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Recommended Citation

Robert C. NeSmith, *Tough on Crime or Tough Luck for the Incarcerated? Exploring the Adverse Psychological Impacts of Mandatory Minimum Sentencing and Pushing for Action*, (2015).

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**TOUGH ON CRIME OR TOUGH LUCK FOR THE INCARCERATED?
EXPLORING THE ADVERSE PSYCHOLOGICAL IMPACTS OF MANDATORY
MINIMUM SENTENCING AND PUSHING FOR ACTION**

ROBERT C. NESMITH*

INTRODUCTION

Few question that the criminal justice system in the United States is imperfect or needs revision, as this is not a new concept. To be sure, for over four decades the United States has grappled with criminal justice reforms and sentencing in its attempt to “get tough” on crime and, more specifically, eliminate illicit drug use.¹ Yet, notwithstanding the longevity of these efforts and an eye-popping price tag of \$1 trillion,² most scholars consider this “War on Drugs” to be an unmitigated failure analogous to Prohibition-era policies.³ Consider that during this period, the United States has become the largest incarcerator in the world, housing 25% of the world’s prison population, but is home to only 5% of the world’s population.⁴ There are currently over 2.3 million people in local, state, and federal jails or prisons,⁵ which translates to the world’s highest prison population

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¹ See Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 597 (2011).

² Martha Mendoza, *US Drug War Has Met None of Its Goals*, NBC NEWS (May 13, 2010, 4:06 PM), http://www.nbcnews.com/id/37134751/ns/us_news-security/t/us-drug-war-has-met-none-its-goals/#.VHST2YvF-8A.

³ Burton Adams, *80 Years After Prohibition’s Repeal, President Obama Continues a Failed Drug War*, FORBES (Dec. 5, 2013, 1:03 PM), <http://www.forbes.com/sites/realspin/2013/12/05/80-years-after-prohibitions-repeal-president-obama-continues-a-failed-drug-war/>.

⁴ *The Prison Crisis*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/safe-communities-fair-sentences/prison-crisis> (last visited Feb. 23, 2015).

⁵ See E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., available at <http://www.bjs.gov/content/pub/pdf/p13.pdf> (last visited Nov. 16, 2014); Todd D. Minton & Daniela Golinelli, *Jail Inmates at Midyear 2013*, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., available at <http://www.bjs.gov/content/pub/pdf/jim13st.pdf> (last visited Nov. 13, 2014).

rate of 716 persons per 100,000 of the population.⁶ And to boot, over half of prisoners in the federal system are incarcerated for nonviolent drug offenses as a result of mandatory minimum sentences.⁷

These staggering rates of incarceration coupled with prison overcrowding, strained budgets, and the negative psychological impacts prison has on those incarcerated and their families along with structural barriers faced upon reentry have strengthened the push for criminal justice reform in recent years.⁸ Though it is important to note that significant strides have been made recently, these reforms are relatively modest. They do not make the systemic change necessary to fully address our nation's mass incarceration problem⁹ and the negative psychological impacts of prison.¹⁰ The purpose of this note is to evaluate the psychological impacts these harsh mandatory minimum sentences have on those incarcerated, their families, and their communities. This note will begin with an analysis of the history and philosophy of mandatory minimum sentences in the context of our nation's criminal justice system.¹¹ This note will continue with an evaluation of the psychological impacts of prison on the incarcerated, their families, and their communities.¹² Finally, this note will explore the most recent reforms enacted by U.S. Attorney General Eric Holder and the U.S. Sentencing Commission and will offer recommendations for solving our nation's incarceration problems and minimizing their psychological impacts.¹³

⁶ Roy Walmsley, *World Prison Population List 1* (10th ed. 2013), INT'L CTR. FOR PRISON STUD., http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf.

⁷ Nicole Flatlow, *The United States Has The Largest Prison Population In The World — And It's Growing*, THINKPROGRESS (Sept. 17, 2014, 9:08 AM), <http://thinkprogress.org/justice/2014/09/17/3568232/the-united-states-had-even-more-prisoners-in-2013/>.

⁸ See Fairfax, *supra* note 1, at 597–98; Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment 3–4* (Dec. 2001) (unpublished manuscript) (on file with the U.S. Dep't of Health & Human Servs.), *available at* <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf>.

