

# Hamline University's School of Law's Journal of Public Law and Policy

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Volume 36 | Issue 1

Article 4

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2015

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### Recommended Citation

36 Hamline J. Pub. L. & Pol'y 78

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# **One Size Does Not Fit All: A Look at the Disproportionate Effects Of Federal Mandatory Minimum Drug Sentences On Racial Minorities And How They Have Contributed To The Degradation Of The Underprivileged African–American Family**

By: *Danielle Snyder*<sup>1</sup>

## **I. Welcome to the Federal Slaughterhouse—Bang, Bang, Next!**

“If you stand in a Federal Court, you’re watching poor and uneducated people being fed into a machine like meat to make sausage. It’s just bang, bang, bang, bang, next!” says journalist Charles Bowden in Eugene Jarecki’s documentary film entitled, *The House I Live In*.<sup>2</sup> This metaphorical butchery concept illustrates the harsh and unfair nature of mandatory minimum sentencing laws.<sup>3</sup> In

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<sup>2</sup> THE HOUSE I LIVE IN (British Broadcast Corporation Oct. 5, 2012) (documenting the social and political history of the war on drugs and its effects on culture and society, specifically highlighting the disproportionate effects on the African–American community and impoverished persons). The documentary’s main focus concentrates on the racial inequities of the legal system in the war on drugs, and exposes the war efforts as de facto racist in its commencement, as well as in its continuation. *Id.* The documentary also includes thorough research and testimonials from experts such as; Harvard University professors, a doctor specializing in addiction, a federal judge, a senator, a criminal defense attorney, narcotics officers, authors, reporters, historians, and more. *Id.*

<sup>3</sup> *Safety Valves in a Nutshell*, FAMILIES AGAINST MANDATORY MINIMUMS 1 (Jul. 16, 2009), [http://www.famm.org/Repository/Files/Safety\\_valves\\_in\\_a\\_nutshell\\_7.16.09%5B1%5D.pdf](http://www.famm.org/Repository/Files/Safety_valves_in_a_nutshell_7.16.09%5B1%5D.pdf) [hereinafter SAFETY VALVE NUTSHELL] (“A mandatory minimum is a sentence, created by Congress or a state legislature, which the court must give to a person convicted of a crime, no matter what the unique circumstances of the offender or the offense are.”); Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT’G REP. 55, 56 (2008)

the American criminal justice system, almost every drug offender is thrown into a mandatory sentencing scheme, stuffed into a particular classification, and then shipped off to federal prison without any further consideration of that individual's unique facts or circumstances.<sup>4</sup> Mandatory minimums treat the individual like an interchangeable piece of homogenous sausage; the hard-working family man with an unfortunate vice,<sup>5</sup> the desperate mother trying to

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(defining a mandatory minimum sentence as a “required minimum term of punishment (typically incarceration), that is established by Congress or a state legislature in a statute”). When mandatory minimums are applied, they force judges to follow the corresponding statute, “regardless of unique facts and circumstances of the defendant or the offense.” Gill, *supra*.

<sup>4</sup> See *supra* text accompanying note 3.

<sup>5</sup> *Stories: Michael McClain*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/michael-mcclain/> (last visited Oct. 9, 2013). Michael had a history of untreated depression and alcoholism, which paved the way for his later formed cocaine addiction. When Michael had his first son he took on longer hours at work and traveled more in an effort to support his family. Unfortunately, this scheduled proved to be too taxing for Michael, and so he experimented with cocaine hoping that it would provide him with enough energy to keep up. As a result, he was fired from his job, his marriage ended, and he lost custody of his son. Michael then enrolled in drug treatment and kicked his cocaine habit, which allowed him to get a new job, regain sole custody of his son, and purchase his first home. Sadly, Michael once more turned to drugs to help him perform better on the job and keep up with his new life, this time trying methamphetamine. The methamphetamine took control of Michael's life, he lost his son, his job, his home, and thus began to sell marijuana and methamphetamine in order to support his addiction. Michael was sentenced to fifteen years total, ten years for the drug trafficking charges, and an additional five year enhancement for his possession of a firearm. *Id.*

stay afloat,<sup>6</sup> the susceptible teenager who played a nominal role,<sup>7</sup> and the chronic and malicious offender are all one-and-the-same.<sup>8</sup> By lumping all drug offenders together as criminals to be locked up and

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<sup>6</sup> *Stories: Sharanda Jones*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/sharanda-jones/> (last visited Oct. 22, 2013). Sharanda, a first-time, non-violent drug offender, was sentenced to life in federal prison without parole. Sharanda maintained steady employment as a hair stylist and restaurant manager, however she constantly struggled to get by and had financial difficulties trying to support herself and her eight-year-old daughter. Out of desperation and the desire to form a better life for her family, Sharanda made a poor decision to become involved in a cocaine and crack cocaine distribution rink. Sharanda's role was to buy cocaine from a supplier in Houston, Texas and bringing it back to Dallas, Texas. At trial, Sharanda was found guilty of conspiracy to distribute and possession with intent to distribute crack cocaine. Although she only transported the powder form of cocaine, the court sentenced her under the harsher crack cocaine penalties because she knew, or should have known, that the powder she was bringing back was being transformed into crack cocaine. Sharanda also received enhancements because she was considered a "leader," and because she possessed a firearm, even though she legally purchased the firearm for her protection. At the time of Sharanda's arrest, she only had \$250 in her bank account. *Id.*

<sup>7</sup> *Stories: Ronald J. Evans*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/ronald-j-evans/> (last visited Oct. 9, 2013). Ronald's story is a sadly commonplace theme for young and impressionable adolescents growing up in inner city projects, surrounded by hardships and the lure of easy money. Ronald was raised by a single mother in a public housing project. He suffered from learning disabilities which caused him to struggle in school, and lead to his reaching out to and associating with the neighborhood drug dealers. By Ronald's sixteenth birthday he got involved in the drug business, first as a lookout making fifty dollars a day, second as a small quantity heroin seller, and then later progressing to couriating money, and packaging and transporting drugs. At 19-years-old, Ronald was sentenced to life in prison without the possibility of parole. *Id.*

<sup>8</sup> *Stories: Debi Campbell: Success Story*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/debi-campbell/> (last visited Oct. 9, 2013). Debie spent more than sixteen years in federal prison for a non-violent drug offense. She unfortunately became addicted to methamphetamine and started to sell it in to others in order to support her habit and family at the same time. Debie was sentenced to more time than some convicted murderers or kidnapers receive. *Id.*

uniformly<sup>9</sup> punished according to some arbitrary weight-based sentencing criteria,<sup>10</sup> Congress has created an unjust<sup>11</sup> system that fails to take the “whole person into account.”<sup>12</sup>

Additionally, the punitive objective<sup>13</sup> of mandatory minimum drug sentencing laws criminalizes all drug users by attempting to deal

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<sup>9</sup> See Gill, *supra* note 3, at 61 (referring to the uniformity of mandatory minimum sentences as “one-size-fits-all”); *What are Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/mandatory-sentencing/mandatory-minimums/> (last visited Sept. 26, 2013) [hereinafter FAMM *What are Mandatory Minimums*] (stating that mandatory minimums are “inflexible, ‘one-size-fits-all’ sentencing laws [that] may seem like a quick-fix solution for crime . . . [however,] they undermine justice by preventing judges from fitting the punishment to the individual and the circumstances of their offenses.”).

<sup>10</sup> See discussion *infra* Part II A–B (discussing mandatory minimum laws and the arbitrary provisions set forth in the 1986 ADAA and 1988 Omnibus Act).

<sup>11</sup> *But see* STEPHEN MURDOCH, THE DISTRICT OF COLUMBIA BAR, THE DEBATE OVER MANDATORY MINIMUMS (2001), available at [http://www.dcbbar.org/for\\_lawyers/resources/publications/washington\\_lawyer/november\\_2001/minimums.cfm](http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/november_2001/minimums.cfm) (referring to statements made by William Otis, an assistant U.S. attorney for the Eastern District of Virginia from 1981 to 1999, who also served on the attorney general’s Advisory Subcommittee on Sentencing). Otis advocates that instead of “handicap[ping] the pursuit of justice,” mandatory minimums have actually “increased fairness by imposing a degree of uniformity on the criminal justice system.” *Id.*

<sup>12</sup> *Cracked Justice—Addressing The Unfairness In Cocaine Sentencing: Hearing Before the H. Subcomm. On Crime, Terrorism and Homeland Security*, 110th Cong.1, Sess. 67 (2008) (testimony of Michael Short, Former Offender, Md.) [hereinafter *Cracked Justice*] Stating that:

Mandatory minimums forbid a judge from taking the whole person into account. Remorse, acceptance of responsibility, the influence of coercion or poverty, addiction—all of it gets swept aside in favor of one measure, the weight of drugs. It makes the small fry as liable to serve extremely hard sentences as those who actually deserve them.

*Id.*

<sup>13</sup> 18 U.S.C. § 3553(a)(2) (2010); Erik Luna, *Mandatory Minimum Sentencing Provisions Under Federal Law*, CATO INSTITUTE 1 (May 27, 2010), available at <http://www.cato.org/publications/congressional-testimony/mandatory-minimum-sentencing-provisions-under-federal-law> (stating that mandatory minimums don’t serve traditional or consequentialist goals of punishment); Barbara S. Vincent & Paul J. Hofer, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS, FED. JUDICIAL CTR. 11 (1994), available at

with a health problem as if it were a legal problem, thus contributing to the drug abuse problem and America's futile efforts in its war against drugs.<sup>14</sup> While it is certainly true that drugs in—and-of

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[http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/\\$file/conmanmin.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf) (stating that mandatory minimum sentences have been ineffective in producing congressional goals of reducing crime or drug availability). Mandatory minimum sentences don't serve traditional goals of punishment, because they undermine a common principle of justice, "[t]he notion of proportionality between crime and punishment,"—essentially that the punishment should fit the crime. Luna, *supra*. The author clarifies that because mandatory minimums eliminate a judge's discretion to impose a sentence lower than the statute mandates, it makes the particular facts of a defendant's case irrelevant, and thus makes mandatory minimums indifferent to any concept of proportionality. Consequentialist goals are also unaccomplished by mandatory minimum sentences, because they fail "to provide effective, efficient deterrence or meaningful incapacitation." The author stipulates that "[c]larity and certainty of punishment are not synonymous with deterrence," and equates an economic cost-benefit analysis to a criminal cost-benefit analysis. The cost-benefit analysis requires that a defendant not only know the rule, but also believe that the costs outweigh the benefits from violating the law, and then apply that understanding to decision-making at the time of the crime. *Id.* Furthermore, the statute provides that there are four purposes of sentencing, to: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . . § 3553(a)(2).

<sup>14</sup> See THE HOUSE I LIVE IN, *supra* note 2 (interviewing Dr. Gabor Maté, a physician, and an expert on addictions); Dr. Gabor Maté, *Stop Treating Drug Users As Criminals*, (Jul. 27, 2013, 3:02 PM), available at <http://drgabormate.com/article/stop-treating-drug-users-as-criminals/> (discussing the failure of the drug war and attributing it to a lack of social and scientific understanding concerning drugs and drug use). Dr. Maté recognizes drug abuse as a matter of public health and explains that treating drug use as only a legal issue has contributed to the drug problem in America. THE HOUSE I LIVE IN, *supra*. In his article, Dr. Maté explains that:

This war has failed to curtail drug use, trafficking or the spread of addiction . . . . The war is doomed to fail because neither the methods of war nor the war metaphor itself are appropriate to a complex social problem that calls for compassion, self-searching insight, and factually researched scientific understanding.  
Mate, *supra*..

themselves destroy lives, it is also inherently true that American anti-drug policies impose significant costs, burdens, and aggregate harm on society.<sup>15</sup> Although incarceration is an important function of the criminal justice system, prison should not be the only mechanism for dealing with an individual who has committed a low-level,<sup>16</sup> non-violent drug offense.<sup>17</sup> Research has indicated that alternatives to incarceration (such as supervised probation through drug courts,<sup>18</sup> work programs, and treatment programs) reduce criminal reoffending and significantly lower costs to American taxpayers.<sup>19</sup>

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<sup>15</sup> Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 965 (2001) (noting that both drugs and anti-drug policies may impose costs and aggregate harm on society).

