because those subject to the harsh penalties are nonviolent offenders, which does not affect the crime rate or the level of public safety.

Mandatory sentencing policies do not serve the traditionally accepted goals of punishment. All theories of retribution require that the punishment be proportionate to the gravity of the offense. This principle of justice functions as a limitation on government power that has been recognized throughout history and across cultures and is deeply rooted in our own.<sup>286</sup>

While retribution remains an important purpose of sentencing, the other purposes of sentencing—specifically, rehabilitation and proportionality—have profound importance in terms of decreasing recidivism, increasing public safety, and increasing public trust in the legitimacy of the criminal justice system. This has been borne out at the state level. Recent bipartisan sentencing reform efforts among the states, which this report discusses in greater detail later, demonstrate that there are alternatives to harsh and unjust mass incarceration that manage to keep communities safe and taxpayer dollars targeted toward initiatives that have a proven track record of deterrence and rehabilitation. Many states have reduced their crime rates and correctional spending by reducing or eliminating mandatory minimum sentencing, implementing evidence-based practices in community supervision, improving programming within federal prisons, and strengthening reentry.

Prison officials have long recognized the beneficial role that educational and employment related programs have on prison populations while incarcerated and upon release in reducing recidivism. Literacy rates among prisoners are well below the general population, and about one-third of inmates have completed high school.<sup>287</sup> While more than 80% of state prisons, and 90% of federal prisons offer basic and secondary education courses to inmates, in 1994, Congress restricted Pell grants to inmates, significantly precluding the ability of inmates to

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<sup>284</sup> *Id.* at 19.

<sup>285</sup> Rand Mandatory Penalties Report.

<sup>286</sup> *See, e.g.*, U.S. Const. Amend VIII (banning “cruel and unusual punishment”); Universal Declaration of Human Rights, art. 1, G.A. Res. 217A, U.N. Doc. A/810, art. 5 (1948) (same); Richard L. Perry, *Sources of our Liberties* 107, 236 (1959) (proportionality was enshrined in the Magna Carta, the English Bill of Rights, and British jurisprudence and carried over to America and codified in both colonial law and post-revolutionary state constitutions).

<sup>287</sup> Caroline Wolf Harlow, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Special Report: Education and Correctional Populations 2* (2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf>.

receive post-secondary education while incarcerated, which would improve their outlook upon release and reduce recidivism.<sup>288</sup>

There are continuing funding cuts to programs providing job training and education, which ease recidivism rates. Federal and state prison industries provide full time work to inmates in efforts to develop marketable skills for use upon release.<sup>289</sup> Federal Prison Industries (FPI) employed 16,000 inmates, as of 2012.<sup>290</sup> But it is no longer self-perpetuating having lost Department of Defense procurement preference in the 2002, 2003, and 2008 National Defense Authorization Acts.<sup>291</sup> Additionally, there have been reductions in federal funding under the Workforce Investment Act from a *minimum* of 10% to a *maximum* of 10% of funding.<sup>292</sup> Likewise, funding for vocational education has been cut from a *minimum* of 1% of funds spent on correctional education to a *maximum* of 1%.<sup>293</sup> Indeed, “[d]espite the large percentage of facilities that offer educational opportunities to prisoners, participation rates in correctional education [and vocation] programs have not grown alongside the exploding prison population.”<sup>294</sup> In point of fact, the number of federal inmates participating in basic, GED, English as a second language, vocational, life skills, and community adjustment classes decreased steadily from 1991 to 2004.<sup>295</sup> It is unclear whether this reduction is due to the unavailability of programs, long waiting lists, inmates opting not to participate, or a combination of these factors.<sup>296</sup>

The BOP has found that high inmate-to-staff ratios reduce the programming available to prevent inmates from recidivating, decrease the safety of inmates and staff, and strain essential prison infrastructure (e.g. plumbing).<sup>297</sup> BOP facilities are currently operating at between 35 and 40 percent above their rated capacity, with 51 percent crowding at high-security facilities and 47 percent at medium-security facilities in FY 2012.<sup>298</sup>

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<sup>288</sup> Pub. L. 103-322 (1994).

<sup>289</sup> U.S. Dep’t of Justice, Federal Prison System, *Federal Prison Industries FY 2012 Budget* at 2 (2012), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2013/12/14/fy12-bop-fpi-justification.pdf>.

<sup>290</sup> *Id.*

<sup>291</sup> U.S. Bureau of Prisons, Federal Prison Industries, Inc. Appropriations Justification FY 2012 (2012), available at <http://www.justice.gov/jmd/2012justification/pdf/fy12-bop-fpi-justification.pdf>.

<sup>292</sup> Anna Crayton and Suzanne Rebecca Neusteter, Prisoner Reentry Institute, John Jay College of Criminal Justice, *The Current State of Correctional Education* 15 (2008), available at <http://www.urban.org/projects/reentry-roundtable/upload/Crayton.pdf>.

<sup>293</sup> *Id.* at 17.

<sup>294</sup> *Id.* at 10.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Stemming the Tide* at 1-2.

<sup>298</sup> *Hearing on the Oversight of the Federal Bureau of Prisons Subcommittee on Crime, Terrorism, Homeland Security, & Investigations*, 113<sup>th</sup> Cong. (2013) (statement of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons).

Prison overcrowding has contributed significantly to the diminished inability of correctional facilities to accomplish two of their primary goals: deterrence and rehabilitation.<sup>299</sup> Unreasonably high recidivism rates may cause many Americans to lose confidence in the criminal justice system.<sup>300</sup>

Rehabilitation of an offender includes addressing any underlying mental health and/or substance abuse issues that may have contributed to the offense, either in the sense that the offense was committed while the offender had a diminished mental capacity or to support the offender's addiction. Commonsense tells us that unless and until we resolve the root cause, the doors to our prisons will be revolving ones. We cannot continue to warehouse instead of rehabilitate offenders with these issues.

There is a high incidence of mental illness and drug and alcohol dependence of incarcerated persons as reflected by a 2006 Bureau of Justice Statistics survey.<sup>301</sup> Jails see the highest incidence of mental illness, at 64%, followed by state and federal prisons at 56% and 45%, respectively.<sup>302</sup> It is estimated that 10% to 25% of inmates suffer from serious mental health problems, including major affective disorders or schizophrenia.<sup>303</sup>

The prevalence of substance abuse is highest in jails, as well, with 54% evidencing drug abuse/dependence and 47% alcohol abuse/dependence, resulting in a significant portion of the population dealing with both issues simultaneously.<sup>304</sup> Persons incarcerated in state prisons see an incidence rate of 43% for drug abuse/dependence and 36% for alcohol abuse/dependence, while federal prisons are susceptible at rates of 39% and 30% for drug and alcohol abuse/dependence, respectively.<sup>305</sup> It is estimated that fewer than 10% of inmates have access to substance abuse treatment at a given time.<sup>306</sup> While mortality rates in prisons and jails is comparable to the general population, a recently released individual is 13 times more likely to die in the two weeks following incarceration than the general population, including being 129 times more likely to die of an overdose.<sup>307</sup>

Eighty percent of recently released persons are bereft of private or public health insurance.<sup>308</sup> Most Medicaid recipients generally lose their coverage during incarceration and most states

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<sup>299</sup> Alexia D. Cooper, et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* 1 (2014), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>.

<sup>300</sup> Heaphy Over-Criminalization Task Force Statement at 6.

<sup>301</sup> Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Mental Health Problems of Prison and Jail Inmates* 1 (2006) [hereinafter *Mental Health Problems*], available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

<sup>302</sup> *Id.*

<sup>303</sup> *Growth of Incarceration* at 205.

<sup>304</sup> *Id.* at 206.

<sup>305</sup> *Mental Health Problems* at 5.

<sup>306</sup> *Growth of Incarceration* at 218.

<sup>307</sup> *Id.* at 226.

<sup>308</sup> Dan Gorenstein, *In prison you get health care. When you're released ...*, MARKETPLACE, Dec. 30, 2013, available at <http://www.marketplace.org/topics/health-care/prison-you-get-health-care-when-youre-released>.

ignore federal guidance recommending taking efforts to reenroll incarcerated individuals upon release.<sup>309</sup> Although inmates with mental health disorders are those most likely to receive discharge planning, they are given only a short term supply of medication upon release, and trend toward disuse of same, with an increasing reliance on emergency health care resultant of homelessness.<sup>310</sup> Additionally, limited access to transportation also disparately impacts the recently released, hindering their access to ongoing healthcare.<sup>311</sup>

As we will see in greater detail when we examine states that have eliminated or reduced mandatory minimums, enhancements, and consecutive counts and provided for alternatives to incarceration, the hallmark measures of public safety---crime and recidivism rates---not only remained steady, but most decreased as a result of shortening sentences.

This is supported by research from the Pew Center on the States that projects that for any ratio of over 350 persons incarcerated for every 100,000 in the total national population, crime reduction value begins to diminish.<sup>312</sup> Furthermore, Pew’s research also warns us that any ratio greater than 500 persons for every 100,000 in the total national population becomes *counterproductive* – incarcerating those additional individuals actually generates more crime than it prevents or stops.<sup>313</sup> The data shows that beyond that 500:100,000 ratio, the impact of so many people being incarcerated actually contributes to *increased* crime nationwide.<sup>314</sup>

As a result of the emotionally appealing “tough on crime” policies, the U.S. is far beyond that tipping point with over 700 persons incarcerated for every 100,000 in the population---far exceeding the world average incarceration rate of about 100 per 100,000.<sup>315</sup>

As Pew explained:

Crime can explain only a *small* portion of the rise in incarceration between 1980 and the early 1990s, and *none of the increase in incarceration since then*. If incarceration rates had tracked violent crime rates, for example, the incarceration rate would have peaked at 317 per 100,000 in 1992, and fallen to 227 per 100,000 by 2008 – less than one third of the actual 2008 level and about the same level as in 1980.<sup>316</sup>

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<sup>309</sup> *Id.*

<sup>310</sup> Growth of Incarceration at 228.

<sup>311</sup> Pew 1 in 100 Report at 19.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> John Schmitt, Kris Warner, & Sarika Gupta, CENTER FOR ECONOMIC AND POLICY RESEARCH, *The High Budgetary Cost of Incarceration* 1 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

## 4. COLLATERAL CONSEQUENCES

### A. Overview

Modern collateral consequences vary state-by-state, but, in general, prohibit people from receiving government assistance, prohibit certain housing situations, hinder entry into institutions of higher learning, preclude entry into a trade, rescind the right to vote, and create any other number of barriers to reentry into society as a productive individual due to a prior criminal conviction. On the federal level, collateral consequence can raise significant housing, educational, healthcare, subsistence, and immigration issues.

The American Bar Association has, at last count, identified more than 45,000 state and federal collateral consequences of incarceration.<sup>317</sup> At a state-by-state level, examples include Virginia, which has 146 mandatory collateral consequences affecting employment and 345 in full, and Ohio has at least 533 mandatory consequences.<sup>318</sup>

Many of these collateral consequences have little to no correlation to stopping recidivism, and may actually increase recidivism rates by placing greater financial and societal hardships on recently released persons.<sup>319</sup> Additionally, only roughly 10% of the prison population receives discharge planning to assist reintegration into society.<sup>320</sup>

The loss of rights and privileges imposed by collateral consequences pushes individuals attempting to reintegrate into society to the political, social, and economic margins and relegate them to partial citizenship.<sup>321</sup> As the Vera Institute noted “[t]here is a growing awareness that collateral consequences hinder reentry, exacerbate recidivism (creating more victims), are too broadly applied (resulting in arbitrary and unnecessary restrictions), and have a disparate impact on people of color.”<sup>322</sup> These collateral consequences now affect the some 65 million Americans who have a “rap sheet,” including 19 million with felony convictions.<sup>323</sup> This number will only continue to grow with approximately 14 million new arrests every year.<sup>324</sup>

The U.S. lags well behind other post-industrial countries in not only our incarceration rates, but in restoring rights and status to citizens upon their release from incarceration. In several European countries, prisoners can vote and criminal confidentiality protections are

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<sup>317</sup> National Association of Criminal Defense Lawyers, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime* 22 (2014) [hereinafter NACDL Collateral Damage Report].

<sup>318</sup> *Id.* at 32.

<sup>319</sup> Lorelei Laird, *Ex-Offenders face tens of thousands of legal restrictions, bias, and limits on their rights*, ABA JOURNAL (June 1, 2013).

<sup>320</sup> Growth of Incarceration, at 228.

<sup>321</sup> *Id.* at 303-06.

<sup>322</sup> Vera Institute Review of State Reforms at 27.

<sup>323</sup> *Id.* at 22.

<sup>324</sup> *Drug and Crime Facts*, U.S. Dep't of Justice, Bureau of Justice Statistics, available at <http://www.bjs.gov/content/dcf/enforce.cfm>.

extended throughout a person's lifetime.<sup>325</sup> In the Netherlands, France, Germany, and Spain, there are strict limits on the amount of information available in criminal records and who can gain access.<sup>326</sup>

## **B. Categories of Collateral Consequences**

### **1. Employment**

With more than 65 million citizens with criminal records, criminal background checks are being used with greater frequency to weed out applicants, regardless of other qualifications. The question of whether an individual has a drug offense is also being utilized on FAFSA student loan forms, and any answer but “no” regardless of the level of offense, will bar the applicant from receiving federal student aid until they complete an approved drug rehabilitation program or pass two random drug tests.<sup>327</sup> Private and public employers routinely request disclose about prior criminal arrests or convictions on employment applications. Research demonstrates that admitting to a criminal conviction for an entry-level job, requiring no experience or degree, resulted in a 50% lower likelihood that the applicant would receive a callback or job offer, regardless of any other considerations about the applicant, with a significantly higher incidence of denial for African-Americans than Whites.<sup>328</sup>

Fully thirty-eight states permit public and private employers to consider convictions when reviewing job applications, often with only the limited guidance allowing the denial of licensure if an applicant is “unfit” or “unsuited” for the occupation.<sup>329</sup> In 2013, 4 states passed “ban the box” laws, joining at least 8 other states and many cities and counties in leveling the playing field for ex-offenders.<sup>330</sup> Even so, it is difficult, if not impossible, for those with criminal records to challenge the accuracy of the information contained with criminal background checks, which may disqualify them from employment, or explain the mitigating or extenuating circumstances surrounding the commission of that offense.

Only 1 in 5 inmates have a job lined up post-release, and there is limited assistance in obtaining employment readiness/job-training while in prison. Most cite assistance in finding employment one of their greatest needs after release.<sup>331</sup> Stable employment helps returning

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<sup>325</sup> NACDL Collateral Damage Report at 24.

<sup>326</sup> *Id.*

<sup>327</sup> Nat'l Employment L. Proj., NELP Criminal Records Bulletin (DEC. 2013), *available at* [http://nelp.3cdn.net/48cbf07143b23755fc\\_7hm6i9ex2.pdf](http://nelp.3cdn.net/48cbf07143b23755fc_7hm6i9ex2.pdf).

<sup>328</sup> Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantages: Barriers to Employment Facing Young African-American & White Men with Criminal Records*, 623 ANNALS OF THE AMER. ACAD. 195, 199 (2009).

<sup>329</sup> See Nat'l Employment L. Proj., *Statewide Ban the Box; Reducing Unfair Barriers to Employment of People with Criminal Records* (May 2014).

<sup>330</sup> Vera Institute Review of State Reforms at 31.

<sup>331</sup> The Urban Institute, *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio* 4 (Jan. 2006) [hereinafter The Urban Institute's Prisoner Reentry Portfolio].

citizens reintegrate into their communities; the inability to do so often leaves the individual no choice but to recidivate in order to provide for themselves and their families.<sup>332</sup>

State licensing and certification boards also often have vague guidance as to who may be denied employment licensure, allowing such denial on findings of being “unfit or unsuited” or “lacking moral character.”<sup>333</sup> Due to the subjective nature of these directives, licensing boards may deny licensure to people simply for the fact that they have criminal records, without taking into account any other considerations, and despite that there may be no correlation to the crime and the employment sought, such as someone with a marijuana possession charge being denied a license to cut hair. Some states have initiated inventories of these employment restrictions, such as Florida, which identified state-created restrictions on 40% of the jobs in large employment sectors.<sup>334</sup>

This “one-size-fits-all” approach is not narrowly tailored to effectuate its purpose. Certainly, we can agree that someone with lengthy history of fraud and embezzlement may not be the best candidate for a business’s treasurer. But we are hard-pressed to consider why someone who had a drug conviction from decades ago but has received treatment for his addiction and has remained drug- and incident-free since then should be prohibited from working as a plumber. There is simply no nexus there.

## 2. Housing

The mere fact of a conviction will often result in the barriers to securing housing. Local Public Housing Authorities (PHA) often administer Section 8 housing programs, and have enormous discretion in setting policy.<sup>335</sup> Housing also be denied, or persons may be evicted, when *any* household member has engaged in drug related activity, violent criminal activity, or other criminal activity that may threaten public health and safety.<sup>336</sup> The Department of Housing and Urban Development has a “one strike policy” providing broad discretion to PHAs to bar *entire households* from residence, even when no one in the household itself has been convicted of a crime if *guests* of the household have been convicted of such prohibited offenses.<sup>337</sup> PHAs also have limited discretion to deny housing to persons with a drug conviction in the past three years.<sup>338</sup> Private residential landlords or buildings may run criminal background checks on applicants and use that information to bar them from securing housing. Again, because the

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<sup>332</sup> NACDL Collateral Damage Report at 25.

<sup>333</sup> See generally Margaret Colgate Love, NACDL Restoration of Rights Project, *Consideration of Criminal Record in Licensing and Employment* (2014), available at [https://www.nacdl.org/uploadedFiles/files/resource\\_center/2012\\_restoration\\_project/Consideration\\_of\\_Criminal\\_Record\\_in\\_Licensing\\_And\\_Employment.pdf](https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Consideration_of_Criminal_Record_in_Licensing_And_Employment.pdf).

<sup>334</sup> Growth of Incarceration at 236.

<sup>335</sup> Marah A. Curtis, Sarah Garlington, & Lisa Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT & RESEARCH 43-48 (2013), available at <http://www.huduser.org/portal/periodicals/cityscape/vol15num3/ch2.pdf>.

<sup>336</sup> 24 C.F.R. § 928.553.

<sup>337</sup> *HUD v. Rucker*, 535 U.S. 125 (2002) (upholding the one strike policy).

<sup>338</sup> 24 C.F.R. §960.204(a).

applicant is often unaware if information is accurate or even relevant to the housing decision, these denials are “invisible” and difficult to quantify.

### 3. Prohibition From Receiving Food and Subsistence Benefits

A significant collateral consequence of conviction is the prohibition from receiving federal and state assistance for food and subsistence living expenses through Temporary Aid for Need Families (“TANF”) and the Supplemental Nutrition Assistance Program (“SNAP”).<sup>339</sup> Courts have the discretion to revoke federal benefit eligibility from persons convicted of a drug possession offense at the state or federal level, including TANF, SNAP, and housing assistance for up to 1 year for a first offense and 5 years for a second offense.<sup>340</sup>

A five year ban from public assistance results from a conviction on distribution charges, and can rise to a lifetime ban for a third offense.<sup>341</sup> Under federal charging policies, a lifetime ban from receiving public assistance can arise from a single set of events.<sup>342</sup> Currently, thirteen states have enacted legislation prohibiting receipt of TANF benefits to convicted individuals, 24 states have modified prohibitions, and 13 allow convicted individuals to receive benefits; 9 states have full prohibitions on SNAP benefits, 25 have modified prohibitions, and 16 have no prohibition.<sup>343</sup>

In the 13 states that banned TANF benefits to individuals convicted of drug felonies, it is estimated that this affected 180,000 women.<sup>344</sup> The ban disproportionately impacts women, who make up 85% of the TANF recipient population.<sup>345</sup> Additionally, from 1980 to 2010, the number of women in prison rose by 646%, compared to 419% for men.<sup>346</sup> By 2011, 25% of women in state prison were incarcerated for a drug offense.<sup>347</sup> The ban does not apply to the children of a woman with a felony drug offense, but diminishes the benefit to serve only the children, and the mother will not receive any benefit.<sup>348</sup>

There is a false supposition that “addicts” receiving TANF and SNAP are more likely to commit fraud by using the money to buy drugs or by trafficking in food stamps, despite evidence that the trafficking rate of food stamps between 2006 and 2008 was a mere 1%.<sup>349</sup> Rather, the

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<sup>339</sup> The Sentencing Project, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits* (2013) [hereinafter *A Lifetime of Punishment*], available at [http://sentencingproject.org/doc/publications/cc\\_A%20Lifetime%20of%20Punishment.pdf](http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf).

<sup>340</sup> *Id.* at 1-3

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 3.

<sup>345</sup> *Id.* at 3.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 2-3.

<sup>349</sup> U.S. Dep’t. of Ag. Food & Nutrition Servs., *Fighting SNAP Fraud*, (2011), available at [www.fns.usda.gov/snap/fraud/fraud\\_2.html](http://www.fns.usda.gov/snap/fraud/fraud_2.html); see also, Richard Mantovani and Hoke Wilson, U.S. Dep’t. of Ag. Food & Nutrition Servs., *The Extent of Trafficking in the Supplemental Nutrition Assistance Program: 2006-2008* (Mar. 2011).

negative public health effects of denying subsistence food assistance to individuals recently released from jail far outweighs the potential for fraud. People facing food insecurity are more likely to engage in HIV risk behaviors, including using drugs or alcohol before sex, or engaging in prostitution.<sup>350</sup>

#### **4. Voting and Jury Service - Participation in the Democratic Process**

More importantly, in almost every state, a felony conviction results in voter disenfranchisement, which will only be restored upon the full completion of a sentence, regardless of incarceration status, and seven states, including Virginia, provide for the restoration of voting rights only by pardon or gubernatorial act.<sup>351</sup> Similarly, the existence of a criminal conviction may prohibit service as a juror and, even in states in which it is not expressly prohibited, counsel may inquire about prior encounters with the justice system and exercise either cause-based strikes or peremptory strikes (for any reason) to excuse jurors from service. Jury service and voting are important civic duties that permit ordinary citizens to participate meaningfully in the democratic process, to hold the government accountable in a transparent and significant manner. Depriving individuals, who have served their sentence, of these fundamental democratic acts is irrational at best, unduly punitive at worst.

#### **5. EFFECTS ON FAMILIES AND FUTURE GENERATIONS**

According to a United States Department of Justice Special Report in 2010, there are at least 1.7 million children with an incarcerated parent,<sup>352</sup> accounting for 2.3% of the nation's youth population.<sup>353</sup> Incarcerated mothers are far more likely than incarcerated fathers to have lived with their children prior to incarceration by a rate of 55% to 36%.<sup>354</sup> More importantly, these incarcerated mothers are more likely to be the head of a single parent household, accounting for 42% of women in state prison and 52% in federal prison; fully 77% of them were their children's primary caregiver as well.<sup>355</sup> Half of the women in prison are housed more than 100 miles from their children and nearly 80,000 women will not see their children at any point during their

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<sup>350</sup> A Lifetime of Punishment at 7 (citing Emily A. Wang, et al., *A Pilot Study Examining Food Insecurity and HIV Risk Behaviors Among Individuals Recently Released from Prison*, 25 AIDS EDUC. & PREVENTION (2013) at 112-13)

<sup>351</sup> Margaret Colgate Love, NACDL Restoration of Rights Resource Project, *Chart #1 Loss and Restoration of Civil Rights and Firearms Privileges* (Feb. 2014), available at [https://www.nacdl.org/uploadedFiles/files/resource\\_center/2012\\_restoration\\_project/Loss\\_and\\_Restoration\\_of\\_Civil\\_Rights\\_and\\_Firearms\\_Privileges.pdf](https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Loss_and_Restoration_of_Civil_Rights_and_Firearms_Privileges.pdf).

<sup>352</sup> Dep't of Justice, Bureau of Justice Statistics, *Special Report: Parents in Prison and Their Minor Children* at 1 (March 2010) [hereinafter *Parents in Prison*], available at <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

<sup>353</sup> *Id.*

<sup>354</sup> Growth of Incarceration at 260.

<sup>355</sup> *Id.*

incarceration.<sup>356</sup> Of minors with an incarcerated parent in 2013, more than 25%---over 400,000 children---were age 4 or younger.<sup>357</sup>

The racial and ethnic disparities in these rates are reflected in the rates of parental incarceration; African-American and Latino children are 7.5% and 2.7% more likely than White children to have a parent in prison.<sup>358</sup> White children face a 3.6-4.2% likelihood of seeing a parent imprisoned, while African-American children face a 25.1-28.4% likelihood of the same.<sup>359</sup>

A future cost arises from lower levels of child well-being, including persistent disadvantages in education, financial circumstances, substance abuse, and mental illness. Children have more difficulty in school and parents report more negative behavioral changes, including acting out, not listening to adults, becoming withdrawn, and behavioral regression when a parent is incarcerated.<sup>360</sup> Early and persistent aggression and conduct issues have direct correlations to later criminal behavior, resulting in a cycle of poverty and incarceration.<sup>361</sup>

Paternal incarceration has negative physical effects on children. There is a higher infant mortality rate in non-abusive households.<sup>362</sup> Young adults exhibit higher body mass indexes operating primarily through depression.<sup>363</sup> Further, young women face a higher risk of physical and sexual abuse and neglect.<sup>364</sup>

The U.S. now houses over 200,000 women in jails and prisons, a 646% increase since 1980. Children of incarcerated mothers are more likely to fall prey to domestic or substance abuse and/or to develop behavioral problems or mental illness.<sup>365</sup> A major problem arising from this derives from many children living in single parent households at the time of incarceration, raising the likelihood that they will enter the foster care system.<sup>366</sup> The initial separation leads to significant stress in both the mother and child, often resulting in depressive symptoms in both, and as limited contact continues, the negative outcomes in children may express themselves as

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<sup>356</sup> The Sentencing Project, *Trends 1991-2007: Dep't of Justice, Bureau of Justice Statistics, Incarcerated Parents & Their Children* at 8 (Feb. 2009) [hereinafter *Incarcerated Parents & Their Children*], available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf)

<sup>357</sup> Oliver Roeder, *Just Facts: Actually, Orange Really Is the New Black* at 4, Brennan Center for Justice (June 16, 2014), available at <http://www.brennancenter.org/blog/actually-orange-really-new-black>.

<sup>358</sup> *Incarcerated Parents & Their Children* at 8.

<sup>359</sup> *Id.*

<sup>360</sup> Nancy G. La Vigne, Elizabeth Davies & Diana Brazzell, URBAN INSTITUTE, *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents* 7 (2008) [hereinafter *Broken Bonds*], available at [http://www.urban.org/uploadedpdf/411616\\_incarcerated\\_parents.pdf](http://www.urban.org/uploadedpdf/411616_incarcerated_parents.pdf).

<sup>361</sup> *Id.*

<sup>362</sup> Christopher Wildeman, POPULATION STUDIES CENTER, *Imprisonment and Infant Mortality* (2010), available at <http://www.psc.isr.umich.edu/pubs/pdf/rr09-692.pdf>.

<sup>363</sup> Michael E. Roettger & Jason D. Boardman, *Parental Incarceration and Gender-based Risks for Increased Body Mass Index: Evidence From the National Longitudinal Study of Adolescent Health in the United States*, 175 AM. J. EPIDEMIOL. 636-44 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3324435/>.

<sup>364</sup> *Growth of Incarceration* at 267-71.

<sup>365</sup> *Id.* at 262-63, 274.

<sup>366</sup> *Incarcerated Parents & Their Children* at 8.

noted above.<sup>367</sup> Additionally, the adult children of incarcerated mothers are more likely to see jail time than their counterparts with incarcerated fathers.<sup>368</sup>

When a mother is locked up, her children are five times more likely to enter into the foster care system than when a father is sent to prison or jail.<sup>369</sup> Youths in the foster care system are more likely to run away, become homeless, and remain homeless for long periods of time.<sup>370</sup> Additionally, children who age out of foster care have limited to no income or housing support and end up on the streets.<sup>371</sup> In this vein, one-in-three homeless teens will be lured into child sex trafficking within 48 hours of leaving home;<sup>372</sup> the Los Angeles Police Department estimate that 59% of juveniles arrested for prostitution come from the foster care system.<sup>373</sup>

There are direct correlations between children who face these negative outcomes, especially educational deficiencies and the development of substance abuse or behavioral problems, and future risk of incarceration, perpetuating a generational cycle of poverty and incarceration.<sup>374</sup> Indeed, the NAACP recognizes that the vicious circle of poverty, criminality, and incarceration continues to deprive already-marginalized individuals and their family members of the opportunity to escape poverty.<sup>375</sup>

## 6. CHANGING SOCIAL ATTITUDES

At various times in their careers, the most recent four presidents have questioned the wisdom of long mandatory sentences.<sup>376</sup> Even the former DEA “Drug Czar” and federal prosecutors and lawmakers have disputed the rationality of mandatory sentences.<sup>377</sup>

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<sup>367</sup> Broken Bonds at 7.

<sup>368</sup> Danielle H. Dallaire, *Incarcerated Mothers & Fathers: A Comparison of Risks for Children & Families*, 56 FAMILY RELATIONS 440-453 (2007).

<sup>369</sup> *Incarcerated Parents & Their Children* at 9.

<sup>370</sup> Nat’l Conf. of State Leg., *Homeless & Runaway Youth* (OCT. 2013), available at <http://www.ncsl.org/research/human-services/homeless-and-runaway-youth.aspx>.

<sup>371</sup> *Id.*

<sup>372</sup> *FAQs: Human Trafficking Stats*, TRAFFICKINGHOPE.ORG, available at <http://www.traffickinghope.org/faqsstats.php>.

<sup>373</sup> Abby Sewell, *Most L.A. County Youths held for prostitution come from foster care*, L.A. TIMES, Nov. 27, 2012.

<sup>374</sup> Growth of Incarceration at 274.

<sup>375</sup> See NAACP Supports Passage of Comprehensive Ex-Offender Reentry Legislation, NAACP, available at <http://www.naacp.org/action-alerts/entry/naacp-supports-passage-of-comprehensive-ex-offender-reentry-legislation>.

<sup>376</sup> See then-Sen. Barack Obama, Address at the Howard Univ. Convocation (Sept. 28, 2007); Frank Davies, *Drug Czar Vacancy Exposes Policy Divide in GOP*, MIAMI HERALD, Feb. 23, 2001, at A29 (quoting CNN interview with President-elect George W. Bush); Interview by Rolling Stone Magazine with President William J. Clinton (Nov. 2, 2000); 116 Cong. Rec. H33314 (Sept. 23, 1970) (statement of Rep. George H.W. Bush).

<sup>377</sup> Press Release, Rep. Bob Inglis, *New Poll: Americans Oppose Mandatory Minimums, Will Vote for Candidates Who Feel the Same* (Sept. 24, 2008); Christopher S. Wren, *Public Lives: A Drug Warrior Who Would Rather Treat Than Fight*, N.Y. TIMES, Jan. 8, 2001, at A12 (quoting former U.S. Drug Czar Barry McCaffrey); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192-95 (1993).

Opinion polls suggest that opposition to these draconian mandatory sentences is growing within the general public. A recent survey found that a majority of those polled opposed mandatory minimums for non-violent offenses and stated that they would vote for a congressional candidate who supports ending such sentences.<sup>378</sup>

## 7. NOT FINANCIALLY SUSTAINABLE

As if the Constitutional, statutory, and human toll were not enough, the financial costs of our federal prison system are not sustainable. The high costs of maintaining a growing prisoner population have contributed to the increases in the BOP budget relative to the rest of the DOJ: in FY 2000, BOP took up less than 20 percent of the DOJ budget, but it is projected to consume more than 30 percent by FY 2020.<sup>379</sup> In these fiscally lean times, funding the expanding BOP population crowds out other priorities, including funding for federal investigators and federal prosecutors and support for state and local governments.<sup>380</sup>

The average annual cost of housing an inmate in a BOP facility in FY 2012 was more than \$29,000.<sup>381</sup> The President's FY 2014 budget request for BOP totals \$6.9 billion, reflecting an increase of \$310 million from the FY 2012 enacted budget.<sup>382</sup>

Each federal 15-year sentence costs the federal taxpayers approximately *half a million dollars*, and each federal 30-year sentence costs the federal taxpayers approximately *one million dollars*.<sup>383</sup>

Although the BOP anticipates adding over 25,000 beds by 2020, but most of these projects have not yet been approved and would not substantially reduce overcrowding or the continued budgetary demand.<sup>384</sup> Barring any new prison construction or policy changes, overcrowding will continue to rise to 55 percent in BOP facilities within 10 years.<sup>385</sup>

Longer federal prison sentences typically correlate with longer terms of supervised release, which is overseen by the Judiciary. In a 2010 report, the Sentencing Commission noted that the average term of supervised release for an offender in the federal system subject to a mandatory penalty was 52 months, which compared to 35 months for an offender who was not subject to a

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<sup>378</sup> See, e.g., Families Against Mandatory Minimums, *Omnibus Survey* (2008), <http://www.famm.org/Repository/Files/FAMM%20poll%CC20no%embargo.pdf>.

<sup>379</sup> Growth of Incarceration at 2.

<sup>380</sup> *Hearing on Federal Sentencing Options after Booker: Current State of Federal Sentencing* (2012) (statement of Matthew Axelrod, Associate Deputy Attorney General).

<sup>381</sup> Stemming the Tide at 13.

<sup>382</sup> *Id.*

<sup>383</sup> The U.S. Sentencing Commission estimates the life expectancy of federal prisoners at 470 months (39.16 years). See 2012 Sourcebook of Federal Sentencing Statistics at app. A. The average annual cost of incarceration in fiscal year 2013 was \$29,291.25. See Annual Determination of Average Cost of Incarceration, 79 Fed. Reg. 26,996 (May 12, 2014) [hereinafter Fiscal Year 2013 Annual Determination of Average Cost of Incarceration].

<sup>384</sup> Stemming the Tide at 12.

<sup>385</sup> *Id.* at 18.

mandatory minimum—a difference of 17 months.<sup>386</sup> Based on fiscal year 2013 cost data, the cost of supervising an offender for one month is approximately \$264.<sup>387</sup> Thus, mandatory penalties cost the Judiciary alone, on average, almost \$4.5 million in supervision costs per 1,000 offenders (i.e., \$264 x 17 months x 1,000 offenders = \$4.488 million).

For those who have completed their term of imprisonment and are on supervised release, which is part of the Judiciary's budget, the number and degree of restrictions they must comply with, under threat of additional imprisonment, include limitations on contact with family and friends, residency restrictions, mandatory DNA collection, invasive penile plethysmograph, and many others, have also increased over the years.<sup>388</sup>

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<sup>386</sup> U.S. Sentencing Comm'n, *Federal Offenders Sentenced to Supervised Release* (2010), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722\\_Supervised\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf).

<sup>387</sup> Keeley Over-Criminalization Task Force Statement at 7.

<sup>388</sup> Patton Over-Criminalization Task Force Statement at 2.

## V. THE JUSTICE REINVESTMENT INITIATIVE LENS

### A. STATE CONTEXT

From 1972 to 2011, the state prison population rose by 700 percent; by 2012, states were spending more than \$51 billion a year on corrections.<sup>389</sup> States, already facing increasingly strained budgets, were frustrated with stubbornly high recidivism rates, the attendant public safety concerns, and the costs associated with both.<sup>390</sup> Moreover, money spent on corrections draws resources away from investment in public services crucial to a state's long-term prosperity, such as education and infrastructure.<sup>391</sup>

States were spending millions—and even billions—of dollars each year on ever-expanding corrections systems with little or no demonstrable improvements in offender outcomes.<sup>392</sup> Despite the huge increase in corrections spending over a decade, more than 4 out of 10 adult American offenders returned to prison within three years of their release.<sup>393</sup>

### B. JRI HISTORY AND PROCEDURE

The Justice Reinvestment Initiative is a federal program to support states, cities, and counties in reducing corrections costs and reinvesting funds into high-performing public safety strategies.<sup>394</sup> The guiding principle of JRI is data-driven, consensus-based, bipartisan, and interbranch decision-making. In order for a state to participate in the Justice Reinvestment Initiative the state must gain support from all branches of government and request assistance through the Bureau of Justice Assistance.<sup>395</sup>

The Bureau of Justice Assistance offers the technical assistance and provides funding, an average of \$325,000 per state, to implement the policy changes.<sup>396</sup> In order to receive funds the state “must produce [to the Bureau of Justice Assistance] an implementation plan, a reinvestment strategy, and a performance measurement plan.”<sup>397</sup>

The Justice Reinvestment Initiative model consists of seven steps: (1) establish bipartisan working group; (2) analyze data and identify drivers; (3) develop policy options; (4) codify and

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<sup>389</sup> Nancy Lavigne et al., The Urban Institute, *Justice Reinvestment Initiative State Assessment Report 6* (2014) [hereinafter JRI Report], available at <http://www.urban.org/UploadedPDF/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf>.

<sup>390</sup> *Id.* at 6.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* at 8.

<sup>394</sup> *Id.* at 6

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 16.

<sup>397</sup> *Id.*

document changes; (5) implement policy changes; (6) reinvest savings; (7) and measure outcomes.<sup>398</sup>

The data analysis of the JRI states demonstrated 4 main drivers for their correctional growth: (1) sentencing practices; (2) parole, probation, and supervision revocations; (3) parole processing delays or denials; and (4) insufficient or inefficient community supervision or support.<sup>399</sup> Among the 17 JRI states, their the majority of sentencing-related drivers fall within two broad categories: (1) high or increasing incarceration rates, and (2) increased lengths of stay, often for nonviolent or low-risk offenders.<sup>400</sup>

Consequently, tailored evidence-based approaches adopted successfully by the JRI states included (1) sentencing changes and departure mechanisms; (2) problem-solving courts; (3) risk-based sentencing; (4) earned credits; (5) performance-incentive-funding (PIF) programs; and (6) accountability measures.

### **C. ASSESSMENT OF RETURN ON INVESTMENT IN THE 17 JRI STATES**

The 17 states that are involved with the Justice Reinvestment Initiative have witnessed decreases in their crime rate, recidivism rate, and correctional spending. For 8 of the 17 JRI states in which JRI policies have been in effect for at least one year (Arkansas, Hawaii, Louisiana, Kentucky, New Hampshire, North Carolina, Ohio, and South Carolina), all have experienced reductions in their prison populations since the start of JRI.<sup>401</sup>

States projecting a reduction in total incarcerated population expect the decrease to range from 0.6 to 19 percent.<sup>402</sup> States that do not project a decrease in population expect to slow incarcerated population growth by 5 to 21 percentage points.<sup>403</sup> In total, state JRI policies are (over different respective time frames) projected to yield a 0.8 to 25 percentage-point reduction in population growth compared with projected population growth without JRI reforms—or what might called “business as usual.”<sup>404</sup>

In all these states—Arkansas, Hawaii, Louisiana, Kentucky, New Hampshire, North Carolina, Ohio, and South Carolina—incarcerated populations have declined below the population count at the start of JRI. This suggests that JRI has had some early success in reducing or limiting the growth of incarcerated populations.

**These successes are subject to two caveats. First, reductions in population have not been as large as anticipated in all states, nor have successes been uniformly distributed**

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<sup>398</sup> *Id.* at 14.

<sup>399</sup> *Id.* at 19.

<sup>400</sup> *Id.* at 22.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 3.

<sup>403</sup> *Id.* at 1, 3.

<sup>404</sup> *Id.* at 30.

**across states.**<sup>405</sup> With these qualifications, JRI reforms appear to have successfully reduced—or mitigated the growth of—incarcerated populations.<sup>406</sup> Preliminary findings from the 17 JRI states suggest that enacted reforms have the potential to reduce or limit the growth of justice system populations and, in doing so, produce savings. Indeed, if the savings and reinvestments projected for JRI states materialize fully, they will represent a massive return on the federal investment of \$17 million.<sup>407</sup> None of the JRI states have reached the end of their projection years, so the full impact of JRI has yet to be realized.<sup>408</sup>

Projected savings vary across states and time periods, ranging from \$7.7 million (over 5 years) to \$875 million (over 11 years).<sup>409</sup> Total projected savings amount to as much as \$4.6 billion.<sup>410</sup> These projected savings take two forms: averted operating costs as a result of incarcerating a smaller population and averted construction costs as a result of not having to build new facilities to incarcerate larger correctional populations.<sup>411</sup>

To date, reinvestment has taken the following forms: (1) substance abuse treatment; (2) mental health services; and (3) alternatives to incarceration. States also planned to use cost savings to expand corrections data and research capacity.<sup>412</sup> Thus far, a total of \$165.8 million has been reinvested.<sup>413</sup>

Below please find a summary of the strategies adopted by JRI states. “Front-end” reform is colloquially used to refer to efforts to control the number of people who are going into prison (i.e. the number of people being convicted and imprisoned), including reducing or eliminating mandatory penalties, providing alternatives to incarceration, and investing in crime prevention in communities. In comparison, “back-end” reform colloquially refers to efforts to reduce the population of those already incarcerated, including improving educational and vocational training in prison, providing substance abuse and mental health treatment in prison, decreasing the percentage of the sentence imposed that an individual must serve (i.e. “truth-in-sentencing” laws), and increasing the amount of time an offender can earn towards his release due to his disciplinary record and participation in programs.

The following are **examples of “front-end” reform adopted by the states:**

- legislatively decriminalizing certain offenses (e.g. simple possession of drugs)
- legislatively increasing the thresholds that trigger culpability (e.g. increasing drug quantity to qualify for distribution or increasing dollar value for grand theft)

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<sup>405</sup> *Id.* at 54.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 53.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

- legislatively repealing and/or reducing mandatory penalties, enhancements, and consecutive counts
- employing prosecutorial discretion to decline investigating and charging certain crimes or decline charging certain minimum penalties
- providing alternatives to incarceration
- problem-solving courts for special populations (e.g. drug courts, mental health courts)

The following are **examples of “back-end” reform adopted by the states:**

- reduced “truth-in-sentencing” laws (i.e. what percentage of a sentence must be served prior to release) to allow for earlier release
- earn sentence-reduction credits through participation in education, vocational training, substance abuse treatment and rehabilitation, and work programs
- factor inmates’ compliance with prison rules and regulations into earned time credit calculations.
- programs to prepare inmates for employment
- programs to address substance addiction and mental health issues
- programs to maintain and enhance family relationships
- prison industries programs and work release programs
- educational and vocational programs, particularly post-secondary and adult basic education.
- increased visitation from family members

## **D. DETAILED STATE-BY-STATE SUMMARY OF 17 JRI STATES**

### **1. ARKANSAS**

Over the past 20 years, Arkansas’s population has increased by slightly more than 10 percent, but the state’s prison population has increased by more than 100 percent. Annual corrections spending skyrocketed from \$45 million in 1990 to \$349 million in 2010.

The solutions included:

- shortening mandatory minimum sentences for certain drug offenders
- diverting a greater number of drug users to treatment and drug accountability courts (which were expanded)
- prioritizing Arkansas’s limited prison space for drug manufacturers and violent offenders
- strengthening parole and probation
- providing community supervision alternatives for non-violent offenders.
- establishing a pre-adjudication probation program for most crimes, which would provide expungement and dismissal at the successful completion of the program.
- expanding and extending sealing and expungement procedures to include more classes of felony offenses

- clarifying that since a sealed record means that the underlying conduct did not occur as a matter of law, an individual with a sealed record may state that the conduct never occurred and that the record does not exist, but those sealed records may still be used for a determination of offender status in the event of a future crime
- transferring the balance of a prisoner's commissary account to be issued on a debit card upon release from custody to aid in reentry

These reforms could potentially realize extraordinary savings because probation and parole cost \$1.64 per offender per day — a fraction of the cost of prison, which is \$57.14 per day. Moreover, in 2011, parole revocations in Arkansas dropped by almost 30%, and probation revocations dropped by 15%. Among drug court graduates, the recidivism rate was only 5.7 percent.

## **2. DELAWARE**

By 2011, Delaware's arrest rate for violent crime was 1 in 322, compared with 1 in 529 for the United States as a whole. The state lacked access to timely, reliable data about the criminal justice system, which hindered their ability to make informed decisions about how to invest their limited resources most effectively while still protecting public safety. Specifically, the state had not measured recidivism data. The three primary drivers of Delaware's prison population were: (1) a large pretrial population taking up 23% of prison beds; (2) violations of probation; and (3) long lengths of stay for the incarcerated population, which had average sentences lengths of more than three years while the national average was about two years.

The solutions included:

- focusing detention resources on defendants with a high risk of flight and re-arrest
- increasing pretrial supervision capacity for those individuals who can be released safely with supervision
- reforming law enforcement policies and practices to increase the use of criminal summonses rather than arrests to help reserve detention resources for those who pose a real risk to public safety
- focusing supervision and intervention resources on those posing the highest public safety risk since, conversely, the evidence demonstrates that ordering low-risk offenders to intensive supervision or programming may in fact increase their risk of reoffending
- applying research that demonstrates that swift and certain proportional responses to both positive and negative behavior is the most effective in changing behavior to increase variety, availability and use of intermediate sanctions for violations of supervision conditions
- reducing barriers to reentry, such a restrictions on employment, housing, medical and mental health care, driver license restrictions, fines and fees, and voting restrictions.

It is anticipated that these policies working together will reduce Delaware's projected prison population of up to 740 beds---nearly 18% of the state's total prison capacity and maintaining this for five years would result in \$27.3 million for reinvestment.

### **3. GEORGIA**

By 2012, Georgia's prison population more than doubled to nearly 56,000 inmates. In, Georgia, 1 in 13 adults is under some form of correctional control: either on probation or parole, or behind bars. This is the highest rate in the nation – the national average is 1 in 31. The State was spending more than \$1 billion annually on corrections, up from \$492 million in 1990.

*Id.* Yet despite this growth in prison costs, the recidivism rate remained unchanged at nearly 30 percent throughout the past decade. *Id.* Longer sentences have driven Georgia's prison growth. For instance, the average inmate released in 2009 on a drug possession charge spent 21 months locked up, compared with 10 months in 1990.

The solutions included:

- reducing mandatory sentences for some drug trafficking offenses
- diverting offenders to specialized drug and mental health courts that emphasize treatment and providing those specialized judges the discretion to fully restore driving privileges or issue limited driving permits
- expanding the use of electronic monitoring
- prioritizing prison space for serious habitual and violent offenders
- creating a broad judicial “safety valve” provision for drug trafficking and manufacture cases, including the sale or cultivation of large quantities of marijuana
- creating more alternatives to prison
- punishing low-level first-time offenders with community supervision
- improving probation by using alternatives to incarceration that promote accountability
- creating graduated sanctions for burglary, forgery, theft, and drug possession
- raising felony theft thresholds
- requiring evidence-based corrections practices, including risk and needs assessments
- creating a council on criminal justice reform to conduct periodic comprehensive reviews of all aspects of the state's criminal justice system, monitor the implementation of reforms, and propose further system changes to reduce recidivism, lower costs, and promote public safety
- improving data collection so that the state may evaluate the criminal justice system

These changes are expected to avert the projected prison population growth of about 5,000 inmates during the next five years and reduce the population from current levels. Furthermore, policy makers were able to reinvest \$17 million in accountability courts and residential programs for fiscal year 2013.

### **4. HAWAII**

Hawaii's prison and jail populations grew 18 percent between FY2000 and FY2010. Due to a lack of space in its correctional facilities, Hawaii contracted with mainland facilities to house approximately one-third of its prisoners at a tremendous financial cost. Between FY2006 and FY2011, the state's pretrial population increased partly due to delays in Hawaii's pretrial decision-making process. In addition, victim services were not sufficient to ensure that individuals responsible for making restitution payments were being held accountable.

The solutions included:

- providing judges with the discretion to depart from a mandatory minimum sentences of 5- and 10-years if the judge finds it "appropriate to the defendant's particular offenses and underlying circumstances"
- requiring timely risk assessments of pretrial defendants to lessen costly delays in the pretrial process and detention of only the highest risk defendants
- focusing probation and parole resources on individuals most likely to reoffend and implementing alternatives for lower-risk individuals
- increasing the amount individuals pay toward victim restitution and ensuring institutions have the mechanisms in place to collect, track, and disperse these funds effectively
- instituting Hawaii's Opportunity Probation with Enforcement (HOPE), which program targeted offenders who were at high risk of failure. It provided for swift, certain, and short jail sanctions for every violation, such as failed drug tests or skipped meetings with their supervising officer. The program also required frequent, random drug testing, and imposes drug treatment if an offender tests positive or if an offender requests treatment.

