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## Reforming Expansive Crime Control & Sentencing Legislation in an Era of Mass Incarceration: a National and Cross-national Study

Rebecca Wasif

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REFORMING EXPANSIVE CRIME CONTROL & SENTENCING  
LEGISLATION IN AN ERA OF MASS INCARCERATION: A NATIONAL  
AND CROSS-NATIONAL STUDY

By: Rebecca Wasif

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## INTRODUCTION

One in one hundred American adults was in jail or prison as of 2012<sup>1</sup> making the United States the country with the largest prison population in the world.<sup>2</sup> Since the 1980s the United States' criminal justice system has heavily relied on incapacitation to control crime,<sup>3</sup> and prison cells have been described by scholars as "the purest expression of the public's embrace of promise to protect the victims, and potential victims of crime."<sup>4</sup> Between 1995-2000, seventy percent of convictions in the United States resulted in incarceration—a percentage higher than any other developed countries.<sup>5</sup> This reliance on incarceration to fight the "war on crime" has led to the United States' prison population skyrocketing from around 196,000 inmates in 1972 to over 2.16 million today.<sup>6</sup> Of those 2 million plus individuals in American federal prisons today, only 45.3% of federal prisoners are serving sentences for drug offenses, while less than 15% of the prison population is serving time for violent crime.<sup>7</sup>

Although promises and deliverance of incarceration for criminal offenders has grown out of a political response to a culture

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<sup>1</sup> THE PEW CENTER ON THE STATES, *Time Served: The High Cost, Low Returns of Longer Prison Terms* (last visited Jan. 15, 2019), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prisontimeservedpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf).

<sup>2</sup> WORLD PRISON BRIEF, *Highest to Lowest: Prison Population Total* (last visited Jan. 15, 2019), [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (select and search "Prison Population Total" under dropdown menu #1 and "Entire World" in dropdown menu #2)

<sup>3</sup> JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES*, (National Research Council, 130 ed., 2014).

<sup>4</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 76 (Oxford University Press 2007).

<sup>5</sup> EUROPEAN INSTITUTE FOR CRIME PREVENTION AND CONTROL, PUB. NO. 55, *CRIME AND CRIMINAL JUSTICE SYSTEMS IN EUROPE AND NORTH AMERICA* 115 (Kauko Aromaa and Markku Heiskanen, eds., 2008).

<sup>6</sup> Compare Patrick A. Langan et al., *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86*, at 11 (Dep't of Just., Bureau of Just. Stat., No. NCJ-111098 May 1988) with Danielle Kaeble et al., *Correctional Populations in the United States, 2016*, at 3 (Dep't of Just., Bureau of Just. Stat., No. NCJ 251211 April 2018).

<sup>7</sup> See FED. BUREAU OF PRISONS, *Statistics: Inmate Offenses*, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last visited Jan. 14, 2019).

of fear in the past,<sup>8</sup> the trend in recent years has been to move away from the old “tough on crime” ideology and reform the way the nation approaches criminal justice with a greater emphasis on what really is socially just and legitimately effective at protecting the public from crime.<sup>9</sup> While the tragic human and legal consequences of mass incarceration have put reform at the top of the political agenda in recent years,<sup>10</sup> an international comparison has largely been left out of the conversation.

Germany and the Netherlands have largely embraced restorative justice philosophies. At the same time, these two industrialized nations have effectively implemented a widespread use of jail-alternative sanctions and other progressive sentencing practices which have achieved safety and stability within the two countries<sup>11</sup> – models, which the United States may benefit from studying. The comparison of these countries to the United States is astonishing and illustrates that the progressive models embraced by the European nations may serve as an effective model, of which a comparative study can guide the reform efforts of the movement away from mass incarceration in the United States to a system that puts the individuals and public affected by crime at the forefront and seeks rehabilitation of offenders and effective re-entry into

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<sup>8</sup> See Simon, *supra* note 4, at 43-44.

<sup>9</sup> See FIRST STEP Act, H.R. 5682, 115th Cong. (2018) (also known as the “First Step Act”, the new legislation reduces the impact of mandatory minimum sentencing legislation and contains provisions allowing thousands of prisoners to reduce their sentences, among other things such as funding for job training and education in prisons.)

<sup>10</sup> See *id.*

<sup>11</sup> See PETER J.P. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, at 111-128 (2008) (an overview of jail alternative sanctions used in the Netherlands); HANS- HEINRICH JESCHECK, INTRODUCTION TO STEPHEN THAMAN, TRANSLATOR; GERMANY. GERMAN PENAL CODE AS AMENDED AS OF DECEMBER 19, 2001 at xlv (2002) (“The foundation of criminal policy...is the principle of humanity. It articulates that all human relationships that arise in the broadest sense because of the criminal law must be based in reciprocal solidarity, co-responsibility for the person subject to punishment, readiness to provide social welfare, and the will to win back convicted criminals.” [Germany] has recognized the prohibition of torture and inhuman or demeaning punishment...has abolished the death penalty, eliminated punishment in the penitentiary and honor punishments, and also to the goal of resocialization in the criminal judgment and in the execution of punishments of imprisonment.”).

society rather than harsh prison sentences which have had a less significant impact of crime reduction than one might think.<sup>12</sup>

This paper acknowledges that the time and the culture of the United States society is ripe for change in the area of criminal justice reform – as a plurality of the American public believe that too many people are in prison and that the nation spends too much on imprisonment.<sup>13</sup> Further indication of the widespread support of reform is the swift and largely uneventful passage of The First Step Act – a landmark piece of criminal justice legislation which reduces the impact of some of the United States’ harshest crime laws and will be particularly significant to those individuals serving excessive prison sentences for non-violent drug offenses.<sup>14</sup>

Part I of this paper will address the problem with mass incarceration, focusing on the history of the “war on crime,” mandatory minimum sentencing laws, and the impact the legislation has had on American prisons and Americans themselves. Part II will address past and present efforts to pass reform mandatory minimum sentencing legislation, and arguments on both sides of the issue. Part III will discuss the alternatives to harsh sentencing that Germany and the Netherlands have effectively implemented, and Part IIII will provide a recommendation for moving the criminal justice reform efforts forward in the United States utilizing a study of the models of Germany and the Netherlands.

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<sup>12</sup> See JEREMY TRAVIS ET AL., *supra* note 3, at 130-156. See also PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS (2011), available at [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2011/pewstateofrecidivism.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivism.pdf) (an in-depth discussion on contributing factors of crime reduction over the past 3 decades) (The National Research Council concluded that while prison was a factor in reducing crime, “the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.”). See also PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS (2011), available at [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2011/pewstateofrecidivism.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivism.pdf) (expressing that studies have shown to have only accounted for about 30% of crime reduction since the early 1990s).

<sup>13</sup> See PEW CTR. ON THE STATES, *supra* note 1, at 5-6.

<sup>14</sup> See First Step Act, H.R.5682, 115th Cong. (2018) (enacted).