⁹ Jeremy Haile, *In a Do-Nothing Year, Here's One Thing Congress Can Actually Do*, HUFFINGTON POST (Sept. 9, 2014, 4:46 PM), http://www.huffingtonpost.com/jeremy-haile/in-a-donothing-year-heres_b_5786972.html?utm_hp_ref=politics.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part I.

¹² See *infra* Part II.

¹³ See *infra* Part III.

I. THE ORIGINS OF MINIMUM SENTENCING

A. *The War on Drugs*

Faced with an increase in widespread drug use that resulted from events like Woodstock in the 1960s and soldiers returning from Vietnam addicted to heroin, President Nixon launched a campaign to eradicate the use of illicit drugs in 1971.¹⁴ This decision was an about-face from Nixon's initial embrace of "greater investment in treatment, rehabilitation, and public health to combat substance abuse."¹⁵ Nonetheless, these efforts and the policies enacted became primarily known as the "War on Drugs" when Nixon ardently proclaimed that drug abuse was "[p]ublic enemy No. 1"¹⁶ and that "[i]n order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."¹⁷ Subsequently, the size and presence of federal drug control agencies was substantially increased in addition to an ever-growing budget to support these efforts.¹⁸

During the initial stages of President Nixon's war on drugs, an era of indeterminate sentencing still existed within the federal system and every U.S. state.¹⁹ This system was rooted in the notion that sentences needed to be individualized to each case with rehabilitation as the primary aim of punishment.²⁰ Essentially, judges were the sentencing experts and served more of a therapeutic role in attempting to develop solutions for those who committed crimes.²¹ Parole was also still available to defendants, but it depended largely on their conduct during their incarceration.²²

¹⁴ *AP Impact: After 40 Years, \$1 Trillion, US War on Drugs Has Failed to Meet Any of Its Goals*, FOXNEWS.COM (May 13, 2010), <http://www.foxnews.com/world/2010/05/13/ap-impact-years-trillion-war-drugs-failed-meet-goals/>.

¹⁵ NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 119 (Jeremy Travis et al. eds., 2014).

¹⁶ Mendoza, *supra* note 2 (internal quotation marks omitted).

¹⁷ *Id.* (internal quotation marks omitted).

¹⁸ *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Nov. 15, 2014) [hereinafter DRUG POLICY ALLIANCE]. President Nixon's first drug-fighting budget was \$100 million. Today, that budget stands at a staggering \$25.2 billion for Fiscal Year 2014. See Mendoza, *supra* note 2; OFFICE OF NAT'L DRUG CONTROL POL'Y, EXEC. OFFICE OF THE PRESIDENT, *NATIONAL DRUG CONTROL BUDGET: FY 2014 FUNDING HIGHLIGHTS 2* (2013).

¹⁹ NAT'L RESEARCH COUNCIL, *supra* note 15, at 71.

²⁰ *Id.*

²¹ Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–96 (2010).

²² *Id.* at 696. Parole is essentially "a mechanism for releasing a prisoner before the completion of his sentence," but with the stipulation that the prisoner abide by certain conditions and rules and stay out of trouble. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time*

However, though indeterminate sentencing did provide for flexibility and judicial discretion, it did allow a number of problems to arise. Judges were never trained on how and when to wield their discretion.²³ Different rules existed at the trial and the sentencing stages.²⁴ Even more importantly, disparity in sentencing was widespread because no sentencing system existed to guide judges, and there was little or no appellate review of sentencing.²⁵ These problems with indeterminate sentencing ushered in an overhaul of sentencing reform and the enactment of sentencing guidelines in many states, followed by mandatory minimums with long prison sentences.²⁶

B. *Doubling Down on the War on Drugs*

When President Ronald Reagan took office in 1981, drug use of illicit substances had been declining since it had peaked in 1979.²⁷ Yet, despite the decline, President Reagan launched his own campaign to get “tough on crime” and end drug use, which dramatically increased the efforts employed to achieve this goal initially started by President Nixon.²⁸ What emerged from these doubled-down efforts by President Reagan were significant legislative reforms for prison sentencing as well as enactments of mandatory minimums for a number of offenses.²⁹

1. *Sentencing Guidelines Movement*

The crux of sentencing reform was set in motion with the passage of the Sentencing Reform Act of 1984 (SRA), which created the United State Sentencing Commission (USSC) and abolished federal parole as a part of the larger Comprehensive Crime Control Act signed by President Reagan.³⁰ The purpose of the Commission was to create sentencing guidelines amidst the chaotic criminal code that existed and to utilize scientific studies in determining the efficacy of types of punishments and what might

Credits, and Crowded Prisons: Reconsidering Early Release, GEO. J.L. & PUB. POL'Y 1, 7 (2013).

