

Journal of Civil Rights and Economic Development

Volume 33
Issue 3 *Volume 33, Fall 2020, Issue 3*

Article 4

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REVERSING THE EVILS OF FEDERAL MANDATORY MINIMUM SENTENCES: IS CLEMENCY THE ONLY ANSWER?

*Examining the Clemency and Legislative Policies of the Obama
and Trump Administrations within the United States
Criminal Justice Context*

Melissa Johnson*

INTRODUCTION

Thirty-five years ago, Alice Marie Johnson lived a full life.¹ She was a wife, a mother of five children, and a manager at FedEx.² Then divorce, the death of one of her children, and job loss shattered her world.³ Ms. Johnson was able to find employment as a factory worker, a role which paid only a fraction of her former salary and was insufficient to support her children.⁴ Desperate and burdened, she became a telephone mule for drug dealers.⁵ She was instructed to “pass phone messages [and] [w]hen people came to town . . . [to tell] them what number to call for drug transactions.”⁶

Alice Marie Johnson’s role as a telephone mule can be likened to some drug couriers in smuggling operations.⁷ Drug trafficking

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¹ See Alice Marie Johnson, *Why Kim Kardashian thinks I should be released from prison*, CNN (June 7, 2018, 8:04 A.M.), <https://www.cnn.com/2016/12/28/opinions/obama-clemency-johnson-opinion/index.html>.

² See *id.*

³ See *id.*

⁴ See Victoria Law, *Mothers Serving Long-Term Drug Sentences Call for Clemency*, TRUTHOUT (Sept. 11, 2015), <https://truthout.org/articles/mothers-serving-long-term-drug-sentences-call-for-clemency/>.

⁵ See Johnson, *supra* note 1.

⁶ Law, *supra* note 4.

⁷ See Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1751

rings often recruit women as drug couriers.⁸ These female drug couriers are often disconnected from the intricate workings of the drug conspiracy and are only expected to transport the drugs.⁹ Their minuscule role in the drug ring means they are at a disadvantage during the prosecutorial process because they have little information to trade in exchange for a lesser charge.¹⁰ Such was Ms. Johnson's story.¹¹ She had never been charged with or convicted of a crime.¹² Nor was she a drug kingpin or ringleader.¹³ Yet she was convicted of "conspiracy to possess with intent to distribute cocaine, attempted possession of cocaine with intent to distribute and deliver, money laundering, conspiracy to commit money laundering and structuring a monetary transaction" after her co-defendants testified against her.¹⁴

In the end, Alice Marie Johnson was sentenced to life in prison as a first-time nonviolent drug offender under the mandatory minimum sentencing laws.¹⁵ In Ms. Johnson's words, she "was given a death sentence without sitting on death row" when she was convicted on October 31, 1996.¹⁶

Through the Clemency Initiative 2014 ("Clemency Initiative"), President Barack Obama sought to use his clemency power to give

(2019) (explaining that both couriers and mules are similar because both "occupy the lowest levels of the hierarchy of a drug-trafficking organization.").

⁸ See *id.* at 1766 (explaining that "[f]rom the perspective of law enforcement officers, for example, women may appear less dangerous and thus less suspicious.").

⁹ See *id.* at 1764-65 (clarifying that "though many drug couriers occupy the lowest levels of the drug organization's hierarchy, not all drug couriers are alike . . . some couriers run sophisticated operations to smuggle drugs across borders.").

¹⁰ See *id.* at 1753.

¹¹ See Law, *supra* note 4 (implying prosecutors did not grant much leniency to Johnson).

¹² See Johnson, *supra* note 1.

¹³ See Law, *supra* note 4 (Johnson insisted she "never made drug deals or sold drugs"); Julieta Chiquillo, *I'm that miracle: Woman pardoned by Trump at Kim Kardashian's behest visits girls at Dallas County Detention Center*, DALL. MORNING NEWS (Sept. 27, 2018, 10:43 A.M.), <https://www.dallasnews.com/news/2018/09/27/i-m-that-miracle-woman-pardoned-by-trump-at-kim-kardashian-s-behest-visits-girls-at-dallas-county-detention-center/> (stating that Johnson was considered a low-level drug offender).

¹⁴ Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018, 8:04 AM), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html>; Law, *supra* note 4.

¹⁵ See Johnson, *supra* note 1; see also Tonyaa Weathersbee, *Alice Marie Johnson survived desperation and injustice. Now she's helping others do the same*, COM. APPEAL (June 3, 2019, 2:53 PM), <https://www.commercialappeal.com/story/news/2019/06/03/alice-marie-johnson-kim-kardashian-west-president-trump-pardon/1330927001/>.

¹⁶ See Johnson, *supra* note 1.

convicted nonviolent and low-level drug offenders, who would have received substantially lesser sentences under more recent federal sentencing laws, a second chance.¹⁷ However, Alice Marie Johnson did not benefit from Obama's efforts.¹⁸ Instead, Alice Marie Johnson received her second chance when her sentence was commuted on June 6, 2018.¹⁹ This happened because Kim Kardashian West and Jared Kushner petitioned President Donald J. Trump to exercise his clemency power and pardon Ms. Johnson.²⁰ Alice Marie Johnson's story moved an empathetic Kim Kardashian West to action.²¹ In a CNN interview with Van Jones, Kardashian West said, "I felt like she's a good person. You can see that in her."²²

President Trump's positive response to Kardashian West's and Kushner's activism caused some confusion among President Trump's critics and a conflict among his supporters, since the

¹⁷ See U.S. DEP'T JUSTICE, OFF. PARDON ATT'Y, CLEMENCY INITIATIVE, <https://www.justice.gov/pardon/clemency-initiative> (last updated Dec. 11, 2018); see also Shaun King, *Alice Marie Johnson is Free. Now it's Time to Free Thousands More Prisoners with Unjustly Long Sentences*, APPEAL (June 15, 2018), <https://theappeal.org/alice-marie-johnson-is-free-now-its-time-to-free-thousands-of-more-prisoners-with-unjustly-long-sentences/>.

¹⁸ See Johnson, *supra* note 1 (Johnson wrote, "The week before Christmas 2016, President Barack Obama gave a second chance—in the form of clemency—to 231 people, including my friend Sharanda Jones. I was not among them."); see also CLEMENCY INITIATIVE, *supra* note 17. The Obama-era DOJ denied Johnson's request for clemency consideration three times. See Michelle Mark, *Trump has granted clemency to Alice Johnson, freeing the 63-year-old grandmother whose case was championed by Kim Kardashian*, BUS. INSIDER (June 6, 2018, 12:27 P.M.), <https://www.businessinsider.com/alice-johnson-trump-clemency-pardon-kim-kardashian-west-2018-5>. Moreover, 7,881 Clemency Initiative applications were never reviewed, and 8,880 Clemency Initiative applicants never received a response. See King, *supra* note 17.