The HOPE program has reduced re-arrest rates, drug use, and probation revocations, which have reduced Hawaii's overall level of incarceration. In conjunction with other reforms, these practices are estimated to reduce bed demand in correctional facilities by more than 1,000 beds, saving the state \$130 million over 6 years. In FY2013, the state reinvested \$3.4 million to: expand the availability of community-based treatment programs; hire additional corrections staff to complete risk and needs assessments and support reentry efforts; and reestablish the Department of Public Safety's research and planning office. Hawaii is receiving ongoing implementation guidance from the CSG Justice Center.

## **5. KANSAS**

Between 2009 and 2012, the number of people in Kansas' prisons increased by almost 9 percent and was projected to increase by an additional 23 percent by 2021. Moreover, the high recidivism rate of individuals released from incarceration was problematic. Accommodating this growth would cost at least \$125 million in prison construction and operating costs.

The solutions included:

- limiting its mandatory drug sentencing enhancement, which doubled the maximum presumptive sentence, to only cases in which the prior drug manufacturing convictions involved methamphetamine (it had previously applied to all drugs)
- permitting judges to reduce an enhanced drug sentence to 75% of the maximum potential sentence
- codifying graduated sanctions for violations of probation
- permitting low-risk offenders under community supervision to seek a discharge after 12 months if they have complied with all conditions and paid all restitution.
- requiring supervision agencies to respond to minor probation violations with swift, certain, and cost-effective sanctions
- imposing progressive sanctions for repeat violations
- focusing supervision resources on higher-risk individuals
- providing education, drug treatment, and supportive housing to help individuals reintegrate successfully

These policies are projected to avert \$56 million in prison operating costs and \$125 million in construction costs between 2014 and 2018. Kansas reinvested \$2 million in community-based behavioral health treatment resources in 2013. Kansas is receiving ongoing implementation guidance from the CSG Justice Center.

## **6. KENTUCKY**

From 1980 to 2009, Kentucky's prison population had grown 442% from 3,723 inmates to about 20,200 inmates---one of the nation's fastest-growing prison populations. To pay for this increase, total state spending on corrections in 2009 reached \$513 million, up from \$117 million in 1989.

The solutions included:

- prioritizing prison space for the most serious offenders (i.e. only high-level drug traffickers)
- introducing graduated penalties that diverted minor drug offenders to probation and treatment
- expanding electronic monitoring
- enhancing post-release supervision
- authorizing earned compliance credits for parolees'
- creating two pilot programs based on the Hawaii HOPE initiative
- reinvesting a portion of state savings at the county-level
- improving data collection to provide basis for performance-based incentive funding pilot projects
- repealing the automatic sentence enhancement for certain subsequent drug offenses, including possession and some offenses involving prescription drugs

- changing the way drug possession offenses interact with the State’s persistent felony offender statute, such that a first degree drug possession conviction no longer leads to second degree persistent felony offender status upon another non-drug conviction.

## **7. LOUISIANA**

Louisiana is known for the high crime rate, the nation’s highest incarceration rate, and a high recidivism rate. The state was also facing a substantial budget deficit.

The solutions included:

- increasing the maximum amount of good time credit for participation in treatment and rehabilitation programs---such as basic education, job skills training, and therapeutic programs---from 250 to 360 days
- creating a substance abuse conditional release program that authorized the Department of Corrections to release a first- or second-time drug offender with no violent priors before the end of his sentence if the offender had served at least two years of the sentence if the offender participated in a 2-4 month addiction disorder treatment program
- authorizing the creation of specialized mental health courts for defendants charged with drug- and alcohol-related crimes and upon successful completion of treatment and probation, the conviction may be set aside and the charges dismissed
- clarifying that the mere fact of a criminal record may not disqualify someone from adopting a child
- providing and improving opportunities for employment in conjunction with the private sector and faith-based communities
- expanding work release
- expanding day reporting centers
- expanding reentry initiatives

## **8. MISSOURI**

The Missouri prison population, which doubled over the past two decades and now costs the state \$660 million annually.

The solutions included:

- diverting drug offenders to specialized drug courts
- establishing veterans treatment courts, which combine judicial supervision, drug testing, and substance abuse and mental health treatment and provide for dismissed, reduced, or modified charges and/or penalties upon successful completion.

- substituting incarceration for smaller, community-based residential settings that are closer to families, faith-based institutions and other support resources or day-centers for juvenile offenders, which permit the youth to continue to attend school, participate in community activities, follow their individualized treatment plans, and receive intensive treatment, educational and vocational services, life skills training, victim empathy, social skills, anger/emotions management, healthy thinking patterns and coping skills, peer influences, substance abuse, and self-esteem, as well as educational and vocational programming
- capping the amount of incarceration that low-level offenders may serve for technical violations of parole or probation
- providing earned-time credits for certain low-level offenders who comply with the terms of their parole or probation
- imposing swift and certain sanctions for violations of community supervision

The anticipated savings from drug courts could be significant as the state spends \$14,538 on average to incarcerate an offender, but only \$6,190 to treat the offender using a specialized drug court. Indeed, the 2008 re-incarceration rate for youths discharged from group homes in Missouri during 2007 or 2008 was 9.6 percent, less than half of the national average. Missouri's innovative approach to juvenile justice has also controlled costs: at \$118 per youth per day in these settings, that is less than half of large state lockups in Texas. Officials report that they have not had problems with escapes or other security concerns. In 2007, Missouri boasted a three-year juvenile recidivism rate of 7.2%, a figure that has remained very steady over a five-year period of evaluation. Juvenile re-incarceration rates in other states are typically several times that. On other outcome measures, Missouri's record is also enviable: youth in these programs demonstrate significant educational gains, compared to same age peers. When it comes to reading, writing, and math achievement, more than 70% of the youth progress at rates equal to or greater than their peers in the community. Also, by the time of discharge from DYS facilities, 23% of the youth over 16 either had graduated from high school or had obtained a GED.

## **9. NEW HAMPSHIRE**

Despite New Hampshire's low and stable crime rate, between 1999 and 2009 the prison population increased 31 percent, and annual state spending on corrections doubled to more than \$100 million.

The solutions included:

- authorizing the sentencing court or the superintendent of the county correctional facility to release any inmate for the purpose of working, obtaining work, performing community service, or participating in a home confinement or day reporting program
- prioritizing supervision and resources on high-risk probationers by reducing the length of supervision for low-risk individuals

- authorizing probation officers to employ short, swift jail sanctions for minor probation violations, when permitted by judges at sentencing

These policies are projected to avert up to \$160 million in new construction and operating costs between 2010 and 2015.

## **10. NORTH CAROLINA**

From 2000 to 2008, North Carolina's prison population increased 25 percent from 31,581 to 39,326 inmates. During that same period, the state corrections budget increased 43 percent, from \$918 million to more than \$1.31 billion. If existing policies remain unchanged, the Sentencing and Policy Advisory Commission projects that the prison population will increase by 25 percent, or 10,000 inmates, between 2009 and 2019. The existing prison capacity is about 39,000 beds and the state estimates that it will face a shortfall of about 8,500 beds by FY 2019. Building and operating these new prison beds will cost more than \$2 billion between FY 2012 and FY 2019. Construction costs alone will approach \$775 million between FY 2012 and FY 2019, with one third of this spending needed by FY 2012. Probation revocations accounted for 53 percent of prison admissions while only 15 percent of those released from prison received post-release community supervision.

The solutions included:

- diverting nonviolent, first-time felony drug offenders from prison using second chance incentives, saving both prison bed space and tax dollars
- reserving prison for violent and repeat offenders
- diverting mentally ill individuals into community-based care rather than jails
- providing mentally ill individuals with crisis intervention teams and other pre-bookings interventions
- requiring mandatory supervision of individuals convicted of felonies leaving prison
- authorizing probation officers to recommend swift and certain jail sanctions for violations of conditions of supervision
- increasing sentences for repeat offenders of breaking and entering
- prohibiting employers and educational institutions from requiring the disclosure of expunged records of arrests, charges, or convictions
- clarifying that a person with an expunged criminal history record is not required to disclose any prior arrests, charges, or convictions; and provides for warnings and civil fines up to \$500 for each subsequent incident
- prohibiting a licensing board from automatically denying a license on the basis of an applicant's criminal history
- authorizing the release and parole commission to impose community service (rather than incarceration) on certain classes of offenders who have failed to pay any order for restitution, reparation, or costs imposed as part of their sentence

As a result of this legislation, North Carolina now has its lowest prison population since 2007. The probation revocation rate is down by nearly 15 percent and now accounts for far less than half of new entries to prison. These policies are projected to save the State up to an estimated \$346 million over six years in reduced and averted spending on operations and \$214 million in averted construction costs. These policies are projected to save the state up to an estimated \$560 million over 6 years in reduced spending and averted costs. The legislature reprioritized more than \$8 million in treatment funding in its FY2012 budget to better target existing community-based treatment resources.

## **11. OHIO**

Ohio's prisons held 51,113 inmates in June 2009, and the number is projected to grow to 52,546 in 2011. To put this in perspective, in 1984, there were only 18,479 inmates. By 2018, the state was projected to need 6,647 additional beds for the prison system to operate at 123 percent of capacity and 9,799 beds to operate at 115 percent of capacity. To build facilities that would provide the number of required beds would cost roughly \$1 billion, and that does not include operational funding. Additionally, the Ohio prison system was operating at 133 percent of capacity.

The solutions included:

- diverting over 10,000 of nonviolent offenders from incarceration to intensive supervision or placement in a community corrections facility
- diverting more than 5,500 drug and low-level felony offenders to dormitory-style residential facilities with rehabilitative programming, such as drug treatment, vocational training, and education, which carry no wait times versus similar programs with long waiting lists in prison. The average length of stay is six months
- diverting offenders to serve the last 180 days of their sentences in halfway houses, most of which are operated by non-profit organizations
- creating a graduated sanctions matrix based upon the severity of the parole violation, ranging from increased reporting, electronic monitoring, curfew, drug testing, and placement in a halfway house, which provided a judicial override provision in extenuating circumstances
- training its community corrections officers, judges, and other decision makers in the criminal justice system to identify which offenders are most and least likely to recidivate and structure the level of supervision or type of sentence accordingly based upon empirical data

Of the offenders in community corrections, they earned \$25,597,004 in wages, paid \$969,490 in restitution, \$1,593,080 in court costs and fines, and \$601,295 in child support. They also completed 138,049 hours of community work service. In 2008, CCA prison diversion programs in 42 counties received \$15,758,552 in state funding. The state cost per offender in 2008 was relatively low at \$1,862, far less than a year in prison. Technical revocations from

parole have declined from 556 in 2006 to 343 in 2008. Ohio was able to reduce its prison population without jeopardizing public safety. The re-arrest were comparable to regularly supervised probationers and were lower than offenders released from prison. Ohio credited the graduated sanction matrix with the decline in technical revocations among parole and other offenders.

## **12. OKLAHOMA**

The national violent crime rate fell five times faster than Oklahoma's violent crime rate in the previous decade; murder rates actually increased in the state's two largest cities; more than half of inmates were released from prison without supervision, and supervision determinations were not informed by risk assessment. Over the last 10 years, growth in Oklahoma's prison population outpaced the state's overall population growth and corrections appropriations rose 30 percent. Oklahoma houses over 25,000 inmates, and only Delaware, Louisiana, Alaska, and Texas have higher per-capita incarceration rates. Oklahoma has the highest female incarceration rate in the entire country. For most of the state's history, women made up an average of 3.5 percent of the state's prison population. However, by 2010, that percentage was nearly 11 percent, and the population had climbed to 2,760.

The solutions included:

- shortening the time "low-risk, nonviolent" offenders spend behind bars in favor of expanded use of electronic monitoring, treatment programs and other forms of supervised release
- enhancing community sentencing programs
- limiting the governor's role in the parole process for nonviolent offenders
- considering the defendants' mental health and substance abuse in order to tailor appropriate assistance and punishment
- establishing a new state-funded grant program to assist local law enforcement agencies in implementing data-drive strategies to reduce violent crime
- instituting a pre-sentence risk and needs screening process to help guide sentencing decisions about treatment and supervision
- mandating supervision for all adults released from prison
- creating more cost-efficient and meaningful responses to supervision violations.

These policies mitigated the state's growth in prison population by 1,759 and are projected to save up to \$120 million over 10 years. Oklahoma reinvested \$3.7 million in FY 2013 including \$2 million in funding for the grant program to reduce violent crime. At Oklahoma's request, the CSG Justice Center will continue to provide technical assistance for implementation of these policies.

## **13. OREGON**

Although Oregon had been recognized as a national leader in community corrections during much of the 1980's and 1990's, the state began to drift away from this approach, as a greater share of funding began going to prisons instead of probation and law enforcement. Indeed, Oregon saw a whopping 47% increase in their prison population from 2000. In 2011 and 2012 there had been a jump in the proportion of low-risk drug offenders present in the prison population.

The solutions included:

- repealing mandatory minimums for certain low-level drug offenses
- revising mandatory minimums for certain types of drug offenses and driving with a suspended license, which, in 2011, driving without a license was the fifth most prevalent offense of incarceration
- granting judges the discretion to sentence certain repeat drug offenders to probation and repealing a prior law that mandated a minimum sentence of incarceration for those offenders
- introducing presumptive sentences of probation for marijuana offenses
- reducing the presumptive term of incarceration for identity theft, and robbery in the third degree from 24 to 18 months for first time offenders
- repealing the ban on probation for certain repeat drug offenders
- expanding the use of drug courts
- expanding the use of electronic monitoring
- incentivizing probationers to maintain employment and fulfill all obligations, including victim restitution with earned time component
- extending the period of supervision following a prison term from 30 to 90 days for most offenders
- directing its Criminal Justice Commission to prepare evidence-based standards for specialty courts that would be cost-effective, reduce recidivism, and target medium- and high-risk offenders when possible
- creating a new earned discharge program for felony probationers serving more than six months and compliant with the terms of their supervision may earn up to a 50 percent reduction in their probation period
- expanding the state's transitional leave program, which permitted inmates to participate in employment and educational programs prior to final discharge in order to aid in finding their placement
- requiring fiscal impact statements for all bills that modify sentencing or corrections policy, including laws that create a new crime or increase the length of a custodial sentence, which must set out the 10-year fiscal impact for the state and any affected local governments
- requiring that, upon request from one member of each major political party, the state criminal justice commission must issue a racial and ethnic impact on offender and potential crime victims statement for proposed legislation

These reforms are projected to save the state a projected \$600 million over the next decade.

#### **14. PENNSYLVANIA**

Between 2000 and 2011, Pennsylvania's spending on corrections increased 76 percent, from \$1.1 billion to \$1.9 billion, while the number of people in prison increased 40 percent, from 36,602 to 51,312. In 2007, one in 28 adults in Pennsylvania were in prison, on probation, or on parole. The state's incarceration rate has increased 280% since 1982. This was due to several factors, primarily (1) an increasing percentage of offenders with "less severe offenses" being admitted to prison; (2) high failure rates among people under community supervision; (3) high re-incarceration rates that may be due in part to inmates not receiving effective programming; and (4) a steady stream of admissions of inmates who had previously served time in county jails without receiving appropriate programs, treatment, or reentry training.

The solutions included:

- providing incentives to certain lower-risk inmates to complete programs that reduce recidivism
- diverting nonviolent offenders to drug courts, electronic monitoring, and intermediate sanctions rather than prison for technical violations of probation and parole officers
- reinvesting savings from the state corrections budget to county-level alternatives to incarceration
- allowing the Board of Probation and Parole to focus supervision resources on offenders in their critical first year on parole when the risk of recidivism is greatest
- providing more access to drug-treatment programs
- authorizing the Pennsylvania Commission on Sentencing to develop parole guidelines based on best practices and available research

These policies are projected to save the Commonwealth up to an estimated \$253 million over five years. According to a statutory formula, Pennsylvania will reinvest a portion of realized savings in local law enforcement, county probation and parole, and victim services.

#### **15. SOUTH CAROLINA**

South Carolina's correctional population nearly tripled during the past 25 years and was projected to grow by another 3,200 inmates by 2014 prior to a major overhaul enacted in 2010. Since 1983, state spending on prisons increased by more than 500 percent to \$394 million.

The solutions included:

- diverting certain low-risk, nonviolent offenders from prison to community-based programs such as specialized drug courts
- prioritizing prison space for violent and dangerous offenders
- using risk and needs assessments of offenders to determine how to allocate community supervision resources
- removing barriers to inmates successfully reentering society
- incentivizing probationers and parolees to stay drug- and crime-free.

This program is estimated to save the \$350 million, the cost of building a new prison which would otherwise be necessary.

## **16. SOUTH DAKOTA**

In 1977, South Dakota had 546 prison inmates; in 2013, it has more than 3,600, and the prison population was projected to grow 25 percent through 2022. This would have necessitated two new prisons and increased operating expenses at a total cost of \$224 million. Between 2001 and 2011, South Dakota's imprisonment rate was rising faster than the national average, and its crime rate was falling much more slowly. Nonviolent offenders made up 81 percent of prison admissions and 61 percent of the inmate population. In addition, parole violators occupied 1 in 4 prison beds, and more than 4 in 10 inmates were returning to prison within three years of release.

The solutions included:

- strengthening supervision and interventions
- focusing prison space on violent and career offenders
- ensuring the quality and sustainability of reforms
- reclassifying offenses by increasing the number of felony grand theft offense classes from 2 to 5
- creating a presumptive sentence of probation for the lowest two categories of drug trafficking offenses
- establishing and directing an advisory council to design the framework and criteria for eligibility for drug courts in criminal cases
- mandating that judges attend training on the use of validated risk and needs and behavioral health assessments, as well as other evidence-based practices
- established two HOPE pilot programs, one for violations of parole and the other for violations of probation, each of which requires the use of graduated sanctions, including written reprimands, additional drug testing, community service, and house arrest
- creating a program of earned discharge credits for offenders on probation and parole of at least 15 days for each month that the terms of supervision are met
- mandating the assessment of parole and felony probation supervisees so that officers could tailor supervision and interventions to individual offenders' risk and needs, and focus resources on moderate- and high risk offenders

- providing for tribal-state liaisons to aid in the reentry of parolees who were members of a local tribe
- requiring a criminal justice oversight council that would monitor the effect of wide-ranging evidence-based reforms
- state requiring that a 10-year fiscal impact statement be prepared for any bill, amendment, or ballot initiative that affects correctional populations

These reforms are projected to reduce anticipated prison growth in South Dakota by 716 beds, avert the construction of two prisons, and save state taxpayers \$207 million in construction and operating costs through 2022. Legislation also redirects \$8 million from the current budget to programs and policies proven to reduce recidivism and improve offender accountability. An ongoing investment in these programs of \$4.9 million annually is expected.

## 17. **WEST VIRGINIA**

Since 2010, West Virginia has led the nation in average annual prison population growth. The state's prison population has averaged a growth of 73% from 2000 to 2010, costing the state \$169.2 million. With such a rapid increase of inmates, as of 2012 there were more than 1,800 prisoners waiting for a bed to open up. Also, the number of inmates sent back to prison because their release was revoked has increased 47% from 2005 to 2012, costing the state \$168 million. Furthermore, the average offender completed 51% more time served than those in 1990, costing the state another \$74.8 million. 75% of all inmates are serving their sentences due to drug-related crimes.

The solutions included:

- increasing the number and use of specialized drug courts
- ensuring that supervision practices focus on individuals most likely to reoffend and respond to probation and parole violations with swift, certain, and more cost-effective sanctions
- mandating that people convicted of violent offenses receive one year of supervision upon release from prison
- requiring the use of a pretrial screening instrument in jails that predicts risk of flight and risk of reoffending
- incentivizing non-violent inmates with earned time credits to reduce their sentences in exchange for completion of certain vocational, educational, or substance abuse programs
- releasing nonviolent offenders 6 months before their calculated release dates, subject to electronic or GPS monitoring during that time
- permitting offenders sentenced to 6 month jail sentences to earn sentence reductions by participating in rehabilitative programs for substance abuse, anger management, parenting, domestic violence, and life skills training with each completed program reducing the sentence by 5 days for a total maximum reduction of 30 days

- creating a new drug treatment program for felony drug offenders who were determined to be at high risk of reoffending and in high need of drug treatment
- requiring every judicial district to establish a drug court by July 1, 2016
- authorizing judges, the parole board, and parole officers to impose periods of “shock” incarceration in response to technical violations of probation or parole
- requiring probation officers to conduct assessments of offenders under their supervision and to structure supervision in accordance with the assessment results
- authorizing a director of housing and employment to work with public and private entities to facilitate housing and employment opportunities for individuals released from custody, develop community housing resources, and provide short-term loans to released individuals for costs related to reentry into the community

These policies are projected to avert up to an estimated \$200 million in construction costs and \$87 million in operating costs between 2014 and 2018. West Virginia’s Senate Bill 371 also positions the state to reinvest \$3 million of the projected savings into substance abuse treatment for people under community supervision in FY2014. At the state’s request, the CSG Justice Center continues to provide assistance in the implementation of these policies.

## **E. OTHER SUCCESSFUL EVIDENCE-BASED STATE REFORMS**

In 2013, 35 states passed over 85 bills reforming their criminal justice law and policies.<sup>414</sup> Between 2006 and 2012, 19 states reduced their population---6 of which (New York, New Jersey, Connecticut, Hawaii, Michigan, and California) experienced reductions in the double digits.<sup>415</sup>

The Vera Institute for Justice found that “[d]espite the variation in outcomes and a need to study how new policies are mobilized and deployed, emerging trends are clear: many states are continuing to re-examine the ways in which they respond to offenders at every stage of the criminal justice process, from arrest and punishment to reentry and rehabilitation.”<sup>416</sup> Its report noted that “[e]schewing the reflexively tough-on-crime policies of the past,” the states’ reforms in 2013 have focused five main areas.

First and foremost, states “repealed or narrowed mandatory sentencing schemes, reclassified offenses, or altered sentencing presumptions [and] expand[ed] access to early release mechanisms---such as good time credits---designed to accelerate sentence completion”<sup>417</sup> “Rather than deterring crime and reducing recidivism, mandatory penalties are, instead, one of the major contributing factors to the growth of state prison populations and costs.”<sup>418</sup> “Since 2000, at least 29 states have modified or repealed mandatory sentencing policies.”<sup>419</sup> This was

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<sup>414</sup> Vera Institute Review of State Reforms at 4.

<sup>415</sup> *Id.* at 4.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 4-5.

<sup>418</sup> *Id.* at 8.

<sup>419</sup> *Id.*

due to a recognition that “their sentencing structures did not sufficiently differentiate between minor and serious crimes or that certain penalties were too harsh,”<sup>420</sup> such that “[b]y enhancing proportionality . . . [it] better ensure that only the most serious crimes attract imprisonment or long sentences.”<sup>421</sup>

Second, states “creat[ed] or expand[ed] eligibility for diversion programs---a sentencing alternative to traditional criminal case processing through which charges will be dismissed or expunged if a defendant completes a community-based program or stays out of trouble for a specified period----[and] community-based sentencing options, including the use of problem-solving courts.”<sup>422</sup>

In particular, many states acknowledged that “revocations from community supervision account[ed] for a significant portion of prison admissions.” It was counterproductive to “send[ ] offenders back to prison for violating supervision conditions---particularly for so-called technical violations such as failing a drug test or missing appointments”---when the violator “is not at high risk of re-offending and spending time in jail or prison can increase the risk of future offending, rather than decrease it.”<sup>423</sup> Moreover, states observed that it was an “expensive and ineffective means of dealing with offender misconduct.”<sup>424</sup> Instead of punishment, states relied on “[r]esearch [that] has demonstrated that positive reinforcement and the use of incentives are components of effective behavior modification.”<sup>425</sup>

Third, states “promoted the use of evidence-based, data-driven practices [such as risk and needs assessments] and relying on the support of external groups of experts and stakeholders---such as sentencing commissions or oversight councils---to help guide the development of sentencing and corrections policies.”<sup>426</sup> These efforts were predicated on “[r]esearch [that] has increasingly clarified that the cornerstone of effective correctional intervention is an assessment of both an individual’s risk of re-offending and the personal characteristics that must be addressed to reduce that risk.”<sup>427</sup>

Fourth, states have begun “mitigat[ing] the collateral consequences of criminal convictions---such as restrictions on social benefits and exclusion from employment---that hinder the successful reentry and reintegration of ex-offenders back into the community [and] clarify[ing], expand[ing], or creat[ing] ways to seal or expunge criminal records from the public record [and] helping offenders transition from prison or jail back into the community by mandating more in-prison support prior to release, including transitional leave programs, or by providing necessary resources or supports post-release.”<sup>428</sup>

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<sup>420</sup> *Id.* at 10.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 16.

<sup>423</sup> *Id.* at 22.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.* at 23.

<sup>426</sup> *Id.* at 25.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 26.

Fifth and finally, states solicited the input and expertise from “external groups---such as sentencing commissions, oversight councils, or working groups comprised of key criminal justice experts and stakeholders---to debate proposals, collect and analyze data, and formulate policy recommendations[, even] requiring fiscal or social impact statements in order to help legislators consider the ramifications of proposed criminal justice reforms.”<sup>429</sup>

## **F. SUMMARY OF REFORMS IN 33 NON-JRI STATES**

### **1. ALABAMA**

Alabama has a higher rate of incarceration than any country on the planet, 861 persons per 100,000 population. Alabama’s state-operated prison facilities—the most crowded in the United States—are operating at close to 200% percent of capacity and the state uses contract facilities and alternative placements to manage almost a quarter of its prison population. Corrections spending also increased 49 percent during this ten-year period, from \$309 million to \$460 million.

The solutions included:

- establishing pretrial diversion programs for defendants charged with most drug crimes, property crimes, traffic offenses, misdemeanors, and other offenses

In 2014, the Council of State Governments Justice Center staff began providing intensive technical assistance to the state using a justice reinvestment approach. In early 2015, the task force is expected to deliver to the legislature a report on the study’s findings that includes a data-driven policy framework, which is expected to include the following **recommendations**:

- increasing the state’s work release program
- addressing the number of individuals with substance abuse issues currently incarcerated
- matching supervision strategy, sanction, or program with the type of offender for whom that approach has been proven to reduce recidivism
- diverting non-violent offenders charged with drug and alcohol offenses from long prison terms in favor of community-based programs, which would cost 50% as much as prison, that would include substance abuse treatment
- permitting the sentencing commission to set guidelines for non-violent offenders, such as drug and alcohol offenders, instead of mandating statutory penalties.

The data demonstrates that it costs forty-two dollars per prisoner per day to keep them in jail. However, in some counties, it only costs around seventeen dollars per day per person to send them through community corrections. As close to 70 percent of new inmates are first-time non-

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<sup>429</sup> *Id.*

violent offenders, these reforms are anticipated to level off the prison population and lead to decreases.

## **2. ALASKA**

Alaska's corrections spending has grown nearly 50% in 10 years yet more than half of adult offenders return to prison within 3 years for committing a new crime or for violating the terms of their release---the highest recidivism rate for any state. Between 1991 and 2011, the number of Alaskans behind bars grew four times faster than the state population. The state has the 11th fastest growing prison population in the nation, with only Kentucky and West Virginia experiencing a greater per capita increase in incarceration between 2000 and 2007. Alaska spends almost \$50,000 annually to imprison an offender, driving the state's yearly budget for corrections to more than \$330 million. As a result, it was projected that Alaska would be forced to spend \$250 million on building another prison to accommodate its rapidly growing prison population.

The solutions included:

- creating the Alaska Criminal Justice Commission, a task force charged with the comprehensive review of sentencing and corrections policies to determine drivers of prison overcrowding and corresponding solutions
- expanding a judge's authority to mitigate sentences based upon a consideration whether the offense was related to traumatic brain injury or combat-related post-traumatic stress disorder
- requiring certain offenders to submit to twice-a-day alcohol or drug testing
- increasing the threshold for felony theft from \$500 to \$750
- instituting "swift and certain" punishment for parole violators.

## **3. ARIZONA**

Arizona's population has doubled in the last 30 years, but the state's prison population has increased tenfold, from 3,377 inmates in June 1979 to 40,477 inmates in June 2010. According to a recent projection report, if current trends continue, the state prison population will grow by an additional 52 percent over the next ten years, creating a demand for 20,000 additional prison beds. With 3,000 new beds already appropriated for and under construction, the state will need to appropriate an additional \$3 billion in funding over the next ten years to absorb the projected growth. High rates of failure among people on community supervision are the primary driving factor behind prison growth – parole and probation revocations account for 17 and 26 percent of admissions respectively.

The solutions included:

- incentivized probation departments by offering them a share of the state's savings to reinvest in victim services, substance abuse treatment, and strategies to improve

- community supervision and reduce recidivism when they reduce their revocations to prison without increasing probationers' convictions for new offenses
- increasing the amount provided to prisoners upon discharge to \$100 of their earned wages in the form of a debit or stored value card.

In 2009, the first year of its incentive funding plan, Arizona saw a 12.8 percent decrease in revocations of probationers to prison, including decreases in all but three of the state's 15 counties. There was also a 1.9 percent reduction in the number of probationers convicted of a new felony. This saved the state \$1.7 million in incarceration costs that otherwise would have been incurred.

#### **4. CALIFORNIA**

California's prison overcrowding and associated problems led to federal court intervention and supervision of the state's inmate health care system. Facing a court overcrowding order to either release inmates or create more capacity, the state finally began adopting significant reforms in 2009.

The solutions included:

- providing performance-based probation funding
- reinvesting savings into the community-based programs
- expanding parole for geriatric inmates
- requiring all state and local agencies (except criminal justice agencies) to determine whether a job applicant meets the minimum employment qualifications for the position before asking about the applicant's criminal history
- clarifying that an inmate could not be terminated from state Medicaid solely because of incarceration, but rather suspended until release, and that correctional staff could enroll eligible inmates not previously enrolled, with the coverage taking effect upon release

Geriatric parole legislation alone was estimated to possibly save the state as much as \$200 million a year.

#### **5. COLORADO**

Colorado's inmate count rose 604 percent from 1980 to 2008 while Colorado's overall population grew only 59 percent during that time. Due largely to prison population growth, the Colorado Department of Corrections (DOC) budget went from \$70 million in 1985 to \$703 million in 2008. The state also had a significant recidivism problem. In response, the state passed reform legislation starting in 2010.

The solutions included:

- permitting inmates to earn up to two days of credit per month for exemplary behavior, such as successfully completing education, treatment, and vocational programs
- assisting inmates released from prison obtain employment and housing by making it easier for them to obtain a state photo identification card
- emphasizing diversion to substance abuse and mental health treatment in cases involving low-level drug possession while increasing penalties for selling drugs to minors
- expanding the mandatory treatment options available in lieu of prison revocation for parolees who commit a technical violation, but not a new crime
- eliminating its automatic repeat offender sentencing enhancement for a second drug distribution conviction
- increasing the number of theft offense classes from 4 to 9, which allows for greater proportionality by narrowing the monetary value thresholds that trigger each offense class and raised the threshold for felony theft from \$1,000 to \$2,000
- removing drug crimes from the state's general felony classification and sentencing grid and creating a new stand-alone classification scheme, which established a presumption that low-level felony drug offenders be sentenced to a community-based sanction and the judge's ability to sentence convicted offenders to incarceration only after showing that community-based sanctions have been tried and failed, would fail if they were tried, or present an unacceptable risk to society
- clarifying that high-risk offenders can also be successfully managed in the community with proper supervision and programming
- setting residential drug treatment as a condition of probation
- standardizing new and previously established diversion programs by setting the maximum length of a program to 2 years, detailing the factors the district attorneys must consider when accepting or excluding a defendant from the diversion program, mandating minimum requirements for the diversion agreements, and outlining procedures and consequences for both failure and successful completion
- authorizing judges to keep drug offenders in diversion and impose additional conditions to address the violation and enhance the likelihood of success after a violation of the diversion program terms
- incentivizing offenders to remain compliant by vacating a felony conviction for certain low-level drug offenses in favor of misdemeanor if the offender successfully completes probation or another community-based sentence in order to reduce the negative consequences of a felony conviction
- requiring its county-run probation departments to assess all individuals sentenced to probation to determine their placement in standard or intensive supervision, which is reserved for offenders at the highest risk of recidivism
- expanding the right to expunge records of juvenile delinquency and records of adult convictions upon completion of a diversion program or dismissal

- extending record sealing to those convicted of petty offenses and municipal violations
- sealing dismissed charges
- clarifying that an applicant may not be denied housing or employment solely on a refusal to disclose sealed conviction records, that probation and parole officers to give notice at the final supervision meeting with offenders convicted of certain crimes that they have the right to have their criminal record sealed and that doing so can alleviate certain collateral consequences
- clarifying that a pardon from the governor waives all collateral consequences of conviction, unless otherwise noted in the pardon
- providing judges the discretion to issue an order of collateral relief at the time a person is sentenced to community supervision
- creating a resource center to assist criminal justice agencies in expanding existing and implementing new evidence-based practices to improve offender supervision and case management
- requiring minority and gender impact statements for offenders and victims potentially affected by any proposed legislation that creates a new criminal offense or changes an element or the classification of an offenses

By reallocating \$4.5 million of the savings into proven treatment programs for parolees, the legislation is expected to not only save money, but more importantly also reduce crime. In the middle of 2010, the prison population projections issued by the state concluded the prison population had declined and will continue to decline.

## **6. CONNECTICUT**

By 2003, Connecticut had an unprecedented budget deficit and a prison population growing faster than any other state and was forced to either release people from prison early or contract with other states for additional prison beds to relieve crowding.

The solutions included:

- improving and expanding probation supervision and treatment to aid more offenders in completing their probation and parole process successfully
- creating a new felony offense category for any felony that carried a maximum prison term of more than one but less than 3 years
- repealing the one-year minimum sentence for all Class D felonies

Almost \$13 million of the nearly \$30 million saved was reinvested in community-based pilot projects. Probation violations dropped from 400 in July 2003 to 200 in September 2005. The decrease in the prison population over a two-year period was steeper than that seen in almost any other state while the crime rate continued to drop. The state was able to close a prison because of: “a decline in the inmate population, the agency’s success with a number of post-

release programs, and the need to find savings and efficiencies in state government.” estimated to save \$3.4 million. The state’s crime rate has also declined 6.3 percent.

## **7. FLORIDA**

The Florida Department of Corrections houses 102,000 inmates in its 63 state prisons (including seven private prisons) costing taxpayers nearly \$2.4 billion. The growth in the prison population is not attributable to Florida’s overall population growth. From 1970 through 2009, Florida experienced significant growth – an almost three-fold growth in its population. But during that same period, the prison population grew almost twelve-fold. Currently, one in 31 adults is under some form of correctional control. The state’s incarceration rate is 26 percent higher than the national average, and it has the third-largest correctional system in the nation after California (174,000) and Texas (155,000). Additionally, Florida’s recidivism rate is about 33%, which means one out of every three inmates released from a Florida prison returns to prison in Florida within three years---this does not include the number of inmates who also return to county jails, federal prisons, or prisons in other states. This 33% recidivism rate within 3 years of release increases to 65% after five years. It costs an average of \$53.34 per day or \$19,469 per year to house an inmate in a Florida prison, and Floridians pour nearly \$3 billion a year into the state’s overall corrections system. There is a \$3.75 billion budget gap that has led for multiple calls for criminal justice reform.

## **8. IDAHO**

In 2012, Idaho’s crime rate was among the lowest in the nation, however, recidivism had increased between 2008 and 2012. Drug offenses accounted for about 30 percent of new prison commitments in 2012. The number of offenders sentenced to a prison term increased 23 percent between 2008 and 2012. Nearly 25% of the total prison population is comprised of drug offenders. Due to Idaho’s sentencing laws, drug offenders in the state serve, on average, sentences that are double the length of the national average (4.1 years, compared with 2.2 years nationally). In 2013, the state spent close to \$40 million on incarceration. Unless reforms are implemented, the state’s total prison population is projected to grow by about 16 percent by 2019, or about 1,332 inmates, requiring the state to spend \$213 million to construct facilities to house the new prisoners, and spend more than \$75 million in additional operating costs.

The solutions included:

- expanding eligibility for specialized drug courts for defendants charged with violent crimes
- tailoring sanctions for supervision violations
- improving parole to make more productive use of prison space
- analyzing and optimizing the impact of recidivism-reduction strategies
- improving training for probation and parole officers
- providing community-based treatment services to people on supervision who are at a higher risk of reoffending

- strengthening supervision practices and programs designed to reduce recidivism
- increasing funding and resources for treatment and community-based supervision, which cost less than incarceration
- downgrading a felony conviction to a misdemeanor after successful completion of probation, no intervening felony convictions, no pending charges, and if compatible with the public interest
- creating a legislative committee to advise the legislature on reducing correctional spending and improving justice system outcomes

The law will help the state avoid up to \$288 million in construction and operating costs that would otherwise be needed to accommodate the forecasted growth by FY2019. To achieve these outcomes, the state reinvested nearly \$4 million in FY2015. The state expects to see a reduction in recidivism of up to 15 percent through improved community supervision. Idaho is receiving ongoing implementation guidance from the CSG Justice Center.

## **9. ILLINOIS**

The solutions included:

- creating a new sentencing option called “Second Chance Probation” that allows certain first-time nonviolent drug, theft, and property felony defendants to be sentenced to a minimum 2-year probationary period with no judgment entered upon pleading or being found guilty and the charges are dismissed after successful completion of probation, leaving the offender with no felony record
- removing the sentencing enhancements for proximity to a school zone and repeat offender enhancements in prostitution cases, which previously would have elevated the offense from a misdemeanor to a felony offense
- granting county sheriffs the discretion to substitute electronic home detention for a jail term for appropriate offenders in their custody, with the limited exception for murder, sexual assault, drug conspiracy, and some firearms offenses
- permitting those charged with prostitution to be admitted into a mental health court program that partnered them with advocates, survivors, and service providers
- expanding eligibility for record sealing to additional classes of felony offenses
- directing judges to consider the specific collateral consequences the offender might face in sentencing

## **10. INDIANA**

Indiana’s prison population increased 47% between FY 2000 and FY 2010, from 19,309 to 28,389. Over that same time period, spending on corrections also increased significantly, with appropriations from the state’s general fund for the Indiana Department of Correction increasing 37% from \$495 million, to \$679 million. If existing policies remain unchanged, the prison population is projected to continue to grow, and the state will need to expand prison capacity at a

significant cost to taxpayers. Between 2010 and 2017, the Indiana Department of Correction projects that the prison population will increase 21%, from 28,474 to 34,794. Increasing the capacity of the prison system to absorb the additional people incarcerated is estimated to cost the state approximately \$1.2 billion between 2010 and 2017, which includes construction costs and annual operating costs.

The solutions included:

- establishing a Justice Reinvestment Steering Committee, which will review findings that the CSG Justice Center and Pew present and identify policy options to address the projected growth in Indiana's prison population, generate savings and reinvest in strategies to increase public safety
- reducing the size of the school zone for all drug offenses from 1,000 to 500 feet, limiting the application of the enhancement to only when children are reasonably expected to be present, and removing family housing complexes and youth program centers from the definition of sites protected under the school zone enhancement
- expanding its felony classification schemes from 4 to 6 levels
- decreasing sentences for theft and drug offenses while increasing sentences for sex crimes and other violent offenses
- introducing more graduated sentencing for drug crimes
- reclassifying low-level drug offenses as misdemeanors
- authorizing diversion to problem-solving courts as a condition of a misdemeanor sentence
- expunging certain misdemeanors and low-level felonies if the offender completes the original sentence and remains a law-abiding citizen during the 5-10 year waiting period
- clarifying that it is unlawful discrimination to expel, suspend, or refuse to employ or grant a license on the basis of an expunged conviction or arrest record; that an employer may only ask if an applicant has any convictions or arrest that have not been expunged; and that a person's full civil rights are restored after expungement, including the rights to vote, hold public office, serve as a juror, and own a firearm
- rendering the use of expunged convictions inadmissible in civil actions against employers for negligent hiring

## **8. IOWA**

Iowa's prison population reached a record-high inmate count of 9,009 in 2011. Prison admissions rose for the fifth straight year in fiscal 2014, a 6.4 percent jump that reflected a modest rise in new court commitments and double-digit jumps in probation revocations and inmates being returned because of parole or work release violations. Last fiscal year saw 2,312 paroles issued by the Iowa Board of Parole, a number that analysts in the state Department of Human Rights' division of criminal and juvenile justice planning viewed as a return to past

parole practices that were disrupted by a period of vacancies on the state panel. The state is in need of sentencing reform and more resources devoted to reducing probation caseloads and preparing inmates — especially those serve out their sentences — for release back into the community. Compared to other states, Iowa has better incarceration statistics, but they still require improvement.

## **9. MAINE**

The solutions included:

- emphasizing psychological treatment and education to aid inmates' release
- decreasing the use of solitary confinement, such that prisoners only spend hours or a few days there to cool off as opposed to days, weeks, or months at a time
- reducing the number of prisoners assigned to solitary confinement
- forbidding prison guards' violent "cell extractions" of disobedient prisoners and restraining them in a chair, instead directing guards to use de-escalation procedures such as negotiating with a troubled prisoner and giving the prisoner a benefit such as letting a prisoner paint murals
- ending the use of punishment to control mentally ill prisoners
- reducing the number of mentally-ill who are incarcerated
- replacing the former heavily-criticized health care provider with another national company, leading to far fewer complaint letters from prisoners
- hiring 12 assistants to aid probation officers with paperwork and to oversee low-risk probationers
- prioritizing the ability of probation officers to spend more time helping people on probation succeed in reentry efforts rather than filing violations against them
- diverting probation violators from prison and instead applying graduated sanctions, such as geographical restriction on movement for missing an appointment
- reducing overtime expenses for prison guards
- permitting offenders with unpaid fines to cover the outstanding balance by performing community service work instead of returning to custody---if the default on payment was based upon valid reasons, the fine was to be paid off at a rate of \$25 for every 8 hours of community service work

Medical spending at correctional institutions decreased and paid for a \$1.2 million overage from the previous year. The once ever-rising corrections budget has been stabilized, a change helped by the reduction last year of guard overtime expenses by \$2.4 million.

## **13. MARYLAND**

The solutions included:

- raising the felony threshold for theft from \$500 to \$1,000
- setting graduated felony sentencing based upon property value

- reforming sentencing provisions for extortion, malicious destruction of property, passing bad checks, credit card fraud, and identity fraud
- repealing the death penalty and, in its place, substituting the penalty of life without possibility of parole
- prohibiting state employers (excepting criminal justice employers) from asking an applicant about any criminal history until after the applicant has been given an opportunity for an interview
- requiring its departments of economic development, labor, and public safety to jointly study and evaluate the feasibility of establishing a business development program to provide business training for ex-offenders.

#### **14. MASSACHUSETTS**

In the early 1980s, Massachusetts lawmakers created a system of mandatory minimum sentences for drug offenses, which was based solely on the weight of the drugs in question. Incarcerating these drug offenders costs taxpayers \$46,000 per year. Drug addiction, crime, and recidivism rates have not improved as a result of those policies.

In 2010, Massachusetts implemented the following reforms:

- reducing lengthy drug sentencing laws for the first time since they were enacted over 30 years ago, most by up to one-third
- permitting certain nonviolent drug offenders sentenced to mandatory minimums to apply for parole
- expanding parole eligibility
- expanding work release programs and eligibility
- expanding earned good time credit and eligibility
- reducing the size of drug-free school zones from 1,000 feet to 300 feet.

#### **15. MICHIGAN**

In Michigan, one out of every five state dollars is spent on corrections. As unemployment rates increased and state revenues declined, state spending on corrections grew considerably. Between FY1998 and FY2008, state general fund spending on corrections increased 57 percent from \$1.26 billion to \$1.99 billion, and by FY2007 accounted for 22.6 percent of state general fund expenditures.[i] Spending on corrections is such a large share of the state budget that in 2008, one in three state employees worked for the Michigan Department of Corrections. Violent crime rates in Michigan stagnated even though the national rate experienced an 8 percent decline.

The solutions included:

- consolidating and closing eight unneeded prisons over the protests of the corrections guards union, saving \$120 million

- increasing the use of community-based supervision, sanctions, and treatment strategies that hold offenders accountable
- improving reentry programs to reduce recidivism
- increasing innovation in policing practices to prevent crime in areas correlated with violent crime
- eliminating the majority of mandatory minimum sentences for drug offenses
- enacting a statewide initiative to reduce parole revocations
- enhancing employment, housing, and treatment services for people leaving prison
- establishing mental health courts

In 2009, the index crime rate in Michigan per 100,000 residents fell to its lowest point since 1996. While arrests for violent crime, parolee rearrest rates, and the prison population have all declined, high costs and crime persist, and the prison population is starting to increase once again. The Michigan Law Revision Commission (MLRC) will review the data and work with the CSG Justice Center to recommend needed reforms to the legislature and state leaders. Michigan has reduced its prison population by 12% while its crime rate has remained down.

## **16. MINNESOTA**

Minnesota was one of the first states to adopt sentencing guidelines and employ a permanent, independent sentencing commission to develop and monitor the implementation of guidelines and make other recommendations related to sentencing. Minnesota also pioneered the practice of using guidelines and a permanent commission to develop sentencing policy which sets priorities in the use, and stays within the limits, of available prison capacity. However, the rate of racial disparity in Minnesota's custody populations (as measured by the ratio of the African-American per capita incarceration rate to the White rate) is among the highest in the nation. There is almost no data on charging and plea-bargaining processes in Minnesota.

The solutions included:

- prioritizing incarceration for violent and repeat offenders
- diverting the large numbers of drug offenders from incarceration
- authorizing judges to depart from recommended guidelines sentences to mitigate them when necessary
- extending the prohibition on the inquiry into criminal records to private employers and imposing civil fines to employers who fail to comply

## **17. MISSISSIPPI**

Mississippi's prison population has grown by 17 percent in the last decade, topping 22,600 inmates last year. The state now has the second-highest imprisonment rate in the country, trailing only Louisiana. Without action, these trends will continue and Mississippi prisons will need to house 1,990 more inmates by 2024 – costing taxpayers an additional \$266 million over the next ten years.

The solutions included:

- requiring nonviolent and violent offenders to serve 25 and 50 percent of their sentences, respectively
- eliminating intensive supervision for those released
- narrowing the definition of what constitutes a “violent” offense
- instituting comprehensive case planning for parole-eligible inmates
- restricting parole hearings to offenders who will not comply
- expanding and standardizing victim notification services
- expanding judicial discretion for imposing alternatives to incarceration
- removing restrictions for the use of drug courts, intensive supervision, and other sentencing options
- authorizing the creation of veterans’ courts
- focusing prison beds on violent and career offenders by ensuring that higher-level property and drug offenders are sanctioned more severely than lower-level and property offenders
- increasing funding and resources to law enforcement to target high-level drug traffickers and commercial theft enterprises
- extending parole hearings to a limited number of geriatric offenders
- ensuring that nonviolent offenders are parole eligible
- strengthening supervision and interventions to reduce recidivism by empowering supervision officers to use intermediate sanctions to swiftly and certainly respond to minor violations of supervision
- creating specialized detention centers
- limiting incarceration periods for technical violations of supervision
- streamlining jail transfers for offenders awaiting revocation hearings
- instituting drug court standards and reporting requirements
- providing training in evidence-based practices for decision makers and community supervision officers
- establishing an oversight council to oversee implementation of sentencing and corrections reforms and making further recommendations as needed
- reforming its “truth in sentencing” law to reduce the requirement of amount of time serve prior to release from 85% to 25% for nonviolent offenders
- establishing a 21-member task force to undertake a comprehensive review of the state’s corrections and criminal justice systems and make recommendations for improvement, including examining disparities in sentencing, alternatives to incarceration, mandatory sentences, in conjunction with stakeholders.

The anticipated benefits are averting projected growth in prison population and costs during the next decade, saving a minimum of \$266 million. It permits the Department of Corrections to redirect an estimated \$7 million from averted prison costs towards programs and policies proven to reduce recidivism and hold offenders accountable and improve reentry

services, including increasing the number of permanent beds available for offenders entering the community without adequate housing. By closing down the solitary confinement unit in just one of its supermax prisons and redesignating nearly 1,000 prisoners out of solitary confinement, Mississippi saved \$5.6 million in 2010. The projected benefit is a decrease in crime and recidivism rates and saving state taxpayers a minimum of \$266 million in the next decade.

## **18. MONTANA**

The solutions included:

- establishing a statewide reentry task force whose goal is to develop and implement reentry programs, including mental health, substance abuse, employment, housing, healthcare, parenting, and relationship services, for high-risk inmates within 12 months of release from prison
- coordinating with community restorative justice programs to ensure that victim concerns and restitution are considered in sentencing

## **19. NEBRASKA**

Nebraska's prison population increased by 34 percent between 1995 and 2005, and its corrections budget nearly tripled. As of May 2014, Nebraska's prisons were operating at 158 percent of capacity and the prison population was projected to grow an additional 12 percent by FY2023.