## THE EXPANSION OF CRIME CONTROL LEGISLATION AND THE "WAR ON CRIME"

A consideration of the recent history behind expanded legislation relating to crime control is essential to understanding the underlying causes and possible solutions for mass incarceration today. While aggressive criminal justice policies used as political tools have roots as far back as the 1920s, during which political leaders had to reassert their control over organized criminal organizations which grew during Prohibition,<sup>15</sup> the tactic began being consistently employed as a method of garnishing public support by politicians after the 1960s, largely in response to a growing culture of fearing crime associated with rising crime rates in the United States.<sup>16</sup> And the belief that incarcerating more people would reduce crime was central to the political dynamic that fueled the growth of mass incarceration in the United States throughout the past four decades.<sup>17</sup>

By 1994, the same year that the Violent Crime Control Act passed, crime was identified as the number one problem facing the United States.<sup>18</sup> Thirty-seven percent of Americans endorsed this view—a significantly greater percentage than any other major social issues at the time.<sup>19</sup> One poll published during 1994, reported that more than seventy percent of Americans surveyed believed that crime was the most serious threat to individual rights and freedoms in the United States.<sup>20</sup> As of 1995 Americans were also quite willing to pay for expanded criminal justice expenditures, as a study reported that seventy percent of Americans believed that too little was being spent on fighting crime, despite a budget greater than seventy billion dollars a year at the time.<sup>21</sup> In response to this widespread public fear of crime that grew significantly between the 1960s and 90s, politicians began campaigning with their tough on crime ideologies front and center.<sup>22</sup> And as a result, the United States' produced some of the most significant and

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<sup>15</sup> SIMON, *supra* note 4, at 46-47.

<sup>16</sup> SIMON, *supra* note 4, at 24.

<sup>17</sup> See JEREMY TRAVIS ET AL., *supra* note 3.

<sup>18</sup> JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, & CRIMINAL JUSTICE 1 (John Hagan et al., eds., Westview Press 1997).

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

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

<sup>22</sup> SIMON, *supra* note 4, at 44.

harmful criminal justice legislation in modern history, including the Omnibus Safe Streets and Crime Control Act of 1968—what some scholars call the “mother of all contemporary crime legislation”<sup>23</sup>—the 1986 Anti-Drug Abuse Act,<sup>24</sup> and the 1994 Violent Crime Control Act.<sup>25</sup> The rise in incarceration rates over the past four decades was directly propelled by legislation that changed sentencing and penal policies intended to improve public safety and reduce crime rates in the United States.<sup>26</sup>

The Executive Branch’s emphasis on “tough on crime” policies first took hold when president Lyndon B. Johnson “declar[ed] the ‘war on crime’ a part of his Great Society.”<sup>27</sup> After that, almost every presidential candidate touted their aggressive stances on confronting crime as a political tool which responded to the public’s demand for greater crime control.<sup>28</sup> Richard Nixon campaigned on combating the crime problems he argued were created by former President Johnson’s social welfare programs; Ronald Reagan was vocal about his support of the death penalty; and George Bush promised the public to “bring drug dealers to their knees.”<sup>29</sup>

In his book, *Governing Through Crime*, which analyzes the government’s exploitation of American’s fear of crime, Jonathon Simon argues that crime is a powerful tool through which politicians can govern all aspects of society<sup>30</sup> and that beginning with the Omnibus Crime Control and Safe Streets Act of 1968, a theoretical framework of American criminal justice evolved, under which citizens were divided into either crime victims, potential victims or criminal offenders.<sup>31</sup> Crime victims or potential crime victims were unified under their “victim” status while offenders were portrayed as “monsters” which included sex offenders, drug kingpins, gangsters, and other violent actors.<sup>32</sup> Politicians rallied up public support by adopting aggressive stances on crime control

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<sup>23</sup> SIMON, *supra* note 4, at 8.

<sup>24</sup> Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (2019).

<sup>25</sup> Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12101 (2019).

<sup>26</sup> See JEREMY TRAVIS ET AL., *supra* note 3, at 130.

<sup>27</sup> SIMON, *supra* note 4, at 44.

<sup>28</sup> See *id.*

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

<sup>30</sup> See SIMON, *supra* note 4, at 8.

<sup>31</sup> SIMON, *supra* note 4, at 75-77.

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

which offered "protection" for the unified group of victims and severe punishment for the criminals.<sup>33</sup> But while "unified" as victims or potential victims, the nature of crime victim "identity" has been heavily racialized, because it has primarily been the white, suburban, middle-class crime victims, whose exposure has driven expanded crime legislation,<sup>34</sup> which has disproportionately impacted African American and minority communities.<sup>35</sup>

It follows that crime victims are a central focus of modern American crime legislation<sup>36</sup> and there is an overarching premise that victims and potential victims can only be adequately protected from crime by the government's punishment of the criminal actor, primarily in the form of imprisonment.<sup>37</sup> This government's stepping into the shoes, so to speak, of the victim, during prosecution of a crime, is a unique feature of the American criminal justice system<sup>38</sup> that is absent from the German system.<sup>39</sup> This retributivist feature, as will be discussed throughout, has led to harsh consequences for offenders which in turn affects society as a whole, while failing to adequately address the problem of crime control. And ironically, despite the victim-offender distinction and fear of violent crime which motivated the expansion of harsh crime legislation, the war on crime and resulting legislation has mainly

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<sup>33</sup> SIMON, *supra* note 4, at 34-35.

<sup>34</sup> SIMON, *supra* note 4, at 76.

<sup>35</sup> INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 40 (Marc Mauer & Meda Chesney-Lind eds., 2001) ("People of color are disproportionately represented among those arrested, tried, convicted and sentenced to prison for drug offenses. . . While African Americans make up thirteen percent of the nation's monthly drug users, they represent thirty-five percent of those person arrested for drug crimes, fifty-three percent of drug convictions.").

<sup>36</sup> SIMON, *supra* note 4, at 76.

<sup>37</sup> *Id.* ("Prison cells, meanwhile, are the purest expression of the public's embrace of and promise to protect victims, and potential victims, of crime, especially because they promise to produce a security effect that is generalized to the whole state, while policing is always spatially concentrated...").

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

<sup>39</sup> Nouvelles Etudes Penales, *The Criminal Justice System of the Federal Republic of Germany*, 101-102 (Int'l Ass'n Penal L. 1981) (Many sanctions in the German criminal code "are called measures of prevention and rehabilitation. These measures do not aim at retribution [for the victim] and punishment but try to remove or diminish the dangerousness of the offender for the future. The most severe measure of prevention is incarceration in. . . institutions that are not called prisons because the relevant detention is not defined as a penalty but as a preventative measure.").



targeted crimes that are not violent and have no specific victims, such as drug offenses.<sup>40</sup> What became most evident is that policymakers' decisions to heavily incarcerate Americans in the late 21<sup>st</sup> century, and the growth of the American prison population, can be more closely attributed to ideological policy choices rather than a desire to combat violent crime,<sup>41</sup> and this heavy incarceration has arguably victimized more individuals than it has protected.

A. *The Anti- Drug Abuse Act of 1986 and Mandatory Minimum Sentences*

Mandatory Minimum laws are one of the most significant and impactful forms of expanded crime legislation that grew out of the “war on crime” and have had the largest impact on drug offenders.<sup>42</sup> They were significantly expanded in 1986 when the Anti-Drug Abuse Act was signed into law by President Ronald Reagan.<sup>43</sup> The main effect of the Anti-Drug Abuse Act was to create mandatory minimum sentences for drug offenders. These sentences varied depending on the amount and type of drug involved, with the harshest sentences involving crack cocaine offenses.<sup>44</sup> Under the Anti-Drug Abuse Act of 1986, and until the Smart Sentencing Act was passed in 2010, five grams of a “cocaine base,” more commonly known as “crack” triggered a five-year mandatory minimum sentence.<sup>45</sup> However, it would take five hundred grams or more of “cocaine” or its “salts” to trigger the same five-year mandatory minimum sentence—a five to one disparity for the same chemical substance.<sup>46</sup> Controversially, the law resulted in stark sentencing disparities by assigning the harshest prison sentences to offenses involving drugs more

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<sup>40</sup> SIMON, *supra* note 4, at 76.