¹⁹ See Press Release, White House, *President Trump Commutes Sentence of Alice Marie Johnson* (June 6, 2018), <https://www.whitehouse.gov/briefings-statements/president-trump-commutes-sentence-alice-marie-johnson/>.

²⁰ See Emily Jane Fox, *Keeping Up the Kushners: With Jared Back on Top, Kim Kardashian Heads to the White House*, VANITY FAIR (May 30, 2018, 5:00 A.M.), <https://www.vanityfair.com/news/2018/05/keeping-up-with-the-kushners-kim-kardashian-white-house-visit-prison-reform>. Jared Kushner, Senior Advisor to the President, is seemingly passionate about prison reform, and, prior to Alice Johnson's sentence commutation and release from prison, he had a number of discussions with Kim Kardashian West regarding criminal justice reform. *Id.* Additionally, "Kushner has made significant progress in getting Republican lawmakers on board with the effort, bringing law enforcement officials and Evangelical leaders to the White House, taking meetings on Capitol Hill, and hosting dinner parties with key Washington power players at the home he shares with his wife, Ivanka Trump." *Id.*

²¹ See Darran Simon, *Kim Kardashian said she felt 'connection' to Alice Johnson and wanted to help*, CNN (June 7, 2018, 7:04 PM), <https://www.cnn.com/2018/06/07/us/kim-kardashian-alice-johnson-interview/index.html>.

²² *Id.*

Trump Administration did not continue the Clemency Initiative, and then Attorney General Jeff Sessions declared a ‘War on Crime’ approach to criminal justice.²³ As dialogue heated up over criminal justice reform, there was uncertainty as to whether President Trump would continue President Obama’s exercise of the clemency power to correct the mass incarceration that plagues the federal prison system, or whether he would fuel a second wave of the War on Drugs.²⁴

Ultimately, the Trump Administration recognized that neither one-off clemency grants nor an ill-equipped clemency program that lacked sufficient resources and structure could solve America’s mass incarceration problem.²⁵ Rather, the Trump Administration understood legislative sentencing reform was the better solution to provide lasting relief to first-time, low-level, and nonviolent drug offenders serving draconian mandatory minimum sentences.²⁶

This Note argues the uncertainty inherent in the use of the clemency power with the change of each administration and the bias inherent in the exercise of clemency makes clemency an improper tool to correct the mass incarceration of first-time, low-level, and nonviolent drug offenders. Part I examines the governmental and societal climate that formed the impetus for U.S. mandatory minimum sentencing laws. Part II discusses the impact of U.S. mandatory minimum sentencing laws on the American criminal justice system, namely how it has led to the growth of mass incarceration. Part III looks at clemency and how it is used by past and current presidents to correct sentencing injustices. Part IV posits that legislative reform, not presidential clemency, is the most effective tool to correct the consequences of U.S. mandatory minimum sentencing laws.

²³ See *infra* Part III.D.; Johnson, *supra* note 1 (detailing how Alice Johnson referred to Kim Kardashian West and Jared Kushner as unlikely voices to be her advocates; see also Erin Jensen, *Kim Kardashian West talks ‘mission’ of commuting Alice Johnson, Trump’s ‘compassion’*, USA TODAY (June 14, 2018, 9:22 A.M.), <https://www.usatoday.com/story/life/people/2018/06/14/kim-kardashian-west-alice-johnson-today-show-hoda-kotb/700890002/>).

²⁴ See *infra* Parts III.C. & III.D.

²⁵ See *infra* Part IV.

²⁶ See *infra* Part IV.

I. WHERE IT ALL BEGAN—THE WAR ON DRUGS AND MANDATORY MINIMUM SENTENCING LAWS

On October 2, 1982, approximately twenty-one months after becoming President, Ronald Reagan, with the help of his wife, First Lady Nancy Reagan, gave an impassioned speech in a radio address to the nation.²⁷ In this radio address, the First Lady reported the drug epidemic was destroying the lives of children and causing consternation in families across the United States.²⁸ In response, President Reagan promised a new strategy to address the drug crisis.²⁹ President Reagan then followed with a jarring message to drug traffickers, “[You] can run but [you] can’t hide.”³⁰

President Reagan made good on his “tough on drug criminals” promise to the American public.³¹ During his tenure, Americans witnessed and experienced the passage of sentencing laws that gave rise to the mass incarceration of first-time, low-level, and nonviolent drug offenders.³² As a result, the Reagan Administration gave life to the rhetorical term coined by President Nixon—

²⁷ See President Ronald Reagan & First Lady Nancy Reagan, Radio Address to the Nation on Federal Drug Policy (Oct. 2, 1982) (transcript available at Ronald Reagan Presidential Library & Museum), <https://www.reaganlibrary.gov/research/speeches/100282a>.

²⁸ See *id.* Nancy Reagan informed the public that children were stealing from their parents to support their drug habit, and that alcohol and drug use was one of the primary causes of the increased death rate among adolescents and young adults. See *id.*

²⁹ See *id.*

³⁰ *Id.* President Reagan also said: “We’re not just going to let them go somewhere else; we’re going to be on their tail.” *Id.* At the time of this address, President Reagan had already established a task force in south Florida under Vice President Bush’s leadership. *Id.* The accomplishments of this task force included an increase in the number of judges, prosecutors, law enforcement personnel, and the use of military radar and intelligence to detect drug traffickers. *Id.* President Reagan planned to implement a similar strategy on the federal level. See *id.* (stating President Reagan planned to implement the strategy used to handle the drug crisis in Florida throughout the United States).

³¹ See Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control”*, FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control> (stating that President Reagan fulfilled his promise to the public of getting tough on criminals by declaring a war on drugs).

³² See Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1065-66 (2016) (explaining that the passage of harsh sentencing guidelines caused an increase in incarceration rate). “During the 1980s, the Reagan administration declared a war on drugs. Nancy Reagan introduced her ‘Just Say No’ campaign, and the administration launched a law enforcement strategy that resulted in an exponential increase in federal prisoners and unprecedented racial disparities in the prison population.” *Id.* at 1065. “Between 1980 and 2007, there were more than twenty-five million adult drug arrests in the United States.” Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 271 (2009).

the War on Drugs.³³ In fact, “President Reagan turned the rhetorical war into a literal one when he officially announced the War on Drugs in 1982.”³⁴ What quickly followed were two important pieces of legislation.

A. *The Sentencing Reform Act of 1984 and the Anti-Drug Abuse Act of 1986*

The Sentencing Reform Act of 1984 (“SRA”), one of the “most broad reaching reform[s] of federal sentencing,” created the U.S. Sentencing Commission (“Commission”) and mandatory minimum sentence guidelines (“Guidelines”).³⁵ The Commission intended to correct disparate sentencing of similarly situated defendants, and structure, rather than eliminate, judicial discretion.³⁶ Judges could exercise discretion so long as the imposed sentence did not overstep the overarching purposes of the SRA and could only depart from the Guidelines if there were aggravating or mitigating

³³ See Danielle Snyder, *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*, 36 HAMLINE J. PUB. L. & POL’Y 78, 90 n.54 (2015) (explaining that when President Nixon used the term, it was largely rhetorical because he did not propose any significant changes to public policy).