With technical assistance from the Council of State Governments Justice Center using a justice reinvestment approach, the state is considering recommendations including:

- enhancing the availability of less costly, community-based options for nonviolent offenders
- launching new day and night reporting centers to better accommodate releasees' schedules
- diverting nonviolent, low-risk offenders, particularly drug possession offenders, from incarceration
- implementing automatic notification to the governor when facilities are at a overcapacity
- commissioning a pilot, family-based reentry program for incarcerated parents, especially those with children under 6 years of age, that will provide parental education, child literacy, relationship skills development, and reentry planning

A policy framework will be available for the legislature's consideration by early 2015.

## **20. NEVADA**

Nevada's prison population has been among the fastest growing in the nation, and was projected to grow faster still over the next ten years, increasing 61 percent by 2017, to 22,141 prisoners. High rates of failure among people on probation supervision as well as the lack of community-based treatment for substance abuse, mental illness, or co-occurring disorders were identified as the key factors driving the growth in the prison population.

The solutions included:

- creating a commission on overcriminalization
- providing incentives to offenders who successfully complete probation and parole terms
- reviewing all criminal sentences to determine which ones are duplicative or sanction the same or similar behavior
- reclassifying certain misdemeanor offenses as civil violations
- reclassifying certain felony offenses as misdemeanors given the disparate impacts a felony conviction may carry
- identifying and studying collateral sanctions or disqualifications due to a criminal conviction and recommending provisions allowing relief from those collateral consequences
- reducing the waiting period from 7 years to 5 years before a person convicted of a gross misdemeanor may petition a court to seal his criminal records
- reducing the maximum penalty for a gross misdemeanor from one year to 364 days in order to avoid immigration consequences for non-citizens
- requiring its Department of Corrections to provide photo identification cards to inmates upon release if the inmate requests the card and is eligible to acquire a driver's license or state-issued identification card

As a result, the state is expected to save \$28 million by 2009. To ensure that the savings are reinvested in expanding community-based behavioral health care services, the state established a justice reinvestment fund with \$6.3 million.

## **21. NEW JERSEY**

The solutions included:

- expanding eligibility to misdemeanor courts' conditional dismissal program to defendants charged with non-drug misdemeanors, such as trespassing and shoplifting. Upon successful completion of the program, charges are dismissed and individuals may apply to have their records expunged six months after dismissal.

## **22. NEW MEXICO**

New Mexico spent almost \$300 million in fiscal 2011 to house an average of 6,700 offenders and supervise another 18,000 offenders each day. Most offenders are in lockup because they can't post the \$100 bond. Leading up to the upcoming 30-day legislative session in January 2015, a Criminal Justice Reform Subcommittee was established to explore options to reduce overcrowding and costs while protecting public safety.

### **23. NEW YORK**

New York, like virtually all other states, experienced a sharp increase in crime and the prison population from the 1970's to the late 1990's. In 1977, New York prisons housed 20,000 offenders; by 1999, there were 73,000. But since that time New York is unique among the large states to have experienced both a substantial drop in both its prison population and crime rate.

The solutions included:

- eliminating mandatory minimums for first-time felony drug offenders and certain second-time felony drug offenders
- reducing average drug sentences by approximately 50%
- considering the offender's drug dependency and/or addiction in setting the punishment
- expanding "alternatives to incarceration" programs (e.g. diversion of more drug offenders to treatment and drug courts)
- applying "merit time" credits to speed up parole consideration
- using data-driven policing that facilitates quick responses to hot spots
- holding police commanders accountable for results in their region.

In fact, from 2000 to 2007, New York City's reduced its violent crime rate by 64 percent and incarcerated 42 percent fewer offenders. After 2000, however, New York began a year-by-year drop in its prisoner population, bucking the national trend of continued (though moderate) growth. By 2008, New York prisons held 60,000 inmates—a 16 percent fall from a decade earlier. The same pattern holds for violent crime. By 2008, the violent-crime rate was considerably lower in New York State (400 per 100,000) than in the United States (450 per 100,000). From 1965 through 1991, property crime in the United States and New York tracked closely together, each about doubling. After 1991, the property-crime rate fell both statewide and nationally, but more rapidly in New York. In 2008, the property-crime rate in New York (2,000 crimes per 100,000 residents) was 1.6 times lower than in America as a whole (3,200 per 100,000 residents). As a result, the state considered consolidating partly empty prisons, rather than keeping unneeded prisons open to avoid cutting government jobs, and expanding the use of alternatives to incarceration that cost-effectively reduce recidivism among nonviolent offenders. By 2011, New York reduced its prison population by 20% and saved its taxpayers \$ 72 million in FY 2011 alone while its crime rate has remained low.

### **24. NORTH DAKOTA**

The solutions included:

- mandating automatic parole review for eligible inmates

## **25. RHODE ISLAND**

Despite being the smallest state in the country and having a crime rate among the lowest (the state's violent crime rate is ranked the 40th lowest in the country, while its property crime rate is the 35th lowest), Rhode Island's prison population is projected to increase 21 percent between 2007 and 2017. This increase would come at a cost to taxpayers of an additional \$300 million in construction and operating expenses.

The solutions included:

- standardizing the calculation of earned time credits
- establishing risk reduction program credits
- requiring the use of risk assessments to inform parole release decisions
- prohibiting employers from asking job applicants if they have ever been arrested, charged with, or convicted of a crime, unless for criminal justice employment or positions for which state or federal law requires an absence of convictions.
- authorizing the parole board to grant "certificates of recovery and reentry" to offenders who have met certain specified standards, with the purpose of helping prospective landlords, employers, make more informed decisions about applicants with criminal records.

## **26. TENNESSEE**

The budget of the Department of Corrections has grown 28.4% over the past five years, from \$700,520,000 in FY09 to \$899,270,500 in FY13. Since 1999, the number of incarcerated felons in Tennessee has grown by 32.6%, from 22,539 to 29,885. Five of Tennessee's 14 prisons are presently over capacity, and another eight are currently operating over 95% of assigned capacity. This has created a significant overcrowding problem in local jails; as of July 2014, 47 local jails reported being overcrowded, with one reporting that it was housing 55 inmates in a facility with only 13 beds.

The **proposals** submitted to the state include:

- reducing incarceration or providing alternatives to incarceration for low-level drug users, many of whom engage in drug dealing to support their own habits
- amending the state's "three-strikes law," which provides severe penalties for drug offenses
- reducing the length of drug sentences, which average close to ten years, as drug offenders comprise the largest segment of incarcerated offenders

- evaluating the strict “truth-in-sentencing” laws that require offenders to serve at least 85% of their sentences before being eligible for early release and requiring certain other offenders to serve 100% of their sentence, thus rendering them ineligible for early release
- increasing the number of days per month offenders may earn for good behavior and participating in work, educational or vocational training programs
- improving the collection and analysis of reliable, accurate data
- increasing and improving treatment programs best suited to offenders’ individual needs
- reviewing the collateral consequences that are currently imposed are due to a legitimate concern for public safety
- removing barriers to re-entry

## **27. TEXAS**

Texas’s prison population increased by 300 percent between 1985 and 2005. Between 1997 and 2006, probation revocations to prison increased by 18 percent. In 2007, lawmakers were faced with a Legislative Budget Board projection that 17,332 new prison beds would be needed by 2012. These beds would have cost \$1.13 billion to build based on a \$65,000 per bed construction cost and another \$1.50 billion to operate over five years based on the \$47.50 per day operating cost in 2008.

The solutions included:

- reducing sentencing terms for drug and property offenders from a maximum of ten years to a maximum of five years
- increasing prison capacity for substance abuse (outpatient, in-prison, and post-release) and mental health treatment
- applying graduated sanctions
- creating and expanding treatment as well as social and behavioral intervention programs
- expanding drug and other specialty courts
- increasing the use of parole for low-risk offenders
- expanded diversion options in the probation and parole system for technical violations of supervision, transitional treatment, and substance abuse treatment
- improving and expanding alternatives to incarceration for adults and juveniles
- diverting certain drug possession offenders to probation instead incarceration
- expanding electronic monitoring
- increasing the use of probation for nonviolent offenses
- increasing funding for nonviolent offenders to attend residential and nonresidential treatment programs
- enhancing parole and probation supervision

- diverting juvenile offenders from incarceration to community supervision and residential treatment, which costs half as much
- creating and expanding the number of reentry coordinators available to assist returning citizens
- incentivizing probation officers to reduce incarceration for technical violations
- providing an additional sentencing option for defendants convicted of state jail felonies---to split the sentence and order a period of jail confinement followed by community supervision for the remainder of the term
- recommending best practices for its specialty courts and instituting greater executive and legislative control over them
- implementing a diversion program for those charged with prostitution offenses, to provide information, counseling, and services relating to sexually transmitted diseases, mental health, substance abuse, and sex addiction
- assessing each offender in order to identify available transition and reentry services
- mandating that a criminal record subject to a nondisclosure order may not be publicly disclosed by the court clerk and regulates companies, including online companies, that publish mug shots or other criminal history information and charge a fee to have a record modified or removed, to ensure that the information they publish is accurate and current and imposes a civil penalty on companies that publish records that have been sealed or expunged
- amending the occupational licensing law so that those convicted of certain misdemeanors remain eligible to obtain licenses; shielding employers from liability in negligent hiring and inadequate supervision actions brought solely on the basis of an employee's criminal record; and clarifying that information regarding a sex offender's employer's name and address may not be listed publicly on the sex offender registry
- investing in courses that teach relevant and marketable skills to inmates
- directing prison wardens to identify and encourage volunteer and faith-based organizations to provide programs in their facilities, including job and life skills training, literacy and education programs, parent training, and drug and alcohol rehabilitation
- implementing a pilot post-release program for mentally ill jail inmates with the goal of reducing their rates of recidivism and re-incarceration
- requiring a third-party review of administrative segregation practices (e.g. solitary confinement) in both adult and juvenile facilities

As of FY 2013, Texas's crime rate was at its lowest point since 1968 and the legislature had authorized three prison closures, reduced its population by 20%, and reduced correctional spending.

## **28. UTAH**

Utah's imprisonment rate is below the national average, but it is growing faster than in other states. Without changes, the number of inmates is estimated to grow 37 percent during the next two decades. Utah's current prison population of nearly 7,000 inmates could almost double in the next two decades. Its two prisons are at capacity because inmates are spending more time behind bars and, once they are released, they recidivate at high rates.

The **proposals** submitted to the state include:

- reducing a simple drug-possession charge from a felony to a misdemeanor, which would reduce a possible sentence of five years to a maximum of one year
- diverting drug offenders to community treatment programs than behind bars
- reducing the penalties for selling smaller amounts in support of the offender's own habit as opposed to higher penalties for large-scale drug dealers
- reducing sentences for some lower-level crimes
- expanding options to rehabilitate sex offenders and those with drug and mental health issues
- bolstering programs to help inmates re-enter society
- expanding treatment services and other programming for inmates to keep them from re-offending and returning to the prison system
- reducing incarcerative sentences people involved in non-violent crimes, by two to four months
- standardizing "earned time credit" that would allow inmates to have sentences reduced for successful completion of programming and goals set by case workers
- implementing graduated sanctions
- decreasing sanctions for technical parole violations in order to prevent parolees from losing a job, missing car payments and other bills and getting evicted from their housing, leaving them in a very difficult position once they were released from the violation
- amending "Drug Free Zones" that might be unfairly enhancing certain offenders criminal sentences to establishing better certification for drug treatment centers and best practices for county jails
- expanding expungement eligibility to felony drug possession, for offenders who waited five years, were free of all illegal drug use, and were successfully managing any addiction.

## **29. VERMONT**

According to a 2006 U.S. Department of Justice report, Vermont, one of the least populous states in the country, was among the states with the fastest growing prison populations in the nation. Between 1996 and 2006, the state's incarceration rate increased 80 percent, nearly doubling its prison population from 1,058 to 2,123. To keep pace with the growth in the prison population, state spending on corrections increased from 4 percent of state general funds in 1990 to 10 percent of state general funds in 2008. In fact, as violent crime declined 31 percent nationally between 1995 and 2005, it increased slightly (2 percent) in Vermont. In 2007,

analyses projected that steep prison population growth would continue into the next decade, increasing 23 percent by 2018. Faced with the prospect of contracting for additional capacity in out-of-state facilities or constructing and operating new prisons at an additional cost of between \$82 million and \$206 million, policymakers had to decide if investing more taxpayer dollars in prison capacity was the best way to lower the state's high recidivism rate and increase public safety.

The solutions included:

- expanding community-based supervision and substance abuse treatment, to reduce this rate of recidivism
- improving data collection and analysis to track the impact of these reforms on crime and recidivism rates
- emphasizing restorative justice, i.e. less formal approaches that give victims, rather than the government, a greater role in determining the appropriate sentence, particularly restitution agreements
- establishing pilot screening and assessment processes prior to sentencing and prior to release from prison to identify people who are appropriate for treatment and diversion programs
- improving and expanding mental health and substance abuse treatment programs
- broadening the intensive set of supervision and community-based services targeted at offenders immediately upon release
- releasing successful treatment program participants 90 days prior to their minimum sentence date as permitted by state law
- closing and reorganizing several prisons and establishing a new 100-bed work camp for male offenders with substance abuse treatment needs
- increasing steps to improve the supervision of high risk offenders
- establishing caseload caps for community corrections officers and assignment of supervision levels as based on the severity of offense and the risk to re-offend
- requiring judges to limit conditions of probation supervision to those that require rehabilitation, increase pro-social behavior, and reduce risk to public safety
- authorizing corrections officials to use electronic monitoring for people placed on conditional reentry, furlough, parole, or probation supervision
- creating an administrative probation program, a form of no-contact supervision, for people convicted of certain nonviolent misdemeanors who pose a low risk of harm to the public
- expanding transitional housing and job training programs to reduce costly and unnecessary delays for people entering the reintegration program and to reduce their recidivism upon release by 10 percent
- creating a Criminal Offense Classification Working Group to review Vermont's sentencing structure and develop a system of graduated liability and punishment
- directing the Joint Committee on Corrections Oversight to develop a proposal to increase the use of home detention and confinement, including the use of

electronic monitoring, as alternatives to incarceration for those charged with nonviolent misdemeanors and revising bail and pretrial release conditions

- creating a working group tasked with developing a criminal and juvenile justice cost-benefit model that will be used by policymakers to assess the cost-effectiveness and net social benefit of proposed strategies and programs, costs incurred by victims of crime and the quality of data collection in the criminal justice system.

With these changes, the revised prison population projection shows that the state will need 436 fewer beds by FY 2018. These bed savings will help reduce the state's need to contract for out-of-state capacity to house the prison population and avert the need to construct new prisons, yielding an estimated \$54 million in net savings between FY 2009 and FY 2018. Policymakers opted to reallocate \$3.9 million of the projected savings over the next two years for recidivism-reduction strategies. In FY 2009, the state will reallocate \$600,000 to design and implement an assessment tool to identify people with substance abuse needs prior to release and expand in-prison substance abuse treatment and vocational training in a new 100-bed work camp for men. The plan also reallocates \$3.3 million in FY 2010 for electronic monitoring, a new residential component for the Intensive Substance Abuse Program, and expanded capacity for the transitional housing program to include housing assistance and life skills training.

### **30. VIRGINIA**

One of every 89 adults in Virginia is incarcerated. The state's growth in the imprisonment rate per 100,000 residents was 9th highest of all states from the end of 2000 to June 30, 2009, trailing West Virginia, Indiana, Kentucky, Florida, Pennsylvania, Alabama, Arkansas and South Dakota. Among the factors contributing to the state's prison growth was the abolition of parole in 1994. The imprisonment rate per 100,000 residents in Virginia is nine percent higher than the national average for all states. In 2008 Virginia ranked 41st in index crimes, 42nd in violent crimes and 40th in property crimes per 100,000 resident population. The annual cost of holding a prisoner in Virginia is \$24,667. It is estimated that annual corrections costs since 2000 have increased by at least \$120 million beyond that expected given the state's population growth.

The solutions included:

- establishing an "immediate sanction probation program" for nonviolent offenders to provide for an expedited hearing before the court
- diverting low-level drug and property offenders to probation (rather than incarceration)
- considering risk and needs assessments in sentencing decisions

The re-conviction rate for these diverted offenders is only 13.8 percent.

### **31. WASHINGTON**

Between 2002 and 2012, the state of Washington's resident population increased, while the reported number of crimes and arrests across the state decreased. Despite these efforts, Washington's prison population spiked by 8 percent over the same period. An additional 9-percent increase is anticipated by 2023. The task force is expected to deliver a policy framework to the legislature by early 2015.

The solutions included:

- reducing the maximum sentencing range for certain drug offenders, precluding incarceration in favor of probation or community confinement
- creating and expanding the number of specialized courts (74 are operational)
- devising and instituting a comprehensive programming plan for offenders under community supervision and in prison, including cognitive behavioral therapy
- protecting the parental rights of incarcerated parents by adding incarceration to the list of "good cause" exceptions why the state's child protection agency does not have to file for termination of parental rights when a child has been in foster care for 15 out of 22 months and where incarceration is a major factor in why the child is in foster care.

### **32. WISCONSIN**

In 2008, the Council of State Governments Justice Center provided recommendations to Wisconsin lawmakers, including:

- mapping specific high-stakes neighborhoods where a large number of people released from prison return
- analyzing the prison population to determine the drivers of growth
- developing data-driven policy options for strengthening public safety and reducing corrections spending
- highlighting strategies that have been successfully employed in other states to address similar trends and patterns
- projecting the fiscal impact of policy options on the state budget

### **33. WYOMING**

In Wyoming, one in 44 adults is under the control of the criminal justice system, with a taxpayer burden of \$48,234. The decision comes as violent and property crimes in the state have fallen 11 percent since 2000. But state data shows that prison admissions have increased by 64 percent during the same time period. And the average length of stay has increased from 27 months to 30 months since 2000. Unless Wyoming was able to curb its overincarceration and correctional spending, the state will likely need an extension to Torrington's Medium Correctional Institute, which would add 144 beds to the facility, by 2017. In addition to the \$13.5 million construction price tag, that addition would cost the state about \$5 million a year to

operate and staff. The state is partnering with the National Governors Association and The Pew Charitable Trusts to study how well the state's corrections system is working.

Among the recommendations the state will be considering in 2015 and 2016 are:

- revising the state's drug sentencing and parole policies
- raising the threshold for when a property offense rises to the level of a felony
- reducing the sentence lengths for low-level drug offenses, as a significant component of the state's prison admissions
- diverting drug offenders to treatment instead of incarceration
- reforming penalties for technical violations of their release or parole, which currently incarcerate violators for up to two years
- developing targeted, proportional penalties, which studies demonstrate are more effective in changing behavior

## **VI. THE BI-PARTISAN RESPONSE: PROCEDURAL HISTORY AND FORMATION OF THE OTF**

Nearly forty years later, we must come to grips with the damage caused by legislative efforts, prosecutorial discretion, and judicial hamstringing put in place by both political parties since the 1970s. The decades since have proven to us that our large-scale criminal experiment based upon rhetoric, emotion, and punitive has failed us all. It is a failure that falls on the shoulders of both parties, the House, the Senate, the White House, the Judiciary, the Sentencing Commission, and the law enforcement. We must counter rhetoric with rationality, emotion with evidence, and punishment with proportionality.

On May 7, 2013, the Committee approved a resolution to establish an Over-Criminalization Task Force. The resolution took effect on May 31, 2013, and authorized the Task Force for six months to conduct hearings and investigate issues related to over-criminalization and over-federalization. Over its first six months of existence, the Task Force held four hearings, focusing on the scope of the over-criminalization problem; the lack of a consistent and adequate *mens rea* requirement in the federal code; and the problems associated with regulatory crime.

On February 5, 2014, the Committee approved a resolution to re-authorize the Over-Criminalization Task Force. The resolution took effect on February 5, 2014, and authorizes the Task Force for an additional six months. In addition to the first hearing on criminal code reform, the Task Force plans to conduct hearings on penalties, over-federalization, and the perspectives of the various Executive and Judicial agencies, among other topics.

The Task Force consists of ten members, equally divided between the majority and minority membership of the Committee. Chairman Goodlatte and Ranking Member Conyers serve as *ex officio* members of the Task Force. This bipartisan Task Force is chaired by Crime, Terrorism, Homeland Security, and Investigations Subcommittee Chairman Jim Sensenbrenner. The Task Force Ranking Member is Crime, Terrorism, Homeland Security, and Investigations Subcommittee Ranking Member Bobby Scott.

The Task Force's continuing mission is to conduct an in-depth analysis of over-criminalization and over-federalization, and to identify improvements to federal criminal law and the House Rules, through bipartisan, unanimous recommendations to the Committee.

## VII. INPUT BY AGENCY STAKEHOLDERS

On July 11, 2014, the Overcriminalization Task Force held a hearing, requesting that the four federal agency stakeholders identify the drivers of overcriminalization and propose recommendations. Their written submissions are attached in the appendix, but are summarized.

### A. Interaction of Stakeholder Agencies

The mission of the Department of Justice (DOJ) is to “enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.”<sup>430</sup>

The Federal Public Defender Program was established in response to the Sixth Amendment’s requirement that the government provide a lawyer to someone charged with a serious crime who cannot afford to hire one. Approximately 90% of all federal criminal defendants qualify for court-appointed counsel. In FY 2012, the DOJ pursued criminal charges against 94,121 defendants; during that same time period, the Federal Defender Program opened 86,142 criminal cases for court-appointed clients, which does not include appeals for existing clients, supervised release modification or revocation proceedings for existing clients, or motions to reduce sentences for existing clients.

To help enable it assess the administration of the federal court system and in response to a then-pending significant case backlog,<sup>431</sup> Congress created the Conference of Senior Circuit Judges in 1922.<sup>432</sup> The name of this entity was later changed to the Judicial Conference of the United States with the enactment of section 331 of title 28 of the United States Code in 1948.<sup>433</sup> The Conference’s membership is comprised of the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit. Section 331 requires the Conference to “make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary.”<sup>434</sup> The Chief Justice, as the presiding officer, must submit to Congress “an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.”<sup>435</sup>

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<sup>430</sup> U.S. Dep’t of Justice Mission, available at <http://www.justice.gov/about/about.html>.

<sup>431</sup> See, e.g., Federal Judicial Center, *History of the Federal Judiciary – Landmark Judicial Legislation*, available at [http://www.fjc.gov/history/home.nsf/page/landmark\\_14.html](http://www.fjc.gov/history/home.nsf/page/landmark_14.html).

<sup>432</sup> 42 Stat. 837 (1922).

<sup>433</sup> 62 Stat. 902 (1948).

<sup>434</sup> 28 U.S.C. § 331 (2014).

<sup>435</sup> *Id.*

The Sentencing Commission issues the sentencing guidelines, updated yearly, which form the starting point for the calculation of a federal criminal sentence. The Commission solicits input from the other three stakeholders in determining guideline levels, enhancements, and reductions.

In FY 2013, the federal government endured the sequester, which cut funding to federal agencies.

Of the four stakeholders, DOJ had the largest budget cut during fiscal year 2013 of \$1.6 billion, yet it was able to avoid any layoffs or furloughs of staff because of the agency's ability to shift its enforcement and prosecutorial funds to cover staffing costs.<sup>436</sup> Congress approved "reprogramming" (i.e. transferring) of \$313 million to cover the budgetary shortfall.<sup>437</sup> The reprogrammed funds were comprised of de-obligated and expired Federal Bureau of Investigation and Bureau of Alcohol, Tobacco, Firearms and Explosives salary and expense funding, election monitoring program balances, legal education balances within the U.S. Attorney's Office, and funds from the U.S. Marshal's Service.<sup>438</sup>

In comparison, the sequester cut \$52 million from the Federal Defender budget (representing 10% of its fiscal year 2013 budget), yet, because the sequester cut occurred halfway through the year, it effectively operated as a 20% cut of the budget for the remainder of the year.<sup>439</sup> The Federal Defender budget is comprised of 10% constitutionally-required case-related costs that cannot be cut (e.g. experts, transcripts, costs associated with investigation and defense), 10% locked-in rent costs on long-term leases that could not be renegotiated, leaving 80% for salary, which was the only area to cut.<sup>440</sup> As a result, many Federal Defender employees were forced to take unpaid furlough days or subject to layoffs, or even both.<sup>441</sup> Due to the requirement to provide Constitutionally-effective representation to their clients, many of their attorneys worked during their furlough days without pay.<sup>442</sup> The nationwide average for furlough days for federal defender offices was 15 days per staff member.<sup>443</sup>

The Judicial Conference's budget was cut by \$350 million as a result of the sequester.<sup>444</sup> The budget for the Federal Defender Program falls within the Judiciary's budget as does the Judicial Conference's and Probation and Pretrial's. The impact was a 15% reduction in staff in clerk's offices, circuit court units, and probation and pretrial services office (approximately

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<sup>436</sup> Jordy Yager, "Holder: No Furloughs at Justice Department," THE HILL (Apr. 25, 2013), available at: <http://thehill.com/homenews/administration/296053-holder-no-furloughs-at-justice-department>.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> U.S. Courts, *Fact Sheet: Sequestration & the Federal Judiciary*, available at <http://news.uscourts.gov/content/fact-sheet-sequestration-and-federal-judiciary>.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

3,200 people).<sup>445</sup> In addition, total furlough hours were 41,000<sup>446</sup>. The salary budget for probation and pretrial services officers was cut by 14%, and the number of officers reduced by 11%.<sup>447</sup> This resulted in larger caseloads per officer, which led to presentence investigation reports taking 4% longer to complete.<sup>448</sup> Alternatives to pretrial detention as well as funding for drug testing, drug treatment, and mental health treatment programs were cut by 20%.<sup>449</sup>

## A. DOJ

In response to the Overcriminalization Task Force’s hearing on Agency Perspectives, DOJ identified the most pressing problems in the federal criminal justice system and proposed solutions.

Citing the growing portion of DOJ’s budget that is devoted to prisons and detention, now almost a third, DOJ emphasized that “[t]he large proportion of our citizens behind bars has had serious budget implications that, unless addressed, will negatively affect public safety. The fact is such extensive use of prison is expensive and unsustainable.”<sup>450</sup> Specifically, DOJ explained that growing federal prison spending “has increasingly displaced other crucial justice and public safety investments, including resources for investigation, prosecution, prevention, intervention, assistance to State and local law enforcement agencies, and victims’ support.”<sup>451</sup> From fiscal year 2000 to 2013, the funding for grants decreased from 26% to merely 8%, cannibalized by the increase in prisons and detention from 27% to 31%, the increase in funding for the FBI from 19% to 30%, and the increase in funding for all other DOJ functions (including U.S. Attorneys).<sup>452</sup>

As such, DOJ warned that “[i]f we fail to reduce our prison population and related prison spending, there will continue to be fewer agents to investigate [f]ederal crimes; fewer prosecutors to bring charges; less support to State and local law enforcement, criminal justice partners and crime victims; less support for treatment, prevention and intervention programs; and cuts in other public safety priorities.”<sup>453</sup>

In terms of efficacy, the DOJ acknowledged that the status quo---“our excessive reliance on incarceration and insufficient investment in prisoner reentry”--- “has undermined our ability to effectively address recidivism, which is a significant part of our crime problem.”<sup>454</sup> Such that

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<sup>445</sup> U.S. Courts, *Sequestration’s Impact on Judiciary’s Programs & Operations*, available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/sequestrations-impact-on-the-judiciarys-programs.aspx>.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> Heaphy Over-Criminalization Task Force Statement at 4.

<sup>451</sup> *Id.* at 5.

<sup>452</sup> *Id.* at n.6.

<sup>453</sup> *Id.* at 5.

<sup>454</sup> *Id.*

continuing this overincarceration trend would “threaten” “our remarkable public safety achievements of the last 20 years would be threatened unless reforms are instituted to make our public safety expenditures smarter and more productive.”<sup>455</sup>

Explaining its methodology, DOJ stated that it had “extensively studied all phases of the criminal justice system – including charging, sentencing, incarceration and reentry – to identify which practices are most successful at preventing crime and deterring, incapacitating, treating, and rehabilitating criminals.”<sup>456</sup> DOJ’s data analysis led to its “findings [that] indicate a need for significant changes in our approach to enforcing the Nation’s laws,” as “many of our current practices, including most notably long incarceration sentences, are financially unsustainable.”<sup>457</sup>

DOJ identified

a set of initial reforms that [it] hope[s] this Task Force will embrace and help to bring about, including – changing statutory drug penalties; improving reentry programming; reforming prison credits and other incentives to promote more efficient use of prison resources while simultaneously reducing reoffending; investing in evidence-based diversion programs – for example, drug treatment initiatives and veterans courts – that can serve as alternatives to incarceration in some cases; and reducing unnecessary collateral consequences for formerly incarcerated individuals seeking to rejoin their communities.<sup>458</sup>

These recommendations are due, in large part, to the recognition that “of the 217,000 individuals in the Bureau of Prisons’ custody, nearly half are serving time for drug-related offenses.”<sup>459</sup>

In particular, DOJ stated that it is

committed to modifying charging and sentencing policies for these offenses both to help control Federal prison spending and to ensure that people convicted of certain low-level, nonviolent Federal drug crimes will face sentences appropriate to their individual conduct. While we continue to support mandatory minimum sentencing statutes, we believe they should be applied only to the most serious criminals. By reserving the harshest penalties for dangerous and violent offenders, we can better promote public safety, deterrence, and rehabilitation by

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<sup>455</sup> *Id.* at 6.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 7.

<sup>458</sup> *Id.*

<sup>459</sup> Federal Bureau of Prisons, Inmate Statistics – Offenses, *available at* [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp); *see also* Press Release, Dep’t of Justice, Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers (Mar. 13, 2014), *available at* <http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>.

saving billions of taxpayer dollars and reinvesting the savings to strengthen communities.<sup>460</sup>

Although the Attorney General’s “Smart on Crime” Initiative has permitted DOJ to make some improvements, DOJ “strongly urged” that in order “to most effectively address the issue, congressional action is necessary” and that the “[Overcriminalization] Task Force and the House Judiciary Committee to take up this issue this year.”<sup>461</sup>

Referencing successful reforms on the state level, DOJ explained that “[a]dvancing commonsense reforms to make the Federal criminal justice system more effective, more efficient and more just will help us to enhance justice and battle crime more effectively.”<sup>462</sup>

With regards to specific legislation, DOJ reiterated its “strong[ ] support[ ]” for the Smarter Sentencing Act.<sup>463</sup> In discussing its reasons for supporting the Smarter Sentencing Act, DOJ explained that the bill’s “modest[ ] reduc[tion of] statutory penalties for certain non-violent drug offenders . . . could allow billions of dollars to be reallocated to other critical public safety priorities while enhancing the effectiveness of our Federal sentencing system.”<sup>464</sup> The “critical safety priorities” that would be enhanced by the bill, according to DOJ, include “ensur[ing] that law enforcement continues to have the tools needed to protect national security, combat violent crime and drugs, fight financial fraud, and safeguard the most vulnerable members of our society.”<sup>465</sup> Moreover, DOJ also focused on the ameliorative effect the retroactivity provision of the bill would have in terms of “address[ing] a basic issue of fair treatment for similar offenders: drug offenders with mandatory minimum sentences imposed before the Fair Sentencing Act would receive the same benefit as those convicted afterwards.”<sup>466</sup>

In addition to---but not in lieu of the Smarter Sentencing Act---DOJ expressed its support for “‘back-end’ reforms to enhance the prospects that Federal prisoners will successfully return to their communities.”<sup>467</sup> Noting that it had “some technical concerns” with the House version of the Public Safety Enhancement Act, DOJ noted that it “share[d] the overall goals of legislation,” which were “to improve Federal prisoner reentry, better control the Federal prison population, and reward prisoners who successfully participate in evidence-based programs that assist prisoners with successful reentry.”<sup>468</sup>

DOJ explained that its support for the sentencing reforms embodied in those bills was “not unprecedented” but rather “build on innovative, data-driven reinvestment strategies that have been pioneered” by bi-partisan state lawmakers, law enforcement officials, and other

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<sup>460</sup> Heaphy Over-Criminalization Task Force Statement at 8.

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 9.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

stakeholders who “have begun to transform sentencing and corrections policy across the country.”<sup>469</sup> Drawing on its data from its JRI program, which has supported reforms in at least 18<sup>470</sup> states, DOJ supported a federal effort based upon this JRI model that is “driven more by practical, on-the-ground knowledge and data than by and ideology,” which “direct[s ] significant funding away from prison construction and toward evidence-based programs and services – such as community supervision and drug treatment – that are proven to reduce recidivism while improving public safety.”<sup>471</sup> In support of its proposal, DOJ highlighted the financial savings of JRI states, which are projected to “save \$4.6 billion over an 11-year period.”<sup>472</sup>

DOJ argues that “[a]ll of the[ ] evidence- and results-based efforts across the country have demonstrated that there is much to be learned from the experience of the States” and that “[i]t is time to apply the[ ] lessons at the Federal level.”<sup>473</sup> Indeed, DOJ acknowledges that its “Smart on Crime” initiative and its other legislative proposals “are derived from, and complement these State efforts.”<sup>474</sup> DOJ views their recommendations and call for Congressional action in the form of federal sentencing reform as “approach[es] that [are] not only more efficient and more effective at deterring crime and reducing recidivism, but also more consistent with our nation’s commitment to treating all Americans as equal under the law.”<sup>475</sup>

In light of its discussion of perceived systemic problems and proposed solutions, DOJ was careful to note that it did not support the repeal or restrict of regulatory crimes or the addition of a *mens rea* element.<sup>476</sup> With regards to regulatory crimes, DOJ “strongly encourage[d] the Task Force to proceed cautiously” as “[c]riminal violations of these laws and regulations that are designed to protect people and our environment can and do have serious consequences” and “Congress should think very carefully before weakening these laws.”<sup>477</sup>

This is because “the ‘regulatory’ laws the Government enforces are critical to protect the health and safety of our citizens,” including, but not limited to, the Clean Air Act, the Clean Water Act, the Federal Food, Drug, and Cosmetics Act, the Mine Safety and Health Act, and the Occupational Safety and Health Act, which animate Congressional intent that “it is in our national interest to ensure our families, our neighbors and our communities can breathe clean air and drink clean water, our children consume safe food and medicine, and workers are safe at their plants, mines, factories and offices.”<sup>478</sup>

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<sup>469</sup> *Id.*

<sup>470</sup> The States that have implemented these reinvestment reforms include: Arkansas, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Louisiana, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, and West Virginia. Three additional States that are pursuing Justice Reinvestment but have not yet implemented legislation are Michigan, Nebraska, and Washington.

<sup>471</sup> *Id.* at 3-4.

<sup>472</sup> JRI Report at 3.

<sup>473</sup> Heaphy Over-Criminalization Task Force Statement at 14.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> *Id.* at 2.

<sup>477</sup> *Id.* at 3.

<sup>478</sup> *Id.* at 2.

Acknowledging that “some witnesses before the Task Force have criticized the enforcement of some health, safety, and environmental laws,” DOJ cautioned that those witnesses “have tended to focus on a handful of cases that have raised concerns – some legitimate, some not.”<sup>479</sup> To its point, DOJ cataloged its “prosecut[ions] some of the most egregious violators of our Nation’s regulatory laws,” such as “illegal pesticide applications that resulted in the deaths of innocent children, hazardous materials violations that caused explosions that killed workers, failure to comply with worker safety rules that caused employees to die from exposures to deadly gases, and Clean Air Act violations that caused explosions killing and injuring company employees” and its determination of “responsibility for major disasters, like the BP oil spill and the Upper Big Branch Mine Disaster,” which permit it to “hold accountable those who endanger the public and the environment through their illegal conduct.”<sup>480</sup>

Thus, on a related note, DOJ conceded that while the Overcriminalization Task Force’s witnesses “also raised concerns about laws that impose strict liability for certain crimes,” it would caution against any reform of strict liability statutes (i.e. those without a *mens rea* component) because “they play an important role in protecting the public welfare, including protecting consumers from unsafe food and medicine,” by “plac[ing] the burden of compliance on those who are in the best position to ensure that their products and activities are safe, rather than on the people who cannot protect themselves from the harms that those products and activities can cause.”<sup>481</sup>

## **B. FEDERAL PUBLIC DEFENDER ORGANIZATIONS**

The Federal Public Defender Program identified the overcriminalization in the federal criminal justice system as:

- “the sheer proliferation in the number of criminal laws”<sup>482</sup>
- “the vastly expanded enforcement of those laws (100,366 persons were charged with federal crimes in 2010, up from 83,963 in 2000, 66,341 in 1990, and 39,914 in 1980)”<sup>483</sup>
- “the explosion in the prison population (from a federal inmate population of 24,252 in 1980 to 209,771 in 2010, and growing at a pace three times faster than state inmate populations between 2000-2010)”<sup>484</sup>
- “the high rates of pretrial detention (in 1984 before passage of the Bail Reform Act, 74% of defendants were released on bail; last year 34% were released)”<sup>485</sup>
- “the ever multiplying number of convictions and restrictions associated with probation or supervised release (including lifetime terms of supervision,

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<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 3.

<sup>481</sup> *Id.* at 2.

<sup>482</sup> Patton Over-Criminalization Task Force Statement at 2.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

<sup>485</sup> *Id.*

limitations on contact with family and friends, DNA collection for everyone, residency restrictions, invasive penile plethysmograph, and many others)<sup>486</sup>

- “the large number of collateral consequences that attend most convictions, often affecting not only the individuals convicted but also their families (restricting access to public housing, employment opportunities, government benefits including nutrition assistance, licenses, and civic participation including voting and jury service)<sup>487</sup>
- “the human toll of severity and over-incarceration<sup>488</sup>
- “the fiscal costs<sup>489</sup>
- “the damage to traditional notions of federalism<sup>490</sup>
- “the ever-expanding collateral consequences that attend criminal convictions -- consequences that impede successful rehabilitation and productivity, and ultimately harm public safety<sup>491</sup>
- “damage to the traditional role of the American jury<sup>492</sup>
- “the strain on defender resources and lack of parity between defenders and prosecutors.<sup>493</sup>

Acknowledging that “[t]here are, of course, many other reforms that could improve the quality of justice in American courts,” the Federal Defenders prioritized “five changes [that] would dramatically improve our system and help to solve the problem of over-criminalization.”<sup>494</sup>

First, “Congress should work to alleviate and ultimately eliminate mandatory minimum sentences. They do not result in more uniformity in sentencing, nor do they reflect the seriousness of offenses. They only diminish the traditional role of juries and judges, reduce transparency, and provide prosecutors with enormous, unchecked power.”<sup>495</sup>

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<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.* at 9.

<sup>495</sup> *Id.* at 8.

Second and relatedly, “Congress should eliminate the truly draconian penalty provisions of 18 U.S.C. § 851 and 18 U.S.C. §924(c). They distort the criminal justice system beyond all recognition by threatening defendants with decades and sometimes life in prison for offenses far less serious than many others that carry much lower sentences.”<sup>496</sup>

Third, “[w]hen Congress amends sentencing laws to make them more just, it should make them retroactively applicable. If a sentence imposed the day after a law is passed would be considered unjust, surely it was unjust the day before the law passed. Judgments involving the highest of stakes should not be left to the fortuity of legislative timing.”<sup>497</sup>

Fourth, “Congress should increase funding for public defenders and other appointed counsel so that the large resource disparities that currently exist between prosecutors and defense counsel for the poor can be ameliorated. The quality of justice dispensed in federal courts should not depend so heavily on the size of defendants’ wallets.”<sup>498</sup>

Fifth and finally, “Congress should support expanded discovery in criminal cases. More information will only result in a better truth-seeking process. In appropriate cases where there are compelling, individualized reasons for prosecutors to withhold certain evidence, they should be permitted to do so. But the baseline standard should be greater disclosure.”<sup>499</sup>

### **C. JUDICIAL CONFERENCE**

The Judicial Conference is comprised of federal judges, who preside over every federal criminal case. Those judges bring the wealth of their previous careers to the bench, as many are former federal prosecutors, federal defenders, federal civil attorneys, state court judges, state prosecutors, and state defenders. The Judicial Conference identified “curbing overfederalization of criminal law and reforming mandatory minimums [as] significant reforms that would strengthen our system while conserving taxpayer dollars.”<sup>500</sup>

In terms of “the overfederalization of criminal law, which ... is a cause of overcrowding in our federal prisons,” the Judicial Conference reiterated its century-long admonition about the “limited role of the federal criminal justice system.”<sup>501</sup> Specifically, the Judicial Conference’s “longstanding position that federal prosecutions should be limited to charges that cannot or should not be prosecuted in state Courts,” and has suggested that the “jurisdiction of the federal courts should be limited, complementing and not supplanting the jurisdiction of the state Courts.”<sup>502</sup>

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<sup>496</sup> *Id.*

<sup>497</sup> *Id.* at 9.

<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> Keeley Over-Criminalization Task Force Statement at 20.

<sup>501</sup> *Id.* at 3.

<sup>502</sup> *Id.* at 4.

In its opinion, the most damaging “product of overfederalization” has been “mandatory minimum sentences, which are inefficient, wasteful, and create sentencing disparities.” Reiterating its “consistent[ ] and vigorous[ ] oppos[ition to] mandatory minimum sentences” for “sixty years,” the Judicial Conference explained that it “has supported measures for their repeal or to ameliorate their effects.”<sup>503</sup> Noting that it “has had considerable company in its opposition to mandatory minimum sentences,” the Judicial Conference’s supplemented its rejoinder to “the claim that judges are motivated by a parochial desire to increase their own power in sentencing” by highlighting and enumerating the multitude and magnitude of all of the other “legislatively-mandated tasks” that federal judges “routinely perform . . . in which the individual judge has no or very little discretion-but the Judicial Conference does not advocate for the[ir] repeal.”<sup>504</sup>

Noting that “mandatory minimums have been criticized on numerous grounds,” the Judicial Conference focused primarily on three objections, namely that they (1) “cost taxpayers excessively in the form of unnecessary prison and supervised release costs;” (2) “impair the efforts of the United States Sentencing Commission to fashion Guidelines according to the principles of the Sentencing Reform Act, including the careful calibration of sentences proportionate to severity of the offense and the research-based development of a rational and coherent set of punishments; and (3) “are inherently rigid and often lead to inconsistent and disproportionately severe sentences.”<sup>505</sup>

In order to effectuate “lasting and meaningful solutions,” the Judicial Conference urged all three branches to “work together to ensure that the correct cases are brought into the federal system, just sentences are imposed, and offenders are appropriately placed in prison or under supervision in the community.”<sup>506</sup>

With regards to legislative proposals, with the disclaimer that the Judicial Conference “favors the repeal of all mandatory minimum penalties,” it also supports “swift” Congressional action to “reduce the negative effects of these statutory provisions” such as (1) “the Justice Safety Valve Act of 2013, [which] is designed to restore judges’ sentencing discretion and avoid the costs associated with mandatory minimum sentences;” (2) “the policies contained in the Smarter Sentencing Act of 2013;” and (3) “an amendment to 18 U.S.C. § 924(c) to preclude the “stacking” of counts and to clarify that additional penalties apply only when one or more convictions of such person have become final prior to the commission of such offense” to ameliorate the “particularly egregious” results from the current application of that statute.<sup>507</sup> Drawing from the experience of federal judges around the country, the Conference summarized that “[a]ll mandatory minimum sentences can produce results contrary to the interests of justice, but Section 924(c) is particularly egregious.”<sup>508</sup> This is because “[s]tacked mandatory sentences (counts) . . . even more so than most mandatory terms[] may produce sentences that undermine

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<sup>503</sup> Id. at 5.

<sup>504</sup> Id.

<sup>505</sup> Id. at 6.

<sup>506</sup> Id. at 3.

<sup>507</sup> Id. at 16-17.

<sup>508</sup> Id. at 17.

confidence in the administration of justice. The Conference recommends that 18 U.S.C. § 924(c) be amended to preclude stacking so that additional penalties apply only for true repeat offenders.”<sup>509</sup>

Ultimately, the Judicial Conference noted that “[t]he good intentions of their proponents notwithstanding, mandatory minimums have created what Chief Justice Rehnquist aptly identified as “unintended consequences[, which f]ar from benign . . . waste valuable taxpayer dollars, undermine guideline sentencing, create tremendous injustice in sentencing, and ultimately could foster disrespect for the criminal justice system.”<sup>510</sup>

Furthermore, the Judicial Conference urged Congress and the Sentencing Commission to include retroactivity provisions for any legislation or guideline amendments, respectively, under the rationale that “whenever possible, fundamental fairness dictates that the defendant’s conduct and characteristics should drive the sentence” such that “retroactive application . . . will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future.”<sup>511</sup>

#### **D. SENTENCING COMMISSION**

Congress created the United States Sentencing Commission as an independent agency to guide federal sentencing policy and practices as set forth in the Sentencing Reform Act of 1984 (“SRA”).<sup>512</sup> Congress specifically charged the Commission not only with establishing the federal sentencing guidelines and working to ensure that they function as effectively and fairly as possible, but also with assessing whether sentencing, penal, and correctional practices are fulfilling the purposes they were intended to advance.<sup>513</sup>

As the repository of—and independent agency charged with analyzing—sentencing data, the Commission identified “reducing costs of incarceration and overcapacity as a priority” because “the size of the federal prison population remains a serious problem that needs to be addressed.”<sup>514</sup> The Commission warned that “as more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety, including law enforcement officers, prosecutors, assistance to victims, and crime prevention programs.”<sup>515</sup>

As a threshold matter, it found that existing mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them” and

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<sup>509</sup> *Id.*

<sup>510</sup> *Id.*

<sup>511</sup> *Id.* at 19.

<sup>512</sup> See 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

<sup>513</sup> 28 U.S.C. § 991.

<sup>514</sup> Saris Over-Criminalization Task Force Statement at 1.

<sup>515</sup> *Id.*

“create problematic disparities” “in addition to contributing to the growth in federal prison populations.”<sup>516</sup>

The broad application of mandatory penalties not only “can lead to a perception by those making charging decisions that some offenders to whom mandatory minimums could apply do not merit them” but when “applied inconsistently from district to district and even within districts,” disproportionately impact African-American and Latino offenders, who comprise “the large majority of offenders subject to mandatory minimum penalties,” with African-American offenders being eligible for relief from those penalties far less often than other groups.”<sup>517</sup>

Indeed, “[w]hen similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA . . . . [y]et the Commission has found [based upon its data analyses] severe, broadly applicable mandatory minimum penalties to have that effect.”<sup>518</sup>

Acknowledging that when Congress established mandatory minimum penalties for drug trafficking, Congress intended to target “major” and “serious” drug traffickers,<sup>519</sup> the Commission’s research has consistently found that those penalties sweep more broadly than Congress may have intended, as they apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who conspire with others to bring large quantities of drugs into the United States.<sup>520</sup>

The Commission also attributed the growing federal prison population to “federalization of crime [that] seems to have increased over the past several decades.”<sup>521</sup> It defined “federalization” as “both the continuing creation of new federal criminal statutes covering conduct traditionally addressed by states and to Department of Justice initiatives to increase prosecution of certain types of crime.”<sup>522</sup>

In response to “the crisis faced by the federal prisons” and “[c]onsistent with [the Sentencing Commission’s] statutory charge to both promote public safety and take into account federal prison capacities,” it proposed solutions “that are fair, appropriate, and safe.”<sup>523</sup> The Sentencing Commission’s recommendations incorporated “the perspectives of law enforcement

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<sup>516</sup> *Id.* at 2.

<sup>517</sup> *Id.* at 6.

<sup>518</sup> *Id.*

<sup>519</sup> See U.S. Sentencing Comm’n, *Report to Congress: Cocaine & Federal Sentencing Policy* 6 (2002), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/200205\\_RtC\\_Cocaine\\_Sentencing\\_Policy/index.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm); see also 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) (“For the kingpins . . . the minimum term is 10 years. . . . [F]or the middle-level dealers . . . a minimum term of 5 years.”); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

<sup>520</sup> 2011 Mandatory Penalties Congressional Report at 165-66.

<sup>521</sup> Saris Over-Criminalization Task Force Statement at 1.

<sup>522</sup> 2011 Mandatory Penalties Congressional Report at 64-66.

<sup>523</sup> *Saris Over-Criminalization Task Force Statement* at 2.

to be sure that any proposed changes to the federal sentencing system will not undermine the safety of our communities.”