<sup>16</sup> Jamie Fellner, *Drug Laws: Policy and Reform: Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 269 (2009) (describing low-level drug offenders as “bit players” mostly consisting of street-level dealers, couriers, or lookouts);, *Decades of Disparity: Drug Arrests and Race in the United States* (2009), HUMAN RIGHTS WATCH 1, available at [http://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf) [hereinafter HRW *Decades of Disparity*] (stating that from 1999 through 2007, eighty percent or more of all drug arrests were for simple possession, a low-level offense).

<sup>17</sup> 21 U.S.C. § 841(a) (2010);, *Fact Sheet: Drug Related Crime*, U.S. DEPT' OF JUSTICE 1 (Sept., 1994), available at <http://www.bjs.gov/content/pub/pdf/DRRC.PDF> [hereinafter DEP'T OF JUSTICE *Fact Sheet*] (defining drug offenses, as violations of laws prohibiting or regulating the possession, use, distribution, or manufacture of illegal drugs). The federal statute defines unlawful acts that constitute drug offenses, and states that: [I]t shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance. § 841(a)(1)(2).

<sup>18</sup> *Drug Courts Work*, NAT'L ASS'N OF DRUG COURT PROF'LS, <http://www.nadcp.org/learn/facts-and-figures> (last visited Oct. 22, 2013) [hereinafter *Drug Court Facts*] (finding that drug courts reduce crime, save money, ensure compliance, combat addiction, and restore families).

<sup>19</sup> See Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 385 (2013) (stating that “[l]aws that provide for alternatives to prison for low-level offenses, such as possession or use of drugs, would reduce recidivism, lower incarceration rates, diminish the severity of the criminal justice

For the past forty years,<sup>20</sup> the imposition of mandatory minimum sentences and their draconian effects, have fueled the unsuccessful<sup>21</sup> “crusade for a drug-free America,”<sup>22</sup> and have lead to

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system, and reduce the number of guilty pleas motivated by the possibility of a long mandatory minimum sentence.”). *But see* Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551 (2009) (suggesting that sentence enhancement policies, such as mandatory minimum sentences, “reduce crime by deterring potential offenders from committing crimes and by preventing convicted offenders from reoffending through lengthened incapacitation.”).

<sup>20</sup> David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 252 (2001) (“By all accounts, the war on drugs has been a failure. Although nearly half a million people are locked up for drug crimes, drugs are cheaper, purer, and more easily available than ever before.”); THE HOUSE I LIVE IN, *supra* note 2 (“For the past forty years, the war on drugs has resulted in more than forty-five million arrests, one trillion dollars in government spending, and America’s role as the world’s largest jailer. Yet for all that, drugs are cheaper, purer, and more available than ever.”).

<sup>21</sup> *See* Frank O. Bowman III, *The Geology of Drug Policy*, 14 FED. SENT’G REP. 123, 123 (2002) (“The notion that ‘the drug war is a failure’ has become the common wisdom in academic . . . circles”); James A. Inciardi, *Policy Issues in the Sentencing of Drug Offenders*, 3 CRIMINOLOGY & PUB. POL’Y 397, 397 (2004) (describing the general consensus among those who have closely studied the war on drugs as being “ineffective”); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 65 (2009) (stating that “[e]xperienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms . . . are a bad idea.”). *But see* Maya Rhodan, *Obama Expands Mandatory Minimum Sentencing Relief*, SWAMPLAND TIME (Sept. 20, 2013), <http://swampland.time.com/2013/09/20/obama-expands-mandatory-minimum-sentencing-relief/> (explaining that there are still policymakers and prosecutors who support mandatory minimum sentences, and who believe that mandatory minimums are essential to the war on crime). Inciardi states in his article that: The general consensus of advocates for drug policy change has been that the ‘war on drugs’ is ineffective, having accomplished little more than incarcerating hundreds of thousands of individuals whose only crime was the possession of drugs, and in so doing, disenfranchising them in the areas of voting, employment opportunities, and housing . . . .

Inciardi, *supra*.

<sup>22</sup> Chris Reidy, *Reagans’ Crusade: ‘Drug-free America,’* ORLANDO SENTINEL, (Sept. 15, 1986), available at <http://articles.orlandosentinel.com/1986-09->



America being the largest jailer.<sup>23</sup> Moreover, in addition to being both ineffective and economically unsustainable,<sup>24</sup> mandatory

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15/news/0250330102\_1\_drug-abuse-drug-problem-drug-free (reporting on President Ronald Reagan's televised speech, wherein he unveiled his new plans to win the war and achieve a drug-free America). See generally MICHAEL TONRY, PUNISHMENT AND POLITICS 54 (2004) (explaining that although the political frameworks surrounding the drug war campaigns appeared to target drug use and crime, the underlying implications carried racial undertones); Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 15 (2011) (suggesting that the initial campaign against the war on drugs was all political); Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the 'War on Drugs' was a 'War on Blacks,'* 6 J. GENDER RACE & JUST. 381, 389 (2002) (showing a decline in recreational drug use when Reagan launched his initial campaign against drugs). President Reagan's anti-drug crusade vilified drug abuse by labeling it as an "epidemic," a "menace" to society, and "a repudiation of everything America is." Reidy, *supra*. Reagan accused drugs of undercutting America's institutions, threatening societal values, and killing America's children. *Id.* Reagan even went as far as to compare the anti-drug crusade to World War II, by calling the crusade "another war for our freedom." *Id.* In 1982 however, during President Reagan's initial campaign against the drug war, statistics displayed a decline in recreational drug use, not an increase. Nunn, *supra*. Therefore, from the onset, the declaration against the war on drugs had "little to do with drug crime" or drug statistics and "much to do with racial politics" and political campaigning. Alexander, *supra*. Although political frameworks surrounding presidential campaigns seemed to be concerted in targeting the drug war for the sake of societal welfare and abrogating crime, the underlying implications carried racial undertones. TONRY, *supra*. Essentially, "welfare fraud and violent crime were given black faces." *Id.*

<sup>23</sup> Conyers, *supra* note 19, at 377 (stating that the United States now has the highest incarceration rate in the world).

<sup>24</sup> See Seth Ferranti, *24-Year-Old Gets 3 Life Terms in Prison for Witnessing a Drug Deal: The Ugly Truth of Mandatory Drug Sentencing*, ALTERNET.ORG, (Jun. 11, 2012), [http://www.alternet.org/story/155794/24-year-old\\_gets\\_3\\_life\\_terms\\_in\\_prison\\_for\\_witnessing\\_a\\_drug\\_deal%3A\\_the\\_ugly\\_truth\\_of\\_mandatory\\_drug\\_sentencing](http://www.alternet.org/story/155794/24-year-old_gets_3_life_terms_in_prison_for_witnessing_a_drug_deal%3A_the_ugly_truth_of_mandatory_drug_sentencing) (noting that incarcerating low-level, non-violent drug offenders is senseless and economically wasteful); Nicole Flatlow, *U.S. Attorney General To Ease Impact Of Harsh Drug Sentencing Laws*, THINKPROGRESS.ORG (Aug. 12, 2013, 8:48 AM), [http://thinkprogress.org/justice/2013/08/12/2444441/holder-sentencing-and-drugs/](http://thinkprogress.org/justice/2013/08/12/2444441/holder-sentencing-and-drugs/http://thinkprogress.org/justice/2013/08/12/2444441/holder-sentencing-and-drugs/) (quoting U.S. Attorney General Eric Holder, "widespread incarceration at the federal . . . level . . . is both ineffective and unsustainable . . . [i]t imposes a significant economic burden—totaling \$80 billion in 2010 alone—and it comes

minimum drug sentences have produced remarkably disparate effects in poor minority communities,<sup>25</sup> specifically impacting underprivileged African–Americans and their families.<sup>26</sup>

This comment intends to show how mandatory minimum drug sentencing laws systematically and disproportionately impose severe social and economic ramifications upon the underprivileged African–American community.<sup>27</sup> Additionally, this comment will demonstrate that because of the adverse and disparate impact, mandatory drug minimums have inadvertently lead to a degradation of the African–American family. Part II offers a historical perspective of the “War on Drugs” and the re–emergence of mandatory minimum drug laws,<sup>28</sup> provides background information on the sentencing disparity between crack cocaine and powder cocaine,<sup>29</sup> and introduces the only two exceptions to the mandatory drug provisions.<sup>30</sup> Part III discusses how mandatory minimum

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with human and moral costs that are impossible to calculate.”). *See generally Stories: Sharanda Jones, supra* note 6 (explaining that taxpayers are spending over \$1.2 million dollars incarcerating Sharanda Jones for life, a first–time, non–violent drug offender). The American legal system is the only system in the world that imposes life sentences to teenagers for small–time, non–violent drug offenses, and spends about \$40 billion dollars a year locking up thousands of low–level offenders. Ferranti, *supra*.

<sup>25</sup> *Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States*, Families Against Mandatory Minimums 2 (Mar. 10, 2006), available at [http://www.nclr.org/images/uploads/publications/38367\\_file\\_IAHRC\\_statement\\_FNLNWQC\\_\\_2\\_\\_fnl.pdf](http://www.nclr.org/images/uploads/publications/38367_file_IAHRC_statement_FNLNWQC__2__fnl.pdf) [hereinafter DISPARATE IMPACT ON MINORITY COMMUNITIES] (“Mandatory minimums systematically and disproportionately affect minority groups in this country.”).

<sup>26</sup> *id.* at 4 (“The mandatory minimum sentencing structures contribute to striking disparity and harsh results for defendants of color”). Research also indicates that African–Americans are negatively impacted by mandatory minimum provisions simply because of certain policies and procedures. *Id.* at 2.

<sup>27</sup> *id.* (reporting on research that indicates mandatory minimum laws disproportionately impact minority groups, specifically African–American and Latino communities).

<sup>28</sup> *See* discussion *infra* Part II. A.

<sup>29</sup> *See* discussion *infra* Part II. B.

<sup>30</sup> *See* discussion *infra* Part II. C.

sentencing laws unintentionally result in racially discriminatory policies and operational practices that disproportionately impact the African–American community.<sup>31</sup> Part IV examines the harmful and indirect consequences mandatory minimum drug sentences impose on African–American families.<sup>32</sup> Part V offers solutions that endeavor to eradicate the adverse effects mandatory minimum sentencing laws have on the African–American community,<sup>33</sup> and finally, Part VI briefly concludes this comment.<sup>34</sup>

## II. Historical Context and Background

To fully comprehend the War on Drugs and the passing of mandatory minimum draconian punishments, it is important to understand the historical criminalization of certain kinds of drugs that are illicit today, and to recognize the fact that the Nation’s anti–drug laws have always historically been associated with race.<sup>35</sup> In the 1800’s, drugs such as opium, cocaine, heroine, and cannabis were lawful and common in the United States.<sup>36</sup> The first change began in the west coast with the criminalization of smoking opium.<sup>37</sup> Opium was associated with Chinese people, who were at the time immigrating to the United States and working very hard for very little pay;<sup>38</sup> However, the success of the Chinese immigrants was apparently taking away jobs from white workers, and so politicians got together to criminalize opium.<sup>39</sup>

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<sup>31</sup> See discussion *infra* Part III.

<sup>32</sup> See discussion *infra* Part IV.

<sup>33</sup> See discussion *infra* Part V.

<sup>34</sup> See discussion *infra* Part VI.

<sup>35</sup> See THE HOUSE I LIVE IN, *supra* note 2 (discussing the history of the Nations anti–drug laws). Lincoln historian, Richard Miller, discusses the societal changes in American history that prompted the criminalization of certain drugs. *Id.*

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

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

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

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

The second change came in 1914 with the targeting of “Negros” and the criminalization of cocaine.<sup>40</sup> It was thought that African–Americans on cocaine could withstand police bullets and could work hard all day and night.<sup>41</sup> The next change came about in the 1930’s with the criminalization of hemp.<sup>42</sup> Hemp was a legitimate crop from colonial times, but in the 1930’s with the immigration of Mexican workers coming into the country and working hard and cheap, hemp changed into something dangerous and frightening called “marijuana,” leading the government to outlaw the drug.<sup>43</sup> Thus, throughout these changes, what was technically being outlawed was not being Chinese, African–American, or Mexican, but a habit associated with being Chinese, African–American, or Mexican.<sup>44</sup>

#### **A. You Can’t Fight A War Without Weapons: The Reagan–Era Rise of Mandatory Minimum Drug Sentences**

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<sup>40</sup> *Id.*; see also Edward Huntington Williams, M.D., *Negro Cocaine "Fiends" New Southern Menace*, N.Y. TIMES, (Feb. 8, 1914), <http://query.nytimes.com/mem/archive-free/pdf?res=9901E5D61F3BE633A2575BC0A9649C946596D6CF> (depicting a newspaper article from 1914 that illustrates how lower class African–American’s were viciously targeted for cocaine use).