³⁴ *Id.*

³⁵ See Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 NW. U. J. CRIM. L. & CRIMINOLOGY 883, 883-84 (1990) (explaining that the Sentencing Reform Act contributed to the creation of the Commission); 28 U.S.C.S. § 991(a) (LexisNexis 2019) (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member.”); see also David M. Zlotnick, *The War within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 216 (2004) (explaining that the Sentencing Reform Act of 1984 mandated the creation of mandatory minimum guidelines, abolished parole and required prisoners to serve at least 85% of their sentences). In 1987 the Sentencing Commission released the Sentencing Guidelines to be applied prospectively. See *id.* at 216-17. The Guidelines attributed a base level offense to every offense in the U.S. Code that correlated with a specific punishment range; the base level offense was raised or lowered based on additional considerations. See *id.* at 217. Points were added for prior convictions and the points determined the defendant’s criminal history category. See *id.* The criminal history category determined the mandatory sentencing range. See *id.* Judges were allowed to “depart” from the sentencing range, but all “departures” were subject to judicial review. *Id.* at 217-18.

³⁶ See 28 U.S.C.S. § 991(b)(1)(B) (LexisNexis 2019) (stating the purposes of the Commission are to avoid unwarranted sentencing disparities among defendants with similar records and maintain flexibility for individualized sentences); see also Nagel, *supra* note 35, at 883 (stating the purpose of the Sentencing Reform Act of 1984 was to attack problems of dishonesty—where the court-imposed sentences did not reflect actual time served, excessively lenient sentences, and unfettered judicial discretion).

factors that had not already been calculated into the Guidelines formula.³⁷ In addition, courts were still expected to impose sentences based on the gravity of the offense, with the additional purposes of deterring criminal behavior, protecting the public, and rehabilitating the accused.³⁸ The result was that departures from the Guidelines were unavailable in most cases because the Commission had already accounted for all relevant factors in its formula.³⁹

Two years after the SRA, Nancy Reagan delivered her famous “Just Say No” speech to America.⁴⁰ She told her adolescent listeners to “just say no” when confronted with the temptation to use drugs or drink alcohol.⁴¹ During this radio address, President Reagan reported the successes of the War on Drugs.⁴² However, he declared there was still much work to be done because the illegal sale and use of crack-cocaine posed a new threat to societal and human well-being, and he vowed to implement more stringent drug sentencing laws.⁴³

The American zeal to stamp out crack-cocaine use had begun with the recent death of college basketball star, Len Bias.⁴⁴ Three months before the Reagans’ speeches, the media erroneously

³⁷ See *U.S. v. Booker*, 543 U.S. 220, 235 (2005) (stating departure from Guidelines is appropriate where aggravating or mitigating circumstances were not adequately taken into consideration by Commission); see also Nagel, *supra* note 35, at 902 (explaining that “sentencing judges were instructed to review the following: 1) the nature of the offense and history of the offender; 2) the kinds of sentences available; 3) the guidelines to be developed by the United States Sentencing Commission; and 4) the need to avoid unwarranted sentencing disparity.”).

³⁸ 18 U.S.C. § 3553(a)(2) (2018).

³⁹ See *Booker*, 543 U.S. at 234.

⁴⁰ See generally ‘Just Say No’, CNN, <http://www.cnn.com/SPECIALS/2004/reagan/stories/speech.archive/just.say.no.html> (last visited Dec. 30, 2019) (explaining that Nancy Reagan delivered the campaign against drug use in 1986).

⁴¹ See *id.* (stating that the message was aimed at young people).

⁴² See *id.* (noting the administration’s achievements, such as 10,000 convicted drug offenders and \$250 million in drug-related assets seized by the Drug Enforcement Administration).

⁴³ See *id.* (explaining that illegal cocaine was causing an epidemic that was harming its users, and that his administration “still [had] much to do” to prevent its spread); see also Gerald M. Boyd, *Reagan Proposes Stiffer Drug Laws*, N.Y. TIMES (Sept. 16, 1986), <https://www.nytimes.com/1986/09/16/us/reagan-proposes-stiffer-drug-laws.html> (explaining implementation of stringent drug sentencing laws by President Reagan, such as capital punishment for drug crimes, and drug testing programs).

⁴⁴ See Sheryl Gay Stolberg & Astead W. Herndon, ‘Lock the S.O.B.s Up’: Joe Biden and the Era of Mass Incarceration, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/joe-biden-crime-laws.html>.

reported that Bias had died from a crack-cocaine overdose, when he, in fact, died of a cocaine overdose.⁴⁵ The erroneous media reporting amplified public and congressional awareness of crack-cocaine in the drug market, and the legislative response to this so-called “national hysteria” was the Anti-Drug Abuse Act of 1986 (“ADAA”).⁴⁶

Congress passed the ADAA without Senate committee hearings, without seeking recommendations from the judicial branch, and with minimal input from law enforcement agencies.⁴⁷ The ADAA represented a significant departure from the previous sentencing guidelines⁴⁸ as it instituted mandatory minimum sentences based on the quantity of the controlled or counterfeit substance.⁴⁹

The ADAA also shifted discretion from judges to prosecutors.⁵⁰ Prosecutors were given the power to charge crimes that would not trigger a mandatory minimum for defendants who provided substantial assistance in the same or a different investigation.⁵¹ It follows that low-level drug offenders, like Alice Marie Johnson, who could not provide substantial assistance received the short end of the stick because they “often had no one to ‘rat out,’ or they waited too long to come forward out of ignorance, loyalty, or fear

⁴⁵ See Spencer A. Stone, *Federal Drug Sentencing-What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 311, 313 (2007); see also Lis Wiehl, “Sounding Black” in the Courtroom: *Court-Sanctioned Racial Stereotyping*, 18 HARV. BLACK LETTER L.J. 185, 206-07 (2000).

⁴⁶ See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207 (1986); see also Zlotnick, *supra* note 35, at 218 (explaining that Len Bias’s death “spiked a growing national hysteria over crack cocaine and Congress fell into an anti-drug frenzy [and] [t]he result was the Anti-Drug Abuse Act of 1986”).

⁴⁷ See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207; Zlotnick, *supra* note 35, at 218-19; Stone, *supra* note 45, at 316 (noting that the ADAA was signed into law shortly after the Subcommittee on Crime of the House Judiciary Committee introduced the Narcotics Penalties and Enforcement Act, House Bill 5394, on August 12, 1986, and President Reagan transmitted his Drug Free America Act to Congress on September 15, 1986).