Acknowledging “that one of the most important goals of sentencing is ensuring that sentences reflect the need to protect public safety,”<sup>524</sup> based upon its research, analysis, and experience, the Commission posited that “some reduction in the sentences imposed on drug offenders would not lead to increased recidivism and crime.”<sup>525</sup>

First and foremost, “[t]he bipartisan seven-member Commission<sup>526</sup> has accordingly unanimously recommended statutory changes to reduce and limit mandatory minimum penalties.”<sup>527</sup> Since issuing its 2011 report to Congress detailing its finding that federal mandatory penalties are “unevenly applied, leading to unintended consequences,” the Commission’s “increasing concern about federal prison populations and costs has only heightened our sense that these statutory changes are necessary.”<sup>528</sup>

Specifically, the Sentencing Commission urged that “Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.”<sup>529</sup> This is because “[r]educing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission’s report. It would also reduce the likelihood that lower-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.”<sup>530</sup> The Commission found that “certain severe mandatory minimum penalties lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders.”<sup>531</sup> The Commission further found that, in the drug context, statutory mandatory minimum penalties are often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target.<sup>532</sup> The Commission’s analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population.<sup>533</sup> “A reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking.”<sup>534</sup>

Second, as a corollary, the Sentencing Commission also recommended that Congress expand “the so-called “safety valve,” allowing sentences below mandatory minimum penalties

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<sup>524</sup> 18 U.S.C. § 3553(a)(2)(B)-(C).

<sup>525</sup> Saris Over-Criminalization Task Force Statement at 9.

<sup>526</sup> By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

<sup>527</sup> Saris Over-Criminalization Task Force Statement at 2.

<sup>528</sup> *Id.* at 4.

<sup>529</sup> *Id.* at 2.

<sup>530</sup> *Id.* at 10.

<sup>531</sup> *Id.* at 4.

<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.* at 6.

for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.”<sup>535</sup>

Third, it urged that “[t]he provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.”<sup>536</sup>

Fourth, noting that “[t]he sentencing guidelines provide for alternative penalties within certain zones of the sentencing guidelines table,”<sup>537</sup> the Sentencing Commission explained that one of its priorities for the upcoming year is studying those alternatives to incarceration in the federal system along with a multi-year study of recidivism, which may provide insights into their effectiveness.<sup>538</sup>

Fifth and finally, the Sentencing Commission reaffirmed its longstanding position “that a strong and effective sentencing guidelines system best serves the purposes of the SRA. Should Congress decide to limit mandatory minimum penalties, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing.”<sup>539</sup> It reassured Congress that “stands ready to work with you and others in Congress to enact these statutory changes” and that it “will continue to work to ensure that the guidelines are amended as necessary to most appropriately effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.”<sup>540</sup>

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<sup>535</sup> *Id.* at 2.

<sup>536</sup> *Id.*

<sup>537</sup> U.S. Sentencing Comm’n, *Guidelines Manual* §§ 5B1.1, 5C1.1 (2014).

<sup>538</sup> See U.S. Sentencing Comm’n, *Notice of Proposed Priorities and Request for Public Comment*, 79 Fed. Reg. 31,409 (June 2, 2014) [hereinafter 2014 Notice of Proposed Priorities].

<sup>539</sup> Saris Over-Criminalization Task Force Statement at 13.

<sup>540</sup> *Id.* at 14.

## VIII. ANALYSIS OF THE REFORMS BY THE STATES AND PROPOSED BY THE STAKEHOLDERS

The Urban Institute is a non-profit, nonpartisan policy research and educational organization that examines, among other social problems, evaluations of promising criminal justice reform programs, reviews of the literature of “what works” in reducing recidivism, and expertise in cost-benefit analysis. It is also the assessment partner on the Justice Reinvestment Initiative, a federally funded program that reduces costs associated with state prison systems while enhancing public safety. Its portfolio of research includes studying the drivers of the federal corrections population, identifying policies that can avert future growth, and projecting the impact of those policies in terms of population reductions and cost savings.

The Urban Institute’s report, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System*, chronicles the rampant increase in the size and cost of the federal prison system and reviews 20 policy options designed to reduce the prison population without jeopardizing public safety.<sup>541</sup>

In particular, the Urban Institute found that the length of sentences—particularly for drug offenders, many of whom are subject to mandatory minimum sentences—is an important determinant of the size of the prison population and driver of population growth. Its 2012 study of the growth in the BOP population from 1998 to 2010 confirmed that time served in prison for drug offenses was the largest determinant of population growth.<sup>542</sup> Changes in sentencing laws (particularly mandatory minimums) and practices, prison release policies, or both could directly decrease the time served and thereby moderate prison population growth.

**Given that the federal prison population is driven by the volume of admissions and sentence length, the Urban Institute concluded that any attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options to shorten length of stay, while meaningful, would only yield a marginal impact.**

*“Front-end” reform for those not yet convicted or sentenced*

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<sup>541</sup> *Stemming the Tide* at 17-18.

<sup>542</sup> *Id.* at 11.

Because the biggest driver of federal prison growth has been the number of drug offenders getting lengthy sentences, **the Urban Institute’s projections conclude that the most direct way to reduce the prison population is to address drug offenses.**<sup>543</sup> For example, cutting the number of drug offenders entering BOP by just 10 percent would save \$644 million over 10 years.<sup>544</sup>

Before the Sentencing Reform Act of 1984 and mandatory minimums for drugs, a quarter of all federal drug offenders were fined or sentenced to probation, not prison. Today 95 percent are sentenced to a term of incarceration.<sup>545</sup> The average time served before 1984 was 38.5 months, almost half of what it is now.<sup>546</sup>

**Accordingly, the Urban Institute recommends that:**

- the DOJ only accept certain types of drug cases, divert cases to states, and reduce drug prosecutions
- reducing drug sentences either by instructing prosecutors to modify charging practices to reduce mandatory minimum sentences (as Attorney General Holder has recently done)
- legislatively amending statutory mandatory minimum penalties, enhancements and consecutive counts.

In terms of federal legislative proposals, **the Urban Institute projects that the only policy option that would, on its own, eliminate prison overcrowding going forward is the Smarter Sentencing Act of 2013 (H.R. 3382).** Within 10 years, reducing mandatory minimums by half would save \$2.485 billion and reduce prison crowding to 20 percent above capacity.<sup>547</sup>

**The Urban Institute recommends that another way to address sentence length is to provide more judicial discretion in departing below statutory mandatory minimum penalties as The Justice Safety Valve Act of 2013 (H.R. 1695) does.**<sup>548</sup> It provides even greater authority to judges to depart below the statutory mandatory minimum penalty for offenders whose case-specific characteristics and criminal histories are inconsistent with a lengthy minimum sentence. This new safety valve could be applied to all offenders facing federal mandatory minimums, including drug offenders with more extensive criminal histories and offenders subject to mandatory minimum penalties for non-drug offenses.

**Moreover, the Urban Institute recommends that the Fair Sentencing Act of 2010, which increased the quantity of crack cocaine needed to trigger a mandatory minimum sentence, should apply retroactively as both the Smarter Sentencing Act of 2013 (H.R.**

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<sup>543</sup> *Id.* at 18.

<sup>544</sup> *Id.* at 19.

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> *Id.* at 24.

<sup>548</sup> *Id.* at 25-28, n.80.

**3382) and the Fair Sentencing Clarification Act of 2013 (H.R. 2369) would do.**<sup>549</sup> The previous retroactive sentence change for crack offenders in BOP custody in 2011 was shown in a methodologically rigorous study to have no adverse effects on public safety.<sup>550</sup>

Reducing the number of drug offenders is the quickest way to yield an impact on both population and cost, especially if mandatory sentences are also reformed. Reducing mandatory minimums by half would save \$2.485 billion and reduce overcrowding to 20% above capacity.<sup>551</sup> Reducing the number of drug offenders entering the BOP by just 10% would save \$644 million over 10 years.<sup>552</sup> Cutting drug sentences by 10% would save \$538 million over 10 years.<sup>553</sup> Creating a safety valve for any offender subject to a mandatory minimum sentence could save as much as \$835 million in 10 years.<sup>554</sup> Reducing the minimum amount of time served to 75% would save \$1.079 billion in 10 years.<sup>555</sup> Applying the Fair Sentencing Act of 2010 retroactively would conservatively lead to savings of \$229 million over 10 years.<sup>556</sup>

*“Back-end” reform for those already in BOP custody*

In terms of immediacy, the BOP itself—without any legislative changes required—could within its authority and discretion begin to alleviate overcrowding by providing early release or transfer to community corrections for those already in BOP custody. Expanding such opportunities can free up bed space through the early release of those who participate in intensive programs proven to cut down on recidivism.<sup>557</sup> Research indicates that in the states, the early release of inmates has no significant impact on recidivism rates.

BOP itself—again without any legislative changes required—could within its authority and discretion expand the following programs, which it already has in place:

- Residential Drug Abuse Program (“RDAP”) provides substance abuse treatment to inmates, who are then eligible for up to 12 months off their sentences for successfully completing the program. Unfortunately, even though up to 12 months off the sentence is authorized, most inmates receive much less credit than that even though they have satisfied the requirement. Giving program graduates the full 12 months of credit would save money and encourage inmates to participate in a program proven to decrease post-release drug use and re-arrest rate.<sup>558</sup>
- encouraging participation in prison industries that teach vocational skills such as UNICOR.

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<sup>549</sup> *Id.* at 32.

<sup>550</sup> *Id.*

<sup>551</sup> *Id.* at 3.

<sup>552</sup> *Id.* at 2.

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* at 4.

<sup>555</sup> *Id.*

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at 33-38.

<sup>558</sup> *Id.* at 37.

- current federal law allows inmates up to 54 days of good conduct credit, but because of the way the BOP calculates time off, inmates actually receive only up to 47 days off. If BOP changed its internal calculation to reflect Congressional intent of 54 days. This would result in 4,000 releases and save over \$40 million in the first year alone.<sup>559</sup>
- expanding and reforming compassionate release for sick and elderly inmates. Not only could this save BOP money but it would also help alleviate overcrowding.
- BOP could increase the number of transfers of foreign national inmates to their home countries. About a quarter of the BOP inmates are not U.S. citizens, but less than 1 percent of foreign nationals are transferred through the International Prisoner Transfer Program.<sup>560</sup> Together, expanding elderly and compassionate release and doubling international transfers could save almost \$15 million.<sup>561</sup>
- increasing family visitation for inmates, which is correlated with higher levels of family support linked to higher employment rates and reduced recidivism following release and that in-prison contact with family members is predictive of the strength of family relationships following release.<sup>562</sup>

The Urban Institute also concluded that an additional policy that has been particularly effective at the state level is reducing the required truth-in-sentencing threshold of required time served before the inmate is eligible for release. Currently, most federal offenders sentenced to prison serve at least 87.5 percent of their terms of imprisonment.<sup>563</sup> Reducing the required minimum of time served from 87.5 to 75 percent for those inmates that exhibit exemplary behavior while in BOP custody would save over \$1 billion in 10 years; reducing the minimum to 70 percent would save over \$1.5 billion and prevent any growth in overcrowding over the next 10 years.<sup>564</sup> Lowering the minimum amount of time served to 80, 75, or 70 percent could go a long way toward easing overcrowding without compromising the “certainty and severity of punishment” truth-in-sentencing laws were designed to guarantee.<sup>565</sup> In the states, this policy both reduced the prison population and saved the participating state money, without compromising public safety.<sup>566</sup>

Another option, proposed in The Public Safety Enhancement Act of 2013 (H.R. 2656), is giving early release credits for a broader set of programs and productive activities and rewarding inmates based on their risk level. Low-risk inmates, for example, would earn more credits and would be released early to serve the remainder of their prison terms on home confinement. The chief flaw that the Urban Institute identifies with this policy proposal is that evidence suggests that services are more effective when they are targeted toward reducing recidivism among high-

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<sup>559</sup> *Id.* at 38.

<sup>560</sup> *Id.* at 41-42.

<sup>561</sup> *Id.* at 6, 41-42.

<sup>562</sup> *Lessons from the States: Responsible Prison Reform*, Hearing before the H. Comm. On the Judiciary, Subcomm. On Crime, Terrorism, Homeland Security, & Investigations, 113<sup>th</sup> Cong. (2014) (statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, at 11).

<sup>563</sup> *Stemming the Tide* at 28-31.

<sup>564</sup> *Id.* at 29.

<sup>565</sup> *Id.* at 4.

<sup>566</sup> *Id.* at 29.

risk individuals.<sup>567</sup> In fact, intensive programs for low-risk individuals may actually increase recidivism.<sup>568</sup> At least 31 states offer inmates the opportunity to earn sentence-reduction credits through participation in education, vocational training, substance abuse treatment and rehabilitation, and work programs; education and work programs are the most common.<sup>569</sup>

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<sup>567</sup> Urban Institute, *Transition from Jail to Community Online Learning Toolkit, Module 7: Transition Plan Development, Section 3: Selecting the Targeted Population*, available at [http://www.urban.org/projects/tjc/toolkit/module7/section3\\_1.html](http://www.urban.org/projects/tjc/toolkit/module7/section3_1.html).

<sup>568</sup> *Id.*

<sup>569</sup> *Oversight of the Bureau of Prisons & Cost-Effective Strategies for Reducing Recidivism*, Hearing before the S. Comm. on Judiciary (2013) (statement of Nancy G. La Vigne, Ph. D., Director, Justice Policy Center, Urban Institute, at 7).

## **IX. RECOMMENDATIONS FOR REFORM:**

The Urban Institute, the JRI partner for the states, observed that the federal experience in prison growth has largely been mirrored in the states, but while the federal prison has continued to grow, in the past decade states have engaged in extensive bipartisan reform efforts, many of which have reduced overcrowding and saved taxpayers money without sacrificing public safety.

Importing these lessons from the states to the federal system, the Urban Institute's overarching conclusion is that it will require changes to both "front-end" (i.e. sentencing policies) and "back-end" release policies to reduce the federal prison population to levels that are within their rated design capacity. The Urban Institute posits that doing so can save billions of dollars that could be dedicated to other important justice priorities, including programming and treatment.

As we have seen from the majority of the states that have confronted similar problems in their criminal justice systems, they have benefited from a "justice reinvestment" approach, namely soliciting the stakeholders to identify the major drivers of the problems and propose evidence-based solutions. We are ready to do the same on the federal level.

The recommendations that follow are drawn directly from: (1) prioritized and consensus solutions to the primary drivers in the federal system from the DOJ, FPD, the Judicial Conference, and the Sentencing Commission (i.e. the four stakeholders in our criminal justice system); (2) reforms implemented by the states that have been effective in addressing similar problems; and (3) evidence-based analysis and recommendations from expert organizations.

Government accountability, commitment to individual liberty, and preservation of states' rights are not ideological issues, and a growing consensus is emerging that fundamental American values are advanced when we exercise a measure of restraint in the federal prosecution of criminal laws.

## **A. LEGISLATIVE**

DOJ explained that its support for the sentencing reforms embodied in those bills was “not unprecedented” but rather “build on innovative, data-driven reinvestment strategies that have been pioneered” by bi-partisan state lawmakers, law enforcement officials, and other stakeholders who “have begun to transform sentencing and corrections policy across the country.” Drawing on its data from its JRI program, which has supported reforms in at least 18<sup>570</sup> states, DOJ supported a federal effort based upon this JRI model that is “driven more by practical, on-the-ground knowledge and data than by and ideology,” which “direct[s ] significant funding away from prison construction and toward evidence-based programs and services – such as community supervision and drug treatment – that are proven to reduce recidivism while improving public safety.” In support of its proposal, DOJ highlighted the financial savings of JRI states, which are projected to “save \$4.6 billion over an 11-year period.”<sup>571</sup>

DOJ argues that “[a]ll of the[ ] evidence- and results-based efforts across the country have demonstrated that there is much to be learned from the experience of the States” and that “[i]t is time to apply the[ ] lessons at the Federal level.”

### **1. PROCEDURAL**

#### **(i) MENS REA**

Federal courts have consistently criticized Congress for imprecise drafting of intent requirements for criminal offenses. In numerous occasions, improper drafting has led to protracted litigation and confusion in the courts, all requiring further modifications to clarify Congressional intent.

It is clear that the House and Senate need to do better. We can do so by legislating more carefully and articulately regarding *mens rea* requirements, in order to protect against unintended and unjust conviction. We can also do by ensuring adequate oversight and default rules when we fail to do so.

#### **(ii) CODIFYING THE RULE OF LENITY**

The rule of lenity is a canon of statutory construction that provides that in criminal cases, ambiguities are resolved in the favor of the defendant. When penalties affect a person’s liberty and life, Congress has a responsibility to legislate deliberately, precisely, and carefully. As such, I support the codification of the rule of lenity for criminal offenses and matters involving criminal law and procedure.

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<sup>570</sup> The States that have implemented these reinvestment reforms include: Arkansas, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Louisiana, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, and West Virginia. Three additional States that are pursuing Justice Reinvestment but have not yet implemented legislation are Michigan, Nebraska, and Washington.

<sup>571</sup> JRI Report at 3.

### **(iii) REFERRAL TO HJC**

The Parliamentarian of the House (“Parliamentarian”), acting as the agent of the Speaker of the House (“Speaker”), refers bills and other matters upon their introduction to committees based upon Rule X of the Rules of the House of Representatives, 113<sup>th</sup> Cong. (Jan. 3, 2013), which sets out the jurisdiction of each of the 20 standing committees in the House, and any relevant precedents.<sup>572</sup> Rule XII guides the Speaker in the type and timing of a referral.

The Parliamentarian determines which bills and other matters are referred to the Committee on the Judiciary based upon its interpretation of Rule X subsections (1)(I)(1) and X(1)(I)(7), which have been in existence since 1813 and govern the Committee on the Judiciary’s jurisdiction. Only bill and others matters that address “[t]he judiciary and judicial proceedings, civil and criminal” may be referred. The Parliamentarian has interpreted this grant of jurisdiction to apply to matters “touching judicial proceedings,” and “criminal law enforcement,” respectively.

In addition to the Rules of the House, the Office of the Parliamentarian also considers the organizational structure of the United States Code as part of its determination as to which committee should and will exercise jurisdiction over the matter. This distinction based upon title 18 of the United States Code cuts both ways. On some occasions, the Parliamentarian has referred to the Committee on the Judiciary exclusively measures that other committees otherwise would have jurisdiction over and denying requests by those committees for additional or sequential referrals absent a showing that the measure also contained a non-criminal aspect. However, at other times, the Parliamentarian does not refer measures to the Committee on the Judiciary that create a new criminal penalty or modify an existing criminal penalty if the statute involved falls outside of title 18.

Given the specific criminal law jurisdiction and expertise of the Committee on the Judiciary Committee, automatic sequential referral of all measures adding or modifying criminal offenses and/or penalties or concerning the “enforcement of criminal law” is likely to improve results. This would allow the Committee on the Judiciary to exercise its subject matter expertise and oversight, including marking up a bill or reporting it out of committee prior to consideration by the full House of Representatives. It would also permit the Committee on the Judiciary to analyze and justify the legislation and consider the consequences of its implementation.

### **(iv) SUNSET PROVISIONS**

As the ABA recommended, federal criminal laws should have sunset provisions, which would impose expiration dates, requiring Congress to reassess their efficacy, advisability, and necessity. This would allow Congress to consider whether that statutory provision should be repealed by allowing it to sunset or amended to correct any flaws not evident at the time of enactment. In particular, Congress would be able to consider whether to revise the classification

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<sup>572</sup> Rules of the House of Representatives, 113<sup>th</sup> Congress (Jan. 3, 2013), *available at* <http://clerk.house.gov/legislative/house-rules.pdf>.

of the offense as civil violation (punishable by a fine) as opposed to a criminal offense (punishable by a criminal conviction and criminal penalties, including incarceration) and whether a criminal offense should be classified as a misdemeanor or felony, which carries higher penalties and greater collateral consequences. This review, analysis, and reclassification has been undertaken by the states, including New York, which reclassified certain misdemeanors as civil violations and certain felonies as misdemeanors, and Indiana, which reclassified low-level drug offenses as misdemeanors.

I would add to this that Congress should add sunset provisions not only prospectively to the bills that we will pass, but that we as a Congress should pass a bill providing for a review of the entire criminal code on a periodic basis or an omnibus bill that amends existing all existing criminal laws to add sunset provisions occurring on a staggered basis over the next 5 years in the interest of equity. Undertaking this review on a case-by-case basis as each bill nears its sunset date strikes a balance between the need for comprehensive review (which is time-consuming) and the need for immediate action due to the number of problematic criminal offenses on the books.

#### **(v) IMPACT ANALYSIS OF PROPOSED LEGISLATION**

As discussed earlier, overcriminalization refers to (1) the proliferation in the number of federal criminal laws enacted, (2) the encroachment onto crimes that have traditionally prosecuted by the states, and (3) the disproportionate sentences imposed and the resulting impact.

Starting with the proliferation in the number of federal crimes, the United States code is estimated to contain “approximately” 5,000 crimes---indeed, the inability to determine the precise number is evidence of our indulgence.

The sheer size of the Code is at least partly due to the fact that Congress has often chosen to legislate in a vacuum, or in response to a crisis or national news story, instead of legislating thoughtfully and deliberately. Indeed, “it was the spate of bank robberies by John Dillinger in the 1930s that provoked passage of the federal bank robbery statute; the kidnapping of the Lindbergh baby about the same time that caused passage of the federal statute on kidnapping; the assassination of President Kennedy in the early 1960s that prompted the statute on presidential assassination; and, the killing of Senator Robert Kennedy in the late 1960s that resulted in the passage of a statute finally making it a federal crime to kill a member of Congress.”<sup>573</sup> Many have termed this the “accumulation approach to offenses,” whereby Congress has “simply accumulated new offenses for two hundred years or so, with little examination or reformulation of existing offenses,” which has resulted in “serious overlaps in coverage and irrationalities among offense penalties, which create new possibilities for disparity in treatment and for double punishment for the same harm or evil.”<sup>574</sup>

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<sup>573</sup> *Id.*

<sup>574</sup> Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 233 (1997).

When Congress adds a new crime to the substantive criminal law, there has been “little if any effort to reconcile new crimes and old ones or to order offenses according to their relative severity,” as some states had done when enacting the Model Penal Code.<sup>575</sup> Offenses carrying federal criminal penalties are not organized or graded according to their relative severity.

For purposes of comparison and perspective, the same day that a judge was forced to impose a 660-month (55-year) mandatory sentence on Weldon Angelos, a first-time 24-year-old offender with two young children, received a for his participation in two \$350 marijuana deals, that same judge sentenced someone who murdered an elderly woman to 262 months (21 years, 10 months). *Mr. Angelos' sentence was almost three times longer than the second-degree murderer's and more than double the sentence for an aircraft hijacker (293 months), terrorist who detonated a bomb in a public place (235 months), a hate crime offender who attacked a minority with the intent to kill and inflicted permanent or life-threatening injuries (210 months), second-degree murderer (168 months), or rapist (87 months), as provided for in the sentencing guidelines.* The sentencing judge later denounced the sentence he was required to impose, due to mandatory penalties, on Mr. Angelos as “cruel, unjust, and irrational.”

According to the U.S. Sentencing Commission, of the more than 84,000 defendants sentenced in Fiscal Year 2012, 82.7% were sentenced in one of the “big four” areas: 32.2% for immigration offenses; 30.2% for drug offenses; 10.9% for fraud; and 9.8% for firearms offenses.<sup>576</sup>

Other than immigration, which is a matter of exclusive federal jurisdiction, states have been and continue to exercise their general police power, as granted by the Constitution, over 3 out of the “big four” categories in federal sentencing: drug offenses, fraud, and firearms offenses. There will be instances in which state investigation and prosecution is not advisable (e.g. corruption), sufficient (e.g. fraud schemes spanning multiple states), or permissible (e.g. Medicaid or securities fraud, both of which are exclusively federal crimes)---those are the circumstances in which Congress should legislate. For crimes that can and are already enacted by states and prosecuted by them, Congress has not shown the restraint, deference, and comity that it should.

Oregon requires fiscal impact statements for all bills that modify sentencing or corrections policy, including laws that create a new crime or increase the length of a custodial sentence, which must set out the 10-year fiscal impact for the state and any affected local governments; requiring that, upon request from one member of each major political party, the state criminal justice commission must issue a racial and ethnic impact on offender and potential

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<sup>575</sup> Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571, 573 (2005); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 966-67 & n.26 (2009) (observing that the Model Penal code was an effective force in motivating legislatures to rationalize their criminal codes).

<sup>576</sup> U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2012*, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Publications/2013/FY12\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf).

crime victims statement for proposed legislation. Colorado requires minority and gender impact statements for offenders and victims potentially affected by any proposed legislation that creates a new criminal offense or changes an element or the classification of an offenses. Wisconsin requires a projection of the fiscal impact of policy options on the state budget. South Dakota requires that a 10-year fiscal impact statement be prepared for any bill, amendment, or ballot initiative that affects correctional populations.

Drawing from these illustrative examples, the Committee on the Judiciary should require all bills or amendments that would create or modify elements of a crime or criminal penalties of any kind or affect criminal justice policy to: (1) justify why federal jurisdiction is necessary, why state jurisdiction is not permissible, advisable, or sufficient and certifying that states have been consulted on the exercise of federal jurisdiction; (2) identify any existing offenses in the United States code that overlap with the proposed offense; (3) identify the intended purpose and goal of the bill or amendment are, the empirical basis and analysis supporting the elements and penalties, including comparisons with the 50 states; and (4) project out 10 years' worth of fiscal impact for the federal government and affected branches and agencies (including correctional population and budget) and racial, ethnic, and gender impacts on offender and victims potentially affected.

#### **(i) RETROACTIVITY**

**In order to provide clarity and avoid costly and protracted litigation, Congress should include explicit retroactivity provisions in bills that reduce penalties and collateral consequences to the extent that retroactivity is appropriate.**

The Fair Sentencing Act of 2010 (FSA)<sup>577</sup> was passed in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.<sup>578</sup> This sought to ameliorate the severe sentences that were imposed overwhelmingly on African American offenders even though data demonstrated that same offense commission rates by Whites. **But it did not contain an explicit retroactivity provision, which has led to courts denying the relief Congress intended to thousands of people sentenced before 2010.** Congress will now have to pass a separate bill that explicitly notes our intent to make this relief retroactive.

Justice should not depend on something as arbitrary as the date a person was sentenced, especially when the flaw being corrected has been present since the statute's inception.

All four federal stakeholder agencies support the retroactive application of the Fair Sentencing Act of 2010, and their responses demonstrate that they would support explicit retroactivity provisions for statutes repealing, reducing, or amending penalties and/or collateral

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<sup>577</sup> Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010) (FSA).

<sup>578</sup> *Id.*

consequences. DOJ expressed its support because retroactivity “addresses a basic issue of fair treatment for similar offenders” to ensure that “offenders with mandatory minimum sentences imposed before . . . would receive the same benefit as those convicted afterwards.” Likewise, the Judicial Conference urged Congress and the Sentencing Commission to include retroactivity provisions for any legislation or guideline amendments, respectively, under the rationale that “whenever possible, fundamental fairness dictates that the defendant’s conduct and characteristics should drive the sentence” such that “retroactive application . . . will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future.” This was echoed by the Federal Public Defender’s position that “[w]hen Congress amends sentencing laws to make them more just, it should make them retroactively applicable. If a sentence imposed the day after a law is passed would be considered unjust, surely it was unjust the day before the law passed. Judgments involving the highest of stakes should not be left to the fortuity of legislative timing.”

Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Sentencing Commission’s methodologically rigorous recidivism study in 2011 demonstrated no increase in recidivism for offenders convicted of crack cocaine offenses who were released approximately 27 months earlier on average (due to sentencing guideline reductions) and no adverse effects on public safety.<sup>579</sup>

## **(ii) REQUIRE LISTING OF FEDERAL CRIMES ONLINE**

In addition to the crimes present in Title 18, a multitude of criminal provisions are scattered throughout the other 49 titles of the federal Code, which critics argue makes it difficult to search for what federal criminal law prohibits.

This lack of a properly organized, centralized system of federal criminal offenses stands in stark contrast to the systems in place in many states, or to the American Law Institute’s Model Penal Code (MPC).<sup>580</sup>

Although some critics of the current system have called for Congress to undertake the monumental task of reorganizing the Code to address the potential Due Process concerns, I

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<sup>579</sup> U.S. Sentencing Comm’n, *Preliminary Crack Retroactivity Data Report: Fair Sentencing Act (2014)*, available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2014-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2014-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

<sup>580</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIMINAL L. REV.* 319 (2007).

submit that Congress should prioritize its limited time and resources into developing substantive bills and passing legislative fixes that reform our criminal justice system.

For that reason, I propose that the Executive Branch, which enforces these laws and seeks to impose these penalties, should compile and publish on one publicly accessible and promoted webpage the various offenses that carry criminal penalties as it is the branch that oversees the various components that enforce those penalties. Certainly, the DOJ can work in conjunction with ICE, EPA, FDA, and other cabinet and component agencies to aggregate and publish this information on the internet. Doing so ensures that individuals have fair notice of prohibited conduct.

### **(iii) PARTICIPATION, INFORMATION, AND RESOURCE PARITY**

In a recent case before the Supreme Court of the United States, Chief Justice Roberts wrote separately to remind us that

fundamental constitutional principles” that “the Sixth Amendment provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’

In many ways, this is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendants enjoys . . . .

**Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers---one at a time. In my view, the Court’s opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching.**<sup>581</sup>

States that have successfully reformed their criminal justice systems have recognized that balanced input from all stakeholders leads to better results. In our federal system, our Sentencing Commission lacks comprehensive input and representation from the defense bar.

Of seventeen states with active sentencing commissions, fifteen require criminal defense attorneys as members, ten of those specify that a public defender must be a member, and none of the seventeen prohibits a public defender from serving.<sup>582</sup> The most successful state systems, in terms of both winning the approval of those charged with applying the guidelines, and the development of effective guidelines, include public defenders.<sup>583</sup>

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<sup>581</sup> *Kaley v. United States*, 135 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting).

<sup>582</sup> See National Center for State Courts, *State Sentencing Guidelines, Profiles and Continuum*, available at <http://www.ncsconline.org/csi/PEW-Profiles-v12-online.pdf>.

<sup>583</sup> See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 772, 778, 783, 800 (Feb. 2005); Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 150-51 (2005); Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995).

Professor---and current U.S. Sentencing Commissioner---Rachel Barkow has written that “the politics of sentencing at the legislative level are one-sided. Many state commissions--unlike the Federal Commission--seem to represent an effort to correct this imbalance by having a large and diverse membership on their commissions, including a variety of voices that typically get muted in the legislative process. These voices include those of defense lawyers and those concerned with the rationality and costs of sentencing.”<sup>584</sup>

The U.S. Sentencing Commission stands with a small minority of sentencing commissions that do not have a representative from the public defender system or the defense bar. After two and one-half decades of being deprived of the breadth and experience of a representative of the Federal Public Defenders, it is time for the Commission to have the benefit of their knowledge at all stages of the decision-making process.

At a structural level, the absence of a defender *ex officio* representative undermines the real and perceived legitimacy of the Sentencing Commission as it creates, at a minimum, the appearance that the Sentencing Commission is unevenly influenced by the DOJ. Of course, DOJ, too, has an institutional interest in ensuring a fair, effective and transparent system to aid in its administration of justice. One would expect that DOJ would also want to invite the presence of those who represent the offenders who are subject to these federal policies in order to discern whether those policies are being justly and evenly applied so that it may resolve disparities with agility and immediacy. An *ex officio* representative provides research and practical experience in support of the Sentencing Commission’s (1) preparation for hearings (including developing questions for the witnesses); (2) internal policy discussions; and (3) substantive sentencing policy decision-making, including its staff memos, data analysis, the results of special coding projects. Moreover, the Sentencing Commission requires the Federal Public Defenders to communicate regularly with it and to submit a written report assessing the Sentencing Commission’s priorities for the amendment cycle at least annually. While the Sentencing Commission has consistently thanked and commended the Federal Public Defenders for their input, this does not represent true parity with the DOJ’s level of involvement or influence.<sup>585</sup>

As with the majority of states, a Federal Public Defender *ex officio* member would allow the U.S. Sentencing Commission to improve the breadth, depth, and accuracy of its data, expertise, and policy considerations at crucial stages of the decision-making process. Federal Public Defender organizations represent a sizable number of defendants in criminal proceedings throughout the country, servicing 91 out of the 94 federal judicial districts. In 2012, federal prosecutors filed cases against 94,121 defendants.<sup>586</sup> In the same period, Federal Defender

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<sup>584</sup> Barkow, *Administering Crime*, 52 UCLA L. Rev. at 800.

<sup>585</sup> See 28 U.S.C. § 994(o) (“a representative of the Federal Defenders shall submit to the Commission any observations, comments or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission’s guidelines, suggesting changes in the guidelines that appear warranted, and otherwise assessing the Commission’s work”).

<sup>586</sup> U.S. Courts, *U.S. District Courts, Table 5, Criminal Defendants Filed, Terminated, and Pending (Including Transfers)* (2012), available at [www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx).

organizations opened 86,142 criminal representations---not including appeals, revocation proceedings, and motions to reduce sentence.<sup>587</sup> Given that Federal Defenders represent the bulk of federal criminal defendants, they should have an equal opportunity to participate in setting sentencing policy and should be equal partners in improving the guideline system.

This would bring unparalleled breadth and experience to the work of the Commission. The Federal Defender system includes among its ranks lawyers who have devoted their entire professional careers to indigent defense work. They possess the kind of experience and judgment that can only be acquired through continuous day-to-day interaction with all players in the criminal justice system – judges, probation officers, prosecutors, law enforcement officials, correctional administrators, community treatment providers, and other stakeholders. Defender representatives already serve as voting members on the Advisory Committee on Evidence Rules and the Advisory Committee on Criminal Rules to which they---and their DOJ counterparts---bring extensive experience to inform the development of federal criminal policy and practice.

More than ten years ago, on March 16, 2004, federal judges, by and through the Judicial Conference, adopted a recommendation to seek legislation that would authorize it to appoint a Federal Defender as an *ex officio* non-voting member of the Sentencing Commission.<sup>588</sup> In 2011, two years after that, the Smart on Crime Coalition (41 organizations and individuals with expertise on criminal justice issues), released a report recommending that a Defender *ex officio* be added.<sup>589</sup> On June 26, 2013, I introduced H.R. 2526, co-sponsored by House Committee on the Judiciary Ranking Member John Conyers, Jr., to amend 28 U.S.C. § 991(a) to provide: “A Federal defender representative designated by the Judicial Conference of the United States shall be a nonvoting member of the Commission,” and changed “one nonvoting member” to “two nonvoting members.”<sup>590</sup>

Adding to the imbalance are discovery rules that severely constrain the defense in attempting to gather information. Unlike the Federal Rules of Civil Procedure, which encourage full factual disclosure in civil cases through the use of such devices as document requests, interrogatories, and depositions of relevant witnesses, criminal defendants receive only the barest of information. Not only are defendants unable to depose witnesses against them, there is no requirement that the government inform defendants of the identity of the witnesses against them until the very moment the witnesses are called at trial. Without a requirement that the prosecution disclose the identities of the witnesses sufficiently before trial, the prosecution effectively forecloses the ability of defense counsel to investigate and defend its case. Specifically, defense counsel will be deprived of the ability to investigate whether the witness harbors a bias or motive to shade their testimony, such as personal animus against the defendant, the terms of their cooperation agreement with the government, any prior state or federal cases in

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<sup>587</sup> U.S. Courts, *Representations by Federal Defender Organizations During the 12-Month Periods Ending September 30, 2008 through 2012*, Table S-21, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S21Sep12.pdf>.

<sup>588</sup> See Report of the Proceedings of the Judicial Conference of the United States 11 (Mar. 16, 2004).

<sup>589</sup> See *Smart on Crime: Recommendations for the Administration and Congress* at 129-130 (2011), available at <http://www.besmartoncrime.org/pdf/Complete.pdf>.

<sup>590</sup> See H.R. 2526 (113<sup>th</sup> Cong.).

which that witness was involved, and whether that witness has received or anticipates receiving any benefit from the government as a result of its testimony. Without the ability to review a witness's statement earlier than the eve of trial (the standard practice in most federal criminal cases), the defense is unable to ascertain whether the witness has made any prior inconsistent statements or has any criminal convictions for crimes of moral turpitude, all of which present critical impeachment material necessary for the jury to determine the weight and credibility to accord the witness. Indeed, prosecutors and law enforcement have virtually unchecked discretion to decide whether they must disclose evidence tending to show a defendant's innocence to the defense and how much of and in what form that information is disclosed, a situation which recently prompted a prominent Reagan-appointed federal appeals court judge to declare: "There is an epidemic of [Constitutionally-required discovery] violations abroad in the land."

How myopic discovery rules are in federal criminal cases versus federal civil cases is concerning given that an individual's personal liberty and life are at stake. Even more concerning is that in the federal system, prosecutors are the ones primarily responsible for ensuring that they are in compliance. Certainly, defense counsel may file motions to compel discovery or allege prosecutorial misconduct, however, each avenue of potential relief presents not only high burdens of proof but requires defense counsel to demand information they are not sure exists and somehow articulate the evidentiary and persuasive value of that information to a judge.

Furthermore, the eleventh-hour disclosure of prosecution witness statements as well as calling witnesses without prior notice often leads to delays in trial proceedings so that counsel may litigate the issue and make a record before the judge, all outside the presence of the jury. The vast majority of these evidentiary objections, such as whether a statement constitutes hearsay or a business record or whose prejudicial effect substantially outweighs its probative value, could have been litigated pre-trial and an order entered on the motions in limine, with or without a hearing.

A simple solution adopted by states to address this inherent conflict and problem was the creation of the "open file" discovery policy. An "open file" discovery policy is one in which defense counsel is permitted to examine everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material.

Beyond the benefit to the efficient administration of the trial proceedings, an "open file" discovery rule also ensures that defendants have all the information they need to accurately assess the strength of the government's case-in-chief against them as they consider, with their counsel, whether to plead guilty or go to trial. Moreover, it protects the Constitutional guarantees of "the opportunity for effective cross-examination,"<sup>591</sup> which requires full pretrial disclosure, and that of "a fair trial and effective assistance of counsel," comprising the

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<sup>591</sup> See generally *Crawford v. Washington*, 541 U.S. 36 (2004); *Delaware v. Fensterer*, 474 U.S. 15 (1985); see also *Douglas v. Alabama*, 380 U.S. 415 (1965); *Smith v. Illinois*, 390 U.S. 129 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Davis v. Alaska*, 415 U.S. 308 (1974).

“fundamental and comprehensive” “need to develop all relevant facts . . .” as “the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence”<sup>592</sup>

Most importantly, some or all of this information that is not required to be disclosed sufficiently in advance of trial (or even at all) may constitute reasonable doubt and thus is necessary to provide the defendant with Constitutionally-effective counsel during a fair trial, at the conclusion of which the jury is able to render a fair and just verdict supported by the evidence beyond a reasonable doubt.

Just as we need to ensure institutional and information parity, we also must confront the funding, staffing, and resource disparities that currently exist.

As discussed earlier, barriers to reentry posed by collateral consequences of conviction increase recidivism. Thus, the ABA recommended additional funding for public defender assistance to indigent individuals civilly hindered by collateral consequences. Currently, there is no requirement that first-time offenders be made aware of the collateral consequences of conviction upon entering into a plea. Due to the severity and duration of collateral consequences, especially for federal felony convictions, Federal Public Defenders and defense counsel now must consider their clients’ employment, housing, marital, and immigration statuses so that they may advise them of what effect a conviction and type and length of sentence may have in order to fulfill their Constitutionally-required duty of effective assistance. This will require defense counsel to consult with civil attorneys specializing in these matters, especially immigration, to advise what the consequences are so that defense counsel may best advise their clients on the full panoply of consequences and options available to the client to ensure that a plea is knowingly, voluntarily, and intelligently entered into.

Recognizing that collateral consequences have increased the burden on defense counsel, the ABA recommends a holistic model that requires counsel to consult on and incorporate a whole host of other concerns and advocacy as part of their representation. To that extent, some state and local public defender organizations have begun providing reentry-related services by representing clients in housing, employment, deportation, and expungement proceedings.

Congress should increase funding to the Federal Public Defenders and state and local public defenders to provide these re-entry related services that will ultimately improve public safety and reduce recidivism. Additional funding is necessary for training, hiring additional attorneys, social workers, and paralegals. States and localities should also take efforts to ensure that individuals are advised of collateral consequences prior to their release, and the processes available for removing or neutralizing such.

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<sup>592</sup> See, e.g. *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *United States v. Nixon*, 418 U.S. 683, 709 (1974).

Federal Public Defenders represent a sizable number of defendants in criminal proceedings throughout the country, servicing 91 out of the 94 federal judicial districts. In 2012, **federal prosecutors filed cases against 94,121 defendants.**<sup>593</sup> In the same period, Federal Defender organizations **opened 86,142 criminal representations**---not including appeals, revocation proceedings, and motions to reduce sentences.<sup>594</sup> Given the comparable criminal case and client numbers, one would expect concomitant increases in funding, staffing, and resource allocation for the Federal Defender organizations. But this is not so. To the contrary at the end of December 2013, the number of Assistant U.S. Attorneys nationwide was 4,638 as compared to 1,429 Assistant Federal Public Defenders. These estimates do not fully capture the disparity because state prosecutors and attorneys from DOJ and its law enforcement agencies (ICE, DEA, National Security Division) are able to assist Assistant U.S. Attorneys in the investigation and prosecution of criminal cases and, occasionally, are “detailed” to those local offices while the Federal Defender organizations do not have that additional workforce or support.

Despite large increases in staffing and funding for executive branch agencies, the DOJ, and U.S. Attorney’s offices nationwide, Federal Defenders have not experienced concomitant increases.

Exacerbating existing disparities imperils that quality, effectiveness, and viability of indigent defense. This is because Federal Defender organizations are

entirely responsive to the cases and clients the courts assigned to them. Unlike the Department of Justice, it cannot “reprogram” money and shift enforcement priorities. The disparity in the number of staff only tells part of the story about the resource imbalance between the prosecution and defense. Even simple factual scenarios call for complicated research and expert services, including cellular tower records, metadata, forensic hard drive analysis, DNA, handwriting, and more. The only way to challenge such evidence is to hire expensive experts and to spend time and money examining the details of the government charges. Given the current disparities, counsel for the indigent have neither.

At the Overcriminalization Task Force hearing, the Federal Public Defenders requested that “Congress . . . increase funding for public defenders and other appointed counsel so that the large resource disparities that currently exist between prosecutors and defense counsel for the poor can be ameliorated. The quality of justice dispensed in federal courts should not depend so heavily on the size of defendants’ wallets.”

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<sup>593</sup> U.S. Courts, *U.S. District Courts, Table 5, Criminal Defendants Filed, Terminated, and Pending (Including Transfers)* (2012), available at [www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx).

<sup>594</sup> U.S. Courts, *Representations by Federal Defender Organizations During the 12-Month Periods Ending September 30, 2008 through 2012*, Table S-21, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S21Sep12.pdf>.

Representative Spencer Bachus expressed his astonishment at what he perceived to be an 8:1 ratio of Assistant U.S. Attorneys to Assistant Federal Public Defenders in certain judicial districts.

Echoing its recognition of the funding and staffing disparity, the DOJ representative interjected

We agree. The Department strongly supports adequate funding for indigent defense. It is important for the system to work effectively that resources are relatively balanced, that if the defendant needs a DNA expert or wants to bring a witness in from some other place that he be able to do that. If he's indigent, the court pays for that.

The Attorney General has consistently spoken of the need for adequate funding for indigent defense. As a trial lawyer, I know that I'm frankly better positioned when my opponent on the defense side is an effective advocate.

Juries want to see a fair fight. That's fair. That's how the system works.

So we agree with [the Federal Public Defenders] that indigent defense---Federal Public Defenders and Criminal Justice Act-appointed--- lawyers need to be well-resourced.<sup>595</sup>

It is noteworthy to say the least that the DOJ is urging Congress to adequately fund indigent defense to ameliorate the existing staffing, resource, and funding disparity. Accordingly, I urge my colleagues to increase the appropriations for indigent defense.

## **2. DISMANTLING THE CRADLE-TO-PRISON PIPELINE: THE YOUTH PROMISE ACT (H.R. 1318)**

Instead of continuing to play the politics of crime by focusing on more punishments, we should be doing what the research and the evidence tells us is necessary to prevent crime before it even starts: getting children off the Cradle-to Prison Pipeline and getting and keeping them on a "Cradle to College (or the Workforce) Pipeline."

Evidence is clear that if we want to reduce crime, we need to invest in research-based programs for at-risk youth. By doing so, we also save much more money than would otherwise be spent on building and maintaining prisons and in welfare costs. Programs – such as teen pregnancy prevention, pre-natal care, new parent training, nurse home visits, Head Start and other early childhood education programs, quality education, after-school programs, summer recreation and jobs, guaranteed college scholarships, and job-training programs – work cost-effectively to reduce crime.

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<sup>595</sup> Archived Webcast, H. Comm. on the Judiciary, *Agency Perspectives: Hearing before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2014) (testimony beginning at 01:41:01/01:58:58).

Research also indicates that if we do not invest in prevention and intervention programs, we will never break the cycle of criminal justice system involvement – the “Cradle to Prison Pipeline.” No matter how many we arrest today, if we are not working on preventing the next wave of youth from continuing down the Prison Pipeline, we will only have more to arrest tomorrow.

What we need is a new approach to crime policy, one that is based on evidence and research and has proven outcomes, one that will effectively reduce crime and dismantle the Cradle-to-Prison Pipeline.

That is why I introduced the Youth PROMISE (Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education) Act of 2013 (H.R. 1318). It would put evidence-based approaches to crime reduction into legislative practice.

The Youth PROMISE Act would mobilize community leaders ranging from law enforcement officials to educators to health and mental health agencies to social service providers, and community organizations. These leaders would come together to form a PROMISE Coordinating Council that would identify the community’s needs with regard to youth and gang violence and develop a plan to address these needs. The community would then be eligible for a grant to implement evidence-based strategies based on a comprehensive, locally tailored plan to dismantle the Cradle-to-Prison Pipeline. The result of the Youth PROMISE Act will be to help communities get children off the Cradle-to-Prison Pipeline and onto a Cradle-to-College-and-Career Pipeline.

It is important to note that the Youth PROMISE Act would not stop or impede the current enforcement of laws; the criminal justice system will continue to arrest, convict, and incarcerate those who commit crimes. But the Youth PROMISE Act would equip communities with tools to effectively prevent and reduce crime before it occurs.

Aside from reducing crime and providing better results in the lives of our youth, many of the programs funded under the Youth PROMISE Act will save more money than they cost. The State of Pennsylvania implemented a process very similar to the one provided for in the Youth PROMISE Act in 100 communities across the state. The state found that it saved, on average, \$5 for every \$1 spent during the study period.

The Richmond, Virginia Gang Reduction and Intervention Program (GRIP), a DOJ pilot program funded through a grant from the Office of Juvenile Justice and Delinquency Prevention, spent \$2.5 million in a collaborative effort between the City of Richmond, federal, state and local partners focusing on a target community. In two years, major crimes in that target community were down 43% and homicides fell from 19 to two.

We can make some major progress to turn Congress away from routinely adding more and more counterproductive “tough on crime” slogan-based policies, and instead, we can focus on

efforts that employ a “smart on crime” approach by focusing on juvenile delinquency prevention and early intervention. The 114th Congress should pass the Youth PROMISE Act early next year so children in our next generation will be more likely to receive a college degree than serve time in prison.

### **3. FRONT-END REFORMS**

After analyzing federal sentencing data in the same way it has done so for the 17 states with which it is a JRI partner, the Urban Institute concluded that “[g]iven that the federal prison population is driven by the volume of admissions and sentence length,” front-end reform was critical and “any attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options to shorten length of stay, while meaningful, would only yield a marginal impact.” In particular, as noted earlier, the Urban Institute found that the length of sentences—particularly for drug offenders, many of whom are subject to mandatory minimum sentences—is an important determinant of the size of the prison population and driver of population growth. Its 2012 study of the growth in the BOP population from 1998 to 2010 confirmed that **time served in prison for drug offenses was the largest determinant of population growth.**

Accordingly, the front-end reforms that follow address the offenses that result in the longest-length of sentences to address what the Urban Institute identified as the “largest determinant of prison growth.

**(i) ALTERNATIVES TO INCARCERATION: PRE-TRIAL DIVERSION AND SPECIALIZED COURTS**

Alternatives to incarceration have been among the successful reforms states have implemented to reduce correctional overcrowding and spending while improving re-entry and decreasing recidivism.