<sup>41</sup> See generally THE CRIME DROP IN AMERICA (Alfred Blumenstein & Joel Wallman, eds., 2000) (an in-depth discussion of the limited relationship between crime rates and incarceration rates).

<sup>42</sup> See U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2 (2017) (“[D]rug offenses are the most common offenses carrying mandatory minimum penalties . . .”).

<sup>43</sup> Anti-Drug Abuse Act of 1986, *supra* note 24.

<sup>44</sup> *Id.*

<sup>45</sup> See Spencer A. Stone, *Federal Drug Sentencing – What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 298-99 (2007) (citing 21 U.S.C. § 841(b)).

<sup>46</sup> *Id.*

frequently associated with African Americans and providing for sentence enhancement categories more likely to be associated with African Americans or other minorities.<sup>47</sup> In 2001, despite people of color making up only 37% of the nation's population, they made up 67% of the prison population.<sup>48</sup>

*B. The Violent Crime Control Act of 1994*

The next major piece of crime control legislation that contributed to modern American mass incarceration is the Violent Crime Control and Law Enforcement Act of 1994, which was signed into law by former president Bill Clinton. The Violent Crime Control and Law Enforcement Act contained various provisions aimed to combat crime but specifically provided funds to hire 100,000 police officers, \$9.7 billion dollars to fund prisons, and \$6.1 billion dollars towards crime prevention programs. While the Violent Crime Control and Law Enforcement Act of 1994 did contain some provisions, which might appear to support a rehabilitative focus towards criminal justice, such as provisions for increasing the number of drug treatment programs and gun safety laws, most of its provisions were punitive in nature.<sup>49</sup>

The Act's most significant impact on today's mass imprisonment was made by its allocation of more money to prisons and harsher sentencing guidelines, including a three-strikes law,<sup>50</sup> under which a person who commits a felony with two prior felony convictions must be sentenced to life in prison.<sup>51</sup> The rationale behind the law was that longer prison sentences reduce crime by deterring and incapacitating the most active and dangerous criminals.<sup>52</sup> Contrary to this theory, there has been increasing

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<sup>47</sup> SIMON, *supra* note 4, at 142.

<sup>48</sup> THOMAS P. BONCZAR, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (Bureau of Justice Statistics Special Report 2003).

<sup>49</sup> 34 U.S.C. § 12101 (2018).

<sup>50</sup> 18 U.S.C. § 3559(c) (2018).

<sup>51</sup> *Id.* (Under the federal "Three Strikes" provision the defendant receives mandatory life imprisonment if he or she is convicted in federal court of a "serious violent felony" and has two or more prior convictions in federal or state courts, at least one of which is a "serious violent felony...The other prior offense may be a "serious drug offense.")

<sup>52</sup> See Memorandum from Jo Ann Harris, Ass't U.S. Att'y Gen., Dep't of Just., on "Three Strikes Law," to all U.S. attorneys (Mar. 13, 1995) (on file with author).

evidence demonstrating that large-scale incapacitation is an ineffective means of achieving public safety.<sup>53</sup>

After the Violent Crime Control and Law Enforcement Act was passed at the federal level, many States quickly followed in suit and began to pass their own three-strikes laws and between 1993 and 1995 twenty-four states passed such legislation.<sup>54</sup> The human consequence of the law was evident by 1995 as there were more than 1.5 million people in prison in the United States—an increase of more than half a million from only two years prior.<sup>55</sup>

Today, over thirty years after the birth of the “war on crime” thousands of Americans are serving lengthy sentences for non-violent offenses—primarily drug offenses—in which a judge exercised no or extremely limited sentencing discretion. Severe sentencing laws including mandatory minimums, three-strike laws, and sentencing guidelines, which offer no possibility of parole, keep people in prison for significantly longer periods than sentences determined on an individualized basis would.<sup>56</sup> The National Research Council has reported that increased prison sentences arising out of the new crime legislation was responsible for an astounding half of the 222% growth in state prison populations between 1980 and 2010.<sup>57</sup> Additionally, the use of life sentences has risen exponentially and today 1 in 9 people in prison is serving a life sentence and 1/3 of those individuals are sentenced without the possibility of parole.<sup>58</sup>

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<sup>53</sup> See TRAVIS ET AL., *supra* note 3, at 130-156 (an in-depth discussion on contributing factors of crime reduction over the past 3 decades) (The National Research Council concluded that while prison was a factor in reducing crime, “the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.”); see also THE PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 5-6, (last visited Jan. 15, 2019), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2011/pewstateofrecidivism.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2011/pewstateofrecidivism.pdf) (expresses that studies have shown to have only accounted for about 30% of crime reduction since the early 1990s).

<sup>54</sup> JOHN CLARK ET AL, NAT’L INST. OF JUST., THREE STRIKES AND YOU’RE OUT: A REVIEW OF STATE LEGISLATION (1997).

<sup>55</sup> U.S. DEP’T OF JUST., NCJ- 161132, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISON & JAIL INMATES, 1995 (1996).

<sup>56</sup> TRAVIS ET AL., *supra* note 3, at 101.

<sup>57</sup> THE SENTENCING PROJECT, *Criminal Justice Facts* <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Jan. 19, 2019).

<sup>58</sup> *Id.*

While mandatory minimums have been sanctioned as a solution to arbitrary leniency driven by race or class, they have proven ineffective in reducing the racial disparities within sentencing practices.<sup>59</sup> Although the laws certainly made it more likely that a white, affluent defendant is more likely to benefit from an individualized assessment by the judge during sentencing, which he/she may have prior to the guidelines—a benefit which would be unlikely to be shared by an African American defendant—the laws have failed to reduce the sentencing disparities among different races and have possibly made the gap even greater by means of employing categorical enhancements and disproportionate sentencing guidelines for those offenses more commonly associated with poor, black defendants.<sup>60</sup> Because many of the categorical factors that trigger excessive sentences are targeted at circumstances which are highly correlated with race, such as the crack cocaine/powder cocaine distinction contained in the Anti-Drug Abuse Act and the prohibition of felons from possessing a gun—both of which are more commonly associated with African Americans—they dramatically skew the odds of sending black and minority individuals to prison for longer times than whites.<sup>61</sup> A 2015 report issued by the Bureau of Justice Statistics confirmed that “the race of federally sentenced drug offenders varied greatly by drug type . . . [with] the majority (88%) of crack cocaine offenders being black.”<sup>62</sup> At the end of 2012, more than half of all drug offenders in federal custody were serving sentences for powder and crack cocaine offenses,<sup>63</sup> but crack cocaine offenders were the most likely to receive a mandatory minimum sentence for use of a weapon or to have sentences adjusted for weapon use.<sup>64</sup> Finally, the majority (62%) of crack cocaine offenders in 2012 were sentenced to more than ten years in prison.<sup>65</sup> These realities, therefore, raise the question—has the expanded crime legislation enacted during the “war on crime”

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<sup>59</sup> TRAVIS ET AL., *supra* note 3, at 101.