⁴⁸ See generally Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

⁴⁹ See Zlotnick, *supra* note 35, at 219. Consequently, if the Guidelines sentence resulted in a lower sentence than the mandatory minimum, then the Guidelines sentence was adjusted to match the mandatory minimum sentence. *Id.*

⁵⁰ *Id.* at 219-20.

⁵¹ *Id.* at 220 (“Without a ‘substantial assistance’ motion by the U.S. Attorney’s Office, judges were powerless to sentence below the mandatory minimum even if the judge felt the defendant had made a good faith effort to cooperate.”).

. . . while higher-ups in the same drug network cooperated in exchange for lesser sentences.”⁵²

B. *The Fair Sentencing Act*

The first sign of meaningful sentencing reform came in 2005.⁵³ In *United States v. Booker*, the Supreme Court dispensed with the Guidelines’ mandatory minimum sentences and held that the Guidelines were effectively advisory, permitting courts to depart from Guidelines’ sentences in consideration of other criteria.⁵⁴ The Court’s primary rationale was that the Guidelines conflicted with the Sixth Amendment right to a jury trial when judges applied the Guidelines’ mandatory minimum based on post-trial evidentiary determinations.⁵⁵ Accordingly, Sixth Amendment challenges to the Guidelines’ applications would be moot if the Guidelines were advisory rather than mandatory.⁵⁶ The Court stated its holding was necessary to preserve congressional intent for the SRA because, in conjunction with other points, the statutory goal of the Guidelines was to diminish disparate sentencing which may require judicial inquiry and if Congress had considered the Sixth Amendment constitutional requirement it would not have made the Guidelines mandatory.⁵⁷ However, the significance of this

⁵² *Id.* Prosecutorial discretion is subject to the worldview of the prosecutor and charging decisions on the front-end create a snowball effect in the criminal justice system. *See* Telephone Interview with Anna-Bo Chung Emmanuel, Former Florida Prosecutor (Oct. 8, 2019). Therefore, we need “justice-minded” prosecutors who review defendants’ circumstances holistically and who are not intent on feeding the prison system. *See id.* Justice must account for everyone affected by the crime including the victim and the accused and family and loved ones on both sides. *See id.*

⁵³ Robert L. Boone, *Booker Defined: Examining the Application of United States v. Booker in the Nation’s Most Divergent Circuit Courts*, 95 CAL. L. REV. 1079, 1080 (2007).

⁵⁴ *See* 18 U.S.C. § 3553(a) (2018) (detailing that a judge could consider the (i) nature and circumstances; (ii) retribution, deterrence, rehabilitation, and public safety; (iii) availability of different sentencing schemes; (iv) the sentences and ranges applicable to the offense and the defendant; (v) criminal justice policies; (vi) disparate sentencing among similarly situated defendants; and (vii) restitution); *U.S. v. Booker*, 543 U.S. 220, 266 (2005); *see also* Davis, *supra* note 32, at 1069.

⁵⁵ *See Booker*, 543 U.S. at 223. Defendants like Booker had “no right to a jury determination of the facts that the judge deem[ed] relevant” and challenged their mandatory minimum sentence on this premise. *Id.* at 233.

⁵⁶ *See id.* at 222.

⁵⁷ *Id.* at 227.

holding did not affect the federal mandatory minimums, only the Guidelines.⁵⁸

There was more change when President Barack Obama signed the Fair Sentencing Act (“FSA”) in 2010 which *did* affect federal mandatory minimums.⁵⁹ The FSA caused a dramatic shift in the charging and sentencing regimes for crack-cocaine offenses by increasing the quantity of crack-cocaine that triggered the mandatory minimums.⁶⁰ The FSA specifically sought to correct the sentencing disparities between crack-cocaine and powder cocaine offenses.⁶¹ The FSA also repealed the mandatory five-year minimum sentence for simple possession of crack cocaine to come into conformity with the misdemeanor penalty for simple possession of other controlled substances.⁶²

The Department of Justice (“DOJ”) explained the FSA was *only* applied prospectively to offense conduct that occurred after the FSA was signed into law; offense conduct that occurred before the FSA was enacted, even if the case was charged after enactment, was still subject to previous triggering quantities for crack-

⁵⁸ See *Sentencing 101*, FAMM, <https://famm.org/our-work/sentencing-reform/sentencing-101/> (last visited Jan. 3, 2020) (explaining that federal mandatory minimums are set by Congress mostly apply to drug offenses, whereas, the Guidelines guide judges toward a sentence based on the facts that led to a conviction. The Guidelines normally come into play when the quantity of drugs is too low to trigger the federal mandatory minimum because a federal mandatory minimum always trumps a Guidelines sentence).

⁵⁹ Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 3, 124 Stat. 2372, 2372 (2010); Jesse Lee, *President Obama signs the Fair Sentencing Act*, WHITE HOUSE (Aug. 3, 2010, 4:58 P.M.), <https://obamawhitehouse.archives.gov/blog/2010/08/03/president-obama-signs-fair-sentencing-act>.

⁶⁰ See David Bjerk, *Mandatory Minimums and the Sentencing of Federal Drug Crimes*, 46 J. LEG. STUD. 93, 94 (2017); Snyder, *supra* note 33, at 101-02.

⁶¹ See Bjerk, *supra* note 60, at 94; see also Memorandum from Gary G. Grindler, Acting Deputy Attorney General, on the Fair Sentencing Act of 2010 to all federal prosecutors (Aug. 5, 2010) (on file with the Department of Justice), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fair-sentencing-act-memo.pdf>. In quantitative terms, the FSA reduced the sentencing disparity between crack and powder cocaine offenses from 100:1 to 18:1. *Id.* The triggering quantities for crack-cocaine were increased from 5 grams and 50 grams to 28 grams and 280 grams to trigger the respective 5 and 10-year mandatory minimum sentences. *Id.* The powder cocaine triggering quantity remained unchanged. See Snyder, *supra* note 33, at 100-02.