<sup>41</sup> See Williams, *supra* note 40.

<sup>42</sup> THE HOUSE I LIVE IN, *supra* note 2.

<sup>43</sup> *Id.*

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

Mandatory minimum sentencing laws<sup>45</sup> require strict, harsh, and automatic “one-size-fits-all”<sup>46</sup> prison terms for offenders who

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<sup>45</sup> See 21 U.S.C. § 841(b)(1)(B) (2010); U.S. SENTENCING COMM’N, DRUG PRIMER 1 (2013), available at [http://www.ussc.gov/Legal/Primers/Primer\\_Drug.pdf](http://www.ussc.gov/Legal/Primers/Primer_Drug.pdf) [hereinafter DRUG PRIMER] (explaining that mandatory minimum statutory penalties are driven by the type and the quantity of the drug involved). Mandatory minimum sentences can also be subjected to enhanced penalties if the offense involved death or serious bodily injury, or if the offender had any prior convictions for felony drug offenses. DRUG PRIMER, *supra* at 2–6. The statute’s prohibited acts and penalties section states that:

In the case of a violation of subsection (a) [an unlawful drug offense] of this section involving . . . one-hundred grams or more of a mixture or substance containing a detectable amount of heroin . . . [,] such person shall be sentenced to a term of imprisonment which may not be less than five years and not more than forty years[,] and if death or serious bodily injury results from the use of such substance shall be not less than twenty years or more than life . . . 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 ten years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment.

§ 841(b)(1)(B).

<sup>46</sup> Gill, *supra* note 3, at 81; Letter from Honorable Robert Holmes Bell, Chair, Comm. on Criminal Law, Judicial Conference of the U.S. to Honorable Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S.S. (Sept. 17, 2013), available at <http://news.uscourts.gov/sites/default/files/Judge-Bell-Chairman-Leahy-mandatory-minimums.pdf> [hereinafter Letter From Robert Holmes Bell] (citing *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 110th Cong. 46 (2007) (statement of Judge Paul Cassell, Chair, Comm. on Criminal Law, Judicial Conference of the U.S.)). The letter quotes Judge Cassell’s statement regarding mandatory minimum sentences:

Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yes mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases.

Letter From Robert Holmes Bell, *supra*.

are convicted within a certain class<sup>47</sup> of criminal offenses.<sup>48</sup> These congressionally defined punishments require that every judge “impose [them] on every offender who meets the statutory criteria, regardless of any other facts in the case.”<sup>49</sup> Federal mandatory minimums are mostly concentrated on drug crimes,<sup>50</sup> and re-

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<sup>47</sup> See *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS 1, (Feb. 25, 2013), available at <http://fam.org/Repository/Files/Chart%20All%20Fed%20MMs%202.25.13.pdf> [hereinafter FAMI FEDERAL MANDATORY MINIMUMS] (noting that while most mandatory minimum sentences apply to drug offenses, Congress has enacted mandatory minimums for other offenses as well, including certain sex, gun, and child pornography offenses).

<sup>48</sup> *Id.* at 1–16 (listing all federal mandatory sentencing laws in effect as of August 6, 2012); Families Against Mandatory Minimums, *Federal Mandatory Minimum Drug Sentences: 21 U.S.C. § 841*, available at <http://fam.org/Repository/Files/Chart%20841--Fed%20Drug%20MMs%208.6.12.pdf> [hereinafter FAMI CHART: 21 U.S.C. § 841] (illustrating and simplifying the prohibited acts and mandatory sentences for drugs as detailed in 21 U.S.C. §841).

<sup>49</sup> VINCENT & HOFER, *supra* note 13, at 2. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1 (2010) (noting that mandatory minimum sentencing laws strip judges of the flexibility to modify individual sentences according to specific facts of their case and result in unduly harsh punishment).

<sup>50</sup> See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 32 (1991), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/199108\\_RtC\\_Mandatory\\_Minimum.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm) [hereinafter 1991 SPECIAL REPORT TO CONGRESS] (finding that the primary offense of conviction for most mandatory minimum defendants involves drug activity); Mascharka, *supra* note 15, at 936 (“The brunt of federal mandatory minimum sentences is aimed at drug crimes.”). While over forty–six percent of federal guideline offenders are involved in drug activity, over ninety–one percent of offenders sentenced under mandatory minimum provisions are involved in drug activity. 1991 SPECIAL REPORT TO CONGRESS, *supra*.

emerged<sup>51</sup> in full force during the “war on drugs” era<sup>52</sup> of the 1980’s.<sup>53</sup>

In October of 1982, President Ronald Reagan declared war on drugs,<sup>54</sup> and promised the nation a “planned, concerted campaign” against all drugs—“hard, soft, or otherwise.”<sup>55</sup> In fulfillment of that

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<sup>51</sup> See 1991 SPECIAL REPORT TO CONGRESS, *supra* note 50, at 6 (noting that mandatory minimum sentences are not new to the federal criminal justice system); Mascharka, *supra* note 15, at 938–43 (illustrating a more in depth history of the rise of mandatory minimum provisions). As early as 1790, mandatory penalties had been established for capital offenses. 1991 SPECIAL REPORT TO CONGRESS, *supra*.

<sup>52</sup> Fellner, *supra* note 16, at 262–65 (explaining that the rebirth of the drug war in the mid 1980’s was politically fueled and followed up by federal drug policy initiatives that increased federal funds for anti-drug efforts while simultaneously increasing the federal penalties for drug offenses). Two years after Reagan’s newly revved up campaign against the war on drugs, crack cocaine, the cheaper, smoke-able, base form of powder cocaine appeared on the scene. The emergence of crack cocaine triggered an abundance of media and political attention surrounding “tough on crime” policies that emphasized harsh punishments as the solution to ridding the drug problem in America. *Id.* at 261–63.

<sup>53</sup> Nunn, *supra* note 22, at 386–97 (focusing on the origins of the drug war and Reagan’s role in shaping the public’s fear and perception concerning the threat of illegal drug use).

<sup>54</sup> Alexander, *supra* note 22, at 15 (“President Richard Nixon was the first to coin the term a ‘war on drugs,’ but President Reagan turned the rhetorical war into a literal one.”). The author points out that the initial “war on drugs” was largely rhetorical because President Nixon declared illegal drugs as “public enemy number one,” however he did so without proposing any significant changes in public policy. The author further suggests that President Reagan turned the rhetorical war into a literal one when he officially announced the war on drugs in 1982, while drug crime was on the decline, and less than two percent of the American public even viewed drugs as the most significant problem facing the nation. *Id.*

<sup>55</sup> Reagan, *In Radio Talk, Vows Drive Against Drugs*, N.Y. TIMES, Oct. 3, 1982, available at <http://www.nytimes.com/1982/10/03/us/no-headline-194726.html%5D> (quoting president Reagan saying, “[w]e’re making no excuses for drugs . . . [d]rugs are bad and we’re going after them . . . [a]nd we’re going to win the war on drugs.”); *cf.*, A *Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Sept. 26, 2013) [hereinafter DPA: *History of the Drug War*] (crediting President Reagan’s wife, Nancy Reagan, with coining the slogan “Just Say No” for her zero tolerance campaign aimed at young people). *But see The*

promise, Reagan increased anti-drug spending and increased the number of federal drug task forces; as a result, his presidency marked the start of a lengthy period of high incarceration rates for low-level, non-violent drug offenses.<sup>56</sup>

Reagan's declaration of war vilified drug offenders and promoted public contempt for illegal drug use.<sup>57</sup> With the growing public consensus concerning the "menace" that drugs posed to society, and the emergence of crack cocaine on America's streets in the mid 1980's,<sup>58</sup> Reagan's crusade for a drug-free America fostered

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*Reagan-Era Drug War Legacy*, STOPTHEDRUGWAR.ORG (Jun. 11, 2004), <http://stopthedrugwar.org/chronicle-old/341/reagan.shtml> [hereinafter *Reagan-Era Drug War Legacy*] ("Nancy Reagan's 'Just Say No' did the work of dumbing down the debate on drugs in this country."). Some critics argued that Nancy Reagan's "approach toward drug abuse prevention . . . [only] focused . . . on young people who never used drugs, while it completely ignored talking realistically to young people who were using drugs." *Reagan-Era Drug War Legacy*, *supra*. Additionally:

Instead of recognizing drug use as a complex problem and people as complex beings, she gave us the idea that we could fix everything if we just said no. If that were the case, we wouldn't have a drug problem in this country . . . There was no attempt to treat drug use as a medical problem. Anyone who used illicit drugs had a character flaw and needed to be jailed.

*Id.*

<sup>56</sup> DPA: *History of the Drug War*, *supra* note 55 (describing the massive increase in rates of incarceration for non-violent drug offenses under the Reagan administration). The number of people imprisoned for non-violent drug offenses increased from 50,000 in 1980 to over 400,000 by 1997. The increases are attributed to the political propaganda and hysteria about drugs, which led to the passage of harsh "draconian" penalties in Congress, thus rapidly increasing the prison population. *Id.*

<sup>57</sup> See generally *id.* (quoting Los Angeles Police Chief and founder of DARE drug education, Daryl Gates, saying that "casual drug users should be taken out and shot").

<sup>58</sup> See *Crack Cocaine: A Short History*, DRUGFREEWORLD.ORG, <http://www.drugfreeworld.org/drugfacts/crackcocaine/a-short-history.html> (last visited Sept. 13, 2013) (giving a brief history on the origin of crack, a cheaper, smoke-able, more profitable, crystallized form of cocaine). While crack was developed during the cocaine boom of the 1970's, its use spread to "epidemic" like proportions between 1984 and 1990. *Id.* The drug reportedly increased the number



the perfect political climate for the furtherance of his “get tough”<sup>59</sup> on drug policies.<sup>60</sup> In response to extensive mass media<sup>61</sup> coverage

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of Americans addicted to cocaine from 4.2 million to 5.8 million, and infiltrated all but four states in the United States. *Id.*

<sup>59</sup> See Fellner, *supra* note 16, at 262. The “tough on crime” policies that emphasized harsh and punitive punishment philosophies as the “key to curbing drugs and restoring law and order in America,” were based on misinformation about drugs and its users, naïve understanding of drug war logic, and misguided concerns about the needs of poor urban communities. *Id.*

<sup>60</sup> THE HOUSE I LIVE IN, *supra* note 2 (quoting Harvard University professor William Julius Wilson, “every war starts with propaganda”).