<sup>60</sup> SIMON, *supra* note 4, at 142.

<sup>61</sup> *Id.*

<sup>62</sup> Press Release, Bureau of Justice Statistics, More Than Half of Drug Offenders in Federal Prison Were Serving Sentences for Powder or Crack Cocaine, (Oct. 27, 2015).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

come close to addressing the concerns of the public with regards to protection from violent crime or has the emerging legislation achieved little more than a more divisive and over-populated prison system which disproportionately targets poor, minority communities?

The first successful attempt at legislation aimed as rectifying the racial disparities resulting from mandatory minimum sentencing laws as applied to drug offenders was made via the passage of the 2010 Fair Sentencing Act, reform legislation signed into law by former president Barack Obama.

### C. *The Fair Sentencing Act of 2010*

The Fair Sentencing Act was described by criminal justice reform activists as a watershed in a necessarily “long campaign for better drug policy.”<sup>66</sup> The law’s major achievement was reducing the sentencing disparities between crack cocaine and powder cocaine offenses by increasing the threshold quantity of crack cocaine that triggered the five and ten-year mandatory minimum sentences.<sup>67</sup> The legislation reduced the penalties for crack cocaine offenses to bring down the disparities in the crack to powder cocaine quantity ratio to 18 to 1.<sup>68</sup> After the Fair Sentencing Act, defendants convicted of possessing no more than “the weight two pennies” would no longer receive a mandatory sentence of five years.<sup>69</sup> But the true value of the law was accurately predicted to be the door it might open for greater criminal justice and drug policy reform if its results were viewed as successes by the community and politicians.<sup>70</sup>

Significantly, five years after former president Barack Obama signed the Fair Sentencing Act into law, the United States’ Sentencing Commission reported that the number of federal prosecutions for crack cocaine was cut in half.<sup>71</sup> With regard to prison populations, the United States Sentencing Commissions

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<sup>66</sup> Marc Mauer, *Beyond the Fair Sentencing Act*, THE NATION, Dec. 27, 2010.

<sup>67</sup> Fair Sentencing Act of 2010, 21 U.S.C. § 841(b)(1)(2010).

<sup>68</sup> U.S. SENTENCING COMM’N, 114TH CONG., REP. TO THE CONG.: IMPACT OF THE FAIR SENTENCING ACT OF 2010 3 (2015), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507\\_RtC\\_Fair-Sentencing-Act.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf).

<sup>69</sup> See Mauer, *supra* note 65.

<sup>70</sup> See *id.*

<sup>71</sup> See U.S. SENTENCING COMM’N, *supra* note 67, at 11.

2015 Report to Congress reported that, after taking into account the length of sentences pre- Fair Sentencing Act and post Fair Sentencing Act, "in total, the prospective and retroactive changes made in response to the law resulted in an approximate savings of 29,653 bed-years to the Bureau of Prisons."<sup>72</sup> The commission additionally reported that, contrary to what critics of the legislation believed would happen, crack cocaine use actually decreased significantly after the law was passed.<sup>73</sup>

The Fair Sentencing Act achieved great success in reducing prison sentences and decreasing prison populations. Furthermore, the legislation did not result in an increase in drug use. These factors were significant in and of themselves, but also for the future of the movement and the likelihood of passing additional criminal justice legislation reform going forward because the commission's report discredited or at least challenged the belief of the effectiveness of lengthy terms of incarceration for drug offenders for reducing crime, at least as applied to drug offenders.

Aside from the social issues which expanded crime control legislation has posed in the United States, many scholars believe that the laws, and specifically mandatory minimum laws, raise significant constitutional issues which have yet to be successfully argued in the courts, but are nonetheless worth a brief discussion to illustrate the significance of the issue.

#### PROSECUTORIAL POWER, PLEA BARGAINING AND CONSTITUTIONAL QUESTIONS ASSOCIATED WITH MANDATORY MINIMUM SENTENCING LEGISLATION

Today over 95% of criminal cases at the federal level involve plea bargains, and criminal cases at the state level are not far behind.<sup>74</sup> There are several legal developments that have contributed to the heightening of prosecutorial power and in turn the increase in plea bargaining in the United States. Specifically, the expansion of criminal sanctions and crime legislation, which developed in response to the "war on crime," has awarded

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<sup>72</sup> U.S. SENTENCING COMM'N, *supra* note 67, at 26.

<sup>73</sup> *See id.* at 27.

<sup>74</sup> LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA & CHARGE BARGAINING (2011).

prosecutors an enormous amount of power at the expense of judges, paroling authorities, and defense attorneys.<sup>75</sup>

Mandatory minimum sentencing laws are a prime example of the ways legislation has made the prosecutor's determination over which criminal charges to bring the primary determination of the ultimate prison sentence.<sup>76</sup> Some scholars believe that in determining how much punishment defendants will receive if convicted by choosing a charge which carries a statutorily proscribed mandatory minimum, prosecutors have acquired so much power that roles of the judge, and even the jury, have essentially been nullified.<sup>77</sup> And despite the fact that prosecutorial offices are highly political, prosecutors are exempted from the modern restraints on administrative discretion that other government actors are subject to, resulting in virtually unlimited discretion in deciding what charge and whether or not bring it,<sup>78</sup> and thus, what sentence a convicted person will serve.

The "hardening" of criminal sanctions not only expanded prosecutorial power to determine an individual's charge and punishment by means of mandatory minimum sentencing legislation, but also in reducing the administrative checks through parole boards which were previously equipped to narrow the differences in sentencing created by the prosecutor's selections of charges.<sup>79</sup> By increasing the amount of charges which carry sentences with no possibility of parole, prosecutors' roles in charging are increasingly significant.<sup>80</sup> By charging a defendant with any of several categories of enhancements, such as using a gun during the commission of the underlying offense or for commission of the offense taking place within a school zone, prosecutors can strategically increase a defendant's sentence, determine whether he/she will ever be eligible for parole and thus determine whether or not that person will ever be given an opportunity to enter society again.<sup>81</sup>

Overly powerful prosecutors, equipped with the power discussed above, have a heavy impact on plea-bargaining. Plea

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<sup>75</sup> See SIMON, *supra* note 4, at 35.

<sup>76</sup> See *id.* at 35-36.

<sup>77</sup> *Id.* at 35.

<sup>78</sup> *Id.* at 39.

<sup>79</sup> *Id.* at 40.

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

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

deals are achieved through the use of police pressure and a ballooning incarcerated population.<sup>82</sup> Supported by mandatory minimum sentencing legislation under which defendants face the possibility of significant terms of imprisonment and in some cases no hope for parole if convicted, plea deals are tools which can hasten guilty convictions, but can also convict an unknown number of innocent persons<sup>83</sup> – an unacceptable result.