⁶² Memorandum from Gary G. Grindler, *supra* note 61; see 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). Simple possession occurs “when [a defendant] is arrested for having a relatively small quantity of drugs on his person that is presumably for personal use and not for distribution.” *Id.* at 508. “Simple possession of other controlled substances by a first-time offender—including powder cocaine—is a misdemeanor offense punishable by a maximum of one year in prison.” *Id.* at 509.

cocaine.⁶³ However, the DOJ stated the Commission was not foreclosed from promulgating Guidelines amendments that retroactively applied the FSA.⁶⁴

The application of the FSA to crack-cocaine offenders was far from simple and its difficulties implicated two types of defendants.⁶⁵ Those implicated were (i) defendants whose offense conduct occurred before the FSA was enacted but were not yet sentenced—“pipeline cases”—and (ii) defendants who were sentenced under prior sentencing Guidelines, including those who had appealed their cases and were currently serving time in prison—“pre-FSA sentences.”⁶⁶ There was general consensus among courts and the DOJ that the FSA did not apply retroactively to the latter category of defendants.⁶⁷ However, the Courts of Appeals were split on the issue of whether the FSA should be applied to pipeline cases.⁶⁸ The First, Third, and Eleventh Circuits ruled in favor of applying the FSA to pipeline cases, and the DOJ supported this holding.⁶⁹ The Fifth, Seventh, and Eighth Circuits, however, ruled against applying the FSA to pipeline cases.⁷⁰

There was some resolution to the tension over the pipeline cases (i.e. category (i) defendants) and pre-FSA sentences (i.e. category (ii) defendants) when both the Commission and the Supreme Court took action.⁷¹ In 2011, the Commission made clear that “[o]nly Congress can make a statute retroactive” and effect change for pre-FSA sentences.⁷² The DOJ followed suit and affirmed this

⁶³ See Memorandum from Gary G. Grindler, *supra* note 61.

⁶⁴ See *id.*

⁶⁵ See Hyser, *supra* note 62, at 515.

⁶⁶ See *id.*

⁶⁷ See *id.*; see also Memorandum from Eric H. Holder, Attorney General, on the application of the statutory mandatory minimum sentencing laws for crack offenses amended by the Fair Sentencing Act of 2010 to all federal prosecutors (July 15, 2011) (on file with the Department of Justice), https://www.justice.gov/oip/ag_memo_application_statutory_mandatory_sentencing_laws_amended_fair_sentencing_act_2010/download.

⁶⁸ See Hyser, *supra* note 62, at 515-16.

⁶⁹ See *id.* at 516.

⁷⁰ See *id.*

⁷¹ See *id.* at 506, 523-24 (describing that the “United Supreme Court resolved the circuit split[] [by] finding that defendants sentenced after the FSA’s passage should be subject to the new minimums regardless of when their crime occurred.”).

⁷² See Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Votes Unanimously To Apply Fair Sentencing Act of 2010 Amendment To The Federal Sentencing Guidelines Retroactively (June 30, 2011) (available at https://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20110630_Press_Release.pdf).

position.⁷³ In 2012, the Supreme Court resolved the circuit split in a 5-4 decision holding pipeline cases should be sentenced based on the FSA mandatory minimums, regardless of when the conduct occurred.⁷⁴ In contrast, the Court did not help pre-FSA sentences, and Congress failed to make the FSA retroactive.⁷⁵ Retroactive application of the FSA would have decreased the number of inmates incarcerated in federal prison and corrected long-standing sentencing disparities.⁷⁶

II. PROBLEMS WITH MANDATORY MINIMUM SENTENCES

Without question, Ronald Reagan's War on Drugs "transformed the landscape of the criminal justice system."⁷⁷ The undeniable result is the mass incarceration of America, where "[l]ow-level and marginally culpable drug defendants with no information to trade have received very harsh sentences based upon broad definitions of conspiracy and weight-based penalty schemes."⁷⁸

Ronald Reagan's War on Drugs has cost the United States an estimated \$1 trillion since its inception,⁷⁹ led to the United States

⁷³ See Memorandum from Eric H. Holder, *supra* note 67.

⁷⁴ See Hyser, *supra* note 62, at 523.

⁷⁵ See Jeremy Haile, *Farewell, Fair Cruelty: An Argument for Retroactive Relief in Federal Sentencing*, 47 U. TOL. L. REV. 635, 640 (2016) (arguing fairness is one of the cornerstone principles of retroactivity, and that two defendants who are charged with the same offense should not be given different punishments merely because they were sentenced on different dates).

⁷⁶ See *id.* at 641. Conversely, opponents of retroactivity are concerned the retroactive application of sentencing reform imposes an undue burden on the judiciary, unsettles court judgments when cases are reopened, and overrides the separation of powers doctrine. See *id.* at 645-47.

⁷⁷ Zlotnick, *supra* note 35, at 211.

⁷⁸ *Id.* at 212; see also Raishad Hardnett, *The Prisoners Left Behind*, CANNABIS WIRE (Sept. 7, 2018, 6:50 A.M.), <https://cannabiswire.com/2018/09/07/the-prisoners-left-behind/>; Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and A Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 883 (2014). Mass incarceration indiscriminately affects communities of color. See Haile, *supra* note 75, at 637 ("It is well known that African Americans, in particular, have borne the greatest burden of the nation's four-decade long experiment with mass incarceration. Black men are incarcerated at a rate six times greater than white men and black women at a rate twice that of white women."). Mass incarceration disrupts the familial unit and perpetuates violent and criminal conduct within African American and Latino communities. See Aimée Tecla Canty, Note, *A Return to Balance: Federal Sentencing Reform After the "Tough-on-Crime" Era*, 44 STETSON L. REV. 893, 894 (2015).

⁷⁹ See Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

having the highest incarceration rate in the world,⁸⁰ and helped create a federal prison system that houses more inmates than any individual state.⁸¹ From the 1950s to the mid 1970s, the federal and state prison population combined remained constant at around 200,000 inmates (plus or minus a few thousand).⁸² After the inception of the War on Drugs, the prison population increased steadily until 2010 (with a small decline between 2010 and 2014).⁸³ On the broad scale, from 1974 to 2014, the total combined prison population increased from 218,466 to 1,508,636; from 1980 to 2014 the number of incarcerated drug offenders increased from 41,000 to 488,400.⁸⁴ In 2016, approximately 2.2 million Americans were incarcerated.⁸⁵

The general consensus is that the War on Drugs is the dominant cause of the increase in the prison population.⁸⁶ The numbers support the assertion that a plethora of criminal offenders who were sentenced under the SRA and ADAA for first-time, low-level, and nonviolent offenses, like Alice Marie Johnson, are still in prison.⁸⁷ Plus, the Commission has confirmed that “[m]andatory minimum penalties continue to significantly impact the size and composition of the federal prison population.”⁸⁸

The enactment of the FSA and the repeal of other mandatory minimum sentences drove a decrease in the federal prison

⁸⁰ See Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (Aug. 10, 2012), <https://www.prb.org/us-incarceration/>; see also Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (noting America incarcerates more people “than the top thirty-five European countries combined, and dwarfs [the incarceration rate of] not only other Western allies but also countries like Russia and Iran”).

⁸¹ See JENNIFER BRONSON & ANN CARSON, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 4 (2019).

⁸² See Lauren Carroll, *How the war on drugs affected incarceration rates*, POLITIFACT (July 10, 2016, 6:27 P.M.), <https://www.politifact.com/truth-o-meter/statements/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates/>.

⁸³ *Id.*

⁸⁴ See *id.* (noting this increase represents a 600 percent and 1,000 percent increase, respectively).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Davis, *supra* note 32, at 1070.