²³ Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 572 (2005). A defendant could be subjected to widely differing types of punishment as a result of the judge's opinions or beliefs on the offense. *Id.* at 572–73.

²⁴ *Id.* at 571. The trial stage was subject to evidentiary rules and high standards of proof whereas at the sentencing stage, the evidentiary rules did not apply and the standard of proof was the lowest level, a fair preponderance of the evidence. *Id.*

²⁵ Gertner, *supra* note 21, at 695–96.

²⁶ *Id.* at 698.

²⁷ NAT'L RESEARCH COUNCIL, *supra* note 15, at 119–20.

²⁸ *Id.* at 120.

²⁹ *Id.*

³⁰ Gertner, *supra* note 21, at 698.

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be needed for differing types of offenses and offenders.³¹ Despite these lofty goals for the Commission to act as experts in creating guidelines for sentencing, the results were troubling.³²

The Commission did not study the effectiveness of certain sentences nor did it analyze what worked best for crime control; rather, it merely calculated the average lengths of sentences in the U.S. and simply increased them.³³ Additionally, the Commission did not look closely at the factors judges considered when sentencing, it simply compared gross sentencing outcomes and determined what it thought were the important factors.³⁴ The Commission also sought to reduce judicial discretion by focusing on factors that had a quantitative value or an objective rendering rather than considering the social background or psychological condition of the person being sentenced.³⁵ Ultimately, the Commission focused on one issue above all others—reducing disparity to ensure judges were all doing the same thing—instead of fulfilling the goals it was created to achieve.³⁶ This failure by the Commission had a massive ripple effect on the criminal justice system as judges “slavishly followed the Guidelines” and enforced them with unnecessary rigor beyond what the SRA and USSC Guidelines required.³⁷ What resulted was a skyrocketing of incarceration rates that were accentuated by the harsh mandatory minimums put in place thereafter.³⁸

2. *Mandatory Minimum Sentences for Drug Offenses*

In the mid-1980s, the Reagan Administration seized an opportunity to capitalize on sensational media portrayals as well as a heightened public fear and a sense of national urgency about drug use to get the Anti-Drug Abuse Act of 1986 passed.³⁹ This legislation provided the basic framework for mandatory minimum penalties currently applicable to federal drug trafficking and was pushed through Congress without any of the usual procedure, as no hearings were held nor were committee reports were pro-

³¹ Gertner, *supra* note 23, at 573–74.

³² *See id.* at 574–76. Justice Scalia has referred to the Commission as a “junior varsity Congress” that was “political from the outset, largely responding to public pressure to increase sentences.” *Id.* at 576.

³³ *Id.* at 574.

³⁴ *Id.*

³⁵ *Id.* at 575.

³⁶ *Id.* at 576.

³⁷ Gertner, *supra* note 23, at 576.

³⁸ R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 986 (2014).

³⁹ DRUG POLICY ALLIANCE, *supra* note 18.

duced.⁴⁰ Shortly thereafter, the Anti-Drug Abuse Act of 1988 was passed, which created a policy goal of a drug-free America and created the Office of National Drug Control Policy to set its priorities and implement a national strategy.⁴¹ These two far-reaching pieces of legislation imposed draconian penalties on offenders and resulted in historically unprecedented levels of imprisonment for drug use and possession.⁴² The astronomical incarceration rates that followed have had an even larger psychological impact on those incarcerated as well as their families and their communities.⁴³

II. PSYCHOLOGICAL IMPACTS OF PRISON AS A RESULT OF MANDATORY MINIMUMS

A. *Impact on Criminals*

The shift away from rehabilitation and treatment to an emphasis on punitive retribution through mass incarceration has taken a psychological toll on those incarcerated.⁴⁴ Adaptation to prison life creates habits of thinking and acting that make it difficult for post-prison adjustment.⁴⁵ Because prison requires inmates to relinquish the freedom and autonomy to make their own choices, this may lead to prisoners having the inability to initiate behaviors on their own and the judgment to make decisions for themselves.⁴⁶ Additionally, this controlling of behavior can cause dependency upon the institution.⁴⁷ This proves to be quite a negative effect as prisoners attempt to reenter society but have lost the ability to provide direction for their lives because they are so dependent on institutions like prison to give them direction.⁴⁸