Professor Donald Dripps has taken a novel but persuasive approach in analyzing the constitutionality of giving prosecutors such great power through the use of mandatory minimums. In his unpublished manuscript on charging and sentencing, Professor Dripps argues that granting prosecutors the power to determine the criminal charge, and therefore, the sentence under mandatory minimum laws, contradicts long-standing Supreme Court precedent that sentences must be administered by a neutral tribunal.<sup>84</sup> While the laws have survived constitutional challenges on 8<sup>th</sup> Amendment grounds<sup>85</sup> the Supreme Court has never considered a due process challenge to mandatory minimum laws.<sup>86</sup> Such a challenge, as Professor Dripps argues, should be based on the recognition that mandatory minimum laws merge charging and sentencing into one decision and violate the Constitutional due process requirement that “the discretionary selection of a sentence from within a statutory range be made by a neutral tribunal after notice and hearing.”<sup>87</sup> Mandatory minimum sentencing laws give prosecutors the power of charging and sentencing, in stark violation of the requirement that sentencing be made by a “neutral tribunal.”

While there are many factors that play into the reasons why so few criminal defendants exercise their right to a jury trial and instead opt to plea out, the possibility of being sentenced under mandatory minimum laws is definitely a significant one.

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<sup>82</sup> *Id.* at 40.

<sup>83</sup> *Id.*

<sup>84</sup> Donald A. Dripps, Charging as Sentencing 1 (July 26, 2019) (unpublished manuscript) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3427333](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3427333)).

<sup>85</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (rejecting the argument that a statutorily mandated life sentence for possession of 672 grams of cocaine violates the Eighth Amendment on grounds that the sentence does not qualify for “proportionality review” under Supreme Court jurisprudence).

<sup>86</sup> Dripps, *supra* note, at 83.

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



Prosecutors equipped with the power mandatory minimum laws provide them to determine the charge and the sentence are able to induce guilty pleas and coerce defendants into waiving their right to a jury trial by negotiating a lesser charge which doesn't carry a harsh mandatory minimum sentence that a defendant faces if convicted at trial of the heavier charge.

While an understanding of the legal and social problems that expanded sentencing legislation is essential in any discussion of sentencing reform, the stories of the individuals directly affected by the laws, likewise cannot be left out.

#### THE HUMAN CONSEQUENCES OF MANDATORY MINIMUM SENTENCES: LOW-LEVEL OFFENDERS, WOMEN, CHILDREN, AND FAMILIES

Mandatory minimums have devastating consequences for people and their families. Because the laws take all the discretionary power away from judges when sentencing an individual convicted of certain crimes—mainly drug crimes—many people and even judges have felt it necessary to speak up after being forced to sentence people who were unlikely to ever reoffend to unnecessarily harsh sentences.<sup>88</sup>

##### A. *The "Girlfriend Problem" & Federal Conspiracy Laws.*

These critiques are especially powerful when it comes to women who are convicted under federal conspiracy laws for crimes that their partners committed. What has recently come to be known as "the girlfriend problem" in federal conspiracy prosecutions is a perfect illustration of failures, devastating injustices, and unintended consequences that innocent people have suffered as a result of mandatory minimum sentencing laws.<sup>89</sup>

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<sup>88</sup> Jay Darty, ACLU, *The Human Cost of Mandatory Minimums*, Drug Law Reform Project, <https://www.aclu.org/blog/smart-justice/mass-incarceration/human-cost-mandatory-minimums> (last visited Dec. 17, 2019); See also *Beyond the Fair Sentencing Act*, *The Nation* (2010), <https://www.thenation.com/article/beyond-fair-sentencing-act/> (last visited Dec. 19, 2018) (For example, Judge Cassel spoke against the laws after being forced to sentence a first time offender to a 55-year prison sentence.)

<sup>89</sup> See Press Release, ACLU, "Girlfriend Problem" Harms Women and Children, Impacted Families Call Mandatory Sentences Unfair and Destructive, <https://www.aclu.org/news/girlfriend-problem-harms-women->

Under current federal drug laws, individuals with minimal involvement in drug offenses, who are often women in relationships with men who are engaged in drug trafficking offenses, are held liable for the crimes of their boyfriend or husband.<sup>90</sup> While many of these women knew of, but were not directly involved in the crimes, others did not know about their partner's illegal conduct at all. But under federal conspiracy laws, these women can be arrested, prosecuted, and held liable for the entire quantity of drugs involved in activities of their boyfriends and sentenced under mandatory minimum laws despite their minimal involvement in the underlying conduct that constituted the crime.<sup>91</sup>

Perhaps the most well documented illustrative case of what this "girlfriend problem" is that of Cindy Shark, a mother of three, who was sentenced to a 15 -year mandatory minimum sentence for drug conspiracy for conduct constituting minimal involvement of a bigger crime that her ex-boyfriend was carrying out. The crushing impact of her imprisonment on her husband, three daughters, siblings, and parents was captured in the HBO documentary "The Sentence,"<sup>92</sup> which depicts how the sentence broke a family apart years after the crime had been committed by her ex-boyfriend. The ACLU has taken a strong stance on the issue. Jesselyn McCurdy, an attorney with the ACLU, described the "wrong place, wrong time" problem with mandatory minimums in the following terms—"current laws disproportionately hurt those whose only crime was to be in the wrong place at the wrong time - mainly women. The 1.5 million children they've left behind so far are left with overburdened friends and family or in the child welfare system, where they're at increased risk of physical or sexual abuse."<sup>93</sup>

While it may be especially easy to empathize with women who are victims of "the girlfriend problem," thousands of others who

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and-children-impacted-families-call-mandatory-sentences-unfair (last visited Dec. 17, 2019).

<sup>90</sup> *Id.*

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

<sup>92</sup> THE SENTENCE: PUTTING A FACE ON THE HUMAN CONSEQUENCES OF MANDATORY MINIMUMS, HBO (2019), <https://www.hbo.com/documentaries/the-sentence/putting-a-face-on-the-human-consequences-of-mandatory-minimums> (last visited Jan 20, 2019). (Update: Cindy Shark was granted early leave by President Obama as part of his clemency program and was released from prison to be reunited with her three daughters in 2016.)

<sup>93</sup> ACLU Press Release, *supra* note 89.

actually did engage in the conduct constituting the crime, have also suffered from the immensely disproportionate punishment mandated by the laws. Some of the cases publicized by organizations such as Families Against Mandatory Minimums, an organization which fights to effect criminal justice change, include bizarre stories like that of Cynthia Powell, a mother who sold 35 painkillers to an undercover cop in a desperate attempt to make ends meet after she became disabled from uncontrolled diabetes. Ms. Powell was not a drug dealer and after being unable to provide the prosecution with “substantial assistance,” she was cut no breaks in her charging and, therefore, her sentencing. She is currently serving a 25-year sentence in a Florida state prison.<sup>94</sup>

*B. Enhancements under 21 U.S.C. § 851.*

Another significant issue arising out of laws providing for mandatory minimum sentences are categorical enhancements. Prosecutors have the discretion to charge an accused with an enhancement charge, which increases the mandatory minimum sentence faced depending on whether the crime involved certain enumerated enhancement offenses. Such an enhancement is why Calvin Bryant, another first-time offender who was convicted of selling drugs in Nashville, Tennessee, was sentenced to 17 years in prison. Mr. Bryant would have been sentenced to less than three years if it weren't for the state's drug-free school law. Mr. Bryant was in prison for a first-time nonviolent drug offense for a decade.<sup>95</sup>

Judges have spoken on the issue after being forced to administer excessive prison sentences for low-level offenders charged with enhancements. For example, Judge Paul Cassell was disturbed after being forced to sentence Weldon Angeles, a 24-year old music producer with no prior criminal convictions, to a 55-year sentence for selling marijuana to undercover police officers. Although Mr. Angeles was carrying a gun on his person, he never used nor threatened to use the gun during any of the transactions.