⁸⁸ U.S. SENTENCING COMM'N, FEDERAL MANDATORY MINIMUM PENALTIES: 2017 OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (REPORT AT A GLANCE) (2017), <https://www.usc.gov/sites/default/files/pdf/research-and-publications/backgrounders/RG-mm-overview.pdf> (reporting that, in 2016, “slightly more than half (55.7%; N=92,870) of federal inmates in custody were convicted of an offense carrying a mandatory minimum penalty”).

population and contributed to lesser federal drug convictions based on mandatory minimums.⁸⁹ The Commission reported in both 2015 and 2017 respectively that (i) “the FSA . . . reduced the federal prison population, and appears to have resulted in fewer federal prosecutions for crack cocaine,”⁹⁰ and (ii) “[o]f the 19,584 drug offenders sentenced in fiscal year 2016, less than one-half (46.8%) were convicted of an offense carrying a mandatory minimum penalty.”⁹¹ However, mandatory minimums are still woven into the framework of the criminal justice system.⁹² The average sentence of the federal drug offenders convicted of a mandatory minimum in 2016 was 125 months, while the average sentence of federal drug offenders not convicted of a mandatory minimum was 39 months because their offense did not carry a mandatory minimum penalty.⁹³ Consequently, drug offenders sentenced based on federal mandatory minimums are serving longer sentences than their counterparts who are relieved from mandatory minimums.⁹⁴

When Ms. Johnson was released from federal prison in 2018, she stated the current sentencing system must be reexamined.⁹⁵ She told Hill T.V., “[t]hese mandatory minimums must be struck down . . . [t]here must never be a time that a non-violent first offender like myself can receive the harshest sentence next to the death penalty. . . life without the possibility of parole.”⁹⁶ President Obama echoed these sentiments in his 2017 Harvard Law Review article when he stated,

⁸⁹ See U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22 (2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf#page=15.

⁹⁰ *Id.*

⁹¹ U.S. SENTENCING COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY16.pdf.

⁹² See *id.* (explaining that 13.4% of all federal offenders in 2016 were subject to a mandatory minimum penalty).

⁹³ See *id.* (comparing rates at which crack cocaine and marijuana offenders were subjected to mandatory minimum sentences—71.4% and 33.6%, respectively).

⁹⁴ See *id.*

⁹⁵ See Julia Manchester, *Alice Marie Johnson: Mandatory minimum sentences must be struck down*, HILL (July 19, 2018), <https://thehill.com/hilltv/rising/397849-alice-marie-johnson-mandatory-minimums-must-be-struck-down>.

⁹⁶ *Id.* (internal quotation marks omitted). “No other developed nation sentences nonviolent offenders to life without the possibility of parole. In fact, most nations have even removed such harsh sentences for violent offenders.” King, *supra* note 17.

[e]very dollar that the Department of Justice spends on excessive sentences for nonviolent drug offenses represents a dollar we don't have for investigating emerging threats, from hackers to home-grown terrorists. And it's a dollar we don't have to support state and local law enforcement with more cops on the street and crucial programs for prevention, intervention and reentry.⁹⁷

The impact of the mass incarceration of first-time, low-level, and nonviolent drug offenders in America has proved to be counterproductive.⁹⁸ A 2014 study by Peter Reuter at the University of Maryland and Harold Pollack at the University of Chicago concluded that harsh sentences or supply-elimination efforts are no more effective at decreasing accessibility to narcotics and substance abuse than lighter penalties.⁹⁹ Harsh penalties, such as mandatory minimum sentences, may have some effect on curbing the illegal drug market, but that effect is negligible.¹⁰⁰ Other research revealed draconian sentencing laws do not deter crime and tend to increase the likelihood of criminal conduct after release.¹⁰¹ In other words, “prison can exacerbate, not reduce, recidivism [and] [p]risons themselves may be schools for learning to commit crimes.”¹⁰²

III. THE CLEMENCY POWER AND ITS ROLE IN THE CRIMINAL JUSTICE SYSTEM

A. *An Introduction to Clemency*

The clemency power is a constitutional grant.¹⁰³ Under Article II of the Constitution, the President “shall have power to grant Reprieves and Pardons for Offenses against the United States,

⁹⁷ Obama, *supra* note 80, at 818 (quoting Deputy Attorney General Sally Yates) (internal quotation marks omitted).

⁹⁸ See German Lopez, *The new war on drugs*, VOX (Sept. 13, 2017, 7:50 AM), <https://www.vox.com/policy-and-politics/2017/9/5/16135848/drug-war-opioid-epidemic> (describing that harsh sentencing policies for nonviolent drug offenders has not worked in the past and those same policies are still not working for the current opioid epidemic).

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *Five Things About Deterrence*, NAT'L INST. JUSTICE (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>.

¹⁰² *Id.*

¹⁰³ See U.S. CONST. art. II, § 2, cl. 1.

except in Cases of Impeachment.”¹⁰⁴ The clemency grant is rooted in the Framers’ beliefs that the “nation’s chief executive should be able . . . to ameliorate miscarriages of justice.”¹⁰⁵

The clemency power is exercised in the form of pardons, commutations, remissions, reprieves, or amnesty.¹⁰⁶ Clemency is often a last resort tool to correct unjust criminal sentences; the Supreme Court referred to the clemency power as the “fail safe” in the American criminal justice system.¹⁰⁷ The President has broad discretion to exercise the clemency power however and whenever he or she sees fit,¹⁰⁸ and the power is not subject to judicial or congressional review.¹⁰⁹ Even so, the Framers assumed the President would neither abuse this power, nor use it frivolously and mindlessly.¹¹⁰ With that said, how a President uses the clemency power may inform the public of his criminal justice policies.¹¹¹

Historically, the use of the clemency power has waxed and waned with each administration.¹¹² Some presidents, like “George Washington and John Adams did not use their power

¹⁰⁴ *Id.*

¹⁰⁵ See Paul J. Larkin, Jr., “*A Day Late and A Dollar Short*”—President Obama’s Clemency Initiative 2014, 16 *GEO. J. L. & PUB. POL’Y* 147, 148 (2018) [hereinafter Larkin, *A Day Late and A Dollar Short*].

¹⁰⁶ See Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 *HARV. J. L. & PUB. POL’Y* 833, 846 (2016) [hereinafter Larkin, *Revitalizing the Clemency Process*]. Pardon is defined as “a release from the penalty of an offense” or a “forgiveness of a serious offense or offender.” *Pardon*, *DICTIONARY.COM*, <https://www.dictionary.com/browse/pardon> (last visited Nov. 23, 2018). Commutation is defined as “the changing of a prison sentence or other penalty to another less severe.” *Commutation*, *DICTIONARY.COM*, <https://www.dictionary.com/browse/commutation> (last visited Nov. 23, 2018). Reprieve is defined as “to delay the impending punishment or sentence of (a condemned person).” *Reprieve*, *DICTIONARY.COM*, <https://www.dictionary.com/browse/reprieve> (last visited Nov. 23, 2018). Amnesty is defined as “a general pardon for offenses, especially political offenses, against a government, often granted before any trial or conviction” or “an act of forgiveness for past offenses, especially to a class of persons as a whole.” *Amnesty*, *DICTIONARY.COM*, <https://www.dictionary.com/browse/amnesty> (last visited Nov. 23, 2018).