Another psychologically crippling effect of prison manifests itself through a sense of hyper-vigilance, interpersonal distrust, and emotional over-control that culminates in social isolation and withdrawal.⁴⁹ Prison is a dangerous place where weakness is often exploited and, as a result, those incarcerated become hyper-vigilant, always alert for signs of a threat or personal risk.⁵⁰ This also fuels a lack of trust amongst inmates because of

⁴⁰ U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23–24 (2011).

⁴¹ Office of Nat'l Drug Control Pol'y, *Authorizations Language*, THE WHITE HOUSE, <https://www.whitehouse.gov/ondcp/authorization-language> (last visited Nov. 13, 2014).

⁴² NAT'L RESEARCH COUNCIL, *supra* note 15, at 120.

⁴³ Haney, *supra* note 8, at 4–5.

⁴⁴ *Id.* 3–4.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Haney, *supra* note 8, at 5–8.

⁵⁰ *Id.* at 7–8.

the fear that they might be taken advantage of at any turn or exposure of weakness.⁵¹ Along with this hyper-vigilance is a sense of emotional over-control where prisoners often develop a “prison mask” to hide their emotions and prevent themselves from appearing weak.⁵² This “prison mask” is intended to be unrevealing and impenetrable for their self-protection while in prison.⁵³ However, there is a risk of alienation from themselves and others to which the prisoner might develop emotional flatness that is debilitating in social interaction and relationships because the prisoner created a permanent and irreparable distance between himself and other people.⁵⁴ Essentially, these attempts to control emotions and hide weaknesses can lead to those prisoners withdrawing socially and isolating themselves from authentic social interactions altogether.⁵⁵

The biggest problem that presents itself is how these psychological tolls appear as the prisoners reenter back into the general public.⁵⁶ These ills might be most prevalent for those nonviolent drug offenders serving long prison terms as a result of mandatory minimum sentencing laws. A nonviolent offender serving a long prison term is more likely to become dependent on the institution in decision-making because of the length of the sentence.⁵⁷ The prisoner may have success resisting institutionalization initially in a short-term sentence, but over time, a subtle transformation occurs because of the prisoner’s need to survive, and the adjustment to prison rules or customs become second nature.⁵⁸ Thus, upon reentry into our communities, there are possibly large numbers of nonviolent offenders who have served harsh mandatory minimum sentences and now are incapable of making their own decisions or exercising self-autonomy.

The hyper-vigilance from prison life can also be more problematic for nonviolent offenders serving long mandatory minimum sentences as they reenter the community. For these offenders, they may find themselves lower on the proverbial hyper-masculine totem pole and as a result, be subjected to more psychological abuse than say, a more aggressive and more violent offender serving a term for murder. This would also increase these prisoners’ levels of distrust and desires to control and suppress their emotions to avoid further abuse because they are lower on the prison hierarchy. Consequently, these nonviolent offenders might become psychologically

⁵¹ *Id.* at 8.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Haney, *supra* note 8, at 9.

⁵⁶ *Id.* at 15.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.*

and emotionally hardened by prison, which could lead to recidivism because of aggressive behavior in the community upon release.⁵⁹