<sup>61</sup> Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 854 (2010); Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J.L. & PUB. POL'Y 691, 734 (2010); Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 290 (2012); Spencer A. Stone, Note, *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, 311–12 (2007); Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, (Jan. 26, 2009), <http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=1>. See generally Peter Kerr, *Syphilis Surge With Crack Use Raises Fears on Spread of AIDS*, N.Y. TIMES, (Jun. 29, 1988), <http://www.nytimes.com/1988/06/29/nyregion/syphilis-surge-with-crack-use-raises-fears-on-spread-of-aids.html?src=pm> 1 (linking crack use in poor neighborhoods to the accelerating spread of sexually transmitted diseases and AIDS among heterosexuals). “In the months leading up to the passage of the 1986 Act, NBC News ran four hundred reports on crack, totaling fifteen hours of airtime, and Time Magazine named crack the ‘Issue of the Year.’” Stone, *supra*. The media played a crucial role in spreading communal fear regarding the infiltration of crack cocaine throughout urban areas. Moriearty & Carson, *supra*. More specifically, the media was extremely racially focused on crack cocaine use by African-Americans. *Id.* Additionally, when crack cocaine became a nationwide epidemic in the 1980’s and ’90s, there were widespread fears that prenatal exposure to the drug would produce a generation of severely damaged children. Okie, *supra*. The media portrayed this generation of severely damaged children as “crack babies”—a purported biological underclass of children who would require government support for the rest of their lives. Ahrens, *supra*. Moreover, the media attempted to link the crack baby epidemic to other inner-city crime, such as prostitution and gang violence. Emile, *supra*. Furthermore, the media aided in spreading more nationwide fear by linking crack cocaine to the widespread appearance of AIDS in heterosexuals. Kerr, *supra*. While homosexual activity and

and wide-spread public paranoia<sup>62</sup> surrounding the perceived<sup>63</sup> crack epidemic,<sup>64</sup> Congress enacted the Anti-Drug Abuse Act of 1986 (the “ADAA”).<sup>65</sup> The media’s role in creating public and congressional awareness of crack cocaine created immense political opportunity,<sup>66</sup> and supported the cultural mindset that the ADAA criminal laws

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intravenous drug use was already a well perceived avenue for the spreading of the HIV virus which causes AIDS, Kerr’s article points out that a rising number of young people, that had no experience with intravenous drug use, or homosexual activity, were testing positive for HIV. *Id.* at 3. The article suggests that crack use causes its users to engage in sexually promiscuous behavior with a large number of people, including sex with strangers, sex without condoms, and prostituting sex for crack or money. *Id.* at 2. The article indicates that the use of crack leads to those sexual practices, which exposes its users to the high risk of sexually transmitted diseases, and the transmission of AIDS. *Id.*

<sup>62</sup> Adam M. Acosta, Comment, *Len Bias’ Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing To Reduce Disproportionate Crack-Cocaine Sentences 18 U.S.C. § 3582*, 53 HOW. L.J. 825, 826 (2010) (noting that the death of Len Bias, a basketball star, drew a large amount of media attention to the use of crack-cocaine); Okie, *supra* note 61 (giving examples of newspaper headlines that discussed crack cocaine and its effects on babies). A few hours after being drafted to play basketball for the Boston Celtics, Len Bias died from a cocaine overdose. Acosta, *supra*. “His death immediately drew media attention to the use of crack-cocaine, which was subjected to a high level of public scrutiny where public shock and fear distorted facts about crack-cocaine.” *Id.* at 826–27.

<sup>63</sup> See generally REEFER MADNESS (George A. Hirliman Productions 1936) (providing an example of the media fueled propaganda surrounding the cannabis smear campaign from the 1930’s, and how it shaped societies falsely perceived notions about the drug).

<sup>64</sup> See generally *Ricky Ross Biography*, THE BIOGRAPHY CHANNEL, <http://www.biography.com/people/ricky-ross-481828> (last visited Oct. 22, 2013) (describing the life of Ricky Ross, a former drug kingpin in the 1980’s); *Rayful Edmond III Biography*, THE BIOGRAPHY CHANNEL, <http://www.biography.com/people/rayful-edmond-iii-547286> (last visited Oct. 22, 2013) (describing the life of Rayful Edmond III, a notorious drug dealer in the 1980’s who made millions of dollars supplying cocaine).

<sup>65</sup> 21 U.S.C. § 841 (2010).

<sup>66</sup> Nunn, *supra* note 22, at 390 (explaining how the opportunity for political advancement led to bi-partisan support). “For each anti-drug measure that passed, it became necessary to further escalate the war so that no one, Democrat or Republican, executive or legislative branch, could be called soft on this critical issue.” *Id.*

would save America from drug-induced ruin.<sup>67</sup> Both Democrats and Republicans were on board to pass this whole new generation of mandatory minimum sentencing laws.<sup>68</sup>

The ADAA's mandatory minimum sentencing laws were created in an attempt to "reduce unwarranted disparity, increase certainty and uniformity, and correct past patterns of undue leniency for certain categories of serious offenses."<sup>69</sup> The mandatory minimum provisions took away the flexibility and discretion<sup>70</sup> a

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<sup>67</sup> *Id.* at 389–90. Widespread public support added political value to the War on Drugs and solidified the public's backing of harsh new mandatory laws aimed at punish drug offenders and keeping America safe. *Id.*

<sup>68</sup> Alexander, *supra* note 22, at 17; Nunn *supra* note 22, at 390; Mascharka *supra* note 15, at 964–65. Between 1986 and the mid-1990's, Congress passed a large amount of new additions to the mandatory minimum drug laws. Mascharka, *supra*, at 935. These new changes came about every two years, coinciding with the election year cycle. *Id.* In Mascharka's comment, he also explains that:

Regardless of the mounting evidence indicating that long mandatory minimum sentences for nonviolent criminals are inefficient and often arbitrary, "in the current contentious political climate, the political system seems locked in place." Capitalizing on the public's fear of crime has been an extremely successful political tool in the past two decades. Politicians know that when running for election they cannot go wrong by portraying themselves as "tough on crime" and "hard on drugs." Both major political parties currently embrace the tough-on-crime mantra.

*Id.* at 964–65.

<sup>69</sup> See 1991 SPECIAL REPORT TO CONGRESS, *supra* note 50, at 1; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993) (identifying six objectives of mandatory minimum sentences). Of the six objectives, appropriately severe "just punishment, effective deterrence, and disparity reduction" have been the goals most prominently referred to by legislators. Schulhofer, *supra*.

<sup>70</sup> BLACK'S LAW DICTIONARY 534 (9th ed. 2009); MURDOCH, *supra* note 11; Mascharka, *supra* note 15, at 943. Judicial discretion is defined as the "exercise of judgment by a judge or court based on what is fair under the circumstances . . . ." BLACK'S LAW DICTIONARY, *supra*. A criticism of mandatory minimums is that the sentencing provisions remove discretion traditionally held by "neutral" judges and transfer power to "adversarial" prosecutors. Mascharka, *supra*. In her 1999 D.C. Bar "Legends in the Law" interview, Judge Joyce Hens Green of the U.S. District Court for the District of Columbia is quoted saying, "[a]s a consequence of the mandatory sentences, we know that justice is not always done . . . . [Y]ou cannot dispense equal justice by playing a numbers game. Judgment and discretion

federal judge once had to tailor sentences to the particular facts and circumstances of each case.<sup>71</sup> Now, judges are bound by the ADAA, which imposes mandatory minimum sentences and extended terms of incarceration.<sup>72</sup> The legislature's objective intent<sup>73</sup> behind imposing the new mandatory sentencing laws was to promote a systematic penological<sup>74</sup> approach, whereby all drug offenders would be subject to, and on notice of, the incarceration penalties associated with their criminal conduct.<sup>75</sup>

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and common sense are essential." MURDOCH, *supra*. Prior to his recent retirement, Judge Stanley Sporkin sat on the U.S. District Court for the District of Columbia for fourteen years, and also commented on the loss of judicial discretion. Sporkin noted that mandatory minimums have resulted in the incarceration of "people who are not a threat to society for an ungodly number of years." In contrast, William Otis, an assistant U.S. attorney for the Eastern District of Virginia from 1981 to 1999, and defender of mandatory sentencing laws, suggests that, "the loss of judicial discretion judges complain about so vociferously has been a small price to pay for the increase in public safety that has resulted from the imposition of mandatory sentences." *Id.*

<sup>71</sup> See note 3 and accompanying text.

<sup>72</sup> Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 343 (1995) (explaining the 1986 ADAA mandates). The ADAA mandates a five to forty year sentence, without probation or parole, for first times offenders convicted of possession with intent to distribute small quantities of designated drugs. The ADAA also mandates a sentence of ten years to life, without probation or parole, for first time offenders convicted of possession with intent to distribute larger quantities of drugs. *Id.*

<sup>73</sup> Tonry, *supra* note 21, at 67 (noting that policy makers who promote mandatory minimum penalties usually offer three erroneous justifications for their effectiveness); Mascharka, *supra* note 15, at 940 (explaining that Congress' primary motive for enacting this change was in response to fading public confidence in the criminal justice system due to perceived "soft" judges who were sentencing culpable criminals too lightly). Supporters of mandatory minimums incorrectly assert that the penalties promote transparency, assure evenhandedness, and prevent crime. Tonry, *supra*.

<sup>74</sup> BLACK'S LAW DICTIONARY, *supra* note 70, at 1248; MERRIAM-WEBSTER'S DICTIONARY OF LAW 388 (1996). Penology is defined as "a branch of criminology dealing with prison management and the treatment of offenders." MERRIAM-WEBSTER'S DICTIONARY OF LAW, *supra*.

<sup>75</sup> See note 13 and accompanying text; Spencer, *supra* note 72, at 345 (specifying congressional goals associated with the incarceration penalties in the 1986 ADAA and the 1988 Omnibus Act). *But see* Tonry, *supra* note 21 (explaining that

Two years later, with the political climate still heavily concentrated on the war on drugs, Congress passed the Omnibus Anti-Drug Abuse Act of 1988 (the “Omnibus Act”).<sup>76</sup> While the ADAA established “a new regime of non-parolable,<sup>77</sup> mandatory

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congressional efforts are not achieved); Douglas B. Marlowe, J.D., Ph.D. et. al., *Amenability to Treatment of Drug Offenders*, 67-SEP FED. PROBATION 40 (stating that incarceration has done little to reduce illicit drug use). Congressional efforts to promote “penological goals of specific and general deterrence, and incapacitation” were purportedly for the purpose of sending out clear cut, hard-lined messages to drug offenders. Spencer, *supra*. However, there is no credible evidence that suggests that the definite knowledge of punishment or incapacitation that mandatory minimums are supposed to impose, produce any significant deterrent effects. Tonry, *supra*. Conversely, statistics provide that, eighty-five percent of drug-abusing offenders released from prison returned to drug use within one year, and ninety-five percent returned to drug use within three years. Marlowe, *supra*.

<sup>76</sup> 21 U.S.C. §§ 846, 963 (2013); David H. Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1238 (1997) (noting that because of profound public concern about the widespread availability of drugs, Congress passed the Omnibus Act in an effort to attack supply lines and go after large drug distributors); Frontline, *Thirty Year's of America's Drug War a Chronology*, PBS.ORG, available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (summarizing the event that took place Oct. 27, 1986, when President Reagan signed The Anti-Drug Abuse Act of 1986). Congress believed that harsher minimum penalties associated with higher quantities of drugs would deter potential offenders who intended to distribute or traffic throughout communities. Angeli, *supra* at 1239. The statute defines attempt and conspiracy, and provides that: “[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. §§ 846, 963.

<sup>77</sup> BLACK’S LAW DICTIONARY, *supra* note 70, at 1227; Conyers, *supra* note 19, at 380; Nicole Flatlow, *Meet Five People Serving Draconian Drug Sentences Thanks To Mandatory Minimum Laws*, THINKPROGRESS.ORG, (Aug. 13, 2013), <http://thinkprogress.org/justice/2013/08/13/2453781/five-draconian-drug-sentences-fueled-by-mandatory-minimum-laws/>. Parole is defined as “[t]he conditional release of a prisoner from imprisonment before the full sentence has been served.” BLACK’S LAW DICTIONARY, *supra*. Although some sentences are non-parolable, parole is usually “granted for good behavior.” *Id.* The Sentencing Reform Act of 1984 abolished parole for federal inmates. Conyers, *supra*. Those sentenced to mandatory minimums, even for non-violent drug offenses, are not

minimum sentences for drug trafficking offenses that tied the minimum penalty to the amount of drugs involved in the offense,”<sup>78</sup> the Omnibus Act generated an even more wide-ranging and extensive set of quantity-based minimum drug sentences.<sup>79</sup> Most significantly, the Omnibus Act applied the mandatory minimum penalties to “conspiracies”<sup>80</sup> to distribute or import drugs,

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eligible for parole. Flatlow, *supra*. Even when an offender has obtained proper drug treatment and counseling, has rehabilitated themselves, and is not viewed as at risk for committing crime in the future by the Court, they are still not eligible for parole. *Id.* Additionally, the abolition of parole is one cause of the growing federal prison population. Conyers, *supra*.

<sup>78</sup> 1991 SPECIAL REPORT TO CONGRESS, *supra* note 50, at 8.