¹⁰⁷ See Larkin, *Revitalizing the Clemency Process*, *supra* note 106, at 841 (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)).

¹⁰⁸ See *id.* at 847-48.

¹⁰⁹ See Paul J. Larkin, Jr., *A Proposal to Restructure the Clemency Process—the Vice President as Head of a White House Clemency Office*, 40 *HARV. J. L. & PUB. POL’Y* 237, 237 (2017) [hereinafter Larkin, *Vice President as Head of a White House Clemency Office*].

¹¹⁰ See Larkin, *Revitalizing the Clemency Process*, *supra* note 106, at 848.

¹¹¹ See Larkin, *Vice President as Head of a White House Clemency Office*, *supra* note 109.

¹¹² See *infra* notes 113-19 and accompanying text.

vigorously.”¹¹³ Others, such as “Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams did.”¹¹⁴ The Presidents that served between 1961 and 1981 issued an average of 150 pardons annually.¹¹⁵ However, the Reagan-era and beyond marked a decline in clemency grants.¹¹⁶ Between 1980 and 2010, the number of federal prosecutions and clemency requests increased exponentially, “reflecting lengthier sentences and the elimination of parole for federal inmates,” while the number of clemency grants declined proportionally to the point where a successful clemency application seemed like “luck of draw” rather than the outcome of a predictable process.¹¹⁷ Both President Ronald Reagan and President Bill Clinton granted one in 100 clemency petitions.¹¹⁸ President George W. Bush granted one in 1,000.¹¹⁹

B. Clemency in Focus

The Pardon Attorney and Deputy Attorney General (operating out of the Office of the Pardon Attorney (“OPA”)) are responsible for facilitating and overseeing the clemency process and making

¹¹³ See Larkin, *Revitalizing the Clemency Process*, *supra* note 106, at 853. George Washington and John Adams granted 16 and 21 pardons/commutations respectively. See *List of people pardoned or granted clemency by the president of the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_people_pardoned_or_granted_clemency_by_the_president_of_the_United_States (last visited Nov. 7, 2019).

¹¹⁴ See Larkin, *Revitalizing the Clemency Process*, *supra* note 106, at 853. Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams granted 119, 196, 419, and 183 pardons/commutations respectively. See *List of people pardoned or granted clemency by the president of the United States*, *supra* note 113.

¹¹⁵ See Larkin, *Revitalizing the Clemency Process*, *supra* note 106, at 855.

¹¹⁶ See *id.* at 854. “The clemency grant rate dropped by almost half from President Carter (twenty-two percent) to President Reagan (twelve percent), and by more than half again from President Reagan to President George H.W. Bush (five percent).” *Id.* at 855. The average pardons/commutations from the Reagan Administration (1981) through the Bush Administration (2009) equaled 285.5 (ranging from a low of 77 pardons/commutations issued by George H.W. Bush to a high of 459 pardons/commutations issued by Bill Clinton). See *List of people pardoned or granted clemency by the president of the United States*, *supra* note 113.

¹¹⁷ See Dafna Linzer, *Pardon Attorney Torpedoes Plea for Presidential Mercy*, PROPUBLICA (May 13, 2012, 7:00 PM), <https://www.propublica.org/article/pardon-attorney-torpedoes-plea-for-presidential-mercy>; see also Obama, *supra* note 80, at 836.

¹¹⁸ See Linzer, *supra* note 117.

¹¹⁹ See *id.*

clemency recommendations to the President.¹²⁰ At the core of the clemency process, the Deputy Attorney General is given broad latitude to decide which criteria to use in a clemency investigation and makes judgements on the fate of a clemency petition.¹²¹

President George W. Bush's Pardon Office "was given wide latitude to apply subjective standards, including judgments about the 'attitude' and the marital and financial stability of applicants."¹²² In 2011, ProPublica and the Washington Post reported that under the Bush Administration, white petitioners with similar criminal records to black petitioners were four times more likely to be granted clemency.¹²³ Many of these white petitioners made campaign contributions to lawmakers who would garner congressional support for their clemency petitions.¹²⁴

The propensity of the Pardon Attorney and the Deputy Attorney General towards "subconscious bias" and partiality did not evade the Obama Administration.¹²⁵ Ronald Rodgers was appointed as the Pardon Attorney by President Obama in 2008,¹²⁶ and he also favored whites when he made clemency recommendations.¹²⁷ As a matter of fact, Rodgers brought into plain view "the extraordinary, secretive powers wielded by the Office of the Pardon Attorney"

¹²⁰ See U.S. DEPT OF JUSTICE, JUSTICE MANUAL § 9-140.110 (2018), <https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.112> [hereinafter JUSTICE MANUAL]; see also 28 C.F.R. § 0.36 (2019) (explaining that the Pardon Attorney works under the direction of the Deputy Attorney General, and receives and reviews all petitions for executive clemency, initiates and directs the necessary investigations, and prepares a report and recommendation for submission to the President). The Pardon Attorney may seek information and insight from the prosecuting United States Attorney or Assistant Attorney General. See JUSTICE MANUAL, *supra* note 120, at § 9-140.111 ("The views of the United States Attorney and Assistant Attorney General are given considerable weight in determining what recommendations the Department should make to the President.").

¹²¹ See 28 C.F.R. § 1.6 (2019) (showing the Attorney General and Deputy Attorney General may utilize reports and services of various governmental agencies and advise the President whether to grant or deny a petition).

¹²² Dafner Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, PROPUBLICA (Dec. 3, 2011, 11:00 PM), <https://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites>.

¹²³ See Linzer, *supra* note 117.

¹²⁴ See Linzer & LaFleur, *supra* note 122.

¹²⁵ See Law, *supra* note 4 (explaining that "white people were four times more likely to be pardoned than people of color" under President Obama's U.S. Pardon Attorney, Ronald Rodgers). The term "subconscious bias" was used by Kenneth Lee, "the lawyer who shepherded [Clarence] Aaron's case on behalf of the White House," when discussing Ronald Rodgers' indiscretions. See Linzer, *supra* note 117.

¹²⁶ See Linzer, *supra* note 117.