For example, Arkansas is diverting a greater number of drug offenders to treatment and accountability courts, rather than incarcerating them. Similarly, Alabama is establishing pretrial diversion programs for defendants charged with most drug crimes. North Carolina diverts nonviolent, first-time felony drug offenders from prison using second chance incentives, saving both prison bed space and tax dollars. It also provides mentally ill individuals with crisis intervention teams and other pre-booking interventions prior to diverting them into community-based care, rather than prison. Texas created and expanded drug and other specialty courts and social and behavioral intervention programs, expanded the use of electronic monitoring, increased diversion to probation for drug offenders instead of prison, diverted nonviolent offenders to residential treatment programs instead of prison, and paroled low-risk offenders. Ohio diverted over 10,000 nonviolent offenders from incarceration to intensive supervision or placement in a community corrections facility; diverted more than 5,500 drug and low-level felony offenders to dormitory-style residential facilities with rehabilitative programming, such as drug treatment, vocational training, and education, in which the average length of stay is six months. Likewise, South Carolina diverts certain low-risk, nonviolent offenders from prison to community-based programs, such as specialized drug courts, and prioritizes and reserves prison space for demonstrated violent and dangerous offenders. Illinois created a new sentencing option called “Second Chance Probation” that allows certain first-time nonviolent drug, theft, and property felony defendants to be sentenced to a minimum 2-year probationary period with no judgment entered upon pleading or being found guilty, with the charges being dismissed after successful completion of probation, leaving the offender with no felony record. Washington precluded incarceration in favor of probation or community confinement for certain drug offenders.

The Vera Institute identified the following categories of alternatives to incarceration:

- “the creation or expansion of diversion programs or strengthened the infrastructure supporting existing programs”<sup>596</sup>
- “new community-based sentences, including the use of home detention as an alternative to incarceration, while others expanded the pool of offenders, especially among certain drug offenders, eligible for community-based sentencing”<sup>597</sup>

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<sup>596</sup> Vera Institute Review of States Reforms at 16.

<sup>597</sup> *Id.* at 18.

The most common diversion program employed by the states has been the creation of problem-solving/treatment/specialty courts, and “over the past two and a half decades, [they] have become an important feature of the criminal justice system.”<sup>598</sup> These courts serve “a targeted segment of the offender population,” including offenders with issues stemming from or related to substance abuse, mental health, homelessness, prostitution, or their service in the armed forces.<sup>599</sup> These courts consist of an “interdisciplinary team of professionals, which often includes a court coordinator, prosecuting attorney, defense attorney, treatment provider, case manager, probation officer, and law enforcement representative.”<sup>600</sup> These programs are “focused on providing safe and effective interventions, treatment, services, and supervision to eligible defendants in the community---as opposed to in jail or prison---and, in particular, mental health courts acknowledge that behavioral progress occurs along a continuum.”<sup>601</sup>

As part of its evaluation of federal sentencing data and correctional trends, the Urban Institute concluded that “[b]ecause the biggest driver of federal prison growth has been the number of drug offenders getting lengthy sentences, [its] **projections conclude that the most direct way to reduce the prison population is to address drug offenses.**” Before 1984 (and mandatory minimums for drugs), a quarter of all federal drug offenders were fined or sentenced to probation, not prison. Today 95 percent are sentenced to a term of incarceration.<sup>602</sup> The average time served before 1984 was 38.5 months, almost half of what it is now.<sup>603</sup>

Diverting all nonviolent low-level drug offenders, to specialized treatment programs or community confinement or probation with house arrest and electronic monitoring would allow Congress to reach and exceed the modest criteria the Urban Institute has set out. Even just diverting 10% of the federal drug offenders entering BOP would save \$644 million over 10 years.<sup>604</sup>

## **(ii) MANDATORY PENALTIES SHOULD BE REPEALED**

Drawing from the lessons of successful state reforms, it is noteworthy that since 2000, at least 29 states have modified or repealed mandatory sentencing policies.”<sup>605</sup>

What is especially significant is that all four federal agency stakeholders---DOJ, Federal Public Defenders, Judicial Conference, and the Sentencing Commission---identified mandatory sentencing policies as the most pressing reform for the federal criminal justice system.

The Sentencing Commission, the bi-partisan independent agency created for its expertise on sentencing, released its report to Congress on federal mandatory penalties in 2011, in which it

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<sup>598</sup> *Id.* at 20.

<sup>599</sup> *Id.*

<sup>600</sup> *Id.*

<sup>601</sup> *Id.* at 19.

<sup>602</sup> 2012 Sourcebook of Federal Sentencing Statistics.

<sup>603</sup> *Stemming the Tide* at 19.

<sup>604</sup> *Id.*

<sup>605</sup> Vera Institute Review of State Reforms at 8.

recommended the modification or repeal of mandatory penalties due to their unintended, disparate, and discriminatory impact. In the intervening 3 years, the Sentencing Commission's evaluation of the additional federal sentencing data on mandatory penalties led it to reiterate to the Overcriminalization Task Force that "[a]s a threshold matter," "existing mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them" and "create problematic disparities" "in addition to contributing to the growth in federal prison populations." Indeed, "[w]hen similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA . . . [y]et the [Sentencing] Commission has found [based upon its data analyses] severe, broadly applicable mandatory minimum penalties to have that effect."

These conclusions are shared by the Judicial Conference, which represents federal judges who preside over all criminal proceedings in federal court. In its statement to the Overcriminalization Task Force, the Judicial Conference stated that it "favors the repeal of all mandatory minimum penalties." This is due to the findings of its judges that "[t]he good intentions of their proponents notwithstanding, mandatory minimums have created what Chief Justice Rehnquist aptly identified as "unintended consequences[, which f]ar from benign . . . waste valuable taxpayer dollars, undermine guideline sentencing, create tremendous injustice in sentencing, and ultimately could foster disrespect for the criminal justice system."

The Federal Public Defender's position was also that "Congress should work to alleviate and ultimately eliminate mandatory minimum sentences" on the grounds that "[t]hey do not result in more uniformity in sentencing, nor do they reflect the seriousness of offenses," but rather "only diminish the traditional role of juries and judges, reduce transparency, and provide prosecutors with enormous, unchecked power."

The DOJ, similarly, in its statement to the Overcriminalization Task Force, identified as part of an "initial set of reforms" "changing statutory drug penalties" "of the 217,000 individuals in the Bureau of Prisons' custody, nearly half are serving time for drug-related offenses." It reiterated its "strong[ ] support[]" for the "modest[ ] reduc[tion of] statutory penalties for certain non-violent drug offenders." DOJ explained that doing so "could allow billions of dollars to be reallocated to other critical public safety priorities while enhancing the effectiveness of our Federal sentencing system." The "critical safety priorities" that would be enhanced by the bill, according to DOJ, include "ensur[ing] that law enforcement continues to have the tools needed to protect national security, combat violent crime and drugs, fight financial fraud, and safeguard the most vulnerable members of our society."

States have repealed mandatory minimums, particularly in drug offenses, which a decrease in overcrowding, correctional spending, and recidivism rate, and no increase in crime rate. For example, New York, which was known for its draconian “Rockefeller” mandatory minimum drugs laws, eliminated mandatory minimums for first-time felony drug offenders and certain second-time felony drug offenders. As a result, New York not only lowered its correctional population and spending, but also its recidivism and crime rate as well. Oregon repealed mandatory minimums for certain low-level drug offenses; granting judges the discretion to sentence certain repeat drug offenders to probation and repealing a prior law that mandated a minimum sentence of incarceration for those offenders.

Due to the myriad problems raised by “one-size-fits-all” sentencing that does not consider any extenuating facts, it has been my longstanding position, which is shared by three out of the four federal agency stakeholders (the Sentencing Commission, the Judicial Conference, and the Federal Public Defenders), the Urban Institute (the JRI implementation partner), and other experts that we must repeal all mandatory penalties federally. They discriminate, transfer unchecked sentencing powers to prosecutors, waste taxpayer money, and frequently require judges to impose sentences that violate commonsense. And, to add insult to injury, studies show that they do not reduce crime.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

### **1. NARROWING THE APPLICATION OF MANDATORY PENALTIES AS AN INTERIM STEP TOWARDS THEIR REPEAL**

Congress’s intent and purpose in passing these mandatory penalties was to target high-level kingpins, leaders, organizers, and drug lords. But, as discussed in greater detail earlier in the report, they have applied more expansively than intended, sweeping in an overwhelming number of nonviolent low-level offenders and applying these grossly disproportionate sentences to them.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

**One could narrow the scope of the application of these mandatory minimums, enhancements, and consecutive counts by amending them to require two additional elements of proof beyond a reasonable doubt: (1) the offender is the type of high-level, violent kingpin, leader, organizer, and drug lord Congress intended to target with these penalties; and (2) the offender was not suffering from mental illness or substance abuse addiction at the time of the instant offense.** This will require the government to bear the burden of collecting evidence in the form of decision-making authority, supervision, history and ties to the organization, and personal profit that would support a jury finding beyond a reasonable doubt that the offender is precisely the sort of individual Congress intended to target.

Since we know that the existing drug quantity thresholds are an inaccurate and poor proxy for culpability and role, requiring proof beyond a reasonable doubt as to the defendant's high-ranking role will assist in ameliorating the overbroad application of these statutes.

**Relatedly, one could also narrow the manner in which those drug quantity thresholds are met.** As discussed earlier, law enforcement agents and prosecutors have multiple methods to reach that threshold, which have led to troubling applications of these severe penalties, as discussed in greater detail earlier in the report. Thus, we should amend all mandatory minimums that contain a quantity threshold to require that the threshold quantity must be met in one transaction (sale, delivery, etc.) in one day and that the threshold quantity cannot be met by applying conspiracy principles, aggregating multiple transactions over time, or "reverse stings." All of those practices have resulted in disturbing unintended consequences and unwarranted sentencing disparities, particularly along socioeconomic and racial lines.

On September 24, 2014, Attorney General Holder issued a letter to all DOJ attorneys with the "guidance" that "[a]n § 851 enhancement should not be used in plea negotiations for the sole or predominant purpose of inducing a defendant to plead guilty."<sup>606</sup> While this guidance is laudable, it by no means guarantees that federal prosecutors will not continue to leverage § 851 enhancements. Simply put, all the "guidance" prohibits is if the § 851 enhancement is for the "sole or predominant purpose of inducing a defendant to plead guilty," it does not prohibit the myriad of pretextual reasons that any prosecutor may develop in order to circumvent the prohibition, nor does this prohibition carry any form of oversight, review, or reprimand for instances where the § 851 is used inappropriately. Moreover, this "guidance" remains in place only as long as the current Attorney General remains in office, highlighting the need for a lasting legislative fix to counter these demonstrated abuses.

## **2. REDUCING THE LENGTH OF MANDATORY PENALTIES AS AN INTERIM STEP TOWARDS THEIR REPEAL**

Our federal sentences have increasingly included incarceration and lengthy incarceration at that. Before the Sentencing Reform Act of 1984 and mandatory minimums for drugs, **a quarter of all federal drug offenders were fined or sentenced to probation---not prison.** Yet today 95 percent are sentenced to a term of incarceration.<sup>607</sup> The average time served before 1984 was **38.5 months---almost half of sentences are now.**<sup>608</sup>

Based upon its analysis of federal sentencing data and practices and its expertise in assisting JRI states with their reforms, the Urban Institute found that because the biggest driver of federal prison growth has been the number of drug offenders getting lengthy sentences, **its projections "conclude that the most direct way to reduce the prison population is to address drug offenses."** It stands to reason that reducing the length of sentences being imposed

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<sup>606</sup> Mem. from Eric Holder, Attorney General, to All Federal Prosecutors (Sept. 24, 2014) [hereinafter Holder 2014 Memo], available at <http://www.fd.org/docs/select-topics/sentencing-resources/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf?sfvrsn=6>.

<sup>607</sup> 2012 Sourcebook of Federal Sentencing Statistics.

<sup>608</sup> Stemming the Tide at 19.

and reducing the length of sentences already imposed would also generate substantial savings and ameliorate the dangerous overcrowding in federal facilities.

“The Vera Institute, based upon its study of successful state reforms, concluded that “a growing body of research is now casting doubt on the notion that longer sentences help to reduce recidivism.”<sup>609</sup> For example, in 2010, Massachusetts reduced its lengthy drug mandatory minimums for the first time since they were enacted over 30 years ago, most by up to one-third and permitted certain nonviolent drug offenders sentenced to mandatory minimums to apply for parole. Texas reduced sentencing terms for drug and property offenders from a maximum---not minimum---of ten years to a maximum of five years. New York reduced average drug sentences by approximately 50%. Similarly, Arkansas reduced mandatory minimums for drug offenses, and Indiana introduced more graduated sentencing for drug crimes. These results as well as data from other states engaged in similar reforms led the Vera Institute to conclude that “[b]y enhancing proportionality in this way, a sentencing structure can better ensure that only the most serious crimes attract imprisonment or long sentences.”<sup>610</sup>

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

All four federal agency stakeholders have urged Congress to reduce the length of federal sentences, in particular mandatory penalties, especially for drug offenses. DOJ identified in its “set of initial reforms” the need for Congress to “chang[e] statutory drug penalties” “of the 217,000 individuals in the Bureau of Prisons’ custody, nearly half [of whom] are serving time for drug-related offenses.” Specifically, DOJ reiterated its “strong[ ] support[.]” for the Smarter Sentencing Act,” which would “modestly reduce statutory penalties for certain non-violent drug offenders” and would “allow billions of dollars to be reallocated to other critical public safety priorities while enhancing the effectiveness of our Federal sentencing system.” Based upon its analysis, DOJ concluded that “critical safety priorities” would be enhanced by the Smarter Sentencing Act, such as “ensur[ing] that law enforcement continues to have the tools needed to protect national security, combat violent crime and drugs, fight financial fraud, and safeguard the most vulnerable members of our society.”

Similarly, the bipartisan seven-member Sentencing Commission<sup>611</sup> “unanimously recommended statutory changes to reduce and limit mandatory minimum penalties.” Since issuing its 2011 report to Congress detailing its finding that federal mandatory penalties are “unevenly applied, leading to unintended consequences,” the Commission’s “increasing concern about federal prison populations and costs has only heightened our sense that these statutory changes are necessary.” Specifically, the Sentencing Commission urged that “Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.” This is because “[r]educing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission’s report,”

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<sup>609</sup> Vera Institute Review of State Reforms at 8.

<sup>610</sup> *Id.* at 10.

<sup>611</sup> By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

specifically the “likelihood that lower-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.” The Commission found that “certain severe mandatory minimum penalties lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders.” Thus, the Sentencing Commission stated that “[a] reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking.”

In addition, while the Judicial Conference reiterated its longstanding position that it “favors the repeal of all mandatory minimum penalties,” it also has stated its support of “swift” Congressional action to “reduce the negative effects of these statutory provisions” such as “the policies contained in the Smarter Sentencing Act of 2013. In that same vein, the Federal Public Defenders also reiterated its longstanding position that “Congress should work to alleviate and ultimately eliminate mandatory minimum sentences” as “they do not result in more uniformity in sentencing, nor do they reflect the seriousness of offenses,” but rather “only diminish the traditional role of juries and judges, reduce transparency, and provide prosecutors with enormous, unchecked power.”

In terms of making an immediate fiscal and correctional impact, the Urban Institute concluded that reducing the number of drug offenders would be the quickest way to yield an impact on both population and cost, especially if mandatory sentences are also reformed. It provided the following projections:

- reducing the number of drug offenders entering the BOP by just 10% (by narrowing the application of mandatory penalties as discussed above, for example) would save \$644 million over 10 years.<sup>612</sup>
- reducing mandatory minimums by half would save \$2.485 billion and reduce overcrowding to 20% above capacity over 10 years<sup>613</sup>
- cutting drug sentences by 10% would save \$538 million over 10 years<sup>614</sup>
- applying the Fair Sentencing Act of 2010 retroactively would conservatively lead to savings of \$229 million over 10 years.<sup>615</sup>

In terms of existing federal legislative proposals, **the Urban Institute projects that the only policy option that would, on its own, eliminate prison overcrowding going forward is the Smarter Sentencing Act of 2013 (H.R. 3382), which (1) reduces the length of mandatory minimums from 20 years to 10 years, 10 years to 5 years, and 5 years to 2 years; (2) applies the Fair Sentencing Act of 2010 retroactively; and (3) slightly expands the “safety valve” for drug offenses .** Within 10 years, reducing mandatory minimums by half would save \$2.485 billion and reduce prison crowding to 20 percent above capacity over 10 years.

**Applying similar reductions as set forth in the Smarter Sentencing Act, one could narrow the “supersized” mandatory penalties as follows: (1) § 851 by reducing its penalties**

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<sup>612</sup> Stemming the Tide at 2.

<sup>613</sup> Stemming the Tide at 3.

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

**from life to 20 years, from 20 years to 10 years, and from 10 years to 5 years; (2) § 924(c) by reducing its penalties from 30 to 15, 25 to 10, 7 to 3, and from 5 to 2; and (3) § 924(e) by reducing its penalty from 15 to 7.**

Based upon the BOP's published average cost of incarceration for federal inmates in FY2013 as \$29,291.25, the projected cost savings for just one offender subject to a reduction in each of the following "supersized" mandatory penalties would be as follows:

- § 851 (mandatory enhancement that multiplies the mandatory minimum)
  - A reduction from life (projected at 39.16 incarcerative years by the Sentencing Commission's data regarding federal inmates),<sup>616</sup> to 20 years **would save \$561,220.35 for each applicable inmate**
  - A reduction from 20 years to 10 years **would save \$292,912.50 for each applicable inmate**
  - A reduction from 10 years to 5 years **would save \$146,456.25 for each applicable inmate**
- § 924(c) (mandatory "stacking" consecutive counts)
  - A reduction from 30 years to 15 years **would save \$439,368.75 for each applicable inmate**
  - A reduction from 25 years to 10 years **would save \$439,368.75 for each applicable inmate**
  - A reduction from 7 years to 3 years **would save \$117,165.00 for each applicable inmate**
  - A reduction from 5 years to 2 years **would save \$87,873.75 for each applicable inmate**
- § 924(e) (mandatory 15-year minimum sentence)
  - A reduction from 15 years to 7 years **would save \$234,330.00 for each applicable inmate**

Depending on the applicable inmate, reducing these "supersized" mandatory penalties is an average **\$289,836.92** and a median of **\$234,330 to \$292,912.50**.

Public safety, of course, is an important concern. The results of the Sentencing Commission's 2011 recidivism study demonstrate that federal crack offenders released on average 26 months earlier (representing an average sentence reduction of 17 percent reduction in the total sentence)<sup>617</sup> earlier than their original sentence were no more likely to recidivate than if they had served their full sentences.<sup>618</sup> In fact, those who received sentence reductions re-offended at a *lower* rate (43%) than those who did not receive retroactive reductions (47%) within five years of their release.

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<sup>616</sup> 2012 Sourcebook of Federal Sentencing Statistics at app. A.

<sup>617</sup> U.S. Sentencing Comm'n, *Guidelines Manual*, app. C, amends. 706 & 711 (effective Nov. 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010).

<sup>618</sup> U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report: Fair Sentencing Act* (2014), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2014-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2014-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

This supports the evidence-based finding that reductions in drug statutory penalties, particularly mandatory ones

can be accomplished without significantly impacting public safety, particularly when, as the Department of Justice has asserted, these reductions in penalties would allow more resources to be devoted to catching and punishing the most serious offenders in addition to other programs and initiatives that more effectively prevent crime. Moreover, the study also found that sentence reductions did not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities.<sup>619</sup>

Finally, mandatory sentencing policies deprive the victim of input into the sentence imposed. Research has shown that, in some cases, victims do not want a lengthy or maximum prison term and that restitution or restoration is much more likely to be obtained if an alternative sentence is imposed.<sup>620</sup>

The concern about public safety is best addressed by those who are most familiar with the individuals to whom these mandatory penalties have applied and the risk, if any, they pose to public safety: law enforcement, correctional, and probation officers. Specifically, correctional officers have the expertise and experience given their day-to-day interaction with inmates, of which offenders would pose a risk, if any, to public safety if sentences were reduced or judges were authorized to exercise discretion in sentencing below mandatory penalties. Thus, it is significant that the American Correctional Association, International Community Corrections Association, Council of Prison Locals-AFGE, and American Probation and Parole Association have all expressed their support and advocated for the Smarter Sentencing Act itself.<sup>621</sup> They are joined by over 100 former prosecutors and judges individually as well as the Major Cities Chiefs Association, the International Union of Police Associations, Association of Prosecuting Attorneys, Police Executive Research Forum, American Federal of Government Employees, National Organization of Black Law Enforcement, Blacks in Law Enforcement in America, National Task Force to End Sexual and Domestic Violence, and National Network to End Domestic Violence.<sup>622</sup> It therefore stands to reason that these law enforcement, correctional, and probation officers support the principles and empirical data underlying that reform, namely the reduction in length of mandatory penalties, expansion of the judicial “safety valve,” and retroactivity of the Fair Sentencing Act of 2010, such that extension of those principles to other reforms supported by similar empirical data would not appear to contravene their positions.<sup>623</sup>

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<sup>619</sup> Saris Over-Criminalization Task Force Statement at 9-10.

<sup>620</sup> Center For Social and Behavioral Research - University of Northern Iowa, *The 1997 Iowa Adult Crime Victimization Study* (1998), available at [http://www.csbs.uni.edu/dept.csbr/pdf/CRI\\_Crime\\_Victimization\\_Survey-1998.pdf](http://www.csbs.uni.edu/dept.csbr/pdf/CRI_Crime_Victimization_Survey-1998.pdf); “Empowering and Restoring Crime Victims,” Texas Public Policy Foundation, available at <http://www.texaspolicy.com/sites/default/files/documents/Empowering%20and%20Restoring%20Crime%20Victims.pdf>.

<sup>621</sup> *Smarter Sentencing Act Endorsements*, Families Against Mandatory Minimums, <http://famm.org/wp-content/uploads/2014/02/SSA-Support-July-2014.pdf>.

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*

It bears noting that even with the repeal or reduction in length of mandatory penalties, federal sentencing will still be guided by the Sentencing Guidelines. To that end, the Sentencing Commission reaffirmed its longstanding position “that a strong and effective sentencing guidelines system best serves the purposes of the SRA.” It assured the Overcriminalization Task Force that “[s]hould Congress decide to limit mandatory minimum penalties, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing” and that it “stands ready to work with you and others in Congress to enact these statutory changes” while it “continue[s] to work to ensure that the guidelines are amended as necessary to most appropriately effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.”

### **3. AS AN INTERIM STEP TOWARDS THE REPEAL OF MANDATORY PENALTIES, PROVIDING A MECHANISM FOR RELIEF IN CASES IN WHICH MANDATORY PENALTIES ARE UNWARRANTED DUE TO THE CHARACTERISTICS OF THE OFFENSE AND THE INDIVIDUAL AND OTHER FACTORS**

As discussed earlier, some states chose to repeal mandatory penalties altogether. For the ones that did not, they granted discretion to judges to circumvent these mandatory penalties with broad judicial “safety valve” provisions. For example, Georgia created a broad judicial “safety valve” provision for drug trafficking and manufacture cases, including the sale or cultivation of large quantities of marijuana. Hawaii granted judges the discretionary authority to sentence below the 10- and 5-year mandatory minimum sentences if the judge finds it “appropriate to the defendant’s particular offenses and underlying circumstances.” Kansas granted authority to judges to reduce an enhanced drug sentence to 75% of the maximum potential sentence.

Currently, federal judges are forced to impose sentences in some cases that are grossly disproportionate to the offense, have a disparate racial impact, and do not take into account any extenuating circumstances of the offender or the circumstances of the offense. This transfer of sentencing power from judges to prosecutors raises grave Constitutional and statutory concerns and results in widely divergent, unwarranted, and often punitive sentencing disparities.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

**The Urban Institute recommended providing more judicial discretion in departing below statutory mandatory minimum penalties as The Justice Safety Valve Act of 2013 (H.R. 1695) does.** That bill provides authority to judges to depart below the statutory mandatory minimum penalty for offenders whose case-specific characteristics and criminal histories are inconsistent with a lengthy minimum sentence. This new safety valve could be applied to all offenders facing federal mandatory minimums, including drug offenders with more extensive criminal histories and offenders subject to mandatory minimum penalties for non-drug offenses.

**Creating a safety valve for any offender subject to a mandatory minimum sentence is projected to save as much as \$835 million in 10 years.<sup>624</sup>**

This measure is also supported by the four federal agency stakeholders. The Sentencing Commission recommended that Congress expand “safety valve,” allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.” Although the Judicial Conference prioritizes the repeal of all mandatory penalties, as it also supports “the Justice Safety Valve Act of 2013, [which] is designed to restore judges’ sentencing discretion and avoid the costs associated with mandatory minimum sentences.” The Federal Public Defenders, likewise, supported the bill as a measure that would ameliorate the negative impacts of federal mandatory penalties. DOJ’s prior expressed support of the Smarter Sentencing Act, which contains a provision providing for expanded judicial authority to depart below statutory mandatory minimum in drug offenses, would on principal and logical extend to the Justice Safety Valve Act.

After analysis years of federal sentencing data, the Sentencing Commission in its 2011 report on Mandatory Minimums recommended that Congress consider “expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.”<sup>625</sup> This expansion was premised on its finding that “existing mandatory minimum penalties in drug cases often applied to lower level offenders than Congress intended, the Commission recommended that Congress should consider expanding the number of offenders who still have a modest criminal history, but who otherwise meet the statutory criteria, to qualify for the safety valve, enabling them to be sentenced below the mandatory minimum penalty and in accordance with the sentencing guidelines, which take many more factors into account, particularly in those drug cases where the existing mandatory minimum penalties are too severe, too broad, or unevenly applied.”

In 2013, 7,706 offenders received relief under the safety valve provision in the sentencing guidelines.<sup>626</sup> If the safety valve had been expanded to offenders with two criminal history points, 737 additional offenders would have qualified. Had it been expanded to offenders with three criminal history points, a total of 1,289 additional offenders would have qualified.<sup>627</sup> The Sentencing Commission found that the larger expansion “would start to address some of the disparities and unintended consequences noted above, it would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders because the demographic characteristics of the offenders who would become newly eligible for the safety valve would be similar to those of the offenders already eligible.”<sup>628</sup> The

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<sup>624</sup> Stemming the Tide at 4.

<sup>625</sup> 2011 Mandatory Penalties Congressional Report at xxxi.

<sup>626</sup> 2013 Sourcebook of Federal Sentencing Statistics at S-113.

<sup>627</sup> These totals include offenders not convicted of offenses carrying a mandatory minimum sentence, but subject to safety valve relief under the sentencing guidelines because they meet the same qualifying criteria. The guidelines would need to be amended to correspond to the proposed statutory changes to realize this level of relief. These totals also represent the estimated maximum number of offenders who could qualify for the safety valve since one of the requirements, that the offender provide all information he or she has about the offense to the government, is impossible to predict. *See* 18 U.S.C. § 3553(f).

<sup>628</sup> 2011 Mandatory Penalties Congressional Report at 356.

Commission found that to affect the demographics of those incarcerated, Congress would have to reduce the length of mandatory minimum drug penalties.

Despite concerns about an out-of-control judiciary that would impose overly lenient sentences in the absence of mandatory penalties, in practice, the federal judiciary continues to give considerable weight to the advisory sentencing guidelines even in the absence of any mandatory penalty such that they, as a statistical matter, remain the dominant consideration for federal judges.<sup>629</sup>

Recent experience illustrates that federal district judges generally impose tough sentences even when Congress reduces mandatory minimums or raises the threshold for when mandatory minimum sentences apply, as it did in the Fair Sentencing Act of 2010. In the wake of this legislation, which reduced the crack-to-powder disparity from 100:1 to 18:1 and raised the quantities of crack necessary to trigger the mandatory minimum sentences of 5- and 10-years, federal judges still sentenced offenders, in the absence of mandatory minimums, to average prison terms of 97 months, which exceeds the 5-year mandatory minimum and almost matches the 10-year mandatory minimum.<sup>630</sup> In 2012, sentences that had been appealed on the grounds of substantive unreasonableness (i.e. that the sentence was either too high or too low) were affirmed by federal courts of appeals 95% of the time versus roughly 94% in 2011, 96% in 2010, and 97% in 2009.<sup>631</sup>

Prior to mandatory sentencing, proportionality analysis was part of the sentencing judge's toolkit in an individual case.<sup>632</sup> Uniformity evolves from reasoned judicial decisions at the federal district court level. These judges can look at each other's reasoning—not as binding precedent, but as a template for the cases they encounter—as a way of informing their own analysis and evaluation of the factual circumstances of each case.

#### **4. RETROACTIVITY OF THE FAIR SENTENCING ACT AS AN INTERIM STEP TOWARDS THE REPEAL OF MANDATORY PENALTIES**

The Fair Sentencing Act of 2010 (FSA),<sup>633</sup> in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams,

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<sup>629</sup> U.S. Sentencing Comm'n, *2008 Annual Report* fig. C (2008).

<sup>630</sup> U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2012*, 7-8, available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf).

<sup>631</sup> *Id.*

<sup>632</sup> Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 14 (1998); see also *Ewing v. California*, 538 U.S. 11, 35 (2003) (Stevens, J., dissenting) (“In exercising their discretion, sentencing judges wisely employed a proportionality principle that took into account all of the justifications for punishment—namely, deterrence, incapacitation, retribution, and rehabilitation.”).

<sup>633</sup> Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010).

respectively.<sup>634</sup> This sought to ameliorate the severe sentences that were imposed overwhelmingly on African American offenders even though data demonstrated that same offense commission rates by Whites.

**Although the Fair Sentencing Act of 2010 increased the quantity of crack cocaine needed to trigger a mandatory minimum sentence, it did not apply retroactively to those sentenced before 2010. When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

The same fundamental concerns for fairness and accountability drove Congress to pass the Fair Sentencing Act of 2010 applies to its retroactive application to people sentenced before its enactment: justice should not depend on something as arbitrary as the date a person was sentenced, especially when the flaw being corrected has been present since the statute's inception. That flaw---the original 100:1 ratio in sentencing for punishing crack versus powder cocaine offenses---was amended to a more just ratio of 18:1. To fully effectuate the aims of justice, that fix should be applied prospectively **and** retroactively to those sentenced under the earlier flawed ratio.

All four federal stakeholder agencies support the retroactive application of the Fair Sentencing Act of 2010. DOJ expressed its support to the Overcriminalization Task Force on the basis that doing so “addresses a basic issue of fair treatment for similar offenders: drug offenders with mandatory minimum sentences imposed before the Fair Sentencing Act would receive the same benefit as those convicted afterwards.” The Sentencing Commission urged that “[t]he provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.” Likewise, the Judicial Conference urged Congress and the Sentencing Commission to include retroactivity provisions for any legislation or guideline amendments, respectively, under the rationale that “whenever possible, fundamental fairness dictates that the defendant's conduct and characteristics should drive the sentence” such that “retroactive application . . . will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future.” This was echoed by the Federal Public Defender’s position that “[w]hen Congress amends sentencing laws to make them more just, it should make them retroactively applicable. If a sentence imposed the day after a law is passed would be considered unjust, surely it was unjust the day before the law passed. Judgments involving the highest of stakes should not be left to the fortuity of legislative timing.”

**The Urban Institute also recommends that retroactive application of the Fair Sentencing Act of 2010.** Based upon its data analysis, it projected that over 3,000 inmates would be eligible for immediate release from prison.

Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack

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<sup>634</sup> *Id.*

cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Sentencing Commission's methodologically rigorous recidivism study in 2011 demonstrated no increase in recidivism for offenders convicted of crack cocaine offenses who were released approximately 27 months earlier on average (due to sentencing guideline reductions) and no adverse effects on public safety.<sup>635</sup>

To date, 12,572 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,503 of those cases.<sup>636</sup> The average sentence reduction in these cases has been 30 months, which corresponds to a 19.9 percent decrease from the original sentence.<sup>637</sup>

**The Urban Institute, after reviewing federal sentencing data and practices, recommended passage of the Fair Sentencing Clarification Act of 2013 (H.R. 2369), which would apply FSA's 18:1 ratio retroactively. Retroactive application will have immediate fiscal, correctional, and human impact. The Sentencing Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, 8,829 offenders would likely be eligible for a sentence reduction, with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and in significant cost savings of over a billion dollars---\$1,095,492,750.**<sup>638</sup> The Commission estimates that **87.7 percent of the inmates eligible for a sentence reduction would be African-American.**<sup>639</sup>

It is clear that there is no principled basis for refusing to apply the FSA retroactively.

What is equally clear, given the data and state experience, is that we need to institute true 1:1 parity for crack versus powder cocaine offenses in order to fully ameliorate the destructive, discriminatory, and distorted penalties. **That is why I introduced the Fairness in Cocaine Sentencing Act of 2013 (H.R. 2372), which would equalize crack-to-powder ratios in sentencing calculations at 1:1.**

Although I commend my colleagues in Congress for substantially ameliorating the crack-to-powder disparity from 100:1 to 18:1, it is my duty to make a record of the fact that as much as the 100:1 ratio was not empirically-sound, neither is the 18:1. Rather the legislative history demonstrates that the intent and goal was always for 1:1 parity but in order to overcome the

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<sup>635</sup> U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report: Fair Sentencing Act (2014)*, available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2014-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/2014-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

<sup>636</sup> *Id.* at tbl. 3.

<sup>637</sup> *Id.* at tbl. 8.

<sup>638</sup> *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences, Hearing Before the Committee on the Judiciary, United States Senate*, at 5 (Sept. 18, 2013) (statement of Judge Patti B. Saris, Chair U.S. Sentencing Comm'n), attached to Letter from The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary & Sen. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary (Nov. 26, 2013).

<sup>639</sup> *Id.*

gridlock and accord some measure of relief (versus the alternative of the status quo), we had to compromise on 18:1. My objections to the 18:1 ratio echo my objections to the 100: ratio: treating crack cocaine more severely than powder cocaine is not grounded in empirical fact, but rather is the codification of holdover inaccurate and perjorative stereotypes, lacking any grounding in data or experience.

## **5. CLARIFYING PREDICATE CONVICTIONS FOR MANDATORY PENALTIES AS AN INTERIM STEP TOWARDS THEIR REPEAL**

Yet another way mandatory minimums, enhancements, and consecutive counts sweep in low-level offenders for whom these severe penalties were never intended is how expansive the sweep of the types of “felony drug offense” predicates that will trigger the Armed Career Criminal Act (mandatory minimum of 15-years in ammunition or firearm possession cases if the offender has 3 prior convictions involving drug or guns) and § 851 enhancement (which doubles the mandatory minimum, including up to life, in drug cases).

On the surface, the definition itself is broad, applying to drug offenses punishable by more than one year. A “felony drug offense,” defined as “an offense that is punishable by imprisonment for more than one year ... that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances,” 21 U.S.C. § 802(44).

In practice, depending on the state of conviction, this definition sweeps in the following:

- simple possession of drugs;<sup>640</sup>
- misdemeanors in states where misdemeanors are punishable by more than one year, such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont;
- diversionary dispositions where the defendant was not considered “convicted” in that state court;<sup>641</sup>

As if the inclusion of misdemeanors and dispositions that even the sentencing state itself did not consider “convictions” as predicates for these “supersized” mandatory minimums were not egregious enough, the existing definition has:

- no limit on how old the conviction or diversionary disposition can be
- no distinction between violent (i.e. whether harm occurred or was threatened) and nonviolent offenses

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<sup>640</sup> See *Lopez v. Gonzalez*, 549 U.S. 47, 54 & n.4 (2006); 2011 Mandatory Penalties Congressional Report at 353.

<sup>641</sup> See *United States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013); *United States v. Rivera-Rodriguez*, 617 F.3d 581, 609-10 (1st Cir. 2010); *United States v. Norbury*, 492 F.3d 1012, 1015 (9th Cir. 2007); *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Ortega*, 150 F.3d 937, 948 (8th Cir. 1998); *United States v. Cisneros*, 112 F.3d 1272, 1281-82 (5th Cir. 1997); *United States v. Fernandez*, 58 F.3d 593, 600 (11th Cir. 1995); *United States v. Meraz*, 998 F.2d 182, 183-84 (3d Cir. 1993); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992).

- no consideration if the offense was committed due to mental health and/or substance abuse issues

It is unsettling that predicate offenses like these can form the basis for mandatory minimums, enhancements, and consecutive counts that operate as de facto life sentences without parole in the federal system, with judges powerless to mitigate their severity in light of extenuating facts, circumstances, and offender-specific characteristics.

The use of this expansive definition of “prior felony offense” has led to the deplorable application of these “supersized” mandatory minimums and enhancements in the following cases for defendants that Congress surely never intended to sweep in, much less penalize as egregiously and excessively:

Sherman Chester, a 27-year-old former athlete, had his mandatory minimum sentence for being a street-level drug dealer, enhanced from 10 years to mandatory life without parole because he chose to go to trial, and the prosecutor filed two § 851 enhancements for minor convictions (possession of a plastic bag with cocaine residue and possession of 0.25 grams of cocaine, a personal use amount) punished with probation and house arrest. Except for the leader of the 9-person conspiracy, all of Mr. Chester’s co-defendants, including those more culpable than he, received lower sentences and have been released.

Kenneth Harvey was a courier who was paid \$300 to bring 501 grams of crack from Los Angeles to Kansas City. He had no gun and no record of violence. The prosecutor offered a sentence of 15 years in exchange for a guilty plea, but when Harvey chose to go to trial, filed § 851 enhancements based on one predicate that barely qualified as either a “felony” or a “conviction,” and another for selling 2.23 grams of crack. In sentencing Mr. Harvey to federal prison “for the remainder of his life,” the judge criticized that the priors “were not deemed serious enough to merit imprisonment and appear to be only technically within the statutory punishment plan” and attributed them to Mr. Harvey’s youth and “immaturity of judgment” at the time. The judge “[did] not think [the statutory life minimum] was fully understood or intended by Congress in cases of this nature, but there [was] no authority that [he] knew of that would permit a different sentence by [him].”

Olivar Martinez-Blanco received a mandatory life without parole sentenced after the government filed the two § 851 enhancements -- for convictions that occurred when he was 22 and 24 years old, addicted to drugs, and involved small amounts of drugs -- “to coerce him into entering a plea,” that “his codefendants received lesser sentences but were more culpable.” Due to the facts of the case, the sentencing judge lamented that the mandatory life imprisonment was “savage, cruel and unusual.”

Robert Riley was a 40-year-old “flower child” when he was sentenced to mandatory life for selling a miniscule amount of LSD on blotter paper weighing just over 10 grams and the prosecutor’s filing of § 851 enhancements based on predicates involving small amounts of drugs. The judge stated that “[i]t’s an unfair sentence,” and later wrote, “[t]here was no evidence presented in Mr. Riley’s case to indicate that he was a violent offender or would be in the

future,” and “[i]t gives me no satisfaction that a gentle person such as Mr. Riley will remain in prison the rest of his life.”

Melissa Ross was a young woman who played a minor, non-violent role in her boyfriend’s crack dealing. The prosecutor acknowledged that she was a “minor participant” and offered her a three-year sentence if she would plead guilty to misprision of a felony, but when she chose to go to trial, filed an § 851 enhancement based on her plea with deferred adjudication (which did not result in what the state court itself considered a “conviction”) six years earlier to simple possession of crack. The judge stated that it was “a gross miscarriage of justice” because **“the § 851 enhancement should be used to protect the public from those defendants with a serious history of felony drug offenses, not as a cudgel to force minor participants like [Ross] to accept a plea.”**

Thus, it is evident that additional elements need to be added to both the definition of “felony drug offense” and these “supersized” mandatory penalties.

In terms of the definition of “prior conviction for a felony drug offense,” it should amended to exclude (1) simple possession of drugs; (2) misdemeanors in states where misdemeanors are punishable by more than one year; and (3) deferred adjudications or diversionary dispositions where the defendant was not considered “convicted” in that state court. Specifically, it should clarify that a disposition resulting the dismissal of proceedings, regardless of whether the offender entered a plea of guilty or nolo contendere or no contest is not a “conviction.” Principles of comity and Constitutional restraint dictate that our federal interpretations of the severity of the predicate offense look to and pay the respect due the state legislature’s determination and classification of its own criminal offenses.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

Turning to the “supersized” mandatory penalties themselves (the Armed Career Criminal Act and the § 851 enhancement), one could narrow **the scope of their application by amending them to require the following additional elements of proof beyond a reasonable doubt: (1) that the “prior conviction for a felony drug offense” was entered within 5 years of the defendant’s commencement of the instant offense; (2) that each “prior conviction for a felony drug offense” involved violence (actual serious bodily injury or death or an explicit threat of serious bodily injury or death); (3) that the offender was not suffering from mental illness or substance abuse addiction at the time of “each prior conviction for a felony drug offense;” and (4) that the offender was not suffering from mental illness or substance abuse addiction at the time of the instant offense.** Narrowly tailoring the temporal nexus will ensure that these mandatory penalties do not apply to offenses that so stale that they lose their probative value and become more prejudicial than relevant. Requiring proof of violence ensures that the conduct underlying the predicate offenses does not sweep in nonviolent prior conduct and/or offenders for whom these mandatory penalties were not intended. Similarly, requiring proof beyond a reasonable doubt that the offender was not suffering from mental illness or substance abuse addiction at the time of each predicate and the instant offense

also helps to ensure that low-level, vulnerable people in extenuating circumstances are not treated on par with those who profit off of their desperation: the kingpins, leaders, organizers, and other high-level operatives for whom these mandatory penalties were intended. This will, of course, require law enforcement and the government to bear the burden of collecting additional evidence, which is not too much to mandate when the government seeks mandatory sentences of life without parole or mandatory sentences of 15 or 20 years that effectively serve as de facto life sentences without parole for those individuals. Sentencing someone to grow up, grow older, and then die behind bars should require much greater proof of culpability, role, dangerousness, and recidivism than it currently does.

## **6. CLARIFYING THAT THE “STACKING” PENALTY APPLIES ONLY FOR § 924(C) CONVICTION IN AN EARLIER CASE AS AN INTERIM STEP TOWARDS THE REPEAL OF THIS MANDATORY CONSECUTIVE COUNT**

Section 924(c) requires lengthy 5-, 7-, 10-, and 30-year mandatory minimum sentences for, respectively, possessing, brandishing, or discharging, a gun in the course of a drug trafficking crime or a crime of violence. The second and each subsequent § 924(c) conviction carry mandatory minimum sentences of 25 years **each**. The practice of “stacking” requires that these mandatory minimums be **served back-to-back (i.e., consecutively, not concurrently) with each other and with any other punishment the person receives for the underlying offense**. As discussed earlier, “stacking” results in grossly disproportionate sentences.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

The current statute is also drafted so broadly that it applies to even to legally purchased and registered guns and rifles found in the person’s home---even if the guns were not present or used during the actual instant offense. Moreover, the current statute also applies to nonviolent gun owners who do not actually harm or injure anyone or threaten to do so.

The Federal Public Defenders recommends the repeal of § 924(c) because it is “a truly draconian penalty” that “distort[s] the criminal justice system beyond all recognition by threatening defendants with decades and sometimes life in prison for offenses far less serious than many others that carry much lower sentences.” The Judicial Conference, with its disclaimer that it “favors the repeal of all mandatory minimum penalties,” has expressed its support of “swift” Congressional action to “reduce the negative effects of these statutory provisions” such as “an amendment to 18 U.S.C. § 924(c) to preclude the “stacking” of counts and to clarify that additional penalties apply only when one or more convictions of such person have become final prior to the commission of such offense” to ameliorate the “particularly egregious” results from the current application of that statute. Drawing from the experience of federal judges around the country, the Conference summarized that “[a]ll mandatory minimum sentences can produce results contrary to the interests of justice, but Section 924(c) is particularly egregious.” This is because “[s]tacked mandatory sentences (counts) . . . even more so than most mandatory terms[] may produce sentences that undermine confidence in the administration of justice. The

Conference recommends that 18 U.S.C. § 924(c) be amended to preclude stacking so that additional penalties apply only for true repeat offenders.” Under the Judicial Conference's recommendation, an offender would be subject to an enhanced twenty-five-year sentence if he or she had been convicted in the past of a Section 924(c) offense and, following that conviction, committed and was again convicted of another Section 924(c) offense.

The current wide-ranging and draconian application of § 924(c) is not what Congress intended. This provision was enacted in response to public fear over street crime, civil unrest, and the shooting of Martin Luther King, Jr. The day after the assassination of Robert F. Kennedy, § 924(c) was proposed as a floor amendment to the Gun Control Act of 1968 and the Omnibus Crime Control and Safe Streets Act of 1968. **It passed that same day with no congressional hearings or prior legislative deliberation. There was only a speech by the provision’s sponsor that this would “persuade the man who is tempted to commit a federal felony to leave his gun at home.”**<sup>642</sup> In the decades since the enactment of § 924(c), Congress has amended this provision several times, transforming it into one of the most draconian punishments. It was amended from a mandatory minimum of 1 year to mandatory minimums of 5-, 7-, 10-, 25-, and 30-years that are required to run consecutive to any and all other counts of convictions. Given how the statutory language has been interpreted, we have run far away from that intent to deter street crime and shootings by prohibiting the specific conduct of bringing the gun to the instant offense.

For these reasons, I introduced the Firearm Recidivist Sentencing Act of 2013 (H.R. 2405), which:

- eliminates the following mandatory minimum sentences:
  - the 5-, 7-, and 10-year mandatory minimum sentences for possessing, brandishing, and discharging a gun in the course of a drug trafficking offense or crime of violence.
    - Instead, judges would be able to impose sentences of *up to* 5, 7, or 10 years, respectively, for these offenses.
  - the 10-year mandatory minimum sentence for possessing, brandishing, or discharging a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon in the course of a drug trafficking offense or crime of violence.
    - Instead, judges would be able to impose a sentence of *up to* 10 years for this offense.
  - the 30-year mandatory minimum sentence for possessing, brandishing, or discharging a machinegun or a destructive device, or a gun equipped with a firearm silencer or firearm muffler in the course of a drug trafficking offense or crime of violence.
    - Instead, judges would be able to impose a sentence of *up to* 30 years for this offense.
  - Eliminates the 25-year mandatory minimum sentence for second and subsequent convictions under 18 U.S.C. § 924(c).

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<sup>642</sup> See 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff).

- Instead, judges would be able to impose a consecutive sentence of *up to 25* years for these offenses.
- fixes the “stacking” problem by clarifying that second and subsequent convictions under 18 U.S.C. § 924(c) carry a consecutive sentence of up to 25 years in prison *only if* the defendant is a “true recidivist” — i.e., the defendant’s prior § 924(c) conviction has already become final. For second and subsequent convictions for a prior § 924(c) conviction that have become final, it also modifies the penalties as follows:
  - requires that federal prosecutors file a motion with the court, similar to the procedure used in 21 U.S.C. § 851, before seeking to charge a defendant with the consecutive sentence of up to 25 years because the person has a finalized, prior § 924(c) conviction.
  - eliminates the mandatory minimum sentence of life without parole for second and subsequent § 924(c) convictions involving a machinegun, destructive device, silencer, or firearm muffler.
    - Instead, judges would be able to impose a sentence of any term of years or life without parole.
  - eliminates the 15-year mandatory minimum sentence under 18 U.S.C. § 924(c)(5)(A) for use, carrying, or possession of armor piercing ammunition during or in furtherance of a crime of violence or drug trafficking crime.
  - eliminates the death penalty as a possible punishment for anyone who is convicted under 18 U.S.C. § 924(c)(5)(B)(i) for use, carrying, or possession of armor piercing ammunition during or in furtherance of a crime of violence or drug trafficking crime, in which death results from the use of such ammunition.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

With that understanding in place, one could **narrow the scope of its application by amending § 924(c) (1) to clarify the definition of “second and subsequent conviction” and (2) to add additional element of presence and violent use of the firearm by the offender at the instant offense.** As a threshold matter, § 924(c) could be amended to render it consistent with U.S.C. § 962(b), which defines the phrase "second or subsequent offense" to provide that "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of such person for a felony drug offense have become final." This amendment would address the abhorrent practice of “stacking” in cases where the multiple § 924(c) all arise out of the instant offense and lead to de facto life sentences that are excessively severe and unwarranted. **The additional element of the offense requires that the government to prove beyond a reasonable doubt that the firearm was not only present at the instant offense but also used in a violent manner, that is actual serious bodily injury or death or an explicit threat of serious bodily injury or death.** In light of the Congressional intent---or, more accurately, the sponsor of the floor amendment’s intent as we can best glean from his speech since this penalty was never subject to congressional hearings, markup, or committee reports---that this penalty **“persuade the man who is tempted to commit**

a federal felony to leave his gun at home,” it is only fair to limit the application of the penalty to cases in which the firearm was present at the instant offense. Moreover, in light of the events that inspired the drafting and passage of this floor amendment---shootings---it should follow logically that only conduct that includes the discharge of the firearm, the use of the firearm by the offender in an otherwise violent manner (i.e. pistol-whipping) leading to serious bodily injury or death, or the threatened discharge or use of a firearm that would lead to serious bodily injury or death would qualify based upon the historical context. Requiring this proof ensures that the conduct underlying the instant offense does not sweep too broadly and apply to situations and offenders for whom this mandatory penalty was not intended. Out of the recognition that life matters, any penalty that deprives a person’s ability to participate in the world for their adulthood or even the remainder of their days requires the government to prove beyond a reasonable doubt that the offender was of the category and the conduct of the kind and degree Congress intended to target.