<sup>79</sup> *Id.*, at 8–9; Mascharka, *supra* note 15, at 941–42 (explaining the rise of mandatory minimum provisions from the ADAA to the Omnibus Act). *See generally* Jennifer M. Cox, *Frequent Arrests, Harsh Sentencing, and the Disproportionate Impact They Have on African Americans and Their Community*, 3 S. REGIONAL BLACK L. STUDENTS ASS’N L.J. 17, 19 (2009) (describing the Omnibus Acts impact on the prison population). The new mandatory sentences prescribed in the Omnibus Act were enacted in an effort to targeting larger drug dealers, while also covering mid-level players. 1991 SPECIAL REPORT TO CONGRESS, *supra* note 50. Additionally, the Omnibus Act prescribed a mandatory five year prison sentence for simple possession of crack cocaine. *Id.* As a result, the number of low-level drug offenders in prison has increased by 110 percent. Cox, *supra*. Drug offenders now occupy sixty-one percent of the federal prison population. *Id.*

<sup>80</sup> 21 U.S.C. §§ 846, 963 (2013); DISPARATE IMPACT ON MINORITY COMMUNITIES, *supra* note 25, at 3 (explaining the difference between the 1986 ADAA and the 1988 Omnibus Act). *See generally* Ferranti, *supra* note 24 (explaining the concept of being charged as a conspirator through the story of Clarence Aaron). The main difference between the 1986 ADAA and the 1988 Omnibus Act was the extension of mandatory minimum penalties, “to reach conspirators as well as principals, ensuring that minimum penalties would apply with equal force to peripheral players.” DISPARATE IMPACT ON MINORITY COMMUNITIES, *supra*. Clarence Aaron’s story offers an unsettling example of how the extension of mandatory minimum penalties to conspirators impacted this twenty-four year old, first time, low-level, non-violent offender. Ferranti, *supra*. Aaron was a student and football player at Southern University in Baton Rouge. He had never been arrested or in trouble with the law before. Aaron was sentenced to three life terms of imprisonment for his conspirator role in introducing a buyer and seller, and for being present during the sale and transaction of cocaine. Although Aaron never actually touched any drugs, he would have earned \$1,500

irrespective of the offender's level of culpability or involvement.<sup>81</sup> The Reagan-era drug war ideologies that formulated the strict mandatory minimum sentencing laws set forth in the ADAA and Omnibus Act have drastically impacted the federal prison

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for his minor role in introducing the buyer and seller. The article makes a stark comparison, noting that Aaron's three life terms for his minor role in a cocaine deal, is effectively three times the sentence imposed upon convicted terrorist, Faisal Shahzad, who in 2010 tried to set off a car bomb in New York City's Times Square. *Id.*

<sup>81</sup> 21 U.S.C. §§ 846, 963 (2013); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 118–19 (1995), *available* *at*

[http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Drug\\_Topics/199502\\_RtC\\_Cocaine\\_Sentencing\\_Policy/CHAP5-8.PDF](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/CHAP5-8.PDF) [hereinafter 1995 COCAINE AND FEDERAL SENTENCING POLICY] (noting that the Omnibus Act was designed to catch drug kingpins); Mascharka, *supra* note 15, at 941 (noting that a significant aspect of the mandatory minimum penalties associated with the Omnibus Act was that the penalties now applied equally from major distributors to low-level participants). *But see* Angeli, *supra* note 76, at 1239 (explaining that contrary to congressional goals, mandatory minimum sentences are most often applied to low-level offenders). When Congress set the mandatory minimum penalties for drug trafficking offenses in the Omnibus Act, "one of its primary objectives sought to ensure that major and serious drug dealers received harsher, more certain punishment." 1995 COCAINE AND FEDERAL SENTENCING POLICY, *supra*. Congress intended for "major" drug traffickers to receive higher penalties, because offenders who distributed higher quantities of a given drug inflicted "greater societal harms due to increased availability of the drug to more people." In 1986, The House Judiciary Subcommittee on Crime defined "major traffickers" as "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities;" and "serious traffickers" as "the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities." *Id.* at 119. The Omnibus Act subjected "major" drug traffickers to a ten-year mandatory minimum sentence for a first-time offense, and subjected first-time "serious" drug traffickers to a five-year mandatory minimum sentence. *Id.* at 118.

population<sup>82</sup> and significantly resulted in disparate consequences on the minority<sup>83</sup> population.<sup>84</sup>

### **B. The Penalty Conundrum: Powder Cocaine v. Crack Cocaine**

As a result of the 1986 ADAA and 1988 Omnibus Act,<sup>85</sup> crack offenses were punished more harshly than any other drug, and further, crack offenses were punished one–hundred times<sup>86</sup> more

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<sup>82</sup> See note 79 and accompanying text; see also Conyers, *supra* note 19, at 377 (stating that 700 out of every 100,000 Americans is behind bars); Spencer, *supra* note 72, at 365 (noting that as a consequence of the ADAA and the Omnibus Act, the number of drug offenders convicted in federal courts has more than tripled).

<sup>83</sup> See DISPARATE IMPACT ON MINORITY COMMUNITIES, *supra* note 25 (“Research has shown that certain policies and procedures in the criminal and juvenile justice systems have a disparate impact on the African American and Latino communities in the United States. Mandatory minimums systematically and disproportionately affect minority groups in this country.”).

<sup>84</sup> See Heather C. West et al., *Prisoners in 2009*, BUREAU OF JUST. STAT. BULL., 9 (2011) available at <http://www.bjs.gov/content/pub/pdf/p09.pdf> (stating that federally, African–American men and women are incarcerated at much higher rates than Caucasian and Hispanic men and women); D.J. Sifton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 61 (2002) (contrasting Caucasian and African–American increases in drug arrests). Between 1976 and 1989, the total number of Caucasian drug arrests grew by seventy percent, compared to a 450% increase among African–Americans. Sifton, *supra*. From 1986 to 1991, the number of Caucasians incarcerated for drug offenses increased by fifty percent, while the number of African–Americans incarcerated increased by 350%. *Id.*

<sup>85</sup> Angeli, *supra* note 76, at 1239–40 (explaining that the 1988 Omnibus Act made crack the only drug with a mandatory minimum penalty for a first–time offense of simple possession). Paradoxically, although Congress enacted the Omnibus Act in an effort to target drug kingpins and attack the supply chain for cocaine, the Act “merely subjected the possessor of between one and five grams of crack to a mandatory five–year sentence, while the trafficker of the ‘cocaine’ that so troubled Congress would have to deal 100 to 500 times as much to be subject to the same sentence.” *Id.*

<sup>86</sup> LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 387 (2011) (“For nearly a quarter of a century, federal law penalized crack cocaine



severely than its pharmacological twin,<sup>87</sup> powder cocaine.<sup>88</sup> The new statutory laws<sup>89</sup> mandated a five-year mandatory minimum sentence for possession of only five grams of crack<sup>90</sup> cocaine versus a five-

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offenses at a one hundred-to-one sentencing ratio compared to powder cocaine offenses.”).

<sup>87</sup> Nunn, *supra* note 22, at 396; Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993) (discussing the similarities between the two drugs; crack and powder cocaine); *Cocaine and Crack Facts*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/drug-facts/cocaine-and-crack-facts> (last visited Oct. 23, 2013) [hereinafter *Cocaine and Crack Facts*]; THE HOUSE I LIVE IN, *supra* note 2. Disparity in sentencing exists despite the fact that “cocaine is cocaine” and “there are no physiological differences in effect between the powder and the crack form of the drug.” Nunn, *supra*. All crack cocaine comes from powder cocaine, and the only difference between the two is the simple process of turning the powder into a smoke-able form called “rocks.” *Cocaine and Crack Facts, supra*. This process is achieved by nothing more than processing cocaine with baking soda, water, and heat from an oven. THE HOUSE I LIVE IN, *supra*.

<sup>88</sup> DISPARATE IMPACT ON MINORITY COMMUNITIES, *supra* note 25, at 4; Emile, *supra* note 61, at 692–93; Gary Fields, *Shorter Sentences Sought for Crack*, WALL ST. J., (Apr. 30, 2009), *available at* <http://online.wsj.com/article/SB124101257332168605.html> (noting the imbalance between crack and powder cocaine sentences). The United States Sentencing Commission published reports in 1995, 1997, and 2002 demonstrating that the severe penalties for crack cocaine were unwarranted in light of the fact that crack and powder cocaine were indistinguishable from one another. DISPARATE IMPACT ON MINORITY COMMUNITIES, *supra*. Crack cocaine and powder cocaine both share the same active ingredients and the same psychotropic effects, however simple possession of the crack form imposes the most severe penalties existing for any drug. Emile, *supra*.

<sup>89</sup> See 21 U.S.C. § 841(b)(1)(B) (2010). The statute provides that:

(a) Unlawful acts[;] [e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . . (b) Penalties[;] . . . (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin; (ii) 500 grams or more of a mixture or substance containing a detectable amount of (II) cocaine . . .

*Id.*

<sup>90</sup> FEDERAL CRACK COCAINE SENTENCING, THE SENTENCING PROJECT 2 (2010), *available at* [http://sentencingproject.org/doc/publications/dp\\_CrackBriefingSheet.pdf](http://sentencingproject.org/doc/publications/dp_CrackBriefingSheet.pdf)

### 36.1 Disproportionate Mandatory Minimum Drug Sentences 101

year mandatory minimum sentence for 500 grams of powder cocaine.<sup>91</sup> The notion underlying the one-hundred-to-one sentencing ratio was that cocaine was presumably more hazardous in its crack form than in its powder form.<sup>92</sup> It is now evident, however, that those presumptions were false and based on misconceived assumptions about the drug in both of its comparative forms.<sup>93</sup>

On August 3, 2010, Congress passed into law the Fair Sentencing Act of 2010 (the “FSA”).<sup>94</sup> The FSA raised the quantity

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[hereinafter 2010 CRACK BRIEFING SHEET] (explaining that five grams of crack cocaine weighs less than two sugar packets, and yields a quantity of about ten to fifty doses).

<sup>91</sup> *Id.* (contrasting the mandatory minimum trigger requirements for powder cocaine versus crack cocaine). For the same five-year penalty to be triggered for powder cocaine, the offense would need to involve 500 grams of powder cocaine, which yields between 2,500 and 5,000 doses. *Id.*

<sup>92</sup> *See id.* at 3; Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2546 (2010). Crack cocaine was considered “a social menace more dangerous than powder cocaine in its physiological and psychotropic effects.” 2010 CRACK BRIEFING SHEET, *supra*. Based on the assumptions about crack, Congress listed five justifications for the disparate one-hundred-to-one ratio. Beaver, *supra*. The five justifications were:

(1) the addictive quality of crack cocaine, (2) that crack cocaine was associated with violent crime, (3) that the use of crack cocaine among pregnant women posed threats to children in utero, (4) that more young people were using crack cocaine, and (5) that the low cost of crack cocaine made it especially prevalent and more likely to be consumed in large quantities.

*Id.*

<sup>93</sup> 155 Cong. Rec. S10488–01 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) (“[W]e have learned a great deal in the last 20 years. We now know the assumptions that led us to create this disparity were wrong.”); Sarah Hyser, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 509 (2012). The congressional members who voted for the 1986 ADAA admit today that the assumptions that led them to create the sentencing disparities were false. Hyser, *supra*.