Additionally, the dramatic incarceration rates in the U.S. create concern regarding potential collateral consequences⁶⁰ and reentry because they will ultimately result in increased numbers of prisoners being released to ease the tension on the system caused by overcrowding.⁶¹ Because of the social stigma that prison places on those incarcerated, it makes the transition that much more difficult, as those released have trouble holding gainful employment and fitting into the community without falling subject to their old ways and being imprisoned again.⁶² Some notable collateral consequences faced by prisoners upon release “include temporary or permanent ineligibility for public benefits, public or government-assisted housing, and federal student aid.”⁶³ Other consequences include “various employment-related restrictions[,] disqualification from military service[,] and] civil disqualification such as felon disenfranchisement and ineligibility for jury service.”⁶⁴ This vast network of consequences overwhelmingly affects and limits an individual’s social, economic, and political access⁶⁵ as they attempt to rebuild their lives and families after serving an extended mandatory minimum sentence with little support. These consequences are a critical pitfall of prison sentences and reinforce the cyclical nature of an individual’s behavior. Drug dealers, for example, may never have an opportunity to be anything else besides drug dealers because of the economic and social limitations prison has imposed on them. In essence, because of the gravity of what is at stake for these individuals, more must be done to take into consideration the nature of the crime committed and the psychological impact a harsh minimum sentence could have on the individual. Furthermore, in light of the profound negative psychological trauma an incarcerated individual is subjected to, a larger concern may exist in the resulting psychological impacts that prison has on the families of those incarcerated.

⁵⁹ Approximately two-thirds of individuals released from prison are rearrested within three years of their release. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 629 (2006).

⁶⁰ Collateral consequences are essentially the indirect consequences that are automatically imposed on a person as a result of federal and state criminal convictions, but are not part of the explicit punishment entered by the court. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS I (3d ed. 2004).

⁶¹ Pinard, *supra* note 59, at 627.

⁶² Haney, *supra* note 8, at 15–16.

⁶³ Pinard, *supra* note 59, at 635–36.

⁶⁴ *Id.* at 636.

⁶⁵ *Id.* at 634–35.

B. *Impacts on the Family of the Incarcerated*

The impact of incarcerations on parents is profound, as it has ripped families apart and pushed them to fend for their own survival with little to no support system.⁶⁶ Parents who return from institutionalization still dependent on the institution can hardly be expected to organize the lives of their children or exercise necessary judgment needed for parenting.⁶⁷ The aforementioned social withdrawal or emotional over-control “could not be more dysfunctional in family settings where closeness and interdependency [are] needed.”⁶⁸ Imagine the everyday struggles of parents across our nation as they attempt to balance work with rearing children, but then add in the restrictions and limitations that prison has imposed on these parents. The results are unfathomable. Parents returning from serving an extended minimum sentence cannot be expected to effectively raise children or economically provide for their families because of the limitations created by their incarceration and the psychological ills they were exposed to.

Children of incarcerated parents also experience significant trauma from losing their parents to long prison terms.⁶⁹ The imprisonment of a parent undermines a child’s sense of stability and security as well as compromises her sense of self-worth and connectedness.⁷⁰ When a parent is taken away for a long prison term, this creates instability in the home and can cause the child to lash out aggressively as a result of lack of support.⁷¹ Children also often drop out of school because of the pressure to help supplement household income, whether through legitimate or illegitimate means.⁷² Additionally, children with incarcerated parents have low self-worth and are likely to be misunderstood due to a lack of opportunity to connect with their parents and express their feelings or desires.⁷³ The psychological impacts of mandatory minimum sentences are substantial, and more must be done to address these problems and reform the broken system that continues to incarcerate such a significant portion of the population and results in continued negative ripple effects on our families and communities.

⁶⁶ Patricia Allard, *When the Cost Is Too Great: The Emotional and Psychological Impact on Children of Incarcerating Their Parents for Drug Offences*, 50 FAM. CT. REV. 48, 49 (2012).

⁶⁷ Haney, *supra* note 8, at 15.

⁶⁸ *Id.*

⁶⁹ Allard, *supra* note 66, at 51.

⁷⁰ *Id.* at 51–52.

⁷¹ *Id.*

⁷² *Id.* at 52.

⁷³ *Id.* at 53.

III. MARCHING TOWARD PROGRESS: REFORMING MANDATORY MINIMUMS

A. *Smart on Crime*

Recently, a new approach to criminal justice reform called “smart on crime” has gained traction with lawmakers and criminologists.⁷⁴ The smart on crime philosophy emphasizes

(1) fairness and accuracy in the administration of criminal justice; (2) recidivism-reducing alternatives to incarceration and traditional sanctions; (3) effective pre-emptive mechanisms for preventing criminal behavior; (4) the transition of formerly incarcerated individuals to law-abiding and productive lives; and (5) evidence-based assessments of the costliness, efficiency, and effectiveness of criminal justice policies.⁷⁵

One of the biggest champions of smart on crime has been U.S. Attorney General Eric Holder, who announced recent executive actions to help reform the negative consequences on the war on drugs and to promote this smart on crime initiative.⁷⁶ This shift in executive focus on reforming the draconian sentencing laws has also pushed the U.S. Sentencing Commission (USCC) to take its own action and reform the sentencing guidelines.