#### **7. NARROWING USE AND PRESENCE AT THE SCENE FOR THE ARMED CAREER CRIMINAL ACT AS AN INTERIM STEP TOWARDS ITS REPEAL**

For similar reasons as noted for the § 924(c) mandatory consecutive penalties in the immediately preceding section, the Armed Career Criminal Act currently applies too broadly and sweeps in nonviolent individuals who are not using firearms in a violent manner, but rather may be storing them in their garage or basement---a fact that triggers this 15-year mandatory minimum even in the absence of any evidence that the offender was using the firearm, much less in a violent manner.

**When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.**

Thus, one could **add an additional element of presence and violent use of the firearm by the offender at the instant offense. The additional element of the offense requires that the government to prove beyond a reasonable doubt that the firearm was not only present at the instant offense but also used in a violent manner, that is actual serious bodily injury or death or an explicit threat of serious bodily injury or death.** Existing application leads to absurd results: attributing a firearm found in the trunk of the car to the offender through the doctrine of “constructive possession” even though the offender was unaware of the firearm, which belonged to another passenger or attributing a firearm found several yards away an hour after the chase and arrest of an offender in a “high crime area” at night. To restore rationality and fairness, it makes sense to limit the application to only those instances in which the offender was in actual (not constructive) possession of a firearm and using it in a violent manner. Surely Congress could not have meant to mandate a 15-year mandatory minimum for Civil War aficionado ex-offender cleaning his musket peacefully in his room in a shared house that is raided by law enforcement for another occupant. To do so in that instance and other nonviolent circumstances would be incongruous and would corrupt the purpose behind the statutory penalty.

#### **4. BACK-END REFORMS**

**(i) TRUTH-IN-SENTENCING REQUIREMENTS**  
**a. CLARIFYING AND PROVIDING FOR THE FULL 54 DAYS OF GOOD TIME CREDIT**

The BOP is statutorily authorized to provide federal prisoners with “good time”/ “good conduct time” credit, which is earned for “good behavior,” defined as “exemplary compliance with institutional disciplinary regulations.” This “good time” credit reduces a prisoner’s actual time in BOP custody.

Section 3624(b) provides:

a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.

In reality, even though the statute provides for a maximum of 54 days of good time for each year of the sentence imposed, based on the way the BOP calculates good time, prisoners only earn a maximum of 47 days of good time for each year of the sentence imposed.

Although there have been attempts over the past 3 decades to clarify Congress’s intent and correct this flaw in BOP’s calculation, BOP has not implemented the clarification and continues to use the 47 day maximum.

Specifically, the U.S. Sentencing Commission incorporated Congress’s intent for 54 days of good time credit when it designed the U.S. Sentencing Guidelines---the guideline ranges in the Sentencing Table are 15% longer than the time Congress actually wanted prisoners to serve. This made it very clear that prisoners should serve only 85% of the sentences they are given. Congress also amended § 3624(b) to allow a maximum of 54 days of good time for each year of the sentence—54 days is almost exactly 15% of the sentence handed down. The BOP has not followed this clarification.

As a result of the BOP’s unusual math, even model prisoners in the federal system spend seven extra days every year in prison. Instead of the intended 15% good time, the BOP’s rules cause federal prisoners to receive just 12.8% good time. Seven days of one year means a lot to a prisoner and his family. When that time gets added up over five or 10 or 20 years or when it is multiplied by the all the years that tens of thousands of prisoners spend in prison, it costs taxpayers millions of dollars that Congress may never have wanted the BOP to spend.

**The Urban Institute projected that if BOP changed its internal calculation to reflect Congressional intent of 54 days, it would result in 4,000 releases and save over \$40 million**

in the first year alone.<sup>643</sup> FAMM projected doing so would save \$914 million every 9.5 years.<sup>644</sup> This is why I introduced the Prisoner Incentive Act of 2013 (H.R. 2371), which would require BOP to implement the Congressional intent of 54 days for each year of the sentence imposed by the judge.

This change to the good time statute, and the other areas identified above, would reduce costs and allow for sentences that better reflect the purposes of sentencing. We urge the Commission to continue its work to encourage Congress to make these important changes.

#### **b. DECREASING THE AMOUNT OF TIME REQUIRED TO BE SERVED PRIOR TO RELEASE**

Based upon its review and analysis of successful reforms implemented by the states, the Vera Institute reiterated that “research demonstrate[s] that recidivism rates are no higher among prisoners whose release is accelerated and that good time credits improve institutional safety and reentry outcomes.”<sup>645</sup> Some states expanded the availability of “good time” credit categorically while others “advanced parole eligibility dates for certain nonviolent offenders or created a mechanism by which a court or facility superintendent can identify offenders whose earlier release would help advance their rehabilitation.”<sup>646</sup> For example, Mississippi, for example, decreased the minimum amount of time served to 25% for nonviolent offenders and 50 % for violent offenders. West Virginia released nonviolent offenders 6 months prior to their calculated release dates, subject to electronic or GPS monitoring.

Due to its role as the JRI implementation partner for 17 of states, the Urban Institute concluded that an additional policy that has been particularly effective at the state level is reducing the required truth-in-sentencing threshold of required time served before the inmate is eligible for release.

Currently, most federal offenders sentenced to prison serve at least 87.5 percent of their terms of imprisonment. **Reducing the required minimum of time served from 87.5 to 75 percent for those inmates that exhibit exemplary behavior while in BOP custody would save over \$1 billion in 10 years; reducing the minimum to 70 percent would save over \$1.5 billion and prevent any growth in overcrowding over the next 10 years.**<sup>647</sup> Lowering the minimum amount of time served to 80, 75, or 70 percent could go a long way toward easing overcrowding without compromising the “certainty and severity of punishment” truth-in-

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<sup>643</sup> Stemming the Tide at 38.

<sup>644</sup> This projected cost savings is based upon their calculation that in 2013 there were 201,386 federal prisoners eligible for good time credits of an extra 7 days per year, which resulted in 1,409,702 extra days collectively. Multiplying those 1,409,702 extra days by the average federal sentence of 9.5 years equals 13,392,169 extra days over 9.5 years. Dividing that number of extra days by 365 days, the number of extra years that inmates are incarcerated is 36,691 extra years over every 9.5 years. Since the average cost of incarceration in 2013 was \$24,922 per year x 36,691 extra years every 9.5 years, leads to a savings of \$914 million every 9.5 years. See <http://famm.org/wp-content/uploads/2013/08/FAQ-Federal-Good-Time-6.7.pdf>

<sup>645</sup> Vera Institute Review of State Reforms at 15.

<sup>646</sup> Vera Institute Review of State Reforms at 15.

<sup>647</sup> Stemming the Tide at 29.

sentencing laws were designed to guarantee. In the states, this policy both reduced the prison population and saved the participating state money, without compromising public safety.<sup>648</sup>

## **(ii) EXPANDED PRISON AND TRANSITIONAL PROGRAMS**

In addition to---but not in lieu of the Smarter Sentencing Act---DOJ expressed its support for “back-end” reforms to enhance the prospects that Federal prisoners will successfully return to their communities.” Noting that it had “some technical concerns” with the House version of the Public Safety Enhancement Act, DOJ noted that it “share[d] the overall goals of legislation,” which were “to improve Federal prisoner reentry, better control the Federal prison population, and reward prisoners who successfully participate in evidence-based programs that assist prisoners with successful reentry.”

In conjunction with “front-end” reforms, such as repealing or reducing mandatory penalties, the Urban Institute also expressed its support for “back-end” reforms that would provide inmates with sentence reduction credits upon their successful completion of rehabilitative, educational, or vocational programming. Specifically, it supported The Public Safety Enhancement Act of 2013 (H.R. 2656), which provides sentence reductions credits for a programs and activities tiered to an inmate’s assessed risk level. Low-risk inmates, for example, would earn more credits and would be released early to serve the remainder of their prison terms on home confinement. The chief flaw that the Urban Institute identified with this policy proposal is that evidence suggests that services are more effective when they are targeted toward reducing recidivism among high-risk individuals. In fact, intensive programs for low-risk individuals may actually increase recidivism.<sup>649</sup> At least 31 states offer inmates the opportunity to earn sentence-reduction credits through participation in education, vocational training, substance abuse treatment and rehabilitation, and work programs; education and work programs are the most common.<sup>650</sup>

This is mirrored in successful state reforms such as those in West Virginia, which permit offenders sentenced to 6-month jail sentences to earn sentence reductions by successfully completing rehabilitative programs for substance abuse, anger management, parenting, domestic violence, and life skills training that reduce the sentence by 5 days up to a maximum reduction of 30 days.

The Vera Institute reviewed successful state reforms and summarized their efforts aimed at improving the likelihood of success for those leaving prison as follows: (1) reentry programs in-prison and post-release; (2) transitional leave programs to help prisoners orient themselves before full release from custody; (3) facilitated individuals’ access to state-issued identification, housing resources, and health insurance coverage; (4) provided easier way to access wages and commissary accounts and increase their balances upon release; (5) promoted family connection and reunification; and (6) mitigated the burden of criminal justice debt by allowing those released to meet these obligations through community service.<sup>651</sup>

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<sup>648</sup> *Id.*

<sup>649</sup> *Id.* at 25.

<sup>650</sup> *Id.*

<sup>651</sup> Vera Institute Review of State Reforms at 33.

### **(iii) COLLATERAL CONSEQUENCES**

The Vera Institute noted that “[i]n 2013, state legislatures signaled an increasing awareness of and willingness to support ex-offenders” by:

- passing laws that mitigate collateral consequences
- mandating more in-prison support prior to release, such as transitional leave programs in which inmates are moved into intensive supervision in the community just prior to release or providing access to state-issued identification or housing resources
- alleviating the burden of court-imposed fines or other criminal justice debt, such as restitution or user fees by substituting community service
- expanding options for sealing or expunging criminal records
- clarifying and strengthening the effect of record sealing and expungement
- limiting the consequences of a criminal record”<sup>652</sup>

These legislative initiatives are due to “a growing awareness that collateral consequences hinder reentry, exacerbate recidivism (creating more victims), are too broadly applied (resulting in arbitrary and unnecessary restrictions), and have a disparate impact on people of color.”<sup>653</sup>

For example, Colorado incentivized offenders to remain compliant by vacating a felony conviction for certain low-level drug offenses in favor of misdemeanor if the offender successfully completes probation or another community-based sentence in order to reduce the negative consequences of a felony conviction; expanded the right to expunge records of juvenile delinquency and records of adult convictions upon completion of a diversion program or dismissal; and provided judges the discretion to issue an order of collateral relief at the time a person is sentenced to community supervision. Likewise, Indiana expunged certain misdemeanors and low-level felonies if the offender completes the original sentence and remains a law-abiding citizen during the 5-10 year waiting period.

### **(iv) EXPANDING MOTIONS TO REDUCE SENTENCE**

Currently, the only mechanisms that permit a court to reduce a sentence that it has previously imposed are (1) upon the motion of the government for the defendant’s cooperation that rises to the level of “substantial assistance;” (2) upon the motion of the BOP for compassionate release if the defendant meets the criteria for medical release or extenuating reasons for non-medical release; and (3) if the sentencing guidelines upon which the defendant’s sentence have been reduced and his release is consistent with the Sentencing Commission’s policy statements.

Since parole has been abolished in the federal system, a defendant who has been sentenced to a lengthy sentence but has rehabilitated himself during his lengthy period of incarceration has no vehicle by which the sentencing judge can make a reassessment.

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<sup>652</sup> Vera Institute Review of State Reforms at 26-29.

<sup>653</sup> Vera Institute Review of State Reforms at 27.

Later in this report, in the recommendations for the Executive Branch, I suggest that it consider expanding the criteria for its expedited clemency initiative. While a laudable and important first step towards dispensing greater justice in our federal criminal system, the primary flaw with clemency is that it is an ephemeral solution that disappears upon the inauguration of another presidential administration. Moreover, it exacerbates the problem of transferring sentencing power to prosecutors when the sentencing disparities we bear are the result of that unconstitutional misappropriation of that authority; now the last chance for salvation lies at the chance that a pardon office attorney or detailee will thoroughly review and familiarize himself with the entire procedural history, pleadings, trial and sentencing transcripts, and appellate briefs and the whim of that attorney.

Instead, we should allow the executive to exercise its constitutional clemency power as it sees fit and we, as Congress, should remedy the disparities and injustices we created by addressing the root cause: divesting sentencing judges of their authority. As such, Congress should expand the § 3582, the federal statute that authorizes judges to exercise their discretion to modify final sentences, to provide relief in cases in which the offender is serving a sentence that, by operation of law (either statute or judicial interpretation), would be different if imposed today. The prosecutor, defense attorney, and probation officer were already immersed in the case and all proceedings in the past and thus are the best advocates and resources to allow the sentencing judge, who is similarly familiar, the best record from which to make the most empirically-sound, holistic, and individualized decision. To reiterate, as in other very limited instances in which the sentencing judge is empowered to exercise her discretion to reduce a sentence, she is not required to exercise her discretion to do so and may very well decline to, as sentencing judges have done in cases that have not warranted it, including for public safety reasons.

#### **(v) EXPANDING COMPASSIONATE RELEASE**

Under the existing statute, only BOP has the authority to file a motion for compassionate release. As noted in the OIG reports, there have been serious failures with putting all the responsibility for providing this relief to inmates, especially in light of the current high inmate-to-staff ratios as a result of overcrowding. Much like commonplace motions to reduce sentences in federal court, there is no principled reason why defense counsel or the prosecutor cannot file these motions with the understanding, as in all other sentence reduction cases, that the advocates, the probation officer, and the sentencing judge will seek BOP's assessment in the resolution of the matter. Not only would this relieve BOP from the burden of identifying these cases, drafting the required documentation, seeking the necessary approvals through the various levels of management, and then preparing the motion for the court's review, but that burden-shifting and corresponding time savings will result in a greater number of filings done so more expeditiously, resulting in greater savings in both prison bed space and correctional spending.

Therefore, we should amend the compassionate release statute to provide that the motion can be made by BOP, defense counsel, counsel for the government, the probation officer, or *sua sponte* by the judge.

#### **(vi) REFORMING SUPERVISED RELEASE**

Another successful state reform is the incentivized early termination of supervised release following the offenders' incarceration. The Vera Institute found that "[i]n 2013, at least three states passed laws that offer offenders on probation or parole earned discharge or other benefits if they comply with the conditions of their supervision. By awarding credits and discharging those who have been consistently compliant, community supervision departments can focus resources on offenders who pose the greatest risk to public safety."<sup>654</sup> South Dakota created a program of earned discharge credits for offenders on probation and parole of at least 15 days for each month that the terms of supervision are met.

Congress should pass a law that awards early termination credits and other benefits (e.g. decreased reporting or travel out of district) as well as presumptively terminates supervision of those who have been consistently compliant for a year of supervised release. Moreover, judges and probation officers should employ a presumption against incarceration for violations on supervised release. As this falls within the discretion and authority of judges, a more detailed discussion follows in that section of the report.

## **5. INCENTIVIZING STATE REFORMS**

The ABA Task Force recommended that Congress could increase its funding to states to support public safety initiatives and criminal justice reforms.<sup>655</sup>

As discussed earlier, state and federal collateral consequences have created almost insurmountable hurdles for returning citizens. Providing additional funding to states to limit their state restrictions and ameliorate their consequences is not only the right thing to do, but also ultimately one of the most effective crime prevention tools we have.

People who are unable to get a job upon release are three times more likely to recidivate than those who are employed, yet 60% of former prisoners remain unemployed one year after their release. The high unemployment rate stems from a variety of factors, including lack of education, training, and skills, and risk-averse employers who use background checks to weed out otherwise viable job candidates, putting these people at a greater disadvantage. Still, in the vast majority of jurisdictions, there is no way to avoid or waive the myriad statutory legal disqualifications inherent to a felony conviction, regardless of rehabilitation or fitness for employment and when the crime occurred.

States should consider adopting measures to "ban the box" (i.e. prohibit inquiry into criminal background until a tentative job offer or interview is made), an initiative that is gaining momentum, with 12 state and over 60 local jurisdictions, but more states and cities should be signing on. The ABA recommends limiting access to and use of criminal history for non-law enforcement purposes and providing procedures to ensure that criminal history information is correct. The ABA suggests crafting balanced and rationally-related limited access policies to ensure that safety is maintained, for example, permitting taxicab services to determine if applicants have DUI convictions, pharmacies to determine if applicants have drug convictions, or banks to determine if applicants have embezzlement convictions. Such databases also must be

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<sup>654</sup> Vera Institute Review of State Reforms at 23.

<sup>655</sup> *Id.*

reliable, be updated to accurately depict judicial outcomes, especially if beneficial to the defendant, and be able to be challenged by an individual in the event of inaccuracies.<sup>656</sup>

The ABA also recommends that state licensing authorities conduct inventories of restrictions based upon criminal records and modify or eliminate those that are not substantially related to a particular occupation or not designed to protect public safety. They could also provide a case-by-case exemption or waiver process and provide for review of denials of employment or licensure based upon a criminal record.

States could also follow the lead of New York, Ohio, and Colorado by implementing “Certificates of Relief from Disability,” “Certificates of Achievement and Employability,” “Certificates of Rehabilitation,” and “Orders of Collateral Relief,” which may be issued administratively or judicial, allowing waiver of collateral consequences preventing employment and licensure. If done by the courts, offenders should be notified of such upon sentencing or release, and allow the individual to present evidence of rehabilitation. Alternatively, some states waive collateral consequences from employment if an individual does not recidivate for a number of years, making such *prima facie* evidence of rehabilitation. There is also concern by employers that evidence of a criminal record could be used against them in an employer negligence claim, but states could alleviate this by precluding the introduction of such evidence if the employer relied on such a certificate of rehabilitation.<sup>657</sup>

Beyond collateral consequences, for juvenile offenders, states could raise the age of adult sentences to 18 and limit the use of transferring certain juvenile cases into adult court, which incarcerate them (and increase their risk of continued encounters with law enforcement) rather than rehabilitating them using proven evidence-based solutions, such as community treatment and involvement, behavioral therapy, and education.

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<sup>656</sup> See *id.* At 36-37; see also ABA COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, REPORT TO THE HOUSE OF DELEGATES ON ACCESS TO AND USE OF CRIMINAL RECORDS, AMERICAN BAR ASSOCIATION

<sup>657</sup> See *id.* at 26-30; see also, ABA COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, REPORT TO THE HOUSE OF DELEGATES ON EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD, AMERICAN BAR ASSOCIATION (2007).

## **B. EXECUTIVE BRANCH**

The vast power of the Executive Branch is tempered by the requirement that it pursue just results.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>658</sup>

Our current federal law and practices have granted the Executive Branch incredible power in determining sentences, particularly sentence length. Thus, it is uniquely positioned, due to its inherent and statutorily-provided authority---even in the absence of any legislative changes---to significantly reform the number and profile of those entering our federal criminal justice system, the length of sentence they serve, and the incentives for earlier release.

Recognizing the tremendous power and obligation of the executive, the checks and balances written into our Constitution and intended by its Framers, the challenges our federal criminal justice system currently face, and the successful solutions implemented by various U.S. Attorneys and state prosecutors around the country, my recommendations for various structural and substantive reforms follow.

### **1. STRUCTURAL**

#### **(i) LIST OF CRIMINAL OFFENSES ONLINE VIA CFR**

In addition to the crimes present in Title 18, a multitude of criminal provisions are scattered throughout the other 49 titles of the federal Code, which critics argue makes it difficult to search for what federal criminal law prohibits.

This lack of a properly organized, centralized system of federal criminal offenses stands in stark contrast to the systems in place in many states, or to the Model Penal Code (MPC).

Although some critics of the current system have called for Congress to undertake the monumental task of reorganizing the Code to address the potential Due Process concerns, I submit that Congress should prioritize its limited time and resources onto passing legislative fixes that reform our criminal justice system. For that reason, I propose that the Executive Branch should compile and publish on one webpage the various offenses that carry criminal penalties as it is the branch that oversees the various components that enforce those penalties.

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<sup>658</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

Certainly, the DOJ can work in conjunction with ICE, EPA, FDA, and other cabinet and component agencies to aggregate and publish this information on the internet. Doing so, also sets the stage for my next recommendation to address the issue of overfederalization and overcriminalization.

**(ii) AGENCY COORDINATION WHEN AFFECTING CRIMINAL PENALTY WITH DOJ**

Over multiple hearings, the Overcriminalization Task Force received expert testimony that often criminal penalties are added by federal agencies without coordination or input to the Department of Justice. As an institutional matter, one would expect that federal agencies, whose subject matter expertise is not criminal law or prosecution as is DOJ's, would want to and would actually consult DOJ prior to the adoption of criminal penalties in their regulations for better decision-making. Further, this coordination and comity would permit DOJ and the other agency to engage in discussions as to the suitability of criminal penalties as compared to increased civil sanctions, the parameters of the criminal penalty sought (and its relative severity to other criminal offenses), and the coordination of investigation, prosecution versus civil suit, and the purpose of the sanction. Since DOJ's share of the budget will include funding BOP and the salaries of the federal prosecutors on the civil and criminal level who are called upon to enforce those laws, as a matter of courtesy, comity, and collaboration, this makes sense.

**(iii) EXPANDING THE EXPEDITED CLEMENCY INITIATIVE**

On April 23, 2013, the DOJ announced its new expedited clemency initiative The Executive Clemency Initiative will be an expedited process (in addition to the existing pardon process) for inmates who meet all 6 of the following criteria:

- Currently serving a federal sentence that would be substantially lower if individual was convicted and sentenced today
- Nonviolent, low-level offender with no ties to organized crime
- Have served at least 10 years of the federal sentence
- No significant criminal history
- Good conduct during period of incarceration
- No history of violence prior to or during the period of incarceration

This is a commendable initiative, but I urge DOJ to give expedited clemency consideration to a broader category of individuals to ensure that it can right the wrongs that our federal criminal laws and policies have put into place. Understandably, the DOJ needs to prioritize its review beginning with the lengthiest sentences of life or numerical sentences that are de facto life sentences. That being said, given the myriad ways that our federal mandatory penalties have worked in conjunction with the prior DOJ guidance memoranda, there are many individuals who the DOJ should include in its expedited consideration, whose sentences include 5-, 7-, or 10-year mandatory terms, enhancements, or counts.

Furthermore, I hope that DOJ does not interpret the criterion of "no history of violence prior to the period of incarceration" to exclude those who were convicted of § 924(c) mandatory

consecutive counts but did not “use” (but merely “carried or brandished”) the firearm during the commission of the offense or those convicted of the 15-year mandatory minimum § 924(e) in cases in which the firearm was not present or being “used” in the commission of an offense. As explained earlier in this report, these mandatory firearm enhancements and consecutive counts appear to apply only to “violent” conduct, but a review of its application demonstrates that it has applied to firearms that have been legally purchased and registered that are neither present nor being used during an actual offense. I trust that DOJ will draw the appropriate distinctions when evaluating those cases.

#### **(iv) COORDINATION WITH STATES AND LOCAL PROSECUTORS**

Another area of comity, courtesy, and collaboration that exists is between the federal government and state and local governments. As the Overcriminalization Task Force has heard, there are constitutional concerns about DOJ infringing upon the general police power of the states. Moreover, the data from the states demonstrates that states have registered much greater successes in reducing overcrowding, out-of-control correctional spending, recidivism, addiction, and crime.

From a constitutional and pragmatic perspective, our federal criminal law enforcement should proceed with restraint. This is, by no means, a new observation or recommendation.

In fact, almost 20 years ago, in 1995, the Judicial Conference adopted policies encouraging Congress "to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism," and emphasized that "[i]n principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."

Based upon the experience of federal judges around the country, the Judicial Conference specifically identified five types of criminal offenses it deemed appropriate for what the Constitution intended to be limited federal jurisdiction:

- Offenses against the federal government or its inherent interests;
- Criminal activity with substantial multistate or international aspects;
- Criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
- Serious, high-level or widespread state or local government corruption; and,
- Criminal cases raising highly sensitive local issues, such as corruption.

In addition to reserving federal prosecution for these enumerated categories of offenses, the Judicial Conference recommended that Congress review existing federal criminal statutes with the goal of eliminating provisions that no longer serve an essential federal purpose. In addition, the Judicial Conference recommended that Congress consider using "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.

Finally, the Judicial Conference recommended that Congress and the Executive Branch undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in the federal or state systems.

Similarly, after analyzing federal sentencing data and practices and summarizing federal prison overcrowding and growing correctional spending in comparison to state reforms, **the Urban Institute recommended that** the DOJ “only accept certain types of drug cases, divert cases to states, and reduce drug prosecutions.”

Much like the Justice Reinvestment Initiative that brings together stakeholders in order to come to the best result, federal prosecutors working in conjunction and direct collaboration with state and local law enforcement, prosecutors, and communities lead to the evidence-based practices and sustainable results.

U.S. Attorneys have the incredible ability to exercise leadership and effectuate change on the federal, state, and local levels through their investigative and charging decisions as well as their coordination and collaboration with law enforcement. Certainly, presenting an indictment to the grand jury or filing an information to bring federal criminal charges are powerful weapons in a prosecutor’s arsenal. But if the prosecutor’s dual goals are crime prevention and justice, there are other weapons in that arsenal that are just as effective without the casualties.

One such example is U.S. Attorney for the District of South Carolina Bill Nettles. In his words, “[w]hat i want to do is to make the people’s lives who are law-abiding citizens in this community better. Incarceration is no longer the goal, but is one of many tools available to allow you to effect your goal of improving their lives. It represents a fundamental shift, a seismic shift in terms of how you’re viewing what you’re doing. When you declare a ‘war on drugs,’ the community sees the cops as the occupiers, and the cops see the people in the community as enemy combatants. Well, that’s not the way it’s supposed to be.”

This U.S. Attorney has instructed the federal prosecutors in his office to work with local prosecutors, local law enforcement, probation officers, and community members to identify local drug dealers. Working together, federal and local prosecutors build criminal cases against them by reviewing records for outstanding warrants and conducting undercover drug buys. Federal and state prosecutors and law enforcement, together with the low-level drug dealer’s family members, religious leaders, and other members of the community, confront the dealers with the criminal cases built against them, providing them with the option of the criminal charge (and prison) or participation in Nettles’s pilot program, the Drug Market Intervention Initiative. This program helps the dealers find legitimate jobs, offers them help with drug treatment, education, and transportation, under the theory of providing them with the opportunity to provide for themselves to permit them to leave their drug dealing behind.

The men and women who are chosen for this program are told that not everyone gets this chance as each city has finite resources. Thus far, the program has been limited to only certain low-level offenders, with limited criminal histories and no violent crimes. For a period of time, typically more than a year, they are monitored to ensure that they remain law-abiding citizens, including regular drug testing, drug treatment, education, failure to comply with any of those

obligations will result in arrest. If they do, they will remain free of the criminal justice system. However, unless and until the successful completion of the program—the certainty of arrest, indictment, and prison remains. This means that if any of the local or federal officials involved receive complaints about anyone involved in the program, the judge can sign off on already prepared arrest warrant. As U.S. Attorney Nettles explains “[t]his is what some people call a motivated employee.”

The program has debunked the myth that drug dealers live a life of luxury; in truth, only those at the very top of the drug organization live that life. For low-level drug dealers, a steady paycheck from a legitimate source is actually more lucrative than the drug business. Research has demonstrated that most crimes are motivated mainly by desperation borne of poverty, and Nettles’s pilot program puts this knowledge to use, by providing these offenders with the opportunity for economic advancement and financial security as a way out.

Nettles’s plan was modeled on a decade-old program that local law enforcement officials had launched in High Point, North Carolina. The High Point Police Department recognized that the “war on drugs” was feeding the divide between minority communities and law enforcement so it sought to reform its established practice of undercover buys and arrests (“buy-busts”) and police raids. By pooling law enforcement, social service, and community resources and involving the dealers’ family members, officials were able to virtually eliminate the open-air drug markets in High Point. In one neighborhood in particular, violent crime was still down 57 percent five years after the program was implemented.

Seeing those successes, Nettles hoped to implement a similar program in his own state and picked the city of North Charleston as the inaugural one due to its high crime rate (it was the seventh-deadliest city in America) and the support from local leaders. Out of the 8 drug dealers who were not arrested or charged criminally and chose to participate in the program, four have not reoffended, one is up for promotion as a sanitation worker and another recently earned his GED.

Even though law enforcement officers initially did not approve of the plan, after participating they were persuaded that it was leading to better results. In fact, the Assistant Police Chief who oversaw the program in North Charleston reminisced that his department was inundated with calls from surrounding cities that were outside of his jurisdiction that were interested in the programs—calls from street-level dealers themselves. The Assistant Police Chief credits the success of the program to the fact that it helped not only the drug dealers themselves but their families and communities. Parents were no longer taken away from their families, children grew up in stable and supportive environments, steady legitimate employment provide not only financial security but also health benefits, saving the family and the community from the high costs of reliance on hospital emergency rooms, shelters, and other social services. Nettles expanded the program to Aiken and Charleston Farms, which saw their crime rates drop.

DOJ should share success stories like these and train U.S. Attorneys in the 93 offices to develop and implement similar innovative practices. Even for less labor-intensive cooperation, coordination among prosecutors and law enforcement ensure that parallel investigations,

prosecutions, and sentences do not occur---all of which not only save federal resources but also preserve the intended balance of state and federal power.

#### **(v) CREATING A MANDATORY PENALTY REVIEW SECTION**

As discussed in greater detail earlier, there is tremendous inconsistency among the 94 federal judicial districts nationwide in terms of charging mandatory minimums (and whether conspiracy and/or stash houses and/or sentencing manipulation tactics have been employed to reach the triggering drug quantity), mandatory 851 enhancements that double those minimums (even up to mandatory life), mandatory 924(c) consecutive counts, and mandatory ACCA enhancements. Simply put, in some districts, these are never charged while in others they are routinely charged. Just as justice should not depend on the arbitrary date of sentencing, justice similarly should not depend on geography. In order to ensure that the directives of the Holder memo are being applied uniformly, that only kingpins and high-level operatives are being targeted as Congress intended, the DOJ has a duty to oversee and approve the use of the most powerful and destructive weapons.

As part of its oversight function, DOJ should question which offenders are worth \$500,000 or \$1,000,000 to incarcerate federally (the cost of a 15-year-sentence or 30-year sentence, respectively) versus referring those prosecutions to the state.

Although DOJ grants each individual United States Attorney's Office with broad and wide-ranging authority,<sup>659</sup> that authority is limited in certain instances. For federal prosecutions where the death penalty is sought as punishment, the DOJ requires pre-indictment review, other detailed procedures and submissions, and approval before the individual AUSA or U.S. Attorney's Office may proceed.

The purpose of the DOJ's "Capital Case Review Process," outlined in Chapter 9-10.000 of the Manual, is to ensure

[e]ach such decision must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors—such as a defendant's race, ethnicity, or religion—will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.<sup>660</sup>

This is overseen and accomplished by the Capital Case Review Committee, which is comprised of the Chief of the Capital Case Unit, a senior DOJ attorney with capital experience, and senior AUSAs or U.S. Attorneys with capital trial experience. This expert committee reviews every case seeking authorization for the federal death penalty. Their individualized consideration of appropriate factors relevant to each case, includes:

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<sup>659</sup> U.S. Attorney Manual at 9-2.001. The U.S. Attorney within his/her district has plenary authority with regard to federal criminal matters with this authority exercised under the supervision and direction of the Attorney General and his/her delegates.

<sup>660</sup> *Id.* at 9-10.030.

- a written submission from the prosecuting attorney stating the intention and reason for intending to seek the federal death penalty<sup>661</sup>
- “evaluating each case on its own merits and on its own terms”<sup>662</sup>
- “[n]ational consistency requires treating similar cases similarly, when the only material difference is the location of the crime” and “contextualize[ing] a given case within national norms or practice . . . to reduce disparities across districts”<sup>663</sup>
- weighing aggravating and mitigating factors<sup>664</sup>
- consultation with the victim and victim’s family<sup>665</sup>
- fairness, national consistency, statutory requirements, and law-enforcement objectives<sup>666</sup>
- any and all materials submitted by defense counsel<sup>667</sup>
- “any allegation of individual or systemic racial bias in the Federal administration of the death penalty”<sup>668</sup>

The Capital Case Section has at least 90 days to evaluate the information and render its decision on whether to permit a capital case to move forward though the Attorney General is ultimately the final arbiter.<sup>669</sup> If the prosecution with the death penalty is approved to proceed, the prosecuting attorney must ensure that the Capital Review Section is kept informed of any and all updates regarding the case.<sup>670</sup>

**After reviewing and analyzing federal sentencing data and the practices that had driven the rapid increase in federal prison population and correctional spending, the Urban Institute, based upon its expertise as the implementation partner for the 17 JRI states recommended that the DOJ:**

- only accept certain types of drug cases
- divert cases to states
- reduce drug prosecutions
- modify charging practices to reserve the application of mandatory minimum sentences, thus conserving prison bed space and taxpayer money

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<sup>661</sup> *Id.* at 9-10.060. “Extenuating circumstances may include, for example, a need to present capital-eligible charges to comply with the Speedy Trial Act, to address public safety concerns, or a need to collect and/or analyze additional information necessary to determine whether to recommend seeking the death penalty.”

<sup>662</sup> *Id.* at 9-10.140.

<sup>663</sup> *Id.*

<sup>664</sup> *Id.*

<sup>665</sup> *Id.* at 9-10.100. Additionally, the victim’s family shall be kept informed of all final decisions regarding the death penalty decision.

<sup>666</sup> *Id.* at 9-10.140.

<sup>667</sup> *Id.* at 9-10.030.

<sup>668</sup> *Id.*

<sup>669</sup> *Id.* Each decision reached must be based upon the facts and law applicable to the case and be set within a framework of “consistent and even-handed national application of Federal capital sentencing laws.” In addition, a mandatory pre-indictment consultation with the Department of Justice’s Capital Case Section exists to assist streamline the processes of preparing submissions pursuant to chapter 9-10.000, ensure charging documents are properly prepared, and help ensure applicable deadlines are met. *Id.* at 9-10.040.

<sup>670</sup> *Id.* at 9-10.180.

We have seen DOJ's oversight function when it comes to deciding which out of the many cases that are eligible for the federal death penalty, the DOJ intends to actually pursue that most extreme penalty. In part out of recognition of the severity of the penalty but also out of the financial, institutional, and human toll that penalty has, DOJ has rightly concluded that its use must be restrained and pursued in the most egregious cases.

The DOJ should require the same institutional safeguards for uniformity and restraint when it charges and ultimately determines the sentence that mandates someone to grow up, grow older, and die behind bars, as many of these mandatory minimums, enhancements, and consecutive counts do. This would decrease many of the unwarranted disparities currently seen in the system and ensure that these draconian penalties are reserved for the kingpins, leaders, organizers, and cartel heads that Congress intended.

Admittedly, upon a superficial review, the Holder memo does implore federal prosecutors to use their judgment as to which offenders should receive these mandatory penalties. But examined closely, this is sophistry at its best: the solution to the demonstrated practice of widely divergent and unchecked inherent discretion by federal prosecutors to seek these penalties against those for whom they were not intended is to ask those same prosecutors to think twice before using that same unchecked discretion that is known to diverge wildly based upon judicial district for offenders who are guilty of similar behavior. That makes no sense. We have the saying "when you're holding a hammer, everything looks like a nail" for a reason: a recognition that often those wielding a powerful weapon require supervision and oversight to ensure that it is being wielded judiciously, wisely, and evenly.

The DOJ's institutionalized recognition of this concept is evident in its creation of the Capital Case Section with DOJ that is staffed with high-level trial attorneys with significant capital case experience. Discretion, wisdom, and judgment are skills that are honed over the course of a career. The necessary perspective as to which offenders deserve the two harshest penalties a human being can receive---the death penalty or a life sentence (either de jure or de facto based upon the number of years sought)---vest in those who are at the capstone of their career, not the early stages of it. All human beings are subject to human failings. Creating a backstop to ensure that prosecutorial discretions are made on the basis of reason than emotion puts that knowledge into practice. The detachment of the Capital Case Review Section and lack of direct personal involvement with opposing counsel or the offender or law enforcement agents ensures that decisions are not made vindictively, emotionally, or for any other inappropriate reason. The DOJ should extend the rationale behind its Capital Case Review Section and create an analogous Mandatory Penalty Review Section, staffed by high-level DOJ and a geographically-diverse selection of high-level Assistant U.S. Attorneys or U.S. Attorneys with significant expertise and experience in offenses requiring mandatory penalties so that the committee may impart not only its subject matter expertise (e.g. drugs, guns, or other offenses for which mandatory penalties apply) but also its wisdom, judgment, and perspective gleaned from the perspective of careers spanning several thousand cases each. The prosecutor's duty to pursue justice, not merely convictions, requires at least this when imposing the harshest penalties our country permits.

**(vi) MORE JUDICIOUS USE OF STASH-HOUSE/REVERSE STINGS**

The Bureau of Alcohol, Tobacco, Firearms, and Explosives, in addition to other federal law enforcement agencies, have used “reverse stings” or “storefront operations” or “stash-house stings” to lure and entice individuals into fictitious crimes (imaginary drugs, imaginary robberies) for which the penalties are real, mandatory, and harsh. The ATF has engaged in more than 1,000 of these schemes, 365 of them over the past decade.<sup>671</sup> These schemes originated in Miami in the 1990s, when the ATF and the Miami-Dade Police Department started using these reverse stings to target violent drug robberies. Since then, these practices have spread across the country.

Since the undercover agents can set the quantity of drugs and firearms in these imaginary scenarios, very often the threshold amounts for mandatory minimums, enhancements, and consecutive counts are met, resulting in sentences of up to life in prison.

Over the past several years, federal courts around the country have questioned these practices, with the matter reaching a fever pitch this year.

In March 2014, U.S. District Judge Otis D. Wright II in Los Angeles dismissed criminal charges against two defendants, which carried mandatory minimums of 10 years for the drug charges followed by additional mandatory consecutive 5-year-sentences for the gun charges, on the basis of “outrageous government conduct” and described the stash-house robbery reverse sting as the ATF “trawling for crooks in seedy poverty-ridden areas---all without an iota of suspicion that any particular person has committed similar conduct in the past” and having “goaded” the defendants into acquiring firearms that they did not own, such that ATF became an organizer, leader, and partner to the crime, rather than a passive observer.<sup>672</sup> “The government [is] hitting individuals . . . where they are most vulnerable: their depressed economic circumstances. But for the undercover agent’s imagination in this case there would be no crime.”<sup>673</sup> Indeed, the judge found that the reverse sting had crossed the line from being a justifiable investigative tool to an easy means of securing convictions “designed to never fail.”<sup>674</sup> “Society does not win when the government stoops to the same level as the defendants it seeks to prosecute. Especially when the government has acted solely to achieve a conviction for a made-up crime.”<sup>675</sup>

In May 2014, U.S. District Judge Manuel L. Real in Los Angeles dismissed similar drug and gun charges against three defendants, which carried similar mandatory minimums and consecutive counts, on the grounds that ATF and the prosecution “steers too close to tyranny” as the ATF agents initially knew only that the defendants “were from a poor neighborhood and minorities.”<sup>676</sup>

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<sup>671</sup> Erik Eckholm, *More Judges Question Use of Fake Drugs in Sting Cases*, N.Y. TIMES, Nov. 20, 2014; Victoria Kim, *Judges Question ATF Stings That Lure Suspects Into Fictitious Stickups*, L.A. TIMES, Nov. 19, 2014.

<sup>672</sup> *Id.*

<sup>673</sup> *Id.*

<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

<sup>676</sup> *Id.*

In July 2014, USA Today published its unofficial national review of court files involving these practices.<sup>677</sup> It found that 9 out of every 10 defendants imprisoned as a result of such things were African-American or Latino, which far exceeds the ratio of these minorities in the general population or of those convicted on charges of federal robbery, gun, and drug offenses in other cases.<sup>678</sup>

In November 2014, a federal appeals court in Chicago mandated a new trial to allow evidence of possible entrapment for a defendant who said he had been pressured into planning the robbery for which he was sentenced to nearly 27 years when the trial judge did not permit him to prevent an entrapment defense.<sup>679</sup>

Other federal judges have demanded data from ATF to help them explore whether these practices involve illegal racial profiling and selective prosecution, as the vast majority of them involve African-American or Latino defendants.

Given finite law enforcement resources, we must question whether this is how we want law enforcement to prioritize their time, effort, and resources: setting up elaborate imaginary crimes or investigating and prosecuting the real crime being committed? In a dissenting opinion to a Ninth Circuit opinion that found ATF's tactics of looking for potential robbery crews in "a bad part of town" "troubling" but insufficient justification to overturn the defendants' convictions, "[t]he United States has enormous resources that could be used to tempt and trap criminals. If these resources are deployed to fire the imaginations of dreamers of easy wealth and turn them to conspiring to commit a crime, our government has been the oppressor of its people."<sup>680</sup>

Federal law enforcement officials explain that these "reverse stings" are a reliable and necessary tool that enables them to target violent drug robberies that they claim are seldom reported and difficult to investigate. On the other hand, these stings are criticized for sweeping up small-time criminals with no history of armed robbery or serious drug dealing and are homeless, indigent, or mentally ill, who would be hard-pressed to turn down the opportunity for quick cash, rather than nabbing those suspected of committing similar violent drug robberies in the past.<sup>681</sup>

Rather than responding to crime that has occurred as the result of the offender's initiative, "reverse stings" exploit desperation and bait individuals who are financially-distressed with sums of money beyond anything they have ever seen for schemes that are presented as low-risk, high-reward, "sure things" that they would regret passing up. Use of stash-houses and "reverse stings" should therefore not be used as a dragnet to entice unsuspecting victims into committing a crime but judiciously and only as a tool to gather evidence against suspicious targets who have been previously identified.

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<sup>677</sup> *Id.*

<sup>678</sup> *Id.*

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

## **(vii) DEMILITARIZATION OF LAW ENFORCEMENT**

The militarization of law enforcement began at the end of the 1960s when the Los Angeles Police Department created the Special Weapons and Tactics Unit, now commonly known as SWAT. This specialized tactical unit was designed to handle high-risk confrontations with barricaded gunmen or hostage-takers.

However, in the 50 years since its inception, these SWAT units have been used nationwide by state and local law enforcement agencies in a much-broader array of situations than initially intended. Militarized SWAT teams were deployed approximately 3,000 times a year in the 1980s. Twenty years later in the mid-2000s, those deployments were fifteen times--- at 45,000.

In its report on this issue, the ACLU analyzed more than 800 incident reports from 20 state and local law enforcement agencies from 2011 to 2012. It found that approximately 80% of SWAT deployments were not to confront barricaded gunmen or to negotiate the release of hostages but for the prosaic task of serving search warrants. In two-thirds of those search warrant cases, law enforcement officers broke down doors, tossed flash-bang grenades, and aimed guns at the occupants.

Admittedly, the ACLU report did not analyze all state and local law enforcement agencies nor every deployment of SWAT teams thus, it cannot be said to be comprehensive. Even so, the practice of using SWAT teams to serve warrants on a routine basis, as discussed by ACLU, has been documented elsewhere and represents the commonsense reality that if and when law enforcement officers have these units, these types of equipment, they tend to use them, even in scenarios for which they were never intended.

The Department of Defense and the Department of Justice should adopt the ACLU's recommendations to:

- reduce the distribution of military equipment to law enforcement
- insure that any such equipment is used only by properly trained personnel in the circumstances for which it was intended
- collect data on SWAT deployments
- collaborate with state and local governments to standardize criteria and oversight for when SWAT teams are deployed such that those units are deployed only in situations that warrant it proportionally.

Furthermore, Congress and the courts should exercise their constitutional oversight roles and check on this incredible power.

## **(viii) TRANSPARENCY AND ACCOUNTABILITY**

The deaths of Tamir Rice, Michael Brown, and Eric Garner---an unarmed African American boy, youth, and man---at the hands of state and local police officers have been the focus of our media over the past several months. The problem, however, is a longstanding one

with, unfortunately, thousands of more victims. Certainly, there are instances in which the use of force is necessary and proportional, but there are also cases in which it is neither. Transparency and accountability allow us to determine into which category a death falls, a critical determination when our police practices result in the deaths of the citizens they are meant to serve and protect.

The Death in Custody Reporting Act (H.R. 1447) passed the House and the Senate and is ready for the President to sign into law. This is a bill that unanimously passed in 2000 but expired in 2006. Since then, the Justice Department has not had access to accurate information on deaths in custody or during arrest. As a result, public debates about this crucial issue are not informed by complete, timely data.

Without this data, state and local law enforcement agencies have not been operating in either a transparent or accountable manner. Since death in custody reporting became optional in 2006, the Bureau of Justice Statistics has been unable to guarantee complete and accurate data. BJS has stopped reporting on deaths during arrest altogether, and underreporting in other areas has crept up. Other studies of the issue are anecdotal or simply inadequate, leading to confusion.

Without accurate and timely data, it is nearly impossible for policymakers to identify variables that lead to an unnecessary and unacceptable risk of individuals dying in custody or during an arrest.

The burden is not high---it requires state law enforcement agencies to provide basic information any time an individual dies in custody or during an arrest---information that virtually all police departments are already required to collect for internal purposes. This reporting of basic information—demographic data, the name of the detaining or arresting agency, and the basic circumstances of the death—permits the Attorney General of the United States to study this information and provide suggestions, including training and resources, to aid in reducing the number of such deaths.

Some opponents have expressed their concern about reporting data, to which I would ask what they are afraid the data will bear out and why they oppose transparency and accountability and the development of better practices and training nationwide to reduce these tragedies. If law enforcement is reserving the use of force for when it is necessary and only using that amount of force that is proportional, then the data will bear that out, as it will for the inverse.

Greater transparency and accountability by state and local law enforcement needs to occur to ensure that they are protecting and serving our citizens, rather than targeting and terrorizing them.

#### **(ix) “BANK OF TRUST” TO ADDRESS RACIAL DIVIDE**

Two days after the shooting of Michael Brown in Ferguson, Mo., a strikingly similar shooting occurred in Los Angeles, Cal., police officers, yet the interaction between law

enforcement and their communities has been just as strikingly different.<sup>682</sup> This comes more than a year after dozens of Los Angeles Police Department officers “were accused of tampering with evidence and physically abusing and framing suspects.”<sup>683</sup>

Less than 24 hours after Los Angeles police officers shot and killed Ezell Ford, an unarmed young African-American mentally ill man, who some witnesses say was not putting up a struggle, a ranking law enforcement officer at a nearby station called a grandmother and community organizer to work with her to determine what they could do to “quell rumors and hear what we need.”<sup>684</sup> While there have been numerous protests, including one that blocked traffic on city streets, since the shooting, the law enforcement response was much more subdued. Instead of hundreds of rifle-carrying officers with riot gear, tanks, and curfews in Ferguson, in Los Angeles, it was a “handful of bicycle-riding officers in polo shirts,” the Police Department Chief and other high-ranking officials at community meetings in local churches, routinely meeting with local residents and community leaders.<sup>685</sup>

Even though “a sense of distrust of the police remains,” “we have an infrastructure here where there are outlets for people to vent frustration and move into action.”<sup>686</sup> As the Chief of the Los Angeles Police Department acknowledged, “[w]e’ve learned that community outreach can’t wait for the day when you’re in trouble and need help.”<sup>687</sup> Thus, law enforcement has invested in creating a community support network in which the officers as “a matter of course” call local leaders, who, in turn, have direct lines to high-ranking police officials to request meetings and other reforms---all of which temper the “deep wounds” that surface “anytime something like this happens” due to the “L.A.P.D. [being] a pretty notorious not that long ago.”<sup>688</sup>

### **(x) CALL-LINE TO OIG/OVERSIGHT**

A necessary adjunct to uniformity, fairness, and accountability effectuated by the structural reform of consolidating review and approval of mandatory penalties, enhancements, and consecutive counts is the ability for judges, defense counsel, offenders, agents, state prosecutors, and state law enforcement to raise concerns about specific cases to those outside the charging office. Specifically, current procedure calls for the immediate supervisor or division chief within the U.S. Attorney’s office for that judicial district to oversee concerns raised by these other stakeholders. Certainly, funneling these concerns to decisionmakers and supervisors not associated with the office in question provides an additional layer of objectivity and accountability.