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<sup>94</sup> Story, *Cynthia Powell: 25 Years for 35 Pills*, FAMM, <https://famm.org/stories/cynthia-powell-25-years-35-pills-2/> (last visited Jan 20, 2019).

<sup>95</sup> Story, *Calvin Bryant: 17 Years for a First Offense*, FAMM, <https://famm.org/stories/calvin-bryant-17-years-first-offense/> (last visited Jan 20, 2019).

Judge Cassell even described the aforementioned sentence as “unjust, cruel, and even irrational.”<sup>96</sup>

Enhancement charges associated with 21 U.S.C § 851 demonstrate a particular problem that arises out of mandatory minimum laws. The USSC reported that enhancement charges were used by prosecutors inconsistently, with wide geographic variations in eligibility, filing, withdrawal, and ultimate application of enhancement charges among offenders.<sup>97</sup> To illustrate the disparity, the Commission reported that five federal districts sought § 851 enhancements against more than 50% of eligible drug trafficking offenders, while nineteen districts did not seek § 851 enhancements against eligible offenders.<sup>98</sup> Additionally, while § 851 enhancements had a significant impact on all racial groups, African-American offenders were more significantly affected.<sup>99</sup>

C. “Stacking” Penalties under 21 U.S.C. §924(c).

“Stacking” refers to the federal law that mandates consecutive 5, 7, 10, and 30- year mandatory minimum sentences for possessing, brandishing, or discharging a gun in the course of a drug trafficking crime or a crime of violence, and consecutive 25-year sentences for each subsequent conviction.<sup>100</sup> The “stacking” penalties were required even when all of the charges arose out of one offense or conduct giving rise to a single indictment and would allow mandatory minimum sentences to be stacked on top of one another, for separate crimes that arose out of a single course of conduct constituting the offense.<sup>101</sup> As discussed in Section IV of this paper, the First Step Act mitigates the potential harms of “stacking”.

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<sup>96</sup> Marc Mauer, *Beyond the Fair Sentencing Act*, THE NATION (December 9, 2010), <https://www.thenation.com/article/beyond-fair-sentencing-act/>

<sup>97</sup> U.S. SENTENCING COMM’N, *Impact of Enhancements Under 21 U.S.C § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, 6 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712\\_851-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf) (last visited Jan. 20, 2019).

<sup>98</sup> *Id.*

<sup>99</sup> U.S. SENTENCING COMM’N, *supra* note 96, at 32.

<sup>100</sup> See 18 U.S.C. § 924 (c) (2012).

<sup>101</sup> Molly Gill, *Threading the Needle: The First Step Act, Sentencing Reform, And the Future of Criminal Justice Reform Advocacy*, 31 Fed. Sent’g Rep. 107, 108 (2018) (citing *Deal v. U.S.*, 508 U.S. 129 (1993)).

## THE FIRST STEP ACT OF 2018

On December 21, 2018, President Donald Trump signed the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, otherwise known as the First Step Act (“FSA”).<sup>102</sup> As the first major criminal justice reform legislation since the Fair Sentencing Act was passed in 2010, the new law is a glimmer of hope for thousands of individuals serving sentences for non-violent drug offenses. The law makes many overdue changes to former crime control laws, of which the most impactful changes to mass incarceration are the following:

First, the First Step Act increases what is known as “good time credit” for federal prisoners.<sup>103</sup> Under prior federal law, prisoners are allowed to earn up to fifty-four days per year of “good time” credit, which is awarded for adhering to the prison’s rules.<sup>104</sup> However, the United States Supreme Court and the Federal Bureau of Prisons have interpreted the rule such that prisoners could really only earn forty-seven days per year.<sup>105</sup> In addition to increasing the possible “good time credits” a prisoner may earn, the First Step Act also corrects the discrepancy between the rule and the way it has been applied as well as allows prisoners to earn the initial fifty-four days plus seven pursuant to the new law. As such, prisoners can potentially earn sixty-one days per year off of their sentences.<sup>106</sup>

Second, the First Step Act requires that the Bureau of Prisons put low-risk individuals in home confinement for the maximum allowed, which is currently 10% of the individual’s sentence or up to six months, whichever is less, at the end of their sentence.<sup>107</sup> And finally, the First Step Act authorizes \$250 million for five years in funding for rehabilitative programs within federal prisons, which are currently lacking in any meaningful job training programs, education, or drug treatment.<sup>108</sup>

With regard to sentencing legislation, the First Step Act achieves three significant reforms. First, it limits a prosecutor’s ability to “stack” charges under 18 U.S.C. §924 (c) by requiring that

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<sup>102</sup> The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

<sup>103</sup> 18 U.S.C.A § 3632(d)(4)(A)(i) (West 2018).

<sup>104</sup> 18 U.S.C § 3624(b)(1) (2012).

<sup>105</sup> Gill, *supra* note 100, at 107 (citing *Barbara v. Thomas*, 560 U.S. 474 (2010)).

<sup>106</sup> § 107, 132 Stat. at 5216.

<sup>107</sup> *See id.* § 602 at 5238.

<sup>108</sup> *See id.* § 104 at 5214.

mandatory minimum sentences for second or subsequent offenses only be applied when the prior conviction was finalized prior to the commission of the current offense.<sup>109</sup>

Second, the First Step Act reduces mandatory minimum sentences for repeat offenders. Prior to the passage of First Step Act, the law required mandatory minimum 20-year and life-without-parole sentences for drug offenders with prior drug convictions, but only if the prosecutor sought such sentences through the filing of an information.<sup>110</sup> The First Step Act reduces the mandatory life-without-parole sentence to a mandatory minimum 25-year sentence for a third drug offense. It also reduces the mandatory minimum 25-year sentence to a mandatory minimum 15-year sentence for a second drug offense.<sup>111</sup>

And perhaps one of the most significant reforms the law makes is expanding the “safety valve,” a legal tool which allows judges to diverge from statutorily prescribed mandatory minimum sentencing when dealing with low-level offenders.<sup>112</sup> Prior to the First Step Act, a “safety valve” existed but it was so narrow that a significant number of low-level offenders were exempt from its benefit due to minimal criminal records such as careless driving, bouncing checks, and disorderly conduct.<sup>113</sup> The First Step Act limits these absurd restrictions and instead expands the safety

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<sup>109</sup> See *id.* § 401 at 5220-21. 21 U.S.C.A §841 (amended by striking “If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years” and inserting the following: “If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years”; and (ii) by striking “after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release” and inserting the following: “after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years”; and (B) in subparagraph (B), in the matter following clause (viii), by striking “If any person commits such a violation after a prior conviction for a felony drug offense has become final” and inserting the following: “If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final”).

<sup>110</sup> Gill, *supra* note 100 (citing U.S.S.G. §4A1.2 (2018)).

<sup>111</sup> § 401, 132 Stat. at 5220.

<sup>112</sup> 18 U.S.C. § 3553 (2018).