B. *U.S. Sentencing Commission Reforms*

Following Attorney General Holder’s support for smart on crime, the USSC has taken a new look at its own sentencing guideline policies and enacted new reforms that will have an important impact on those incarcerated and the prison system.⁷⁷ Most groups have referred to this reform as the “all drugs minus two” fix, which retroactively reduces sentencing for those already imprisoned and seeks to shorten prison terms moving forward by lowering the mandatory minimum category that low-level drug offenses

⁷⁴ Fairfax, *supra* note 1, at 610.

⁷⁵ *Id.*

⁷⁶ Evan Perez, *Holder Endorses Shorter Sentences for Drug Offenders Now in Prison*, CNN, <http://www.cnn.com/2014/06/10/justice/holder-prison-sentences/index.html> (last updated June 10, 2014, 10:02 AM).

⁷⁷ Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf.

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fall into.⁷⁸ The new reforms may reduce the prison population by 6,500 over five years and perhaps even more over time, with more than 46,000 current prisoners eligible to have their sentences reduced.⁷⁹ Both the new policies of Attorney General Holder and the USSC reflect a shift in how our leaders view incarceration in this country.⁸⁰ However, Congressional action must be taken to ensure that long-lasting reforms are put in place because a new administration could easily roll back the executive actions, and the USSC reforms are largely advisory.⁸¹

C. *A Call for Congressional Action*

A need for Congressional action has been identified to remedy the ills of mandatory minimum sentencing and attempt to correct the problems of mass incarceration.⁸² The core of our prison problem—“overly tough mandatory minimum sentences and the difficulty in reintegrating ex-prisoners into society—can be addressed only by Congress.”⁸³ Currently, there are bipartisan bills waiting for Congressional action to move forward in addressing this problem. The Smarter Sentencing Act, introduced by Senators Dick Durbin (D-IL) and Mike Lee (R-UT), is a bill that seeks to modernize drug-sentencing policy and to target some of the most egregious mandatory minimums.⁸⁴ This bill would reform the draconian mandatory minimum sentences by cutting many of them in half as well as “expanding exemptions for nonviolent offenders with little criminal history.”⁸⁵ This bill was voted out of committee and seemingly looked poised for a vote, but political gridlock has again prevented reform from moving forward.⁸⁶

⁷⁸ *Reforming the Guidelines for Drug Offenses: “All Drugs Minus Two”*, FAMM, <http://famm.org/projects/federal/u-s-sentencing-commission/reforming-the-guidelines-for-drug-offenses/> (last visited Nov. 12, 2014).

⁷⁹ Press Release, U.S. Sentencing Commission, Comment of Honorable Patti B. Saris, Chair, U.S. Sentencing Commission, on Amendment Reducing Drug Guidelines Becoming Effective Tomorrow (Oct. 31, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/news-advisories/20141031_News_Advisory.pdf.

⁸⁰ Haile, *supra* note 9.

⁸¹ Editorial, *Congress Should Reform the Mandatory Minimum Sentences for Drug Offenses*, WASH. POST, July 23, 2014, http://www.washingtonpost.com/opinions/congress-should-reform-the-mandatory-minimum-sentences-for-drug-offenses/2014/07/23/df845d68-1125-11e4-9285-4243a40ddc97_story.html.

⁸² Haile, *supra* note 9.

⁸³ Editorial, *supra* note 81.

⁸⁴ Press Release, Senator Dick Durbin, Durbin and Lee Introduce Smarter Sentencing Act (Aug. 1, 2013), *available at* <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736>.

⁸⁵ Editorial, *supra* note 81.

⁸⁶ Haile, *supra* note 9.

The second bill, the Recidivism Reduction and Public Safety Act, introduced by Senators Sheldon Whitehouse (D-RI) and John Cornyn (R-TX), “seeks to reduce recidivism, increase public safety and reduce the federal prison population.”⁸⁷ The bill “expands prison jobs, academic classes and drug treatment programs that allow inmates to prepare for life after jail.”⁸⁸ Our nation’s recidivism rates are so high because ex-cons suffer from the collateral consequences of incarceration and often find themselves being treated as second-class citizens, unable to find employment to provide for themselves and their families.⁸⁹ “This bill also ties early-release credits to the successful completion of recidivism-reduction programs.”⁹⁰ This bill has also been voted out of committee, but has been stalled in moving forward because of political posturing.