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<sup>682</sup> Jennifer Medina, *Despite Similar Shooting, Los Angeles’s ‘Bank of Trust’ Tempers Reaction*, N.Y. TIMES, Aug. 22, 2014, available at [http://www.nytimes.com/2014/08/23/us/despote-similar-shootings-steps-by-los-angeles-police-temper-reaction.html?\\_r=0](http://www.nytimes.com/2014/08/23/us/despote-similar-shootings-steps-by-los-angeles-police-temper-reaction.html?_r=0).

<sup>683</sup> *Id.*

<sup>684</sup> *Id.*

<sup>685</sup> *Id.*

<sup>686</sup> *Id.*

<sup>687</sup> *Id.*

<sup>688</sup> *Id.*

**(xi) METRIC FOR EVALUATION AND ADVANCEMENT AND PRISON FOR PROFIT**

Congress has not required the same kind of evidence-based performance metrics that the majority of our state counterparts have. Rather as our federal prisons have become more bloated, we have continued to attempt to solve the problem by increasing our correctional spending without an analysis of what is and is not working.

States have implemented measures to hold their prosecutors, law enforcement officers, and correctional institutions accountable. They have held prosecutors accountable for recidivism and crime rates in their jurisdiction. On the federal level, we should require the same of our prosecutors in addition to evaluating their collaboration with and deference to state law enforcement and prosecution to avoid parallel cases. As states have held their correctional officers and institutions accountable for increasing vocational, educational, and rehabilitative programs; decreasing the use of solitary confinement or other punitive measures; and reducing overcrowding and overspending, we should similarly hold the BOP to the same standards. Moreover, states have reduced or eliminated their use of private prisons as a result of their evidence-based strategies. On the federal level, we should do the same to reduce our reliance on private prisons and private contractors.

**2. DOJ/USAO CHARGING PRACTICES**

Before he became an Associate Justice of the Supreme Court of the United States, then-Attorney General of the United States Robert H. Jackson acknowledged in a speech to federal prosecutors that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”<sup>689</sup>

As prescient as this observation---and moral imperative---was at the time in 1940, it is even more so now in light of the tremendous transfer of sentencing power that federal mandatory minimums, enhancements, and consecutive counts have effectuated in the intervening 74 years.

Accordingly, the DOJ and U.S. Attorneys can wield their tremendous power over investigative, charging, and sentencing decisions in a more restrained, transparent, and accountable manner. The following recommendations would begin to immediately address and ameliorate the problems in our federal criminal justice system---without the need for any legislative intervention. DOJ has the exclusive ability to more precisely target those for whom these staggering mandatory penalties were intended---the primary driver of the exponential growth in our federal prison population and correctional spending.

**(i) DECIDE BETWEEN FINES AND CRIMINAL PENALTIES AND MISDEMEANOR VERSUS FELONY**

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<sup>689</sup> Attorney General Robert H. Jackson, THE FEDERAL PROSECUTOR, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940).

Depending on the offense, there are federal misdemeanors that cover similar conduct as existing federal felonies. We have seen states amend their criminal codes to reclassify certain offenses, particularly low-level drug and theft offenses. The Appendix to this report contains a list of federal misdemeanor offenses that are available to federal prosecutors in lieu of some felony offenses.

While not every federal felony has a misdemeanor analog, one of the primary drivers of our federal overcrowding --- and of our disparities in sentencing --- is drug sentencing. Even though the federal felony statute was intended by Congress to target kingpins, cartel heads, leaders, and organizers, the data demonstrates that it has far greater application, sweeping in low-level street dealers, addicts, couriers, mules, and the like---many of whom have existing substance abuse and/or mental health issues. Within the federal code, simple possession (21 U.S.C. § 844) is a misdemeanor, with enhancement provisions. Maintaining a drug-involved premises does not have a mandatory minimum or enhancement provisions and has a 20-year maximum.

When DOJ's review of the facts of the investigation demonstrate that the individual against whom federal charges are being considered is one of the most common low-level roles in a drug organization---courier, mule, street-level dealer, wholesaler---DOJ should, as states have done, and file a misdemeanor or felony offenses that diverts the offender from incarceration.

In particular, the continuing and indefensible disparity between crack and powder cocaine sentencing, which still exists at an 18:1 ratio in the federal felony statute does not exist under the federal misdemeanor statute.

Having a centralized office will aid the DOJ in determining which defendants are worth \$500,000 or \$1,000,000 of taxpayer money to incarcerate under existing mandatory minimums, enhancements, and consecutive counts and which are not.

## **(ii) PRETRIAL PRACTICES: SUMMONS VERSUS ARREST AND INCREASED USE OF BOND**

As states have recognized, the population of pretrial detainees contributes to the cost of incarceration and the use of prison bed space. Their solutions to reduce the pretrial population awaiting hearings include prioritizing summons over arrest warrants, increasing the recommendation for bonds that offenders are able to afford, and prioritizing pretrial detention for only the most serious risks of flights and demonstrated danger to the community. For example, Delaware reformed its law enforcement policies and practices to increase the use of criminal summonses rather than arrests to help reserve detention resources for those who pose a high risk to public safety.

Data demonstrate that pretrial detention of an offender was nearly 10 times more expensive than the cost of supervising that offender by a federal pretrial services officer.<sup>690</sup>

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<sup>690</sup> U.S. Courts, *Supervision Costs Significantly Less Than Incarceration in the Federal System*, available at <http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system>.

DOJ has wide latitude in deciding whether to pursue summons for initial appearances in court versus arrest warrants and in recommending bonds versus seeking detention (or bonds that are tantamount to detention). There are three types of bond available in federal court, listed in increasing onerousness: (1) personal surety (a.k.a. signature bonds) requiring merely a promise to appear, with the ability of the government to seize assets in the amount of the bond in the case of nonappearance; (2) percentage bond, requiring the deposit of a percentage of the total bond amount into the court's registry and returned with interest at the conclusion of all proceedings; and (3) corporate surety bond (a.k.a. a bondsman or a bounty hunter), which requires a 15% (or more) payment, which is nonrefundable, to a bondsman who assures the appearance of the offender or is personally responsible for the full amount of the bond to the court and thus will track the offender down in order to receive the return of his payment.

Given that the majority of federal criminal defendants are found to be indigent and appointed court-appointed counsel (either the Federal Public Defender's office or, in cases with a conflict, a private attorney under the Criminal Justice Act), logically most cannot afford a corporate surety bond or, depending on the percentage, even a high percentage bond. Thus, unless a bond is a personal surety bond or a percentage bond that the offender, his family, and friends can meet, often the bond recommended by the prosecutor is tantamount to detention, which vitiates the intent of the Bail Reform Act.

Moreover, as discussed earlier, some federal cases are based upon parallel state cases, in which the offender at issue has already received a personal recognizance bond, which would counsel that the federal prosecutor should consider that as a factor too.

### **(iii) PRETRIAL DIVERSION – MENTAL HEALTH, SUBSTANCE ABUSE, AND VETERANS**

As the majority of states have done, DOJ has the inherent authority, in the interim until Congress acts, to exercise its broad prosecutorial discretion powers.

Within DOJ's wide latitude in its charging decisions is pretrial diversion. Currently, this is the closest federal analogue we have to specialized drug and alcohol courts, mental health courts, and veterans courts, which the majority of states have turned to in their efforts to ensure that incarceration was reserved for the most serious and dangerous offenders, as their statistics demonstrated that offenders with these medical conditions comprised a significant driver of their prison population. These specialized courts and the federal pretrial diversion program promote the conservative value of accountability.

Moreover, based upon its research and expertise, the ABA has supported the use of greater pretrial diversionary tactics in the federal system. In particular, it found that lengthy sentences to offenders posing the greatest danger to the community via serious/violent offenses and creating alternatives for low-risk and non-violent offenders who are likely to benefit from rehabilitation services. Low-risk offenders could be placed under community supervision in programs that focus on substance abuse or mental illness treatments. These could be posed as deferred adjudication/diversion options that require a guilty or nolo contendere plea, that would be dismissed or expunged if the program is successfully completed so that collateral consequences would never be triggered. The ABA recommends that such programs not exclude persons with

histories of minor violence or second offenses due to the nature of mental illness and addiction, and anything implemented should provide flexibility for individualized considerations.

We need to train prosecutors and judges in exercising discretion. The impact of collateral consequences varies drastically between jurisdictions, and the discretion in prosecution and sentencing can significantly impact the collateral consequences imposed on individual offenders. It is the duty of prosecutors to seek justice rather than gain convictions, and judges to utilize discretion in ensuring that the punishment fits the crime.

There is far too much decentralization in the criminal justice system to enact sweeping national policy regarding these issues. It is therefore necessary that the federal government, states and localities develop programs to train personnel at all level of the criminal justice system to understand, adopt, and utilize factors that promote the sound exercise of discretion. This applies strongly to prosecutors, who are the gatekeepers to the justice system.

Prosecutors' offices should take efforts to consider more than just conviction records and aggregate sentence lengths when conducting performance evaluations. Doing so promotes prosecutors seek harsher punishments that may not be warranted by the crime committed, cause them to seek "trial penalties" by seeking harsher penalties against those that do not plead than they would otherwise be subject to, and avoid utilizing prospective diversion programs. Prosecutors should also take efforts to educate themselves on the collateral consequences of conviction in charging decisions.

#### **(iv) VACATE 924(c) STACKED COUNTS**

The DOJ's ability to offer immediate relief in cases in which 924(c) has been used to stack multiple, mandatory consecutive 5-, 7-, and 10-year sentences is best illustrated in the case of *United States v. Holloway*.<sup>691</sup>

Francois Holloway was sentenced to 57 years imprisonment in federal court for three counts of carjacking and using a gun during a violent crime, even though it was another person who carried the gun, not Mr. Holloway.<sup>692</sup> Back in 1996, at the original sentencing, the federal judge argued that "by stripping me of discretion," the three stacked/consecutive mandatory gun "require the imposition of a sentence that is, in essence, a life sentence."<sup>693</sup>

As the Sentencing Commission has recognized, 924(c) stacking is "excessively severe and unjust."

To be clear, no one argued that Francois Holloway was innocent, but rather that his 57-year mandatory sentence for carjacking and firearms counts, which was comprised of stacked 924(c) mandatory consecutive sentences, was excessive.

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<sup>691</sup> Monique O. Madan, *At Behest of Judge, U.S. Shortens Man's 57-Year Mandatory Sentence*, N.Y. TIMES, A20, July 30, 2014.

<sup>692</sup> *Id.*

<sup>693</sup> *Id.*

At first, federal prosecutors offered Mr. Holloway an 11-year plea bargain.<sup>694</sup> After Mr. Holloway turned that offer down and was convicted at trial, the law required that the judge sentence him to a consecutive 5-year-sentence for the first gun conviction, a consecutive 20-year-sentence for the second gun conviction, and a consecutive 20-year-sentence for the third gun conviction, even though those offenses were committed mere hours apart.<sup>695</sup>

At the behest of the trial and sentencing judge, the federal prosecutors agreed to vacate two of the three stacking convictions, such that Mr. Holloway was sentenced to a 17-year-sentence that he had been serving since 1996.<sup>696</sup> That 57-year-sentence was more than double the average federal sentence in that judicial district for murder.<sup>697</sup>

The judge was clear that “this is not an act of grace” but rather “an effort to do what we’re here to do: be fair and exercise justice.”<sup>698</sup> “Prosecutors also use their power to remedy injustices. Even people who are indisputably guilty of violent crimes deserve justice.”<sup>699</sup> The judge explained that Mr. Holloway’s sentence illustrated the “trial penalty” imposed on federal defendants who exercise their constitutional right to trial, who then face mandatory sentences “that would be laughable if only there weren’t real people on the receiving end of them.”<sup>700</sup> “There are no floodgates to worry about; the authority exercised in this case will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly. But the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences.”<sup>701</sup>

Even three of the carjacking victims told the federal prosecutors that the 17 years that the defendant had already served in prison was “an awfully long time, and people deserve another chance.”<sup>702</sup>

Another illustrative case is *United States v. Hungerford*, which involved a 52-year old “profoundly mentally disabled” woman with no prior criminal record, who was convicted of conspiracy, robbery, and using a firearm in relation to those crimes **even though** she had a limited role in the incident, had never touched a firearm or threatened anyone, and was so mentally ill that she believed she was innocent. Her boyfriend pleaded guilty and received a 32-year sentence, but because she did not cooperate, due in part to her limited involvement and hence knowledge, she was subject to a mandatory minimum sentence of 159 years---155 of which came from the mandatory stacked consecutive gun counts.<sup>703</sup> Only after fighting the sentence from prison and with aid from the federal judge, the government agreed in 2010 to vacate 6 of the 7 gun convictions, leading to her resentencing to 93 months.

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<sup>694</sup> *Id.*

<sup>695</sup> *Id.*

<sup>696</sup> *Id.*

<sup>697</sup> *Id.*

<sup>698</sup> *Id.*

<sup>699</sup> *Id.*

<sup>700</sup> *Id.*

<sup>701</sup> *Id.*

<sup>702</sup> *Id.*

<sup>703</sup> *United States v. Hungerford*, 465 F.3d 1113 (9<sup>th</sup> Cir. 2006).

Also, in Montana, the defendant Christopher Williams, a medical marijuana distributor, who owned guns was convicted of four counts of possessing a firearm during drug trafficking, which resulted in an 80-year sentence on just the stacked mandatory consecutive gun charges alone. After the jury verdict but before sentencing, the government agreed to drop three of the four gun counts. Citing the fact that these mandatory consecutive gun sentences were “unfair and absurd,” U.S. District Judge Dana L. Christensen sentenced the defendant to five years.

Federal prosecutors should move to vacate one or multiple “stacking” § 924(c) convictions to ameliorate the grossly disproportionate sentences that have resulted.

#### **(v) RECONSIDER IMMIGRATION OFFENSES (DHS, NOT BOP)**

Non-U.S. citizens are treated differently by the Bureau of Prisons and are subjected to a longer and more onerous term of incarceration than American citizens guilty and sentenced for the same behavior. These additional consequences are severe, unfair, and financially inefficient.

First, inmates with immigration detainees (i.e. those who do not have legal status in the U.S. and will be transferred to ICE upon their release from BOP) are not eligible to reduce their sentences by six, nine, or up to twelve months through their successful completion of this intensive, residential, substance abuse treatment program. It is estimated that the federal government has spent \$5.5 billion imprisoning people prosecuted for these border-crossing violations since 2005.<sup>704</sup> Since the Bureau of Prisons relies heavily on private prison contracts to house people sentenced for border crossing violations, the increase in immigrant convictions under federal criminal law has given a massive financial boost to the for-profit prison industry.<sup>705</sup>

Second, inmates who are not U.S. citizens will not qualify to spend the last 6 months of his sentence in a halfway house, effectively reducing the term of incarceration by 6 months, at an average cost of \$14,645.63 to the BOP for **each** inmate during that 6-month period. This is due to BOP policy that “after service of his sentence, the [deportable detainees] will be released to the custody of the Department of Homeland Security (“DHS”) for removal from the United States. Release into DHS custody can, and generally does, mean a further term of detention until his removal has been completed.”<sup>706</sup> Since deportable detainees are ineligible for release to a halfway house at the end of their sentences, this increases their term of imprisonment.<sup>707</sup>

Third, while a U.S. citizen is eligible to be housed at a minimum security facility, such as a less restrictive “camp” facility, a deportable detainee is not.<sup>708</sup> Under Bureau of Prisons policies, illegal alien inmates “shall be housed in at least a Low security level institution.”<sup>709</sup>

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<sup>704</sup> Alistair Graham Robertson, et al., GRASSROOTS LEADERSHIP, *Operation Streamline: Costs and Consequences*, (Sept. 2012), available at [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Sept2012\\_Report-final.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf)

<sup>705</sup> *Id.*

<sup>706</sup> *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 733 (E.D. Va. 2005).

<sup>707</sup> See Bureau of Prisons, *Chapter 4: Description of Drug Treatment Programs and Services 70*, available at <http://www.bop.gov/policy>.

<sup>708</sup> *United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1328 (D.N.M. 2005).

<sup>709</sup> Bureau of Prisons, Program Statement, *Inmate Security Designation and Custody Classification*, P5100.08 Ch. 5 at 9 (Sept. 12, 2009).

The Federal Bureau of Prison's Program Statement P5100.08, Chapter 5, pages 7-9 indicates that deportable alien status is considered a "public safety factor." According to Chapter 2, page 4 of the same document, "[t]here are nine Public Safety Factors (PSFs) which are applied to inmates who are not appropriate for placement at an institution which would permit inmate access to the community (i.e., MINIMUM security)."

Consequently, a non-U.S. citizen faces a longer period of incarceration (without the possibility of release to a halfway house) in a higher security, more restrictive setting than a citizen who is guilty of similar behavior. Other federal courts have recognized that below-guidelines sentences are appropriate given the harsher treatment illegal alien inmates will face, including ineligibility for early release and restricted facility assignments.<sup>710</sup>

Last but not least, at the completion of the sentence, the non-U.S. citizen will be deported. Because those inmates will inevitably be deported, a lengthy sentence is not necessary to protect the public. As detailed above, a long term of incarceration is not necessary to provide them with needed educational and vocational training, as current BOP regulations currently prohibit their participation.<sup>711</sup>

### **3. BOP**

BOP is the component DOJ agency that is responsible for administering the federal prisons and its associated programs. Federal prosecutors are the engines that drive the population entering the federal prisons. BOP has its distinct but similarly significant role in determining whether what, if any, portion of the offender's incarceration is rehabilitative and whether any of that rehabilitation is used as an incentive and a factor in determining any credits toward the sentence imposed by the judge. Thus, BOP too has inherent statutory authority---absent any legislative action---to start effectuating reforms that will have a considerable impact on the quantity and quality of the incarcerative time of federal prisoners.

DOJ warned that "[i]f we fail to reduce our prison population and related prison spending, there will continue to be fewer agents to investigate [f]ederal crimes; fewer prosecutors to bring charges; less support to State and local law enforcement, criminal justice partners and crime victims; less support for treatment, prevention and intervention programs; and cuts in other public safety priorities."

As BOP is a component agency of DOJ, DOJ may adjust its allocation of its appropriated budget to BOP and adjust the policies under which BOP operates at any time. Maine, for example, reduced overtime expenses for correctional officers out of the recognition that requiring overtime on a regular basis leads to overworked correctional officers, which increases the risk that mistakes are made thus lowering safety for the officers and the inmates, and

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<sup>710</sup> See *Zapata-Trevino*, 378 F. Supp. 2d at 1328 ("Because of his immigration status, Defendant may not be eligible for certain Bureau of Prisons programming, and must be placed, at the minimum, in a low-security facility rather than at a more relaxed 'camp.' Additionally, Defendant will not be eligible for early release.").

<sup>711</sup> Indeed as one federal court noted, "[w]hen a defendant will ultimately be removed and sent out of the country, there is less need for the sentence imposed to protect the public from further crimes of the defendant, or to provide the defendant with needed educational or vocational training." *Ramirez-Ramirez*, 365 F. Supp. 2d at 733.

increased correctional expenditures. Hiring additional correctional officers in lieu of increasing overtime for existing correctional officers not only lowers staff-to-inmate ratio but also ensures that correctional officers are not overworked and vulnerable to mistakes.

The Urban Institute noted that “in terms of immediacy, the BOP itself—without any legislative changes required—could within its authority and discretion begin to alleviate overcrowding by providing early release or transfer to community corrections for those already in BOP custody.” It found based upon its review of the federal sentencing data and experience with the 17 JRI states that “[e]xpanding such opportunities can free up bed space through the early release of those who participate in intensive programs was proven at the state level to reduce recidivism”<sup>712</sup>

The recommendations that follow are within the BOP’s inherent authority and discretion, without any legislative changes required, and build upon the Urban Institute’s recommendation and borrow from state experience.

**(i) MOVE TO HALFWAY HOUSE OR E/M OR HOME CONFINEMENT EARLIER**

As demonstrated by reforms implemented successfully by the states, transferring inmates to community confinement (e.g. halfway house), home confinement, or electronic monitoring towards the end of their term of incarceration or earlier than their prior statutes provided for, has reduced overcrowding and reduced correctional spending with no detrimental impact on crime or recidivism rates. Ohio, for example, diverts incarcerated inmates to serve the last full 6 months of their sentences in halfway houses, most of which are operated by non-profit organizations.

Typically, BOP inmates are eligible to spend the last 6 months at a halfway house, but due to a lack of vacancy at halfway houses, not all eligible inmates spend the full 6 months at a halfway house. Given that the overwhelmingly majority of federal inmates are nonviolent---93%---BOP should consider, as states have done, prioritizing home confinement or electronic monitoring for those inmates over halfway houses, in order to reserve bed space at those more structured and secure facilities for the 7% of inmates who were convicted of violent offenses.

Halfway houses, electronic monitoring, and home confinement are all options that offer supervision, accountability, and public safety benefits at a fraction of the cost. Respectively, the savings (both bedspace and fiscal) created by diverting inmates to these alternatives for 6 months at the end of their sentence are as follows.

- Halfway house or community correction center or residential reentry center (per BOP’s criteria) **would cost \$10,440 to \$ 20,160 depending on the inmate and the facility**<sup>713</sup>
- Supervision by a probation officer **would cost \$1,942.20**
- Home confinement, with or without electronic monitoring, **would cost \$900 to \$2700**

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<sup>712</sup> Stemming the Tide at 4.

<sup>713</sup> See <http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf>

That same 6-month period of incarceration in the federal system would cost, on average, **\$14,645.63.**

The significant correctional savings can be reinvested in expanding community confinement, electronic monitoring, and home confinement, and correctional officers reassigned to aid in these endeavors, if necessary.

**(ii) EXPAND RDAP**

The Residential Drug Abuse Program (RDAP) is a voluntary, 500-hour, nine-to-twelve-month program of individual and group therapy for federal prisoners with substance abuse issues. Federal prisoners who successfully complete the program are eligible to have BOP reduce their sentences. If the sentence length is 30 months or less, the maximum reduction is 6 months. If the sentence length is 31-36 months, the maximum reduction is 9 months. If the sentence length is 37 months or more, the maximum reduction is 12 months.

Unfortunately, even though up to 12 months off the sentence is authorized, the Urban Institute found that most inmates receive much less credit than that even though they have satisfied the requirement. Currently, anyone who completes the RDAP is likely to get less than their maximum authorized sentence reduction (the average sentence reduction is 8 months), due to the long waiting lists to participate in the programs means that by the time an inmate enters and completes the program, he will usually already have less than a year left to serve on his sentence.

Moreover, not every federal prison provides the RDAP program.<sup>714</sup> Of the federal prisons that do, the following inmates are barred from participating in the program even if they have a qualifying “verifiable substance abuse disorder”:

- Those with less than 24 months of their sentence remaining
- ICE or INS detainees
- Pretrial inmates
- State inmates or military inmates
- D.C. offenders who committed their crimes before August 5, 2000
- Federal prisoners who committed their crimes before November 1, 1987
- Prisoners with prior felonies or misdemeanors for homicide, forcible rape, robbery, arson, kidnapping, aggravated assault, or child sexual abuse offenses
- Prisoners currently serving time for a felony crime that involved:
  - The actual, attempted, or threatened use of physical force OR
  - Serious potential risk of physical force OR
  - The carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device) OR
  - Sexual abuse committed upon children OR

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<sup>714</sup> See [http://www.bop.gov/inmate\\_programs/substance.jsp](http://www.bop.gov/inmate_programs/substance.jsp) for the most recent listing.

- An attempt or conspiracy to commit any of these types of offenses OR to commit homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or child sexual abuse;
- Prisoners who are not eligible for placement in a halfway house or home confinement
- Prisoners who already received the RDAP sentence reduction for completing the RDAP while serving a previous prison term (i.e. if a person was in federal prison before, completed the RDAP, and got the RDAP sentence reduction, then was released, reoffended, and returned to federal prison, the prisoner will not get the RDAP sentence reduction for completing the RDAP during their second prison term)
- D.C. Code offenders sentenced for a “crime of violence” under D.C. Code § 23-1331(4)

Expanding the RDAP program to all BOP facilities and all inmates does not require any legislative changes. In point of fact, the authorizing statute is expansive: it directs BOP to provide “residential substance abuse treatment (and make arrangements for appropriate aftercare) . . . for all eligible prisoners.”<sup>715</sup>

Based upon its analysis of the 17 JRI states’ successful reforms and federal sentencing data, the Urban Institute concluded that “[g]iving program graduates the full 12 months of credit would save money and encourage inmates to participate in a program proven to decrease post-release drug use and re-arrest rate.”<sup>716</sup>

Accordingly, BOP should consider:

- Prioritizing participation by those with longer sentences
- Applying the maximum authorized reduction in each instance
- Setting the maximum authorized reduction to a standardized percentage reduction of the sentence (i.e. 33%)

Doing so would yield three immediate benefits:

- Reducing our federal overcapacity
- Reducing correctional spending problems. Each year reduction for each inmate results in \$29,291.25 in average savings.
- Reducing one of the major recidivism factors. Unaddressed substance abuse issues are responsible for technical violations of supervised release and/or rearrest for new offenses, which are committed to support the individual’s addiction.
- Supporting accountability and incentivizing positive and productive behavioral changes.

**(iii) CREATE SIMILAR PROGRAM FOR MENTAL HEALTH**

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<sup>715</sup> 18 U.S.C. § 3621.

<sup>716</sup> Stemming the Tide at 5-6.

In a 2006 Special Report, the Bureau of Justice Statistics (BJS) estimated that 78,800 adults with mental illness were incarcerated in federal prisons. Indeed, about 4 in 10 male inmates and 6 in 10 female inmates reported a combination of physical health, mental health, and substance abuse conditions, including an estimated one-tenth of male inmates and one-quarter of female inmates with co-occurring substance abuse and mental health conditions.<sup>717</sup> The research demonstrates that many individuals with substance abuse issues also have undiagnosed and/or untreated mental health issues (i.e. “dual diagnosis”) and that their substance abuse has functioned as self-medication. Clinical experience with co-occurring mental health and substance abuse problems has shown that incomplete attention to one type of problem decreases the likelihood of successfully treating the others.<sup>718</sup> Thus, the data demonstrates that unless and until the underlying mental health issues are addressed, the substance abuse will continue out of necessity.

The ACLU found that

[t]he damaging effects of solitary confinement on people with mental illness are exacerbated because these prisoners often do not receive meaningful treatment for their illnesses. While mental health treatment in many prisons and jails is inadequate, the problems in supermax prisons and segregation units are even greater because the extreme security measures in these facilities render appropriate mental health treatment nearly impossible. For example, because prisoners in solitary confinement are usually not allowed to sit alone in a room with a mental health clinician, any “therapy” will generally take place at cell-front, often through an opening in a solid steel door, and necessarily at a high volume where other prisoners and staff can overhear the conversation. Most prisoners are reluctant to say anything in such a setting, not wanting to appear weak or vulnerable, so this type of “treatment” is largely ineffective.<sup>719</sup>

Thus, an important reform that BOP should consider adopting in conjunction with expansion of RDAP is screening, diagnosis, treatment, and similarly intensive programs for mental health issues that occur prior to and in conjunction with substance abuse treatment.

States have implemented specialized mental health programs that place offenders suffering from mental illness, mental disabilities, dual diagnosis, or serious personality disorders in supervised, community-based facilities with inpatient or outpatient professional mental health treatment. Participating inmates receive rewards for compliance with their treatment plans and supervision conditions and receive assistance for housing, other health care, and life skills resources that promote their recovery, prevent relapse, and prepare them to reintegrate successfully. Maine, for example, has reduced the number of mentally-ill who are incarcerated,

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<sup>717</sup> Kamala Mallik-Kane & Christy A. Visher, THE URBAN INSTITUTE, *Health & Prisoner Reentry: How Physical, Mental & Substance Abuse Conditions Shape the Process of Reintegration 1*, available at [http://www.urban.org/uploadedpdf/411617\\_health\\_prisoner\\_reentry.pdf](http://www.urban.org/uploadedpdf/411617_health_prisoner_reentry.pdf)

<sup>718</sup> *Id.*

<sup>719</sup> *The Dangerous Overuse of Solitary Confinement in the U.S.*, ACLU (2014), available at [https://www.aclu.org/sites/default/files/assets/stop\\_solitary\\_briefing\\_paper\\_updated\\_august\\_2014.pdf](https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf).

diverting them instead to specialized care facilities, to improve the quality of treatment they receive from licensed medical staff and to reduce the risks posed to those vulnerable inmates.

#### **(iv) CALCULATION OF GOOD TIME CREDIT**

The BOP is statutorily authorized to provide federal prisoners with “good time”/ “good conduct time” credit, which is earned for “good behavior,” defined as “exemplary compliance with institutional disciplinary regulations.” This “good time” credit reduces a prisoner’s actual time in BOP custody.

Section 3624(b) provides:

a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.

In reality, even though the statute provides for a maximum of 54 days of good time for each year of the sentence imposed, based on the way the BOP calculates good time, prisoners only earn a maximum of 47 days of good time for each year of the sentence imposed.

The plain, clear, and unambiguous text of the statute would lead one to assume the following: that for every year of imprisonment, prisoners should earn up to 54 days of credit against their entire term of imprisonment. (“Term of imprisonment” is widely understood as meaning the sentence of imprisonment imposed by the judge.).

Thus, for example, a prisoner is serving a term of imprisonment of five years (1,826 days, including an extra day for a leap year). His conduct is excellent and he earns all possible good time. He should serve 85% of each year sentenced. He should earn 54 days of good time as he completes each set of 311 days (for a total of 365 days per year). By the end of his five sets, he should serve 1,555 days of his 1,826-day sentence—almost exactly 85%.

However, BOP’s current rules on calculating good time are very different. The BOP uses a more complicated and complex calculation that ends up awarding only a 47-days-per-year reduction of the sentence imposed, instead of the 54 days per year mandated by the statute. This is because, since 1988, the BOP has awarded good time credit based on the days actually served by the prisoner, not the sentence (or “term of imprisonment”) imposed by the judge. First, BOP subtracts 14.8% from the sentence (“term of imprisonment”) imposed by the judge to determine how many days of the total sentence imposed by the judge will actually be served by the prisoner. Next, the BOP multiplies the time actually served by 14.8% to determine how much of the sentence actually served should be considered for good time credit. The arithmetic flaw with this calculation is that BOP’s determination of good time credit added to time actually

served does not equal the full sentence imposed (“term of imprisonment”), which led to the adoption of the 47 day maximum.

Although there have been attempts over the past 3 decades to clarify Congress’s intent and correct this flaw in BOP’s calculation, BOP has not implemented the clarification and continues to use the 47 day maximum.

Specifically, the U.S. Sentencing Commission incorporated Congress’s intent for 54 days of good time credit when it designed the U.S. Sentencing Guidelines---the guideline ranges in the Sentencing Table are 15% longer than the time Congress actually wanted prisoners to serve. This made it very clear that prisoners should serve only 85% of the sentences they are given.

Congress also amended § 3624(b) to allow a maximum of 54 days of good time for each year of the sentence—54 days is almost exactly 15% of the sentence handed down. The BOP has not followed this clarification.

In light of the current average cost of incarceration per week (7 days) is approximately \$577---the difference between the maximum 54 days Congress intended to allow versus the maximum 47 days BOP is awarding despite the clear language of the statute, Congressional intent, and the structure of the sentencing guidelines---for each year of the sentence imposed by the judge for every inmate, the potential cost savings are huge.

As a result of the BOP’s unusual math, even model prisoners in the federal system spend seven extra days every year in prison. Instead of the intended 15% good time, the BOP’s rules cause federal prisoners to receive just 12.8% good time. Seven days of one year means a lot to a prisoner and his family. When that time gets added up over five or 10 or 20 years or when it is multiplied by the all the years that tens of thousands of prisoners spend in prison, it costs taxpayers millions of dollars that Congress may never have wanted the BOP to spend.

**As noted earlier, the Urban Institute projected that if BOP changed its internal calculation to reflect Congressional intent of 54 days, it would result in 4,000 releases and save over \$40 million in the first year alone. FAMM projected doing so would save \$914 million every 9.5 years.**

Currently, the BOP can rescind an inmate’s earned good time or future good time as a sanction for a disciplinary incident.<sup>720</sup> Permitting an inmate to earn back rescinded or future forfeited good time not only serves the interest of accountability and reinforces the behavioral modifications and life skills necessary to support successful reentry, but also addresses the pressing problems of overincarceration and unchecked correctional spending.

(v) **COMPASSIONATE RELEASE**

Congress authorized sentence reductions for “compassionate release” out of recognition that changed circumstances could render continued imprisonment impractical,

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<sup>720</sup>See Bureau of Prisons, *Inmate Discipline Program* 11-14, available at [http://www.bop.gov/policy/progstat/5270\\_009.pdf](http://www.bop.gov/policy/progstat/5270_009.pdf).

counterproductive, and inhumane. While this is a laudable program, BOP is the only entity that is permitted to bring these motions for sentence reduction to federal court. This means that unless the BOP files these motions, judges, prosecutors, defense counsel, probation officers, and prisoners are powerless to petition on any of these worthy and significant bases. In April 2013, the DOJ's Office of the Inspector General issued a comprehensive report criticizing the failures of how BOP has managed the compassionate release program.<sup>721</sup> Specifically, it found that "the existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."<sup>722</sup> In fact, thirteen percent of the prisoners whose requests for compassionate release were approved by their Warden and BOP Regional Director died before the BOP Director made a decision on the request.<sup>723</sup>

The Office of the Inspector General found that, on average, the number of inmates released nationwide each year was 24(during the period of review from 2006 through 2011).<sup>724</sup> Moreover, the OIG report found that BOP officials refuse to make a motion to the courts if in their personal judgment the prisoner has not been punished long enough, might re-offend if released, or has committed too heinous a crime even though the

The DOJ's Office of the Inspector General found that "an effectively managed compassionate release program would result in cost savings for the BOP, as well as assist the BOP in managing its continually growing inmate population and the significant capacity challenges it is facing." The OIG report concluded that "it is self-evident that the release from BOP custody of an inmate with a serious or terminal medical condition results in cost savings for the BOP" and "provides the BOP with an additional bed space which, given the serious population management challenges facing the BOP."<sup>725</sup>

Although the FY 2011 annual cost for incarcerating an inmate averaged \$28,893, the average annual cost for incarcerating an inmate at a BOP medical center was \$57,962.<sup>726</sup> The costs for operating these medical centers have increased 38% from FY 2006 to FY 2011.<sup>727</sup> **Even expanding the program to 100 inmates with serious medical conditions from its medical centers each year would result in potentially at least \$5.8 million in savings per year.** As of December 2012, BOP's medical centers housed 7,464 inmates, which does not include the number of inmates with serious medical issues who are housed at BOP's regular facilities and receive treatment at hospitals at BOP's expense as BOP does not track this information.<sup>728</sup>

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<sup>721</sup> U.S. Dep't of Justice, Office of the Inspector General, Evaluation & Inspections Division, *The Federal Bureau of Prisons' Compassionate Release Program* i (Apr. 2013), available at <http://www.justice.gov/oig/reports/2013/e1306.pdf>

<sup>722</sup> *Id.*

<sup>723</sup> *Id.* at 38 (noting 28 approved requests out of 208 submitted requests).

<sup>724</sup> *Id.* at 1.

<sup>725</sup> *Id.* at 43-44.

<sup>726</sup> *Id.* at 45.

<sup>727</sup> *Id.*

<sup>728</sup> *Id.* at 48.

The report found that expanding the program to more prisoners would not negatively impact public safety based upon its finding from the data that only “a small percentage of inmates were rearrested within 3 years of their release under the compassionate release program”---specifically, “of the 142 inmates approved and released during our 6-year review period, 5 (3.5 percent) were rearrested within a 3-year period.”<sup>729</sup> In that 6-year review period, the 5 who were rearrested were arrested for using methamphetamine and illegally obtaining prescription medication; theft of less than \$100; using cocaine and traffic violations; resisting arrest; and malicious destruction of property less than \$500, respectively.<sup>730</sup> This recidivism rate pales in comparison to the general recidivism rate for federal offenders within 3 years after their release, which is estimated at 41%.<sup>731</sup> The OIG found that “recidivism data suggests that, given these prisoners’ serious medical conditions, a well-managed compassionate release program can significantly minimize the risk to the public from an inmate’s early release from prison.”<sup>732</sup>

In response to the OIG report, the BOP, as of August 2013, broadened its authority to petition federal courts for the “compassionate release” of federal prisoners for “extraordinary and compelling” reasons, such as:

- Medical circumstances
  - Diagnosis with a terminal, incurable disease and life expectancy is 18 months or less; OR
  - Diagnosis with an incurable, progressive illness (e.g. Alzheimer’s) or debilitating injury from which the prisoner will not recover (e.g. limited self-care and confined to a bed or chair more than 50% of waking hours)
- Non-medical circumstances for elderly inmates
  - Age 70 or older and have served 30 years or more of their term of imprisonment and sentenced for an offense that occurred on or after November 1, 2987; OR
  - Age 65 or older and have served at least 50% of their sentence and suffer from chronic or serious medical conditions related to the aging process, experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility; no substantial improvement after conventional treatment
  - Age 65 or older and have served 10 years or 75% of the term of imprisonment
- Death or Incapacitation of the Family Member Caregiver For Prisoner’s Child
  - Prisoners whose biological or legally adopted child or children (under 18) are suddenly without a family member caregiver due to that caregiver’s death or incapacitation (i.e. severe injury or severe illness that renders the caregiver incapable of caring for that child)
- Incapacitation of a Spouse or Registered Partner
  - Prisoners whose legally-recognized and verifiable spouse (including common-law spouse) or registered partner (i.e. civil union or registered domestic partnership) has suffered a serious injury, debilitating physical illness, or severe cognitive deficit that renders the spouse or partner unable to care for him- or herself and the

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<sup>729</sup> *Id.* at 49.

<sup>730</sup> *Id.*

<sup>731</sup> *Id.*

<sup>732</sup> *Id.* at 52.

prisoner is the only available caregiver, meaning that there is no other family member or adequate care option that is able to provide primary care for the spouse or registered partner

While DOJ's modest expansion is helpful, it can still expand eligibility for compassionate release to a greater number of elderly prisoners (i.e. those who have served a minimum of 5 years or 25% of their sentence), as states have done to ease overcrowding and address correctional spending while still preserving public safety. California, for example, expanding parole for and release of geriatric inmates to address overcrowding, correctional spending, and fairness concerns.

Correctional officers who interact daily with the prisoners at the facility in conjunction with defense counsel can assist in identifying those inmates who should be considered for compassionate release.

The Urban Institute concluded that expanding and reforming compassionate release for sick and elderly inmates, Not only could this save BOP money but it would also help alleviate overcrowding. The Urban Institute also recommended that BOP increase the number of transfers of foreign national inmates to their home countries, as approximately about a quarter of the BOP inmates are not U.S. citizens, but less than 1 percent of foreign nationals are transferred through the International Prisoner Transfer Program.<sup>733</sup> **Expanding elderly and compassionate release and doubling international transfers could save almost \$15 million together.**<sup>734</sup>

**(vi) GATHERING AND NOTIFICATION OF STAKEHOLDERS OF UPTICKS OR TROUBLING TRENDS**

As many JRI states and other states that have reformed their criminal justice system have done, BOP should follow suit in collecting demographic information of its inmates and the case-specific and sentencing factors, aggregating that data, and providing it to DOJ, FPD, the Judicial Conference, and the Sentencing Commission on a regular basis. The states have found that this sharing of data---in particular, the notification and regular analysis of any developing trends in the inmate population---is useful and practical as it permits the stakeholders to collaborate and react immediately to problematic trends at an earlier point to mitigate the damage. Thus, BOP should automatically notify the four federal stakeholder agencies of increasing prison populations and developing trends so that they may addressed at as early a stage as possible.

**(vii) PRISON INDUSTRIES AND WORK RELEASE INCENTIVIZE BEHAVIOR CORRELATED WITH LOWERING RECIDIVISM – G.E.D., LICENSING, MRT, PARENTING CLASSES, PHONE TIME – RENEGOTIATE VIDEO CALLS VISITATION AND COMMISSARY TIME**

According to the ABA Task Force report, programs and resources that aid offenders with their reentry into society and securing employment reduce recidivism. Successful programs

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<sup>733</sup> Stemming the Tide at 6.

<sup>734</sup> *Id.*

instituted by state corrections include: (1) transitional employment programs, which provide temporary, subsidized work upon release under high levels of supervision; (2) residential and training programs for disadvantaged youth, which is often combined with drug treatment and education; (3) prison work and education programs, either throughout the sentence or just prior to release; and (4) providing income supplements to unemployed releases to provide stability while searching for work.

For example, Oregon expanded its transitional leave program, which permitted inmates to participate in employment and educational programs prior to final discharge in order to aid in finding their placement afterwards. New Hampshire authorized the sentencing court or the superintendent of the county correctional facility to release any inmate for the purpose of working, obtaining work, performing community service, or participating in a home confinement or day reporting program. Similarly, Louisiana expanded its work release programs for inmates. Vermont closed and reorganized several prisons and established a new 100-bed work camp for male offenders with substance abuse treatment needs. New Hampshire authorized the sentencing court or the superintendent of the county correctional facility to release any inmate for the purpose of working, obtaining work, performing community service, or participating in a home confinement or day reporting program.

Residential and training programs for youths has shown to reduce recidivism as well. Job Corps training has shown positive effects in the obtainment of GEDs, vocational certificates, and higher earnings for disadvantaged youth, and the economic benefits have exceeded the costs over the life of the program by \$17,000 per participant. It also reduces involvement in crime by 16% for individuals involved in the programs.<sup>735</sup>

Likewise, prison work and education programs benefit offenders and their communities. One study found that participation in education and vocation training resulted in a 9% improvement in recidivism rates, compared to a comparison control group.<sup>736</sup> The Vera Institute, which has studied successful state reform efforts, found that “[s]upporting the transition from prison or jail back into the community is critical to reducing ex-offenders’ risk of recidivism and to improving public safety.”<sup>737</sup>

These recommendations are supported by the data and findings from the Urban Institute, JRI states, and other states that have instituted successful criminal justice reforms. Moreover, the state experience demonstrates that supplemental prison programming (e.g. comprehensive reentry planning, work release, behavioral modification therapy, life skills (parenting, communication, scheduling, etc.), support for homeless or indigent inmates as they prepare for the end of their incarceration term, and positive incentives for completing those milestones successfully (e.g. additional phone time, visitation, commissary visits) are all correlated with more successful re-entry and lower rates of recidivism.

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<sup>735</sup> John Burghardt, et al., *Does Job Corps Work: Summary of the National Job Corps Study*, DEPT. OF LABOR EMPLOYMENT AND TRAINING ADMIN. (June 2001), available at <http://wdr.doleta.gov/opr/fulltext/01-jcsummary.pdf>.

<sup>736</sup> Growth of Incarceration at 250-56.

<sup>737</sup> Vera Institute Review of State Reforms at 26.

Transitional employment programs reflect the concept that people tend to age out of crime. Studies from the 1970s reflect that a 12% differentiation in recidivism between people over the age of 26 who were transitioned into construction jobs. Likewise, a New York program called CrimALERT provided substance abuse treatment with subsidized employment and housing, which resulted in an 18% reduction in recidivism rates compared to a control group with similar demographics.

These recommendations are supported by federal sentencing data. The Urban Institute, which evaluated federal data and successful state practices, urged that

In terms of immediacy, the BOP itself—without any legislative changes required—could within its authority and discretion begin to alleviate overcrowding by providing early release or transfer to community corrections for those already in BOP custody.

Specifically, the Urban Institute recommended:

- expanding prison industries that teach vocational skills such as UNICOR, which has been undermined by the elimination of the “mandatory source clause” (requiring the majority of federal agencies to purchase products offered by UNICOR, unless authorized to solicit bids from the private sector);
- “increasing family visitation for inmates, which is correlated with higher levels of family support linked to higher employment rates and reduced recidivism following release and that in-prison contact with family members is predictive of the strength of family relationships following release.”<sup>738</sup>

The Urban Institute found that “[e]xpanding such opportunities can free up bed space through the early release of those who participate in intensive programs proven to cut down on recidivism.”<sup>739</sup> Research from the states demonstrates that the early release of inmates has no significant impact on recidivism rates.<sup>740</sup>

#### **(viii) STEP DOWN LIKE SMU FOR SECURITY CLASSIFICATION AND EARN BACK LOST GOOD TIME CREDIT**

As noted by both the Urban Institute, JRI states, and other states that have instituted successful criminal justice reforms, incentivizing inmates who complete certain classes without any new disciplinary infractions can earn the right to be transferred from a high-security facility to progressively lower security facilities with the goal of eventually rejoining the general population.

The data demonstrates not only that overcrowding at federal high-security facilities is greater than that at lower security facilities, but that this high staff-to-inmate ratio, particularly at

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<sup>738</sup> *Id.*

<sup>739</sup> *Id.*

<sup>740</sup> *Id.*

those facilities, poses safety concerns for the inmates and the staff and that higher security facilities are more expensive to operate.

It stands to reason that reducing the number of inmates at high-security facilities, by assisting them in completing programs that carry concomitant benefits in improving rehabilitation and decreasing recidivism, carries both fiscal and public safety savings.

BOP has 5 security levels for its facilities: (a) minimum; (b) low; (c) medium; (d) high; and (e) administrative (facility with a special mission such as medical/mental health, pretrial, and holdover).<sup>741</sup> Certain BOP facilities have Special Management Units (SMU), colloquially referred to as “supermax” units, within them that represent the most secure levels of custody, to provide long-term, segregated housing for inmates classified as the highest security risks.

Although BOP’s policies provide that depending on changed circumstances, such as medical condition, an inmate may be transferred to another facility with a different security designation, its policies generally do not actively incentivize and reward inmates to take steps to earn designation to a lower security facility.

To be fair, for those inmates in “supermax” SMUs, the BOP offers a four-level program that requires inmates to complete “self-study, individual, and group activities geared toward the development of behavior and values that will allow for successful reintegration into a general population” while “strict[ly] adher[ing] to the rules and regulations of the unit.”<sup>742</sup> Typically, inmates complete the program in 18-24 months, during which time they learn “self-discipline, pro-social values, and the ability to successfully coexist with members of other geographical, cultural, and religious backgrounds.”<sup>743</sup>

Designation to the SMU carries significantly higher and more onerous restrictions than designation to a mere high security site.<sup>744</sup> In particular, SMU inmates are held in their cells for 23-24 hours per day with only one hour out, which must be used for hygiene (i.e. showering), legal calls, or exercise. Two inmates occupy each cell; an inmate may not refuse a cellmate perceived as a safety threat. Visitation is also severely curtailed, thereby adding an additional isolation and punishment due to lack of contact with one’s family.

In SMU, inmates are required to complete four levels or phases of classes and behavioral assessment before being transferred back to the general prison population; each level must be satisfactorily completed with zero disciplinary infractions before ascending to the next level. SMU Level I carries the greatest restrictions; as an inmate graduates to higher levels (the highest being SMU Level IV), the inmate still faces greater restrictions than the general high security population but gains increasing incentives for his continued good behavior. An inmate must

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<sup>741</sup> See, e.g., [http://www.bop.gov/policy/progstat/5100\\_008.pdf](http://www.bop.gov/policy/progstat/5100_008.pdf)

<sup>742</sup> See, e.g., at 3 [http://www.bop.gov/locations/institutions/lew/LEW\\_smu\\_aohandbook.pdf](http://www.bop.gov/locations/institutions/lew/LEW_smu_aohandbook.pdf)

<sup>743</sup> *Id.*

<sup>744</sup> See, e.g., Federal Bureau of Prisons, U.S. Dep’t of Justice, Visiting Regulations - Institution Supplement, United States Penitentiary Lewisburg, Pennsylvania 17837, at 7-8 (Mar. 2011). SMU Level I and II inmates able to visit with immediate family over video conference for a maximum of one hour per week, SMU Level III inmates able to have non-contact visits with immediate family for a maximum of one hour per week, and SMU Level IV inmates able to have contact visits and those visits are not limited to immediate family.

remain in Level I for four months, Level II for six months, Level III for six months, and Level IV for between two to four months.