<sup>94</sup> Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960). The FSA does not eliminate the disparity completely, however it attempts to correct the disparity by reducing the disproportionate ratio between the two categories of crack and cocaine offenders.

of crack cocaine necessary to trigger the five and ten year mandatory minimum sentences, thereby reducing the penalty disparity for crack cocaine previously set in the 1986 ADAA.<sup>95</sup> The FSA lowered the previous ratio of one hundred-to-one to a current ratio of eighteen-to-one.<sup>96</sup> The FSA's modification of the federal sentencing policies marks progress geared towards reducing the rigid mandatory minimum sentencing requirements for low-level crack cocaine offenses.<sup>97</sup>

However, despite the FSA's scientific knowledge pertaining to the almost identical composition and effects of crack and powder cocaine, and despite bipartisan recognition that the former ratio disparity was overly harsh and unjust,<sup>98</sup> there is still congressional

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The FSA reduced the previous one hundred-to-one crack ratio to a current ratio of eighteen-to-one. *Id.*

<sup>95</sup> 2010 CRACK BRIEFING SHEET, *supra* note 90 (discussing the reduction in disparate treatment of crack cocaine sentences with the new ratio set forth by the FSA); Norman L. Reimer & Lisa M. Wayne, *From the Practitioners' Perch: How Mandatory Minimum Sentences and the Prosecution's Unfettered Control over Sentence Reductions for Cooperation Subvert Justice and Exacerbate Racial Disparity*, 160 U. PA. L. REV. 159, 166 (2011); Tyler B. Parks, *The Unfairness of the Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1008 (2012). Prior to the passage of the FSA, "five grams of crack cocaine and five hundred grams of powder cocaine were treated the same for sentencing purposes." Parks, *supra*. Currently, since the FSA reduced the ratio and raised the quantity of crack necessary to trigger the same sentence, "twenty-eight grams of crack cocaine and five hundred grams of powder cocaine are [now] treated the same." *Id.*

<sup>96</sup> See note 94 and accompanying text.

<sup>97</sup> Davis, *supra* note 86, at 375 (noting that "[w]hile this reduction does not eliminate the crack/powder cocaine disparity, the Fair Sentencing Act is a breakthrough after more than twenty years of sentencing under the one hundred-to-one ratio"). *But see* Fields, *supra* note 88 (referencing the oppositional belief that the reduction in disparity should be achieved by raising the penalties for powder cocaine, not by lowering the penalties for crack cocaine). James Pasco, executive director of the Fraternal Order of Police, is quoted saying that "the remedy would be to increase the penalties for powder cocaine so all criminals are treated equally." Fields, *supra*.

<sup>98</sup> 2010 CRACK BRIEFING SHEET, *supra* note 90 (noting that the new legislation limiting the mandatory minimum sentences for low-level crack cocaine offenses was supported by bipartisan leaders who believed the prior sentencing laws were overly harsh and unjust).

resistance to eliminate the scientifically unsupportable eighteen-to-one disparity completely.<sup>99</sup> While there was a compromise and a significant reduction in the ratio calculation, there is still an unnecessary and arbitrary targeting of crack cocaine that will continue to have a disproportionately negative impact on the African-American community.<sup>100</sup>

### C. Two Exceptions to Mandatory Minimums Sentences

There are currently only two exceptions to mandatory minimum sentences that would allow a judge to impose a sentence lower than the prescribed statutory minimum.<sup>101</sup> These two exceptions are known as the substantial assistance<sup>102</sup> and “safety valve”<sup>103</sup> provisions.<sup>104</sup> The substantial assistance exception allows

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<sup>99</sup> See Fields, *supra* note 88 (“The U.S. Sentencing Commission has tried since 1995 . . . to bring the penalties for crack crimes more in line with powder cocaine, but those recommendations have been rejected by Congress.”).

<sup>100</sup> See discussion *infra* Part III B.

<sup>101</sup> Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 2 (2008) (noting that the U.S. Sentencing Commission recently listed only two relief mechanisms by which judges can avoid imposing a mandatory sentence).

<sup>102</sup> 18 U.S.C. § 3553(e) (2010). Subsection (e) of the statute grants the Government limited authority to impose a sentence below the statutory mandatory minimum when a defendant has given substantial assistance in the investigation of or prosecution of another person who has committed an offense. *Id.*

<sup>103</sup> 18 U.S.C. § 3553(f) (2010). Subsection (f) of the statute permits a reduced prison sentence when:

(1) the defendant does not have more than 1 criminal history point . . . (2) the defendant did not use violence . . . or possess a firearm . . . in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense . . . and was not engaged in a continuing criminal enterprise . . . and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan . . . .

*Id.*

<sup>104</sup> Greenblatt, *supra* note 101, at 5–6.

for a downward departure from a mandatory minimum sentence only upon a government motion asserting that the offender has provided substantial assistance in the prosecution of others who have committed an offense.<sup>105</sup> Substantial assistance is limited in its authority and is only valid when an offender furnishes information to the prosecution that is substantial<sup>106</sup> or pertinent to the investigation or conviction of other criminals.<sup>107</sup> While the substantial assistance exception applies to all mandatory minimum sentences, it applies almost exclusively in drug cases.<sup>108</sup> Providing useful information and brokering deals with the Government in order to receive sentence reductions is not a new facet of the American sentencing system; however, when coupled with the imposition of otherwise harsh and long mandatory drug sentences, this function creates a troubling paradox.<sup>109</sup> Basically, instead of targeting drug kingpins and

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<sup>105</sup> 18 U.S.C. § 3553(e) (2010). This provision is limited in its authority and is only valid upon a Government motion asserting that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. *Id.*

<sup>106</sup> See *United States v. Flores*, 559 F.3d 1016, 1020 (9th Cir. 2009) (noting that although the defendant provided truthful information to government agents, the assistance provided did not result in arrests, indictments, or convictions, and thus was of “little value” and not substantial assistance); see also Daniel Donovan & John Rhodes, *The Prisoner’s Dilemma Becomes the Lawyer’s Dilemma: To Be a Zealous Advocate or a Judas Goat?*, 35-JAN MONT. LAW. 8, 29 (2010) (noting that the U.S. Attorney’s Office, on its own, determines whether a defendant’s cooperation is “substantial” or not).

<sup>107</sup> Donovan & Rhodes, *supra* note 106 (explaining what “substantial assistance” entails). Substantial assistance can include anything from “a written proffer, verbal information, acting undercover, repeated debriefings with law enforcement officers, meetings with prosecutors and defense attorneys, . . . [to] testifying in court or before a grand jury.” *Id.*

<sup>108</sup> Greenblatt, *supra* note 101, at 5 (noting that the substantial assistance provision is used almost exclusively in drug cases).

<sup>109</sup> Schulhofer, *supra* note 69, at 212; Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1493 (2000). “Rewarding defendants for their cooperation with the government has a disparate impact on those defendants who are unable to provide ‘substantial’ assistance . . . [because] it benefits those most deeply involved in crime, while low-level defendants have no comparable means of reducing their sentences.” Froyd, *supra*.

subjecting them to longer prison sentences, what the substantial assistance exception has actually created is a paradoxical “statutory escape hatch,” where “[t]he big fish get the big breaks, . . . [and] the minnows are left to face severe and sometimes draconian penalties.”<sup>110</sup>

The safety valve provision is even more limited and narrow in its scope, and applies exclusively to federal drug offenses.<sup>111</sup> Safety valves are congressionally created laws that allow courts to give an offender a lesser sentence than the mandatory minimum requires, but only if the offender or his offense meets certain requirements.<sup>112</sup> They allow “offenders ‘who are the least culpable participants in drug trafficking offenses to receive strictly regulated

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<sup>110</sup> Schulhofer, *supra* note 69, at 213; *see also* Ferranti, *supra* note 24 (representing the minnow facing an extremely harsh sentence); *Ricky Ross Bio*, *supra* note 64 (representing the big fish getting the big break). Logically, defendants who are drug leaders or kingpins are most “in the know,” and thus have the most contacts to give up or information to provide. Schulhofer, *supra* at 212. Consequently, the more culpable drug kingpins “have the most ‘substantial assistance’ to offer,” placing them in better positions to negotiate away prison years on their sentences. *Id.* For example, Clarence Aaron played a minor role during a drug transaction, where he introduced a buyer and seller, and then was present during the sale and exchange of the drugs. Ferranti, *supra*. Although he never actually touched any drugs, and would have only earned \$1,500 for his small part in introducing the two parties, he was sentenced to three life terms. *Id.* Out of all of the offenders who received prison sentences stemming from this conspiracy, Aaron’s sentence was the longest because he refused to “cooperate” with authorities. *Id.* In stark contrast, Ricky Ross was the epitome of a drug kingpin. *Ricky Ross Bio*, *supra*. He was responsible for creating crack and cocaine markets in several states throughout the U.S., and at the height of his drug career was selling two to three million dollars of crack on a daily basis. *Id.* When Ross was first arrested in 1990 he pled guilty and began serving a ten year sentence, however he only actually served a little over four years of it when he was given the opportunity to help police by testifying in a federal case. *Id.*

<sup>111</sup> *See* Greenblatt, *supra* note 101, at 5–6 (stating that “[t]he ‘safety valve,’ 18 U.S.C. § 3553(f), is available only in drug cases”); SAFETY VALVE NUTSHELL, *supra* note 3. The federal safety valve “was created in 1994, when Congress realized that many first-time, low-level, and nonviolent drug offenders were receiving mandatory minimums that did not fit them or their crimes.” SAFETY VALVE NUTSHELL, *supra*.

<sup>112</sup> *See* SAFETY VALVE NUTSHELL, *supra* note 3.

reductions in prison sentences for mitigating factors' recognized in the federal sentencing guidelines."<sup>113</sup> The provision utilizes a five-part test,<sup>114</sup> and if an offender meets all five parts of the test criteria, the judge must sentence the person below the mandatory minimum requirement, to a term the court deems appropriate.<sup>115</sup> While the premise behind the safety-valve exception clearly has recognizable value, it is unfortunately way too limited and far too subject-able to government manipulation.<sup>116</sup>

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<sup>113</sup> Greenblatt, *supra* note 101 at 6 (quoting *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 110th Cong. 14–15 (2007) (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission)).

<sup>114</sup> SAFETY VALVE NUTSHELL, *supra* note 3 (explaining that the federal safety valve requires the court to sentence an offender below the statutory minimum “[i]f—and only if—” all five criteria for the test are met). The test requirements are as follows:

(1) no one was harmed during the offense, (2) the offender has little or no history of criminal convictions, (3) the offender did not use violence or a gun, (4) the offender was not a leader or organizer of the offense, and (5) the offender told the prosecutor all that they know about the offense.

*Id.*

<sup>115</sup> *How Federal Sentencing Works: Mandatory Minimums, Statutory Maximums, and Sentencing Guidelines*, FAMILIES AGAINST MANDATORY MINIMUMS 2 (Sept. 15, 2012), available at <http://famm.org/wp-content/uploads/2013/08/Chart-How-Fed-Sentencing-Works-9.5.pdf> [hereinafter Famm HOW FEDERAL SENTENCING WORKS] (explaining the safety valve and substantial assistance rule exceptions and how they apply). See generally Donovan & Rhodes, *supra* note 106, at 30 (providing an example of how narrowly the rule applies). The safety valve provision is very strict and narrow in its application. Famm HOW FEDERAL SENTENCING WORKS, *supra*. For example, if a first time offender was arrested in their home, however they happened to have a lawfully owned, unloaded hunting rifle in their bedroom or closet, they would be ineligible for the safety valve departure because part four of the test requirements would have been violated. Donovan & Rhodes, *supra*.

<sup>116</sup> See Reimer & Wayne, *supra* note 95, at 175. But see Greenblatt, *supra* note 101, at 6 (“Statistics show that 23.5% of mandatory sentences in drug cases are avoided through this statutory provision alone.”).

### III. Ways in Which Mandatory Minimum Drug Sentences Disproportionately Impact and Imprison the Underprivileged African–American Community

Not only do mandatory minimum sentencing laws subvert the entire notion of equality that they were intended to create, but they actually exacerbate racial disparity in poor disadvantaged communities and “exaggerate the types of law enforcement practices that foster as much crime as they prevent.”<sup>117</sup> Throughout “every stage of the criminal justice process, mandatory minimums contribute to disparate impact among racial groups.”<sup>118</sup> However, of all the communities impacted by the drug war and its resulting harsh mandatory minimum sentencing laws, “poor African–Americans have arguably experienced the most dramatic and lasting effects . . . .”<sup>119</sup> Mandatory minimum drug sentencing laws emphasize the racial inequities that are intrinsically manifest characteristics of the federal criminal justice system by unconsciously employing discriminatory sentencing rules and operational practices.<sup>120</sup> Accordingly, poor and disadvantaged minorities are imprisoned for drug offenses at rates that significantly exceed their percentage of the drug–using

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<sup>117</sup> Reimer & Wayne, *supra* note 95, at 160.