<sup>113</sup> Gill, *supra* note 100.

valve's benefit to those individuals who do not have more than four criminal history points, a 3-point offense, or a prior 2-point violent offense.<sup>114</sup> The First Step Act also allows the safety valve to apply to individuals who lack prison convictions for serious violent felonies and whose criminal history score overrepresented the person's record or likelihood of reoffending.<sup>115</sup>

While the reforms that the First Step Act has accomplished will offer individuals and their families a second chance at life and constitutes an enormous step towards achieving greater justice and fairness, some critics believe it is not sufficient. For example, U.S. Senator Kamala Harris, a supporter and critic of the new law, argues that the First Step Act is just that—a first step.<sup>116</sup> The First Step Act does not make its changes to mandatory minimum sentencing legislation retroactive and does not address private prisons,<sup>117</sup> which are funded by the federal government and provide monetary incentives to increase incarceration.

With significant and overdue reforms enacted pursuant to the First Step Act, the question remains—how far does this get us away from the culture and “war on crime” legislation that grew during the late 20th Century? Compared to the legislation, which was passed during the 80s and 90s, the First Step Act has achieved enormous progress in the area of criminal justice reform. This section, however, will argue that without incorporating community intervention and resocialization to deal with crime and offenders, continued progress towards comprehensive criminal justice reform will be slow and lacking. Such a cultural difference is evident within Germany and the Netherlands—the principles that guide their approach to criminal justice are evidently effective at achieving both low prison populations and low recidivism rates.<sup>118</sup>

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<sup>114</sup> *Id.* at 108-09.

<sup>115</sup> *Id.* at 109 (providing “Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”; and “(g) DEFINITION OF VIOLENT OFFENSE. — As used in this section, the term ‘violent offense’ means a crime of violence, as defined in section 16, that is punishable by imprisonment.”).

<sup>116</sup> See Press Release, Kamala D. Harris, U.S. Senator for California, Statement on the First Step Act (Dec. 17, 2018), <https://www.harris.senate.gov/news/press-releases/senator-harris-statement-on-first-step-act>.

<sup>117</sup> *Id.*

<sup>118</sup> Hans-Heinrich Jescheck, INTRODUCTION TO STEPHEN THAMAN, TRANSLATOR; GERMANY. GERMAN PENAL CODE as amended as of December 19, 2001 at xlv (2002). (“The foundation of criminal policy...is the principle of humanity. It articulates

A DIFFERENT CULTURE OF PUNISHMENT & ALTERNATIVE MODELS  
OF SENTENCING AND CORRECTIONS: GERMANY AND THE  
NETHERLANDS

A. *General Principles of Criminal Justice in the Netherlands and  
Germany*

In 2013, the Vera Institute of Justice managed a study known as the European-American Prison Project, in which participants from several states in the United States visited Germany and the Netherlands to interview corrections officials, inmates, and tour prisons in an effort to expose them to “radically” different corrections systems in order to advance the conversation around reform efforts in the United States.<sup>119</sup> This section expresses that the United States can benefit from studying the models of these countries and considers how far recent criminal justice reform legislation—mainly the First Step Act—allows the United States to achieve the ideals embraced by both Germany and the Netherlands.

Germany has an estimated seventy-six per hundred thousand residents in prison. The Netherlands has about sixty-one per hundred thousand residents.<sup>120</sup> The United States currently has over sixty-five per hundred thousand residents in prison.<sup>121</sup> While

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that all human relationships that arise in the broadest sense because of the criminal law must be based in reciprocal solidarity, co-responsibility for the person subject to punishment, readiness to provide social welfare, and the will to win back convicted criminals.” “[Germany] has recognized the prohibition of torture and inhuman or demeaning punishment...has abolished the death penalty, eliminated punishment in the penitentiary and honor punishments, and also to the goal of resocialization in the criminal judgment and in the execution of punishments of imprisonment.”); *see also* Peter J.P. Tarek, THE DUTCH CRIMINAL JUSTICE SYSTEM 7 (“The Dutch criminal justice system has long been noted for its mildness...[and] tolerant criminal policies towards societal and morally controversial criminal offences like drugs or euthanasia, and to the low prison rate in the Netherlands compared to other European countries.” The Dutch 1998 Penitentiary Principles Act provides that the guiding principle [criminal sanctions] are “resocialization, that a sanction is implemented as soon as possible after it is imposed, and the principle that the incarcerated person is to be subjected to as few restrictions as possible.”).

<sup>119</sup> *See* RAM SUBRAMANIAN & ALISON SHAMES, SENTENCING & PRISON PRACTICES IN GERMANY & THE NETHERLANDS (Vera Inst. of Just. 2013).

<sup>120</sup> World Prison Brief Data, <http://www.prisonstudies.org/country/germany> (last visited Jan. 20, 2019).

<sup>121</sup> *Id.*



the United States is focused on combating crime via incarceration, embracing a retributivist philosophy of punishment, the basic principles underlying the German and Dutch corrections systems are more restorative in nature with a focus on resocialization and rehabilitation of the offender.<sup>122</sup> The German criminal code is less concerned with the impact of the crime on the victim and retribution but is aimed more at reeducation and rehabilitation of offenders.<sup>123</sup> The Netherlands is significantly more tolerant of drug offenses than the U.S. is. Both nations utilize jail-alternative sanctions as the primary form of criminal responsibility and reserve imprisonment as a last resort.<sup>124</sup> All of these elements, if implemented in the United States, would serve the United States' criminal justice system well, as this section will discuss.

Germany's Prison Act provides that the sole aim of incarceration is to enable prisoners to lead a life of social responsibility free from crime upon release, requiring that prison life be as similar as possible to life in the community.<sup>125</sup> Very similarly, the Netherlands Penitentiary Principles Act's core goal is the resocialization of prisoners after they have served their time.<sup>126</sup> These principles of rehabilitation and normalization adopted by both Germany and the Netherlands inform not only the conditions of prisons but also the countries' sentencing practices. For example, both countries frequently utilize prison sentence alternative sanctions including fines, suspended sentences, community service, and task-penalties depending on the severity of the crime. Additionally, the Netherlands does not use mandatory minimum prison sentences and Germany use of them is limited.

Penal policies in the Netherlands have been characterized by a strong tendency towards reducing short-term imprisonment and favoring the use of non-custodial sanctions.<sup>127</sup> Since the 1980s, fines have become the preferred criminal sanction, prosecutorial diversion (such as out of court settlements or suspended prosecution) has increased significantly, community service sentences emerged, and other new non-custodial sanctions were

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<sup>122</sup> THE INT'L ASS'N OF PENAL LAW, *supra* note 39, at 105.

<sup>123</sup> *Id.*

<sup>124</sup> TAREK, *supra* note 118, at 11.

<sup>125</sup> Prison Act of 16 March 1976 (Federal Law Gazette Part I p. 581, 2088), as last amended by Article 7 of the Act of April 2013 (Federal Law Gazette 1 p. 935).

<sup>126</sup> TAREK, *supra* note 118, at 14.