Congress established mandatory minimums, and it is incumbent on our lawmakers to take action to reform our sentencing policies and offer clarity on how much flexibility they want included in the system.⁹¹ If our nation is to move forward in reforming our prison system, then we must take the needed Congressional action to ensure those needs are addressed. These bills are critically important in taking that step, but there is still more work left to do, and there are other alternatives to aid individuals who face the prospect of a daunting mandatory minimum sentence.

D. *Offering Alternative Treatment Options*

Our nation should focus more on treatment and rehabilitative measures in moving away from the retributive measures of the criminal justice system. More efforts should be put into the treatment of offenders rather than shipping individuals off to prison and forgetting about them as our prisons continue to overcrowd, budget constraints continue to mount, and their families suffer. Penologists have suggested numerous alternatives and several of them have proven effective. Alternatives like drug courts are a viable option to incarceration. “[D]rug courts attempt to prevent and address the root causes of[] antisocial conduct related to narcotics use.”⁹² Through a system of sanctions utilized to incentivize completion of drug

⁸⁷ W. Zachary Malinowski, *Sen. Whitehouse Pushes for Federal Prison-Reform Legislation*, PROVIDENCE J. (Mar. 17, 2014, 10:13 PM), <http://www.providencejournal.com/breaking-news/content/20140317-sen.-whitehouse-pushes-for-federal-prison-reform-legislation.ece>.

⁸⁸ Editorial, *supra* note 81.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Editorial, *Drug Prosecution Reform Still Needs Congress’s Help*, WASH. POST, Aug. 13, 2013, http://www.washingtonpost.com/opinions/drug-prosecution-reform-still-needs-congress-help/2013/08/13/39edcfac-045f-11e3-88d6-d5795fab4637_story.html.

⁹² Fairfax, *supra* note 1, at 615.

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treatment and other rehabilitations, drug courts can give offenders an opportunity to avoid serious criminal charges or incarceration.⁹³

Another option is through victim-offender mediation, which is a voluntary process where the alleged offender and the victim are joined by a neutral mediator in a face-to-face meeting to resolve the issues and conflict of the underlying conduct.⁹⁴ The offender may offer an apology where appropriate or financial restitution to make the victim whole again.⁹⁵ These “successful mediations mean that the criminal process is not invoked (or prolonged),”⁹⁶ and that “criminal sanctions are not imposed unnecessarily.”⁹⁷ However, it is important to keep in mind that there are limitations to the options as apologies are not always appropriate in certain situations or are not satisfactory for the victim. That said, we should still be willing to consider any available alternatives to imprisoning so many Americans.

CONCLUSION

There is little debate about whether the war on drugs has failed or if it is high time to address the psychological problems resulting from harsh mandatory minimum sentences. The biggest issue moving forward is how our nation will continue to address and correct this problem. We have taken some steps forward with executive action through the Smart On Crime initiatives enacted by Attorney General Holder and the reforms put in place by the USSC. Yet, there is still more for Congress to do to roll back these harsh mandatory minimums. Lawmakers on both sides of the aisle have shifted their focus from being tough on crime to embracing reform, but until legislation is actually passed, this embrace is nothing more than lip service for the countless lives and families who have suffered at the hands of mandatory minimum sentence policies. We must continue to allocate more of our drug budget for treatment and alternative solutions rather than incarcerations. The continued increase of incarcerations while crime rates have declined is glaring evidence that punitive measures of old were not successful.

Additionally, going to prison is a psychologically traumatic experience that has profound effects on the incarcerated individuals and their families. The collateral consequences individuals are subjected to upon release, as well as the psychological effects of institutionalization—hyper-vigilance and emotional over-control—must be addressed more effectively

⁹³ *Id.*

⁹⁴ *Id.* at 614.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

by our communities to aid in reentry. Put more simply, we must take the necessary steps to ensure the families of the incarcerated are cared for and that, upon reentry, former prisoners can assimilate into society with ease.