<sup>118</sup> *Id.*; see *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, THE SENTENCING PROJECT 1 (2008), available at

[http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf) [hereinafter REDUCING RACIAL DISPARITY MANUAL] (“[W]hole segments of American communities have become marginalized. One fundamental aspect of this marginalization is the disparate treatment of persons of color which occurs incrementally across the entire spectrum of America’s criminal justice system.”).

<sup>119</sup> Nekima Levy–Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African–American Children and Families*, 7 HASTINGS RACE & POVERTY L. J. 353, 354 (2010).

<sup>120</sup> DISPARATE IMPACT ON MINORITY COMMUNITIES, *supra* note 25, at 7 (explaining that federal sentencing laws in the United States impose heavy burdens on defendants of color). The disparate treatment of racial minorities is believed to be a consequence of the sentencing rules and practices associated with mandatory minimum provisions—expressly crack cocaine penalties and governmental charging decisions. *Id.*



population.<sup>121</sup> African-Americans make up only about twelve percent of the U.S. population, and constitute only about thirteen percent of the nation's drug-user population.<sup>122</sup> Further, while studies indicate that African-Americans use alcohol and drugs less frequently than Caucasians, African-Americans make up thirty-eight percent of people arrested for committing a drug offense, and represent fifty-nine percent of people who are imprisoned for drug offenses.<sup>123</sup> The War Against Drugs, with its attributably aggressive and harsh mandatory sentencing of drug offenders, is the culprit responsible for this disproportionately high level of African-American incarceration.<sup>124</sup>

### A. The De Facto Racist Crack Cocaine Sentencing Disparity

Although drug laws are seemingly race-neutral on their face, the mandatory cocaine sentencing dichotomy clearly implicates racially discriminatory considerations effecting the African-American community.<sup>125</sup> Though Congress' attempt was intended to ensure uniformity in sentencing,<sup>126</sup> the sentencing disparities associated with the calculation of powder cocaine and crack cocaine

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<sup>121</sup> REDUCING RACIAL DISPARITY MANUAL, *supra* note 118, at 7; *see* Levy-Pounds, *supra* note 119 (“Although African Americans comprise just thirteen percent of the U.S. population, they constitute nearly forty percent of the federal and state prison population, largely due to drug-related convictions.”).

<sup>122</sup> Cox, *supra* note 79, at 18.

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

<sup>124</sup> Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275 (2004).

<sup>125</sup> Marlow Stern, *The House I Live In: A fascinating expose on the (racist) war on drugs*, SUNDANCE CHANNEL BLOG (Jan. 27, 2012, 12:01 PM), <http://www.sundancechannel.com/blog/2012/01/the-house-i-live-in> (quoting the films creator in an interview). “[W]hether it was racist in intent or not, it became de facto racist when congress was aware of how disproportionately these laws were putting African-Americans away in jail when other people using the same substance under different conditions were not.” *Id.*

<sup>126</sup> 1991 SPECIAL REPORT TO CONGRESS, *supra* note 50, at 12 (explaining that the congressional goal of applying uniformity to sentencing is, “so that similar defendants convicted of similar offenses would receive similar sentences.”).

have created racially unbalanced results that have disproportionately imprisoned the African–American community.<sup>127</sup> “Most experts<sup>128</sup> agree that there is no sound basis for the one hundred–to–one ratio between crack and cocaine, yet the difference and its lopsided effect remain; over eighty–eight percent of those arrested for possession of crack are African–American.”<sup>129</sup> This overrepresentation of African–Americans may be due in part to the fact that law enforcement

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<sup>127</sup> Robert L. Carter, *Fourth Annual W. Haywood Burns Memorial Lecture*, 3 N.Y. CITY L. REV. 267, 272 (2000).

Crack, a form of cocaine, has long been associated with poor black communities. The association persists despite the Sentencing Commission's widely publicized 1995 Special Report to Congress on cocaine and federal sentencing, which established that fifty–two percent of crack users are white, and only thirty–eight percent are black. This association between blacks and crack has proved a self–fulfilling prophecy. The Sentencing Commission's 1997 update report on cocaine and federal sentencing policy shows that, despite being a minority of crack users, ninety percent of persons convicted of crack offenses are black.

*Id.*

<sup>128</sup> See *Unfairness In Federal Cocaine Sentencing: Is It Time To Crack The 110 To 1 Disparity?: Hearing Before the H. Subcomm. On Crime, Terrorism, and Homeland Security*, 111th Cong. 1 (2009) [hereinafter *Unfairness In Federal Cocaine Sentencing*] (quoting several federal judges statements concerning the disparity in crack and powder cocaine penalties); Mary Jayne McKay, *More Than They Deserve: Judges Protest Mandatory Sentencing In Drug Cases*, CBS NEWS (May 7, 2009), [http://www.cbsnews.com/8301-18560\\_162-590900.html](http://www.cbsnews.com/8301-18560_162-590900.html) (reporting that “federal judges by the dozens have protested harsh drug laws.”). Judges find that the mandatory minimum laws are unjust because they obligate them to either send people to prison who don't belong there, or send people to prison for a longer periods than they deserve. McKay, *supra*. During the cocaine sentencing hearing in 2009, Honorable Robert C. “Bobby” Scott made a statement that the “disparity in crack and powder cocaine penalties makes no sense, is unfair and . . . [un]justified, and . . . should be fixed.” *Unfairness In Federal Cocaine Sentencing*, *supra*. He also noted that, after an extensive twenty year study between powder and crack cocaine, “there appears to be no convincing scientific, medical or public policy rationale to justify the current or any other disparity in penalties for the two forms of cocaine.” *Id.* Additionally, Honorable Roscoe G. Bartlett provided testimony that, “the [one–hundred–to–one] unequal treatment is not justified.” *Id.* at 12.

<sup>129</sup> Mascharka, *supra* note 15, at 944; see THE HOUSE I LIVE IN, *supra* note 2 (explaining ninety percent of crack defendants in the federal system are African–American).

efforts, including police emphasis on outdoor drug markets, are often geared toward sale and distribution offenses in low-income, urban, minority neighborhoods.<sup>130</sup>

### **B. What Exceptions? The Safety Valve and Substantial Assistance Provisions Fail Underprivileged African-Americans**

Congress recognized that the mandatory minimums were unjustly sentencing low-level offenders too harshly, and not applying to whom they were actually intended (the kingpins and mid-level offenders), and thus created the safety valve provision.<sup>131</sup> Although the safety valve provision is a step in the right direction to “restore . . . fairness and rationality to sentencing,” the provision falls short of this objective because its benefits apply too narrowly and its limiting factors result in arbitrary disqualification and increased racial disparity among African-Americans.<sup>132</sup> Furthermore, another disconcerting aspect that undermines the effectiveness of the safety valve provision, and potentially contributes to racial disparity, is “the prosecution’s unbridled charging discretion [that] enables the government to include charges that will disqualify otherwise eligible offenders.”<sup>133</sup>

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<sup>130</sup> See Fellner, *supra* note 16, at 261–265; Kevin F. Ryan, *Clinging to Failure: The Rise and Continued Life of U.S. Drug Policy*, 32 L. & SOC’Y REV. 221, 226 (1998) (stating that law enforcements attention to the drug trade is concentrated on inner-city, minority neighborhoods). See generally THE HOUSE I LIVE IN, *supra* note 2 (noting that police departments are allowed to keep and operate off of the drug money and paraphernalia that they seize). Unsurprisingly, law enforcements attention on these types neighborhoods yields vastly more minority arrests than Caucasians arrests, and fosters public perceptions that the drug business is predominantly a minority one. Ryan, *supra*.

<sup>131</sup> Froyd, *supra* note 109, at 1498.

<sup>132</sup> See Reimer & Wayne, *supra* note 95, at 174. In order to be eligible for the safety valve, a person cannot have more than one criminal history point, irrespective of how minor or remote in time the previous offense was. *Id.* This limiting factor contributes to increased racial disparity and arbitrary disqualification of otherwise qualified, low-level offenders. *Id.*

<sup>133</sup> *Id.* at 175–76.

However, one of the most harrowing and pervasive injustices inflicted upon the underprivileged African–American community occurs when an offender facing a harsh mandatory sentence is too low–level to be able to furnish substantial assistance, yet is willing to work for the government to provide it.<sup>134</sup> In this scenario, the offender becomes a confidential informant and “is turned back in the community with the specific goal of luring others into committing crimes,” creating yet another paradox in mandatory minimums objective efforts to deter criminal drug activity.<sup>135</sup> This type of “ensnaring” provides substantially more unjust and complex socioeconomic concerns, particularly when taking place in inner–city communities with scarce resources, and few support mechanisms.<sup>136</sup> Furthermore, this aspect of the substantial assistance exception is yet another mechanism contributing to the degradation of the African–American family.<sup>137</sup> In the government’s sanctimonious pursuit of its never–ending drug war, the desire for arrests has overshadowed the respect for fundamental familial relationships; now, government officers have been known to request that informants turn against their own siblings or spouses and, in some cases, even have children turn against their parents.<sup>138</sup>

#### **IV. The Negative Ripple Effect: Mandatory Minimum Sentences Collateral Impact on the Underprivileged African–American Family**

Harvard University Professor Charles J. Ogletree notes that there is a structural problem in America.<sup>139</sup> He explains that there are two million people in jail or prison, one million of them African–American and most of them males, many of who are incarcerated for non–violent drug offenses.<sup>140</sup> This pattern, he explains, has

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<sup>134</sup> *Id.* at 174.

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

<sup>136</sup> *Id.*; THE HOUSE I LIVE IN, *supra* note 2.

<sup>137</sup> Reimer & Wayne, *supra* note 95, at 174.

<sup>138</sup> *See id.*

<sup>139</sup> *See* THE HOUSE I LIVE IN, *supra* note 2.

<sup>140</sup> *See id.*

overwhelmed the African–American community, because there is now an entire generation of children who believe that they are going to be a part of the criminal justice system.<sup>141</sup> Mandatory minimums calculate sentences based on the quantity of the drug involved, but they fail to calculate the tremendous socioeconomic costs associated with incarcerating low income African–American men and women for peripheral, non–violent drug offenses.<sup>142</sup>

Moreover, mandatory minimum sentences break families apart,<sup>143</sup> sometimes sending mothers and fathers away for very long

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<sup>141</sup> *Id.* See generally Phillip Mlynar, *The Top 5 Modern Rapping Drug Dealers*, SF WEEKLY BLOGS (Aug. 30, 2011, 8:37 AM), [http://blogs.sfweekly.com/shookdown/2011/08/the\\_top\\_5\\_modern\\_rapping\\_drug.php?page=2](http://blogs.sfweekly.com/shookdown/2011/08/the_top_5_modern_rapping_drug.php?page=2) (listing the top five modern day rappers who rapped about their crimes and glorified going to jail). The glorification of the “gangster” life by these entertainment figures has exploited the “flashy side of the drug game” and made trivial the concepts of prison life and its consequences. Mlynar, *supra*. These rappers celebrate their past criminal activities, and transform themselves from criminals into idolized and iconic ghetto heroes. *Id.*

<sup>142</sup> See Nekima Levy–Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 322–24 (2007) [hereinafter Levy–Pounds: *From the Frying*] (discussing the tremendous societal and economic costs associated with mandatory minimum sentences and the incarceration of mothers for peripheral involvement in drug trafficking). The author explains that when mothers are incarcerated, a domino effect of harmful events occur, which ultimately weaken and destroy the family unit. *Id.* The impact of this domino effect is that:

First, a mother's incarceration causes a disruption in the parent–child relationship . . . result[ing] in emotional harm to the child. Second, because these families are disproportionately poor, single–parent households, it is probable that the children will be placed in the foster care system . . . result[ing] in additional emotional, psychological and physical harm to the children. Third, children may not be able to maintain contact with their incarcerated mothers due to financial barriers, transportation restrictions, and capricious inmate relocation practices. Fourth, because of emotional and psychological issues stemming from maternal separation, the children are prime candidates for involvement in the juvenile justice system . . . .