<sup>127</sup> *Id.* at 8.

developed.<sup>128</sup> Additionally, legal tolerance towards some socially controversial issues, such as drug use, characterizes the Dutch criminal justice system and leads to fewer drug-related prosecutions than the United States.<sup>129</sup>

Furthermore, the Dutch judiciary is granted significant discretionary power with regards to sentencing.<sup>130</sup> The statutory guidelines that the courts utilize in determining a convicted individual's sentence are extremely broad and do not limit courts' ability to choose the type of sanction as well as its severity.<sup>131</sup> Significantly, the Dutch criminal justice system does not utilize mandatory minimum sentences and the codified maximum terms of imprisonment that are specified are limited to the worst possible crimes and reflect the gravity of the offense.<sup>132</sup> Finally, life sentences are uncommon and can be interchanged with a fixed term of imprisonment and a fine.<sup>133</sup>

While the Dutch courts have full discretion in determining a convicted person's sentence, the decision is subject to a few procedural requirements, which concern the rationale behind the chosen sentence. For example, Section 359 (5) of Code of Criminal Procedure ("CCP") requires that the verdict state the reasoning behind the sentence.<sup>134</sup> Additionally, section 359 (6) of CCP requires that a sentence resulting in the deprivation of liberty must articulate the reasons that led the judge to his/her choice, including the circumstances considered when assessing the appropriate length of imprisonment.<sup>135</sup> On the other hand, if a judge chooses to impose a suspended sentence, further reporting of their reasoning is not required.<sup>136</sup>

In Germany, deterrence rather than retribution appears to guide penal policies as prison sentences are used infrequently and fines are the preferred criminal sanction as about eighty percent of German criminal sanctions are criminal fines.<sup>137</sup> The practice of

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 11.

<sup>130</sup> *Id.* at 129.

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

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 130.

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

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

<sup>137</sup> THE INT'L ASS'N OF PENAL LAW, *supra* note 39, at 100.

imposing fines on criminal offenders in Germany is based on the principle that monetary sanctions are more likely to make a criminal offender regret his actions because the individual is forced to reduce his standard of living over the long-term as opposed to serving a short prison term—a more detrimental result in the long run.<sup>138</sup> This rationale likely is an unpopular one within the American culture and criminal justice system which primarily concerns itself with retribution for the victim.<sup>139</sup> Unlike the American model, however, the primary concern of the German criminal code is expressly with the defendant and the general order of peace rather than the victim.<sup>140</sup>

The above practices and principles illustrate that the penal policies in both the Netherlands and Germany are geared towards the idea that punishment should only be severe enough to deter and reduce crime and the goal of retribution for the victim that is central to the United States' reliance on incarceration is largely absent.

*B. Alternative Criminal Sanctions: Fines, Suspended Sentences, and Community Service*

The Netherlands Financial Penalties Act provides that a fine is preferable to a prison sentence and that all crimes, even those which could otherwise be subject to life imprisonment, may be substituted for with a fine.<sup>141</sup> Furthermore, Section 359 of the CCP requires courts to articulate special reasons when a prison sentence is made over a fine.<sup>142</sup> Germany too has an analogous model of fine imposition rather than imprisonment. The German “day fine” approach imposes a monetary fine, which represents a daily rate in substitution for incarceration based on the offender’s income.<sup>143</sup>

Additionally, when prison sentences are given to individuals convicted of certain crimes in Germany and the Netherlands, they are often suspended.<sup>144</sup> Suspended sentences are analogous to the

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<sup>138</sup> Carol D. Rasnic, *Making the Defendant's Punishment Fit the Crime: The Contrast Between German and U.S. Laws in Sentencing*, 7 N.Y. INT'L. L. REV. 62, 69 (1994).

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

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

<sup>141</sup> TAREK, *supra* note 118, at 115.

<sup>142</sup> *Id.*

<sup>143</sup> THE AMERICAN SERIES OF FOREIGN PENAL CODES, *supra* note 116, at 14.

<sup>144</sup> *Id.* at 22 (“Upon a sentence of imprisonment of no more than one year the court shall suspend the execution of the punishment and grant probation if it can

United States probation model but these sentences often times do not require the same sort of surveillance or supervision as probation does in the United States. In the Netherlands, prison or financial sentences of up to two years are eligible for suspension either in whole or in part <sup>145</sup>while in Germany, any individual who is sentenced to prison for up to two years will generally be granted a suspension of the sentence and diverted to probation.<sup>146</sup>

Community sentences are another jail-alternative criminal sanction. In the Netherlands, a penalty that is considered less severe than a custodial sentence but more severe than a fine is sometimes used.<sup>147</sup> This option, known as a task-penalty, consists of work in the community and/or training orders, which require an offender to learn certain behavioral or social skills.<sup>148</sup>

An overview of the two nation's approach to sentencing and the philosophies they embrace demonstrate two things. First, incarceration should be used as a last resort for only the most dangerous criminals. And second, retribution for the victim is not a primary goal of sanctioning criminal behavior, rather the sanction that is the most likely to deter and protect society – even if it is mild relative to the severity of the crime – is the one that should be imposed. Additionally, the Netherlands demonstrates a distinct tolerance towards drug use and even drug use that is criminalized on the books.<sup>149</sup>

#### CONCLUSION

While the First Step Act reduces some of the harsh consequences of excessive prison sentences for victim-less offenders, it fails to change the American philosophy of

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be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence.”); see TAK, *supra* note 118, at 126-127 (“A suspended sentence is possible for all principal sentences.”).

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

<sup>146</sup> THE AMERICAN SERIES OF FOREIGN PENAL CODES, *supra* note 116, at 22.

<sup>147</sup> TAREK, *supra* note 118, at 114.

<sup>148</sup> *Id.* at 21.

<sup>149</sup> *Id.* (“drug users are not treated as criminal offenders but as medical patients who might need to improve their physical and mental health; the main feature of the Dutch drug policy is harm reduction and its objectives are to prevent the use of (hard) drugs and to limit the risks and harm to the drug user.”).

punishment. Retribution and vengeance imposed on offenders by means of decades of incarceration have proven to be largely inconsequential in reducing crime, rehabilitating offenders, and benefitting the victims of violent crime. If the United States were to divert from its focus on retribution for the victim, as Germany does, and focus on re-socializing the offender, crime would be reduced without the costs that are currently being incurred—both in terms of money and human life. When applied to non-violent crimes, such as drug offenses, incarceration punishes the offender and the victim at the expense of the loss of a human life which, with proper rehabilitation may never reoffend—a philosophy embraced by the Netherlands.

The jail-alternative sanctions which are widely used in Germany and the Netherlands may achieve the reduction in mass incarceration that the United States desperately needs to see. Although it may be impossible to predict how reducing the use of jails and prisons as a first response to criminal convictions will affect the rate of crime in the United States, we know the current system is not working and that other nations have utilized distinct models, under which they have not become more exposed to violent criminals and ballooning prison populations.

If the United States has a legitimate goal of rehabilitation for offenders, then the incentive to hasten and lengthen the incarceration of a criminal defendant would not exist. Meaningful criminal justice reform necessarily involves substituting alternative sanctions for incarceration as a first-response to criminal convictions, eliminating mandatory minimums, reducing coercive plea bargaining, and transferring the power of discretion back to judges who can administer sentences, whether they include jail time or jail time alternatives, on an individualized basis with the goal of rehabilitating and reintroducing criminal defendants into society. But without a shift in underlying philosophy of American criminal sanctions, simply reforming the sentencing laws to reduce incarceration rates is unlikely to go far in terms of achieving the goals of criminal law—maintaining public safety and stability of the community. The passage of First Step Act indicates that there is strong support of reforming the American criminal justice system and reducing the use of prisons. The second step must therefore be an overhaul of ineffective philosophies behind our penal system and the implementation of alternative sanctions which have proven

effective at deterring crime and rehabilitating offenders in other industrialized nations.