BOP should expand a similar program for inmates assigned to high, medium, and low facilities that allows them to “earn” their way down to the lower security facilities, with the goal of earning assignment at a minimum security facility. Plainly, BOP would institute rigorous standards, much like the ones for the SMU “step down” program, that have succeeded in reforming the most dangerous inmates in the system, who were originally segregated in “supermax” units. Concerns about public safety would be mitigated and addressed by providing inmates with the opportunity to complete classes that improve their conduct and reasoning and demonstrate their ability to maintain a spotless disciplinary record while also providing correctional officers the opportunity to assess and evaluate their progress and behavior at each stage and having sole discretion over whether to recommend the inmate to graduate to the next level based upon a zero tolerance of any disciplinary infractions, not matter how minor.

By permitting inmates to “earn” their way down to lower security facilities by completion of classes, not only would the BOP be encouraging accountability, BOP would reduce overcrowding in general and at high security facilities in particular. This would improve public safety to correctional officers, inmates, and their communities, and reduce correctional spending, as higher security facilities are almost double the cost of lower security facilities.

Moreover, the BOP can mirror the efforts states have implemented to assist inmates in arranging for their transportation home and transition. Arkansas’s state corrections department, for example, transfers the balance of prisoner’s commissary account to be issued on a debit card upon release from custody to aid in reentry. Likewise, Arizona has increased the amount provided to prisoners upon discharge to \$100 of their earned wages in the form of a debit or stored value card. For the inmates who do not have family or friends able to pick them up, BOP should assist them in making transportation arrangements to their community.

**(ix) REFORM USE OF ESCALATION AND DISCIPLINARY SEGREGATION OR SHU**

In BOP, Special Housing Units (SHU) are housing units in which inmates are separated from the general inmate population and may be housed either alone or with other inmates. Confinement in the SHU can either be administrative (newly arrived inmates, for the inmate’s own protection due to assault or threats, inmates who are informants, for the protection of the other inmates and staff) or disciplinary (due to a violation of the BOP regulations).

The clinical impacts of isolation mirror those of physical torture.<sup>745</sup> People subjected to solitary confinement exhibit a variety of negative physiological and psychological reactions, including hypersensitivity to stimuli,<sup>746</sup> perceptual distortions and hallucinations,<sup>747</sup> increased

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<sup>745</sup> Metin Basoglu, et al., *Torture vs. Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent?* 64 Arch. of Gen. Psychiatry 277 (2007).

<sup>746</sup> Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450, 1452 (1983).

anxiety, nervousness, revenge fantasies, rage, and irrational anger;<sup>748</sup> fears of persecution;<sup>749</sup> lack of impulse control;<sup>750</sup> severe and chronic depression;<sup>751</sup> appetite loss and weight loss;<sup>752</sup> heart palpitations;<sup>753</sup> withdrawal;<sup>754</sup> blunting of affect and apathy;<sup>755</sup> talking to oneself;<sup>756</sup> headaches;<sup>757</sup> problems sleeping;<sup>758</sup> confusing thought processes;<sup>759</sup> nightmares;<sup>760</sup> dizziness;<sup>761</sup> self-mutilation;<sup>762</sup> and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement.<sup>763</sup>

As states have done, the BOP should consider reforming its use of escalation tactics and segregation in solitary confinement. Maine provides an excellent case study. After the head of its correctional department reviewed the detrimental effects of solitary confinement and other disciplinary measures, he dramatically reduced the number of prisoners assigned to solitary confinement in general and eliminated the use of punishment to control mentally ill inmates. It also reduced the use of solitary confinement, such that prisoners only spend hours or a few days in solitary confinement to de-escalate the situation as opposed to using it punitively for terms of days, weeks, or months at a time. Furthermore, Maine forbade the practice that its correctional officers used to respond to inmates that had committed an infraction or were otherwise disobedient. Previously, the correctional officers would engage in violent “cell extractions” in order to restrain inmates to a chair for hours. By directing correctional officers to use de-escalation procedures instead, such as negotiating with a troubled inmate and exchanging a benefit (e.g. participation in an art project), the Maine prison system saw a greater rate of compliance by inmates, fewer violent officer-inmate interactions, and improved behavioral results. BOP should follow these successful reforms that not only improve safety for correctional officers, inmates, and their communities, but also save money and prison bed space and respect the rights guaranteed by the Constitutional against “cruel and unusual punishment.”

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<sup>747</sup> Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130 (2003); see generally Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 Soc. Just. 8 (1988).

<sup>748</sup> Grassian, *supra* note 747, at 1452-53; Haney, *supra* note 748, at 130, 133; Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. OF CORRECTIONAL HEALTHCARE 39, 48 (1994); see generally Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988).

<sup>749</sup> Grassian, *supra* note 747, at 1453.

<sup>750</sup> *Id.*;

<sup>751</sup> Grassian, *supra* note 747, at 1453; Haney, *supra* note 748, at 131.

<sup>752</sup> Haney, *supra* note 748, at 130; see generally Korn, *supra* note 748.

<sup>753</sup> Haney, *supra* note 748, at 131.

<sup>754</sup> See generally Korn, *supra* note 748.

<sup>755</sup> *Id.*

<sup>756</sup> Haney, *supra* note 748, at 134.

<sup>757</sup> *Id.* at 133.

<sup>758</sup> *Id.*

<sup>759</sup> *Id.* at 137.

<sup>760</sup> Haney, *supra* note 748, at 133.

<sup>761</sup> *Id.*

<sup>762</sup> Grassian, *supra* note 747, at 1453.

<sup>763</sup> Paul Gendreau, N.L. Freedman, G.J.S. Wilde & G.D. Scott, *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. OF ABNORMAL PSYCHOL. 54, 57-58 (1972).



## **C. SENTENCING COMMISSION**

As discussed in greater detail above, when federal mandatory minimums, enhancements, and/or consecutive counts do not apply, the advisory sentencing guidelines, which are promulgated by the Sentencing Commission, are both “the starting point and initial benchmark” for federal criminal sentences. In all federal cases, the sentencing judge must begin by correctly calculating the applicable sentencing guideline range. If the sentencing judge departs or varies upward or downward, that judge must explain her justification for doing so with reference to the statutory factors embodied in 18 U.S.C. 3553(a), which include consideration of the facts surrounding the offense, the history and characteristics of the defendant, the need for rehabilitation, deterrence, and punishment, and any other mitigating or aggravating factors.

As discussed in much greater detail throughout this report, federal mandatory minimums, enhancement, and consecutive counts penalties have imposed negative and troubling effects on our constitutional and statutory schemes in addition to disproportionate human tolls.

In order to aid the prosecution, defense, and judges in sentencing, the Sentencing Commission should consider the following structural recommendations. Understanding that the Sentencing Commission receives many requests for substantive amendments to the sentencing guidelines, I have culled the list to reflect the ones that federal stakeholders and experts have identified as most pressing.

### **1. COMPILE COMPREHENSIVE DATA ABOUT THE SENTENCES IMPOSED IN EACH JUDICIAL DISTRICT**

In terms of procedural recommendations, the Sentencing Commission with the assistance of the Judicial Conference should compile comprehensive data about the sentences imposed within each judicial district, including detailed information about the offense and offender characteristics, in order to permit sentencing judges to ensure that the sentences they impose do not treat offenders who are guilty of similar behavior disparately or promote unwarranted sentencing disparities.

Judges are trained to consider and respect the decisions of other judges. Although the Commission publishes extensive data, it is not in a form that allows judges or the parties to determine what other judges did in similar cases or what distinguishes one case from another. Certainly, judges can rely on their Probation Offices, or the parties, to assemble this information, but this is not a comprehensive solution. Thus, the Commission has been asked to provide sentencing information in a more useful form.

### **2. EXPLANATIONS OF PURPOSE AND GOALS OF EACH GUIDELINE AND EMPIRICAL BASIS**

Furthermore, the Sentencing Commission should explain what each guideline is meant to accomplish and the data upon which it is based. Under the SRA, the Sentencing Commission is tasked with conducting empirically-sound research in setting the guidelines and sharing this quantitative and qualitative data with the stakeholders will lead to better results.

The prosecution and defense will be able to use the policy statements and data to anchor and frame their arguments as to where within (or outside) the guidelines the sentence should fall, based upon their analogies.

The sentencing judge would similarly be empowered to determine whether a sentence above, below, or within the guideline range is warranted in a given case as compared to the baseline of what the Sentencing Commission considered as well as the decisions of other judges within the same judicial district and in other judicial districts.

Moreover, when cases are appealed for substantive “reasonableness,” those appellate judges, who are not tasked with sentencing decisions on a daily basis, have a full and rich record against which to evaluate that specific sentence.

The even greater impact will be on the guidelines system itself. If the Commission review the factual situations to which its guidelines apply, evaluate the reasons given by sentencing judges across the country as to why a guidelines sentence was or was not appropriate given a holistic review of a particular case, and analyze whether the guideline itself is problematic and requires revision, the Commission’s stewardship will allow our advisory guideline system to continually evolve and respond best to empirical evidence. It will also permit it to report to Congress, in those cases in which a guideline is based in whole or in part on an express congressional directive, why and how that guideline should be revised. This optimization and evolution of our advisory guideline system is “contemplated by several provisions of the SRA, and has been strongly urged by the Supreme Court, invited by the leadership in Congress, and urged by judges, defense counsel, probation officers, and academics.”<sup>764</sup>

It also finds support in the state advisory guideline systems. The former Director of the Vera Institute’s State Sentencing and Corrections Program noted that “[in Virginia’s guideline system,] judges have been actively involved in the creation and regular adjustment of guidelines in Virginia and the guidelines themselves were based on a study of actual historical sentences served by defendants for specific offenses. These factors, not present to the same extent in the federal regime, may also help promote judicial compliance . . . because [judges] believe that recommended sentences are fair, just and proportionate.”<sup>765</sup> He noted that the experience of Virginia and other states suggests that “the capacity to study and marshal data nimbly as an objective and regularly recurring basis for policy recommendations, is essential to the ultimate substantive credibility and political legitimacy of sentencing policy,” and recommended that the U.S. Sentencing Commission use its “data as the basis of forceful policy recommendations that

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<sup>764</sup> *The Sentencing Reform Act of 1984: 25 Years Later: Public Hearing Before the United States Sentencing Comm’n* (2009) (statement of Carol Brooks, Executive Director, Federal Public Defender for the Eastern District of Illinois, at 18), available at [http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090909-10/Brooks\\_testimony.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090909-10/Brooks_testimony.pdf).

<sup>765</sup> *U.S. v. Booker/Fanfan & the Impact on Federal Sentencing: Public Hearing Before the United States Sentencing Comm’n* (2005) (statement of Daniel F. Wilhelm, Director, State Sentencing & Corrections Program, Vera Institute of Justice, at 3), available at [http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20050215-16/wilhelm\\_testimony.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20050215-16/wilhelm_testimony.pdf).

advance the ends of justice and build the required political and popular support to see that those recommendations are followed.”<sup>766</sup>

### **3. PARITY**

The Judicial Conference and members of the House and Senate Judiciary Committee have supported the addition of an ex officio member of the Sentencing Commission for the Federal Public Defender.

To date, neither the House nor Senate Judiciary Committee have received the Sentencing Commission’s official position on this matter even though legislation has been introduced in the form of H.R. 2526. Although it stands to reason that given the Sentencing Commission’s repeated solicitation of input from the Federal Public Defenders and its concomitant expressions of appreciation, it supports the passage of the legislation. As an administrative matter, having the bi-partisan Sentencing Commission’s written position would greatly aid us lawmakers in scheduling and passing the necessary legislation to formalize this important procedural reform that will yield better results for the federal criminal justice system moving forward.

### **4. DRUG OFFENSE GUIDELINES**

As discussed earlier, the advisory guidelines for drug offenses are based upon and linked with the mandatory minimums, which sets punishment based solely upon drug quantity, which is an inaccurate and poor proxy for culpability. Without belaboring the point, this has led to excessive punishment for many low-level drug defendants, including couriers and street-level dealers.

As part of its statutory duty under the SRA, the Sentencing Commission should examine the relevance of various factors present in every drug trafficking case, including the defendant’s role in the offense, drug quantity, purity, drug type, and relative harms of each drug type. It could then conduct empirical research to determine how much consideration should be given to each of those factors and revise the guidelines accordingly. Rather than set the base offense level at or above the mandatory minimum (as it has historically and currently done), the Commission may set the base offense level below the mandatory minimum and rely on adjustments---including for aggravating role---to reach the mandatory minimum in appropriate cases, or select a base offense level without regard to a mandatory minimum.

Second, and relatedly, the Sentencing Commission should equalize at a 1:1 level in the guidelines the disparity that exists between powder cocaine and crack cocaine cases, which further exacerbates the disproportionate impact on drug sentences. As the Sentencing Commission itself has found, “there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses.”<sup>767</sup>

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<sup>766</sup> *Id.*

<sup>767</sup> *Hearing before the S. Judiciary Comm. ’s Crime & Drugs Subcomm.*, (Feb. 12, 2008) (statement of Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm’n, at 11), *available at* [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20080212\\_Hinojosa\\_Testimony.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20080212_Hinojosa_Testimony.pdf).

Third, even though the Commission in 2011 amended §3B1.2 to remove some language that “may have the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances,” USSG App. C, Amend. 755 (Nov. 1, 2011), some courts still decline to apply the adjustment in cases where the Commission contemplated it would apply.<sup>768</sup> Contrary to the Commission’s intent, federal courts continue to rule that low-level, easily replaceable individuals do not qualify for a minor role adjustment.<sup>769</sup> As the Commission’s own 2007 Cocaine Report noted: “[a]s in 2000, the function category with the largest proportion of powder cocaine offenders remains couriers/mules (33.1%) and for crack cocaine offenders, street-level dealers (55.4%).”<sup>770</sup> Yet, in FY 2009 – the year in which the Commission evaluated the offender’s role – only 19.7% of all drug defendants received mitigating role adjustments.<sup>771</sup> Close to half of all couriers (46%) did not receive a mitigating role adjustment.<sup>772</sup> Nor did 52.1% of mules, 96.5% of street level dealers, or 72.7% of brokers receive a mitigating role adjustment.<sup>773</sup> Thus, the Commission should make additional changes to §3B1.2 to further clarify when the adjustment should apply. Without such amendments, drug quantity will continue to override other relevant considerations, rendering the mitigating role adjustment available in name, but rarely ever in practice.

## 5. CAREER OFFENDER ENHANCEMENT

The current career offender guideline is much broader than Congress required in the Sentencing Reform Act and accordingly should be narrowed.<sup>774</sup> As the Commission has known for ten years, the career offender guideline – particularly as applied to defendants who qualify based on prior drug convictions – dramatically overstates the risk of recidivism.<sup>775</sup> The

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<sup>768</sup> The data show that the amended commentary did not increase the rate of mitigating role adjustments. In FY 2010, mitigating role adjustments were applied to only 7.6% of individuals sentenced that year, and in FY 2013, mitigating role adjustments were applied to only 7.3% of individuals sentenced that year. See 2010 Sourcebook of Federal Sentencing Statistics tbl. 18; 2013 Sourcebook of Federal Sentencing Statistics tbl. 18.

<sup>769</sup> See, e.g., *United States v. Perez-Solis*, 708 F.3d 453, 471-72 (5th Cir. 2013) (defendant who picked up cooler full of methamphetamine denied minor role adjustment); *United States v. Cavazos*, 487 Fed. App. 834, 835 (5th Cir. 2012) (defendant who transported drugs over large geographic area was not a minor participant because his “transportation of the methamphetamine was essential to the completion of the crime”); *United States v. Williams*, 505 Fed. App. 426, 428 (6th Cir. 2012) (reiterating view that court could deny a role adjustment because defendant’s “role as courier was critical to the success of the drug trafficking”); *United States v. Skinner*, 690 F.3d 772, 783 (6th Cir. 2012) (same); *United States v. Otabor*, 477 Fed. App. 593, 595 (11th Cir. 2012) (defendants who smuggled large amount of high purity heroin not entitled to role reduction even though they qualified for safety-valve and had been threatened after attempting to back out of the plan); *United States v. Alfaro-Martinez*, 476 Fed. App. 11, 11 (5th Cir. 2012) (court was not required to give role reduction to defendant who transported 100 kilograms or more of marijuana because his role as a courier was “indispensable”).

<sup>770</sup> U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy* 19 (2007); see also *id.* at 19-21, figs. 2-4, 2-5 & 2-6.

<sup>771</sup> 2009 Sourcebook of Federal Sentencing Statistics tbl. 40.

<sup>772</sup> 2011 *Mandatory Penalties Congressional Report* at app. D, fig. D-4.

<sup>773</sup> *Id.*

<sup>774</sup> Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 51 (2010); U.S. Sentencing Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing (Booker Report): Part C: Career Offenders* 4 (2012) (discussing 1989 amendment, which substantially broadened the definition of “controlled substance offense”).

<sup>775</sup> 15 Year Report on Federal Sentencing at 134. Offenders qualifying for the career offender guideline had a 52 percent recidivism rate, and the rate for those qualifying on the basis of prior drug offenses was only 27 percent. *Id.*

Commission has also known for ten years, that the guideline has an adverse impact on African-American individuals convicted in federal court.<sup>776</sup> Recent data from the Commission reveals the adverse impact has only grown worse. In FY 2012, 20.4% of individuals sentenced under the guidelines were African-American,<sup>777</sup> but 61.9% of individuals subject to the severe penalties of the career offender guideline were African-American.<sup>778</sup> This evidence, combined with the substantial financial cost of this incarceration policy, call for the Commission to quickly and clearly narrow the scope of the career offender guideline.

## **6. UNCHARGED, DISMISSED, AND ACQUITTED CONDUCT**

The Sentencing Commission should eliminate and prohibit from guidelines calculation uncharged, dismissed, and acquitted conduct. Currently, the guidelines permit sentencing judges to take into account acts that the prosecution has not charged, has dismissed, or a jury has acquitted the defendant of beyond a reasonable doubt. No state sentencing guideline system permits such an end-run against constitutional safeguards and neither should the federal system. It is ironic that the purpose of this rule was to prevent prosecutorial control over sentencing---not only has failed to do so but it has exacerbated the problem. It is both illogical and unfair and constitutionally concerning to increase a defendant's sentence based upon conduct that the defendant did not plead guilty to, the government chose not to prove at trial, or that the government was unable to persuade the factfinder beyond a reasonable doubt at trial.

## **7. ALTERNATIVES TO INCARCERATION**

Lastly, the Sentencing Commission should assemble information regarding recidivism and effective sentencing options (including alternatives to incarceration), and to conduct and provide its own research on these issues in conjunction with their analysis of successful practices from the states. This function is contemplated by the SRA, and would build knowledge and consensus on effective sentences. States have had success by providing information to judges about what other judges are doing and empirical evidence regarding what works to reduce recidivism and protect public safety. For example, Missouri has a website showing actual sentencing data for each offense over the past three years, sentencing options, the sentencing commission's recommendation, an individualized risk assessment score and a management plan for the particular defendant. Virginia provides a recidivism risk assessment tool for judges to apply. This has been used to divert 53% of otherwise prison bound non-violent offenders to alternatives without risk to public safety. Rates of incarceration, recidivism, and crime have all dropped. It is my hope that some of the information contained within this report will encourage and inform the Sentencing Commission's research and revision of the guidelines.

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<sup>776</sup> *Id.* at 133 (“Although African-American offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline.”).

<sup>777</sup> 2013 Sourcebook of Federal Sentencing Statistics at tbl. 4.

<sup>778</sup> U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* (2014), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf).

## **D. JUDICIAL CONFERENCE**

The Framers of the Constitution intended the judiciary to be independent and not accountable politically to ensure that it would function as the bulwark against the tyranny of the majority, as represented by the legislative branch that makes the laws and the executive branch that enforces them, against a politically unpopular and powerless minority.

Throughout our Nation's history, we have witnessed our federal courts vindicate civil rights that have been infringed by our legislative and executive branches. The courage and autonomy of federal judges have protected our fundamental liberties when the political process has failed. Federal judges ordered the integration of our schools, the recognition of interracial and same-sex marriage, appointment of counsel for indigents in criminal cases, and the free exercise of religion during times when public opinion was otherwise.

Out of respect for the Constitutionally-mandated independence of our federal judiciary, which provides a necessary check on the power of the legislative and executive branches, my recommendations are, in fact, merely reminders of this important and critical function.

### **1. STRUCTURAL**

#### **(i) COORDINATION WITH SENTENCING COMMISSION TO COLLECT DATA**

Federal judges are empowered to make individualized sentencing determinations that consider not only the fact and circumstances of the offense and the personal characteristics of the offender but also the need to avoid any unwarranted disparities in sentencing.

To assist in and support this goal, I recommended that the Sentencing Commission compile and provide detailed information on the sentences imposed for each offense in each judicial district. This would provide counsel information from which to draw analogies or distinctions for the case at hand. It would aid judges in their preparation for sentencing hearings as this information would be regularly collected, compiled, and distributed. It would also help them identify novel arguments or analyses. Furthermore, this data will assist the Sentencing Commission in optimizing the Sentencing Guidelines, which will enable judges to impose sentences that serve the goals of § 3553(a).

#### **(ii) TRAINING ON EVIDENCE-BASED PRACTICES**

Much like in South Dakota and Mississippi, the Judicial Conference should recommend that its magistrate, district, and circuit judges in addition to its pretrial and probation officers attend training on evidence-based practices. This will enable the judges in imposing bonds, sentences, terms of supervised release and probation that are “sufficient but not greater than necessary” to effectuate the “deterrence, rehabilitation, and punishment” goals of sentencing. This training will also assist them in setting conditions for pretrial, probation, and supervised

release that are empirically-proven to reduce recidivism. As discussed earlier in this report, although many of these approaches sound counterintuitive, the research and data, supported by years of proven success on the state level, should be helpful in assisting judges.

## **2. PRETRIAL**

### **(iii) INITIAL APPEARANCES**

Although it is the federal prosecutor and authorized law enforcement officer who make the determination of whether to seek an arrest warrant or summons, the federal magistrate judge is well within his or her statutory and Constitutional authority to question whether a summons, which requires the individual to appear in federal court at a certain date and time and permits him to return for the bond or detention hearing 3-5 court days later, may be preferable, given the costs to the U.S. Marshal's service or other authorized law enforcement in executing the warrant, the bed space and correctional costs of detaining the individual leading up to the initial appearance and then in the 3-5 court days prior to the bond or detention hearing. In support, Fed. R. Crim. P. 4(a) provides that if a defendant fails to appear in response to a summons, the magistrate retains the authority to issue an arrest warrant.

Whether a defendant appears in response to a summons would be relevant and probative information as to his risk of flight, acceptance of responsibility, and reliability, among other factors, to the magistrate, the federal prosecutor, and the law enforcement agents involved and would be germane to the determination 3-5 court days later whether bond is appropriate and in what amount. Commonsense tells us that a defendant who appears in response to a summons (when he faces no financial penalty for failing to do so) will most likely appear for court appearances when released on bond (when he will jeopardize the bond amount, his liberty, and any sentencing reduction for acceptance of responsibility for failing to do so). Permitting an individual time to place his affairs in order, in terms of finding co-workers to cover a shift or arranging childcare or paying bills, will aid in his re-entry to the community later.

### **(iv) BOND (TYPES OF BONDS) VERSUS DETENTION**

At the bond or detention hearing, the federal magistrate must determine whether there are any conditions of bond which can reasonably assure the defendant's appearance in court and the safety of the community.

As discussed earlier in this report in greater detail, the number of defendants released on bond is half of what it used to be. Data demonstrate that pretrial detention of an offender was nearly 10 times more expensive than the cost of supervising that offender by a federal pretrial services officer.<sup>779</sup>

In addition to the tremendous costs on our correctional system, pretrial detention also serves as a *de facto* termination of their employment, housing (due to inability to pay rent or the mortgage), and other facets of their subsistence.

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<sup>779</sup> U.S. Courts, *Supervision Costs Significantly Less Than Incarceration in the Federal System*, available at <http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system>.

Many states have increased the number of defendants released on bond with no detriment to the individual or the community. For example, Delaware has increased the number of offenders released on bond, reserving detention resources only for those offenders with a history or high risk of flight and re-arrest. As a backstop, those states have recognized that failure to appear is a separate offense and that their law enforcement officers are then empowered to take the defendant into custody only if and when it becomes necessary.

In terms of setting the bond, federal magistrates should avoid setting bonds that are tantamount to detention given the clear statutory mandate of the Bail Reform Act that promotes release.

While certain defendants require the most onerous bonds due to their risk of flight and resources (wealth and connections) that would aid their flight, the majority of the defendants in the federal system are found by that same magistrate to be indigent, requiring court-appointed counsel. For the defendants that have the inclination and resources to flee, setting a corporate surety bond (i.e. bail bondsman or bounty hunter) will be appropriate. For the others, many options exist to address the magistrate's specific concerns. Risk of flight can be addressed by surrender of all travel documents, restricting travel or presence at transportation hubs, home confinement with electronic monitoring and curfews, or, in extreme cases, GPS monitoring that provides to-the-second updates on the individual's location or confinement in a halfway house (which is still a fraction of the cost of detention in a federal facility). If the magistrate's concern is whether the defendant will be incentivized to appear for all required hearings, the magistrate can set a personal surety (i.e. unsecured) bond, which provides that government may collect a money judgment against the defendant if he fails to appear, or, in more serious cases, require that the defendant deposit a percentage of the bond in the court's registry and/or post real estate (if available). If the magistrate's concern is whether the defendant's family or community will assist in ensuring the defendant's appearance (rather than aiding the defendant's flight), the magistrate can require co-signers to the defendant's bonds, who then are equally liable for the entire amount for the bond.

As many other states have done, federal magistrates can order the defendant's participation in programs proven by data and experience to reduce recidivism, improve reentry, and assist the federal district judge in crafting a proportional sentence. Specifically, the federal magistrate may order, as conditions of bond: GED courses, vocational training, licensing, cognitive behavioral therapy, substance abuse treatment, mental health treatment, parenting classes, domestic violence therapy, anger management courses, and other tailored rehabilitative programs. These programs and many more are within the purview of the pretrial services program and are much more available and at a lower cost than ones in the federal facilities, which often have lengthy wait lists. Drawing from state experience, requiring defendants to complete these programs improves accountability (the defendant is given the opportunity to succeed), the sentences imposed (sentencing judges have a basis to determine any positive conduct since the initial appearance and sentence accordingly), and re-entry outcomes (education, employment, substance abuse, mental health and other course are correlated with greater success).

With the variety, flexibility (the magistrate may modify the bond conditions at any point), and guarantee of a warrant in the event of a failure to appear, the Judicial Conference may wish to consider these factors against the deleterious effects of detention for the individual and the correctional system as a whole as part of its bond determinations.

#### **(v) DISCOVERY IN CRIMINAL CASES**

Pursuant to the Supreme Court of the United States' statutory authority under the Rules Enabling Act, it may amend and expand the existing discovery rule to permit "open file" discovery, as states have done, subject to Congressional approval.

Unlike state procedural rules in criminal cases, our federal rules of criminal procedure do not permit the defendant or his counsel to question the government's witness under oath prior to trial nor is there an "open file" federal criminal procedural rule in which defense counsel is permitted to examine everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material.

It is simply unrealistic in our adversarial system to hope that every prosecutor will follow its constitutional and statutory mandate to disclose exculpatory evidence to the defense. This is because the prosecutor is tasked with two roles---securing convictions and ensuring that justice is served---which are, at times, at odds with one another. It is impractical and unrealistic to expect a prosecutor who has been targeting and building a case against a defendant to then ignore his own interpretation and biases, switch gears, view the evidence through the lens of defense counsel, and essentially credit witnesses and evidence initially found incredible. Even with the best of intentions, it is difficult, if not impossible, to overcome one's confirmation bias and be completely objective. That is simply not human nature. These competing roles poses serious impediments to and explain the litigation surrounding compliance with the *Brady* discovery rules.

How myopic discovery rules are in federal criminal cases versus federal civil cases is concerning given that an individual's personal liberty and life are at stake. Even more concerning is that in the federal system, prosecutors are the ones primarily responsible for ensuring that they are in compliance. Certainly, defense counsel may file motions to compel discovery or allege prosecutorial misconduct, however, each avenue of potential relief presents not only high burdens of proof but requires defense counsel to demand information they are not sure exists and somehow articulate the evidentiary and persuasive value of that information to a judge.

A simple solution adopted by states to address this inherent conflict and problem was the creation of the "open file" discovery policy. An "open file" discovery policy is one in which defense counsel is permitted to examine everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material.

This would conserve significant judicial resources. First, an "open file" discovery rule would reduce motions to compel and to quash and the corresponding hearings and opinions that the district judges are required to issue. Second, the "open file" discovery rule would reduce

interruptions, delay, and redundancy at trial as evidentiary objections and motions in limine would be litigated pre-trial outside the presence of the jury. Moreover, instances of “trial by surprise” when information not disclosed in discovery is presented at trial, the trial proceedings are interrupted while the parties and the court handle this matter outside the presence of the jury, and associated motions for mistrial due to *Brady* and *Giglio* violations would surely decrease.

Beyond the benefit to the efficient administration of the trial proceedings, an “open file” discovery rule also ensures that defendants have all the information they need to accurately assess the strength of the government’s case-in-chief against them as they consider, with their counsel, whether to plead guilty or go to trial. Moreover, it protects the Constitutional guarantees of the opportunity for effective cross-examination, which requires full pretrial disclosure, and that of a fair trial and effective assistance of counsel, comprising the fundamental and comprehensive need to develop all relevant facts as the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

The ABA proposed the following:

#### Standard 11.1.1 Objectives of pretrial procedures

- (a) Procedures prior to trial should, consistent with the constitutional rights of the defendant:
  - (i) promote a fair and expeditious disposition of the charges, whether by diversion, plea, or trial;
  - (ii) provide the defendant with sufficient information to make an informed plea;
  - (iii) permit thorough preparation for trial and minimize surprise at trial;
  - (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
  - (v) minimize the procedural and substantive inequities among similarly situated defendants;
  - (vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearing; and
  - (vii) minimize the burden upon victims and witnesses.
- (b) These needs can be served by:
  - (i) full and free exchange of appropriate discovery;
  - (ii) simpler and more efficient procedures; and
  - (iii) procedural pressures for expediting the processing of cases.

#### Standard 11-2.1 Prosecutorial disclosure

- (a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit

inspection, copying, testing, and photographing of disclosed documents or tangible objects:

- (i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.
  - (ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.
  - (iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.
  - (iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons and of scientific tests, experiments or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.
  - (v) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.
  - (vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial.
  - (vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.
  - (viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.
- (b) If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.
- (c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

Thus, requiring full disclosure of the prosecutor's and law enforcement's file (excepting work product and privileged material) would not only protect the defendant's constitutional rights to a fair trial, due process, effective assistance of counsel, effective confrontation and cross-examination, but would also promote confidence in the judicial system and advance its principles--the presumption and protection of the innocent, the search for the truth, and the conviction of the guilty based upon a fair trial and effective representation.

### **3. PLEA, TRIAL, AND SENTENCING**

#### **(i) OVERSIGHT**

As discussed earlier in this report, federal district judges have articulated their concerns about the unwarranted sentencing disparities and the grossly disproportionate sentences they have been forced to impose due to federal mandatory minimums, enhancements, and consecutive counts. Until reform-minded lawmakers like myself are able to marshal sufficient votes to repeal or narrow these unjust laws, it is my hope that federal district judges will continue to exercise their Constitutional authority as a check on executive overreach. Specifically, in those cases in which the government's reasons for filing a § 851 enhancement are pretext for collecting a "trial penalty," when the number of § 924(c) counts sought would lead to an excessive and unnecessary sentence, when the quantity threshold to trigger a mandatory minimum is met through various sentencing manipulation techniques including "reverse stings" or aggregation of events or conspiracy, or when enhancements are sought based upon uncharged, acquitted, or dismissed conduct as a way to circumvent the jury.

The independence of the federal judiciary is necessary precisely because the presiding judge may inquire of the federal prosecutor as to what the reasons behind those choices are and convey that colloquy to the U.S. Attorney for that district, who has a vested interest in ensuring that his line attorneys represent the values espoused by the DOJ. Admittedly, defense counsel or the defendant may raise the same objections with senior management, but their position as an adversary in the case prejudices their assessment. Federal judges who are neutral arbiters and benefit from the experience of presiding over all the criminal cases filed in that district are routinely asked by their U.S. Attorney whether any concerns exist about perceived prosecutorial conduct.

#### **(ii) ALTERNATIVES TO INCARCERATION**

As discussed earlier, states that have employed alternatives to incarceration have seen not only lower correctional costs, but also better reentry outcomes and lower recidivism rates. Georgia, for example, created more alternatives to incarceration, expanded the use of electronic monitoring, and diverted all low-level first-time offenders to community supervision rather than prison. Similarly, Oregon expanded its use of electronic monitoring and drug courts.

In particular, Missouri greatly expanded the number of offenders it diverted to specialized programs and courts targeted to their rehabilitative needs. Its successful reforms reduced incarceration in favor of:

- diverting drug offenders to specialized drug courts
- establishing veterans treatment courts, which combine judicial supervision, drug testing, and substance abuse and mental health treatment and provide for dismissed, reduced, or modified charges and/or penalties upon successful completion
- diverting offenders to smaller, community-based residential settings that are closer to families, faith-based institutions and other support resources
- creating day-centers for juvenile offenders, which permit them to continue to attend school, participate in community activities, follow their individualized treatment plans, and receive intensive treatment, educational and vocational services, life skills training, victim empathy, social skills, anger/emotions management, healthy thinking patterns and coping skills, peer influences, substance abuse, and self-esteem, as well as educational and vocational programming

In light of the federal judges' authority under § 3553(a) to “impose a sentence sufficient, but not greater than necessary” to provide “just punishment” and “needed educational or vocational training, medical care, or other correctional treatment *in the most effective manner*,” while “avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” federal sentencing judges are granted the clear statutory authority to consider the sentences imposed by the federal judges in other districts and those imposed by state judges, including alternatives to incarceration.

The Sentencing Guidelines provide specifically for alternatives to incarceration for sentences within Zone A, B, and C. As demonstrated on the state level and as stated in § 3553(a), sentencing is not for punishment and deterrence only, but also for rehabilitation, educational and vocational training, medical care, and other correctional treatment, which are more available and less costly when coordinated through pretrial services or probation than when offered at correctional institutions. Ultimately the correctional savings far outweigh any incremental increase in funding that the Judicial Conference would require.

Reserving prison bed space for violent and other more serious offenders, as states have done, would relieve overcrowding, contain correctional spending, and improve reentry outcomes. It bears noting that BOP and Sentencing Commission demonstrates that violent offenders represent only 7% of the federal prison population. Federal judges, guided by their consideration of all of the § 3553(a) factors and the policies under the relevant Sentencing Guidelines, should also consider the success that state judges have seen in implementing alternatives to incarceration to avoid unwarranted sentencing disparities for offenders who are guilty of similar behavior.

Even when incarceration is required under the Sentencing Guidelines, it is appropriate and fair for sentencing judges to consider the duration of the sentence relative to those imposed in other federal districts, for other federal offenses, and in states for similar conduct to determine whether the sentence is proportionate to the harm. Moreover, the sentencing judge may also consider what additional punitive, deterrent, or rehabilitative benefit accrues from the approximate \$30,000 it costs taxpayers for each year of the average sentence imposed. In particular, the sentencing judge should fairly question the prosecutor seeking a 30-year sentence whether \$1 million of taxpayer funds is justified or \$500,000 for a 15-year sentence? Certainly, the greater the sentence sought by the prosecution requires greater justification for all the costs: financial, individual, and societal.

### **(iii) SRA COLLABORATION WITH SENTENCING COMMISSION**

The SRA and the decisions interpreting it reiterate that the Sentencing Commission, acting as the neutral expert body it was created to be,<sup>780</sup> must review and revise the Sentencing Guidelines based on what it learns from the courts that apply them in practice. Indeed, it is federal judges' authority in sentencing that has brought greater balance and transparency to the Commissions' rulemaking.

Our federal advisory sentencing guidelines system has permitted the federal judiciary to communicate with the Commission and amongst its component courts, districts, and circuits in a transparent and effective manner. Since federal judges consider the decisions in other districts and circuits when drawing analogies or distinctions or interpreting identical sentencing guidelines, this leads to an ongoing, national conversation regarding sentencing policy and practice, that provides valuable feedback to the Commission in the process.<sup>781</sup>

Because federal judges are tasked with applying the Sentencing Guidelines and statutory mandatory minimums, enhancement, and consecutive counts, they offer their unique practical observations of how the Sentencing Guidelines and mandatory penalties are operating in all categories of cases. This enables them to identify trends and patterns at an earlier point in time.

The most well-known example is the disparity in punishment in the Sentencing Guidelines between powder cocaine and crack cocaine. Beginning in 2006, federal courts split on the issue of whether judges could consider the empirically-flawed basis for the policy underlying that particular guideline.<sup>782</sup> Prior to the Supreme Court's oral argument,<sup>783</sup> two of the original sponsors of the SRA, Senators Kennedy and Hatch, along with Senator Feinstein, filed

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<sup>780</sup> See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (describing the Commission's "characteristic institutional role" as its capacity to "base its determinations on empirical data and national experience" (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10<sup>th</sup> Cir. 2007) (McConnell, J., concurring))).

<sup>781</sup> Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 88 (2000) (the SRA's framers expected that "judges would share-with each other and with the Sentencing Commission—case-specific insights on sentencing policy and practice and thereby contribute to the development of principled and purposeful sentencing law.")

<sup>782</sup> See U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 115-122 (2007) (noting the circuit split, that several cases were pending on petition for certiorari, and that certiorari had been granted in *Claiborne v. United States*).

<sup>783</sup> *Claiborne v. United States*, 549 U.S. 1016 (2006).

an amicus brief urging the Court to permit judges to disagree with unsound policies reflected in the guidelines, including the crack/powder disparity.<sup>784</sup>

As a result of and within 3 years of these developments,<sup>785</sup> the Sentencing Commission reduced the crack guidelines by two levels,<sup>786</sup> the Executive Branch urged Congress to eliminate the crack/powder disparity and supported federal judges' discretion in tailoring sentences,<sup>787</sup> and Congress enacted the Fair Sentencing Act of 2010, which reduced the 100-to-1 powder-to-crack quantity ratio 18-to-1 and directed the Commission to reduce guideline penalties accordingly.<sup>788</sup>

Thus, federal court decisions have identified problematic disparities in the system that the Sentencing Commission, Congress, and the Executive all sought to remedy in collaboration.

As the Sentencing Commission amends and improves the guidelines due to this judicial feedback, judges follow them more often, as the Supreme Court predicted they would.<sup>789</sup> Moreover, the Executive Branch has also relied on the federal judiciary's observations of problematic disparities in fashioning more appropriate allocation of law enforcement and prosecutorial resources. For example, DOJ has recently required United States Attorneys in all judicial districts to implement an early disposition ("fast track") program for illegal reentry cases, noting that the availability of such departures in some districts but not others had generated concern about unwarranted disparity.<sup>790</sup> Federal courts were responsible for raising that concern and highlighting the need for reform.<sup>791</sup>

In that same vein, federal judges should continue to share their concerns about the disparities and problems they observe in our criminal justice system. The Sentencing Commission, the Executive Branch, and reform-minded lawmakers such as myself, rely upon their expertise in setting our priorities for reform. As we have seen with the crack cocaine disparity and with the "fast track" programs, the louder the chorus of federal judges, the greater the momentum for reform from the other branches.

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<sup>784</sup> Brief of Amici Curiae Senators Edward M. Kennedy, Orin G. Hatch & Dianne Feinstein in Support of Affirmance, *Claiborne v. United States*, 551 U.S. 87 (2007) (No. 06-5618), 2007 WL 197103. After petitioner Mario Claiborne died, thus mooting the case, the Court granted review in *Gall v. United States*, 552 U.S. 38, 41 (2007) and *Kimbrough v. United States*, 552 U.S. 85 (2007).

<sup>785</sup> U.S. Sentencing Comm'n, *supra* note 783, at 115-22.

<sup>786</sup> 72 Fed. Reg. 28,558, 28,572-72 (May 21, 2007).

<sup>787</sup> *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder disparity: Hearing Before Subcomm. On Crime & Drugs of the S. Comm. On the Judiciary*, 111<sup>th</sup> Cong. 101 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen.).

<sup>788</sup> Pub. L. No. 111-220, § 2, 124 Stat. 2372; *id.* § 8, 124 Stat. at 2374.

<sup>789</sup> See *Kimrough v. United States*, 552 U.S. 85, 107 (2007) ("[A]dvisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'" (quoting *United States v. Booker*, 543 U.S. 220, 264 (2005))). Justice Scalia explained in *Rita v. United States* that as the Commission "perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission's recommendations." 551 U.S. 338, 382-83 (2007) (Scalia, J., concurring).

<sup>790</sup> Mem. from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys 2 (Jan. 31, 2012), available at <http://www.justice.gov/dag/fast-track-program.pdf>.

<sup>791</sup> See, e.g., *United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011); *United States v. Jimenez-Perez*, 659 F.3d 704, 707-10 (8th Cir. 2011); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008).

Thus, I commend the federal judiciary for its important dual roles as gatekeeper and herald, and I urge federal judges to continue exercising their statutory and Constitutional authority to express their concerns, policy disagreements, and proposed solutions for the serious and pressing concerns we face, including: (1) the effects of mandatory minimums, enhancements, and consecutive counts; (2) the accuracy of drug quantity as a proxy for culpability; (3) sentencing manipulation practices, involving “reverse stings” and charge stacking; (4) sentencing inversion when kingpins cooperate and “flip down;” (5) the scope of the “safety valve;” (6) enhancing sentences based upon acquitted, uncharged, or dismissed conduct; (7) tailoring sentences for non-citizens who will be removed from the United States; and (8) the scope of the career offender enhancement.

#### **4. SUPERVISION (PRETRIAL, PROBATION, SUPERVISED RELEASE)**

##### **(i) INCENTIVIZE EARLY TERMINATION OF SUPERVISED RELEASE**

Federal judges and probation officers should consider creating a presumption for early termination of supervised release. Currently, early termination of supervised release can occur after one-year of supervised release has been completed, if the offender’s conduct warrants the change and it is in the interest of justice to do so.

As states have experienced, reserving intensive supervision for high-risk offenders only and incentivizing positive offender conduct---completion of educational, vocational, medical, and psychological programs---leads to better reentry results and lowers recidivism. For example, New Hampshire prioritized its supervision and resources on high-risk probationers by reducing the length of supervision for low-risk individuals. Missouri capped the amount of incarceration that low-level offenders may serve for technical violations of parole or probation.

Oregon reduced the period of probation by offering credit to offenders who maintained employment and fulfilled all obligations, including victim restitution. For technical violations, Pennsylvania diverted its nonviolent and low-risk offenders to drug courts, electronic monitoring, and intermediate sanctions rather than prison for technical violations of probation and parole officers.

The Judicial Conference’s own 2013 study of early termination of supervised release demonstrated not only lower recidivism rates but substantial cost savings. Specifically, after three years, only 10.2% of early-termination offenders had been rearrested, while 19.2% of full-term offenders were rearrested. As the Judicial Conference found, early termination saves the probation and pretrial officers’ time that they can devote to supervising and servicing offenders who present a greater need for supervision. Early termination also saves money. The more than 7,000 offenders whose supervision terminated early in 2012 saved the Judiciary more than \$7.7 million, which the Judiciary could reinvest in providing needed medical, educational, and vocational programs and hiring additional officers to lessen their caseload burden.

As such, the Judicial Conference should consider expanding the number of offenders eligible for early termination after 1 year with requirements for successful completion of

educational, vocational, medical, and psychological benchmarks for consideration. Raising the number to 10,000 nonviolent, low-level, and low-risk offenders who have completed these rehabilitative programs would, based upon the Judicial Conference data above, save the Judiciary approximately \$10 million.

## **(ii) CONDITIONS OF SUPERVISED RELEASE**

States have recognized that supervision that is too intensive may be counterproductive. Therefore, among their many reforms, states have tailored the level of supervision to the risks and needs of the individual. States have also recognized that they needed to provide a greater degree of specialization, flexibility, and assistance. Louisiana, for example, provides and improves opportunities for releasees to secure employment in conjunction with the private sector and faith-based communities. Acknowledging the variety of professional and personal demands on releasees, it also expanded day reporting centers to make it easier for releasees to comply. Louisiana also expanded reentry initiatives to support releasees in securing housing. Likewise, Nebraska launched new day and night reporting centers to better accommodate releasees' schedules and support their efforts to comply.

A summary of measures implemented by the states have included:

- creating day- and night-reporting centers to accommodate offenders' work schedules;
- permitting offenders to report or drug test at various locations;
- permitting offenders to report telephonically;
- allowing specialized supervision officers to focus on offenders requiring assistance with substance abuse, mental health, and veterans affairs;
- transferring supervision to districts in which the offender has family and/or employment prospects;
- coordinating with local nonprofits, faith-based organizations, community organizers, and private employers to allow offenders to volunteer and develop job skills with the aim of eventual paid employment;
- coordinating with nonprofits, faith-based organizations, community organizers, and private employers to provide mental health and substance treatment programs or funding for them;
- permitting offenders who are not yet employed to meet their monthly restitution payments by completing work release or community service;
- substituting employment training for community service requirements;
- substituting employment training or work release programs for job search certification requirements;
- hiring and training officers to assist offenders with overcoming barriers to reentry such as food and subsistence benefits, housing assistance, applying to educational and vocational programs, and among other things

States have recognized that by easing releasees' transition back to their communities and by supporting releasees in their efforts to comply with the conditions of supervised release, it

necessarily reduces the number of supervised release violations, reduces recidivism, and increases successful reentries by releasees.

### **(iii) VIOLATIONS OF SUPERVISED RELEASE**

The majority of states have reformed their laws to create presumptions against incarceration for technical violations of supervised release, which federal judges should consider doing as well. States have also been flexible in terms of the penalties they have imposed to mitigate any disruption to the offender's employment, such as community confinement or incarceration on weekends only. They have recognized that it is the swiftness and certainty that matters so states have provided that in cases of technical violations (e.g. positive drug tests, failure to attend meetings, violations of curfew), automatic modification to include substance abuse treatment, in-patient treatment, transfer to community confinement, additional drug testing, community service, and other sanctions.

For example, Maine clarified that it prioritized probation officers to assisting probationers with succeeding in reentry efforts rather than officers filing violations against them. It also diverted probation violators from prison and instead applied graduated and proportional sanctions, such as geographical restriction on movement for missing an appointment. Likewise, California instituted performance-based probation funding based upon the results of officers assisting probationers with reentry as compared to the number of violations files and reinvesting savings into the community-based programs. Georgia, for example, improved probation results by using alternatives to incarceration that promote accountability. Arizona incentivized probation departments by offering them a share of the state's savings to reinvest in victim services, substance abuse treatment, and strategies to improve community supervision and reduce recidivism when they reduce their revocations to prison without increasing probationers' convictions for new offenses.

The Judicial Conference should institute performance-based probation funding and metrics for advancement in order to incentivize pre-trial and probation officers to prioritize supporting offenders' successful transition and compliance rather than by filing violations that are ultimately counterproductive.

Along that same vein, the ABA recommends that reincarceration should be limited to occurrences of new crimes, repeated violations, or posing a danger to the community, and that lesser sanctions and appropriate treatments should be utilized for lesser violations. Additionally, the length of incarceration could be adjusted dependent upon the violations, as often a short return to jail may prove more beneficial than a long-term return to prison. Such long-term returns could substantially derail any improvements that an individual has made in their reintegration efforts.

For federal supervised release violations that result from new criminal charges in either state or federal court, federal judges should consider whether incarceration or a lengthy term of incarceration is advisable, necessary, or fiscally prudent if that offender will already be subject to a sentence of incarceration in the new case.

## **X. CONCLUSION**

We have a system of checks and balances precisely because we believe in a nation of laws, not a nation of men. As John Adams famously said on the eve of American independence: “There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty.”

For too long, we have operated as a nation that has allowed too much power to accumulate in the Executive Branch. All of us in Congress bear the responsibility of not instituting safeguards to ensure that principles of restraint and comity applied in the exercise of federal jurisdiction vis-à-vis the states, the data upon which our legislation was based was sound and prudent, and the impact on our country was what we intended. By overfederalizing, overcriminalizing, and overincarcerating, we have abdicated our oversight role.

In contrast, states have reformed their criminal justice systems to address almost identical problems as ours, with great success. As the Supreme Court of the United States recognized, a “state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” The states, serving as laboratories of democracy, have implemented innovative, commonsense, and evidence-based reforms that have improved public safety, decreased crime, invested in beneficial community programs, and, at the same time, saved more money in reduced prison costs than they spent on the new program.

It is time for all three branches of the federal government to learn from the state experience.

More to the point, it is time for the federal government to lead the way in ensuring that the administration of justice on the federal level is the model for the states.

We should all be profoundly grateful to serve in this endeavor.