*Id.*

<sup>143</sup> *Id.* at 317–24 (noting that incarceration itself is not the only barrier separating families). Due to federal inmate relocation practices, inmates are often relocated

periods of time, leaving a ripple effect on the individual members of the community left behind.<sup>144</sup> For example, for every African–American father that is incarcerated, several other people are directly impacted, although the most severely effected are the children and their mothers.<sup>145</sup> Due to the long periods of incarceration associated with mandatory minimums, that mother now needs to raise her children on her own, while also simultaneously being the sole

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to different federal correctional facilities throughout various parts of the country. *Id.* at 317. Because of financial difficulties or transportation constraints, federal inmate relocation practices often make it difficult, if not impossible for parents and children to remain in physical contact with one another. *Id.* at 323.

<sup>144</sup> See Levy–Pounds, *supra* note 119, at 355; Cox, *supra* note 79, at 26 (explaining how incarceration has a ripple effect on the African–American community); Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 305–22 (2005) (explaining the types of collateral consequences stemming from incarceration). When poor African–American mothers and fathers are incarcerated, their innocent children left behind are equally punished. Levy–Pounds, *supra*. These children suffer a multitude of harms, including:

They are more likely to become incarcerated themselves or become engaged in harmful activities such as gang involvement or substance abuse. These children then become entrapped in a debilitating cycle of failure and marginalization that may be perpetuated from generation to generation . . . [additionally] [b]ecause of their low economic status, their extended families may have limited resources to provide care for them, which may result in their being placed in what are sometimes broken foster care systems.

*Id.*

<sup>145</sup> See *Mandatory Minimums Hurt Families, Children and Communities*, NEW SOLUTIONS CAMPAIGN, available at [http://www.drugpolicyaction.org/sites/default/files/DPAnj\\_mandatory.pdf](http://www.drugpolicyaction.org/sites/default/files/DPAnj_mandatory.pdf) [hereinafter MANDATORY MINIMUMS HURT FAMILIES] (explaining the correlation between having a father in prison and its statistical impact on the likelihood of that child spending time in prison). More than a million African–American children have a father in prison. Statistically, children with a parent in prison are seven times more likely to spend time in prison themselves than children without a parent in prison. *Id.*

financial provider; consequently, those children will now be more susceptible to become part of the criminal justice system.<sup>146</sup>

In addition to leaving a devastating impact mandatory minimums impose on the family members left behind, mandatory minimums also have harmful effects on an individual once released from prison.<sup>147</sup> Incarceration for drug offenses, no matter how peripheral or nominal the involvement, results in a prison record that brandishes a permanent scarlet “F” for felony conviction.<sup>148</sup> This felony conviction harms the prospect of African–American social, economic, and familial prosperity.<sup>149</sup> Research has shown that men with prison records are estimated to earn thirty to forty percent less annually than men without prison records, and that individuals with

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<sup>146</sup> THE HOUSE I LIVE IN, *supra* note 2. Today, 2.7 million children in America have a parent that is incarcerated. These children are more likely to be incarcerated during their lifetime than other children. *Id.*

<sup>147</sup> Alexander, *supra* note 22, at 22 (providing some examples of the rules, laws, and policies that apply to people branded felons today); Cox, *supra* note 79, at 29 (explaining the negative effect of incarceration on released convicted felons); Levy–Pounds: *From the Frying*, *supra* note 142, at 338 (noting that convicted rapists, child molesters, and murderers may have access to federal financial aid, but convicted drug offenders do not); MANDATORY MINIMUMS HURT FAMILIES, *supra* note 145. Once released from prison and brandished a felon, people face employment discrimination, housing discrimination, exclusion from jury services, and exceptional fees and fines that are almost impossible to comply with. Alexander, *supra*. Federal law also renders drug offenders ineligible for food stamps for the rest of their lives, denying them access to public benefits, and some states even deny felons the right to vote. *Id.*

<sup>148</sup> Alexander, *supra* note 22, at 20 (proclaiming that “felony” is the “new N–word”). Alexander explains that once an African–American has a felony stamp, their hope of employment, or any kind of integration into society, begins to fade out. She associates incarceration and felony convictions as the modern day notion of lynching and racial control. *Id.*

<sup>149</sup> THE HOUSE I LIVE IN, *supra* note 2; MANDATORY MINIMUMS HURT FAMILIES, *supra* note 145. “Most people don’t realize that when you arrest a young black man, and he’s convicted and goes to prison, the first thing that happens to him when he gets out of prison is that he can’t get a job in most places because of his record.” THE HOUSE I LIVE IN, *supra*. Additionally, people with records are ineligible for certain school grants, cannot get certain healthcare benefits, are restricted from living in certain neighborhoods, and cannot vote. *Id.*

prison records experience more unemployment and are more likely to have unstable family lives.<sup>150</sup>

Mandatory minimum drug sentences bind the hands of judges to impose overly long and harsh sentences that are counter-productive to their efforts, and counter-productive to fair notions of equality and justice.<sup>151</sup> Instead of applying to high and mid-level drug offenders, mandatory minimums over-incarcerate low-level, low-income, and non-violent African-Americans at an alarmingly excessive rate.<sup>152</sup> Furthermore, instead of decreasing drug use or crimes, mandatory minimums merely “increase the chances that families will be torn apart,” and merely subject vulnerable children to the same cyclical cycle of excessive incarceration.<sup>153</sup>

### V. Proposed Solutions

While mandatory minimum drug sentencing laws may have initially been motivated by commendable objectives aimed at thwarting drug crimes, the fact of the matter is that the collateral consequences of their enforcement sweep too broadly and have a disparately racial impact on African-American communities and their families.<sup>154</sup> The harsh and disproportionately negative consequences that these mandatory minimum laws impose on underprivileged African-Americans extensively outweigh any positive benefits they might have conceivably generated.<sup>155</sup> Accordingly, if Congress is to eradicate the continuous cycle of

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<sup>150</sup> MANDATORY MINIMUMS HURT FAMILIES, *supra* note 145.

<sup>151</sup> *Id.*; Finzen, *supra* note 144, at 321 (discussing the difficulties ex-offenders have when reintegrating into society); Tonry, *supra* note 21 at 102–03 (noting that mandatory minimum drug sentences are counter-productive because of the black market niche created by the illegal drug trade).

<sup>152</sup> *See* Froyd, *supra* note 109, at 1471.

<sup>153</sup> MANDATORY MINIMUMS HURT FAMILIES, *supra* note 145 (“Keeping families together and increasing the chances of success for vulnerable children and families is critically important, but mandatory minimum sentences tie the hands of judges and corrections professionals and increase the chances that families will be torn apart and children put at risk.”).

<sup>154</sup> Finzen, *supra* note 144, at 322.

<sup>155</sup> *See id.*



African–American poverty, disparate incarceration, and reoffending that its current drug sentencing policies helped to create, Congress must, first and foremost, restore judicial discretion and repeal mandatory minimum sentencing laws and, second, offer community–based alternatives to incarceration.<sup>156</sup>

### **A. Drug Court Treatment Programs, a Community–Based Alternative to Incarceration**

Instead of charging low–level, non–violent drug offenders at the federal level, and subjecting them to lengthy prison sentences and unpredictable federal relocation practices, the states should assume disciplinary responsibility for these offenders and offer more individualized and appropriate alternatives to incarceration.<sup>157</sup> “[S]tates would arguably be in the best position to provide appropriate services to drug offenders, including access to drug treatment programs, crisis management services, public benefits and oversight of familial reunification and prisoner reentry efforts.”<sup>158</sup> Extensive scientific research over the past twenty years has indicated that drug court treatment programs are more effective than jail, prison, probation, or treatment alone.<sup>159</sup> Drug courts work by closely supervising participants for a minimum one year term, during which the courts provide participants with intensive treatment to get clean and stay sober, subject participants to random and frequent drug tests, and require participants to regularly appear in court so that the presiding drug court judge can review the participants’ progress and make sure they are complying with all of their obligations.<sup>160</sup> Drug court treatment programs are the most effective solutions for

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<sup>156</sup> Levy–Pounds: *From the Frying*, *supra* note 142, at 337.

<sup>157</sup> *See id.* at 342.

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

<sup>159</sup> *Drug Court Facts*, *supra* note 18.

<sup>160</sup> *What Are Drug Courts*, NAT’L ASS’N OF DRUG COURT PROF’LS, <http://www.nadcp.org/learn/what-are-drug-courts> (last visited Oct. 24, 2013) [hereinafter *What Are Drug Courts*].

reducing drug use,<sup>161</sup> crime,<sup>162</sup> combating addiction,<sup>163</sup> restoring families,<sup>164</sup> and saving taxpayers money.<sup>165</sup> Furthermore, by implementing drug courts and making drug court treatment programs more available to low-level, non-violent drug offenders, States would ameliorate the harsh impacts that incarceration imposes on the African-American community, and, thereby, help to keep families together.<sup>166</sup>

## VI. Conclusion

During the course of America's forty year war against drugs, the Nation has dedicated a tremendous amount of fiscal resources "devoted to interdiction, apprehension, and imprisonment and far too little to prevention and meaningful treatment."<sup>167</sup> This has proved to be an ineffective method, because it has failed to address "deep-seated social and economic deficits" in poor, urban communities.<sup>168</sup> Essentially, where there is a demand, economic opportunity will

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<sup>161</sup> *Drug Court Facts*, *supra* note 18 (explaining that drug courts provide more comprehensive supervision than other community-based programs, and are six times more likely to keep offenders in treatment long enough for them to get better).

<sup>162</sup> *See id.* (noting that most rigorous studies have all concluded that drug courts significantly reduce crime as much as forty-five percent more than any other sentencing options).

<sup>163</sup> *See id.* (finding that drug courts, when compared to eight other treatment programs, quadrupled the length of abstinence from methamphetamine).

<sup>164</sup> *See id.* (finding that children of family drug court participants spend significantly less time in foster care, and that family re-unification rates are fifty percent higher for family drug court participants).

<sup>165</sup> *See id.* ("Drug Courts produce cost savings ranging from \$3,000 to \$13,000 per client.").

<sup>166</sup> Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1301-02 (1998).

<sup>167</sup> Dan Richard Beto, *The War on Drugs: A Failure*, 58-SEP FED. PROBATION 68 (1994).

<sup>168</sup> *Id.*; Tonry, *supra* note 21, at 102. "Despite risks of arrest, imprisonment, injury, and death, drug trafficking offers economic and other rewards to disadvantaged people that appear to far outweigh any available in the legitimate economy." Tonry, *supra*.

always ensue, and thus a supply will continually follow.<sup>169</sup> Therefore, reductions in drug abuse, trafficking, and crime, will only stem from an impossible reduction in the demand for those drugs themselves, consequently rendering America the perpetual loser in its war against drugs.<sup>170</sup> The real victims of this war, however, are the disadvantaged members of the African–American community, who continue to be the chief target of the drug war’s harshest weapon—mandatory minimum sentences.<sup>171</sup> Alas, when mandatory minimum sentences are pervasively applied to low–level, non–violent, drug offenders, the effects devastate an entire community, leaving fragmented neighborhoods and collapsing families in its wreckage.<sup>172</sup>

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<sup>169</sup> Tonry, *supra* note 21, at 102–03. *See generally* Levy–Pounds, *supra* note 119, at 363 (explaining that while there undoubtedly needs to be accountability for drug crimes, there also needs to be an examination of the social root level causes of drug involvement). The author explains that:

This is not to suggest that persons involved in drug trafficking should not face accountability for their actions. Rather it is to say that an examination of root level causes of drug involvement, coupled with analyses of the effects of chronic marginalization and under–employment on this segment of the population should have been a starting point for determining appropriate solutions to the problems caused by participation in the drug trade.

Levy–Pounds, *supra*.

<sup>170</sup> *See generally* Larry E. Walker, *Law and More Disorder! The Disparate Impact of Federal Mandatory Sentencing for Drug Related Offenses on the Black Community*, 10 J. SUFFOLK ACAD. L. 97, 119 (1995) (explaining the contradiction that arises between the drugs wars designed intent to decrease street violence and actual effect). “The greatest percentage of arrests, prosecutions, and sentencing are for drug offenses in which no violent crime is involved.” *Id.*

<sup>171</sup> *Id.* at 97.

<sup>172</sup> Nunn, *supra* note 22, at 383–84 (explaining the harmful social consequences of incarcerating such a large number of African–American males); Levy–Pounds, *supra* note 119, at 363–75 (explaining the implications of the drug war and its effects on African–American men, women, and children).