¹²⁷ See Law, *supra* note 125 and accompanying text.

when he omitted critical information in recommending the denial of the clemency petition of an African American college student who was serving three life sentences.¹²⁸ “Rodgers failed to accurately convey the views of the prosecutor and judge, and did not disclose they had advocated for [the student’s] immediate commutation.”¹²⁹

Due to his indiscretions, Ronald Rodgers was removed from office in 2014, and Deborah Leff assumed his role.¹³⁰ Soon after, the Obama Administration launched the Clemency Initiative.¹³¹ Perhaps President Obama’s motivation to launch the Clemency Initiative, even if in part, was to remedy Rodgers’ failures. Yet, a real concern with the clemency process is its vulnerability to inherent (or subconscious) biases.¹³² Thus, it is surprising that President Obama chose to administer the Clemency Initiative through the OPA, given its deficiencies.¹³³ Mary Price, Vice President of Families Against Mandatory Minimums, stated “[t]he chief impediment [to clemency] lies in the pardon attorney’s office.”¹³⁴ Other legal scholars have supported moving the OPA out of the DOJ because the OPA’s functions in granting pardons and commutations may create a conflict of interest with federal prosecutors who put the same petitioners in prison and function out of the same department as the OPA.¹³⁵

C. *President Barack Obama and the Clemency Initiative 2014*

President Obama credited himself with reinvigorating the clemency power after he commuted the sentences of 1,696 federal

¹²⁸ See Linzer, *supra* note 117; see also Law, *supra* note 4 (“Clarence Aaron, a Black college student [was] serving three life sentences for being present during a drug deal.”).

¹²⁹ Linzer, *supra* note 117.

¹³⁰ See Dafna Linzer, *Justice finally comes to the pardons office and perhaps to many inmates*, MSNBC, <http://www.msnbc.com/msnbc/justice-finally-comes-the-pardons-office> (last updated Apr. 23, 2014, 2:19 PM).

¹³¹ See CLEMENCY INITIATIVE, *supra* note 17.

¹³² See Hardnett, *supra* note 78.

¹³³ See *infra* Part III.C.

¹³⁴ Linzer, *supra* note 117.

¹³⁵ See Katie Benner, *Pardon System Needs Fixing, Advocates Say, but They Cringe at Trump’s Approach*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/pardons-justice-department-trump.html>.

prisoners through his Clemency Initiative.¹³⁶ According to President Obama, he “used [his] clemency power to a degree unmatched in modern history to address unfairness in the federal system”¹³⁷ and that he would “be the first President in decades to leave office with a federal prison population lower than when [he] took office.”¹³⁸ President Obama believes that his Clemency Initiative set the stage for government to continue to exercise the clemency power to benefit federal prisoners.¹³⁹

The Clemency Initiative was an extension of the Obama Administration’s policy to ameliorate the consequences of harsh mandatory minimum sentencing laws.¹⁴⁰ Eight months before the launch of the Clemency Initiative, President Obama’s Attorney General, Eric Holder, instructed prosecutors to refrain from charging defendants for drug quantities that triggered mandatory minimums and to refrain from pursuing enhancements for low-level and non-violent drug offenders who did not have a significant criminal history.¹⁴¹ Holder stated, “long sentences for low-level, non-violent drug offenses do not promote public safety . . . [and] rising prison costs have reduced spending on criminal justice initiatives.”¹⁴² The DOJ stated President Obama would use his clemency power in an aggressive and systematic way to correct sentencing injustices.¹⁴³

The Clemency Initiative targeted nonviolent and low-level drug offenders who would have received substantially lower sentences under current sentencing guidelines, including pre-FSA

¹³⁶ See Obama, *supra* note 80, at 838; CTR. ON THE ADMIN. OF CRIMINAL LAW, N.Y. UNIV., *THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE 6* (2018), https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf [hereinafter *Mercy Lottery*].

¹³⁷ Obama, *supra* note 80, at 824.

¹³⁸ *Id.*; see also Larkin, *Vice President as Head of a White House Clemency Office*, *supra* note 109 (“With the exception of President Barack Obama, who granted a large number of commutations to drug offenders, over the past few decades chief executives have granted clemency far less frequently than in years past.”).

¹³⁹ See Obama, *supra* note 80, at 815.

¹⁴⁰ See *id.* at 838.

¹⁴¹ See Memorandum from the Attorney General to the U.S. Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

¹⁴² *Id.*

¹⁴³ See Luke C. Beasley & William D. Ferraro, *How the Obama Administration Used Retroactivity to Advance Its Sentencing Priorities*, 53 HARV. C.R.-C.L. L. REV. 259, 266 (2018).

sentences.¹⁴⁴ Specifically, applicants must have met most, if not all, of the following eligibility criteria:

- (i) They are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
- (ii) They are non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
- (iii) They have served at least 10 years of their prison sentence;
- (iv) They do not have a significant criminal history;
- (v) They have demonstrated good conduct in prison; and
- (vi) They have had no history of violence prior to or during their current term of imprisonment.¹⁴⁵

Under the Clemency Initiative's process, petitioners submitted a completed eligibility survey for screening.¹⁴⁶ Then, if a petitioner appeared to meet the eligibility criteria, a *pro bono* attorney assisted the petitioner in filing an application with the OPA, and the OPA reviewed the application and made recommendations to the Deputy Attorney General.¹⁴⁷ Subsequently, the Deputy Attorney General reviewed the OPA's recommendations and determined if the White House Counsel's Office should review the clemency recommendation.¹⁴⁸

By and large, President Obama's Clemency Initiative was unsuccessful.¹⁴⁹ From the inception of the program in 2014 until President Obama left office in 2019, approximately 24,000 federal prisoners sought relief through the Clemency Initiative.¹⁵⁰ The DOJ made recommendations to the White House on 16,776 drug offender clemency petitions but the majority of the recommendations were denials.¹⁵¹ At the end of President Obama's second

¹⁴⁴ See CLEMENCY INITIATIVE, *supra* note 17.

¹⁴⁵ *Id.*; *contra Mercy Lottery*, *supra* note 136, at 27 (concluding only 5.1% of successful clemency applicants met all six eligibility criteria).

¹⁴⁶ See *Mercy Lottery*, *supra* note 136, at 23.

¹⁴⁷ See *id.* at 23-24.

¹⁴⁸ See *id.* at 24.

¹⁴⁹ See *id.* at 3.

¹⁵⁰ See *id.* at 3, 6.

¹⁵¹ See *Clemency Initiative*, U.S. DEP'T JUSTICE, <https://www.justice.gov/pardon/clemency-initiative>, (last updated Dec. 11, 2018); see also Liliana Segura, *Obama's Clemency Problem – And Ours*, INTERCEPT (Dec. 24, 2016, 9:31 AM),

term, 7,881 clemency petitions were yet to be reviewed—including 3,469 pending petitions from drug offenders—and only 1,715 clemency petitions were granted through the Clemency Initiative.¹⁵²

The Commission reported that many applicants seemed to meet all of the Clemency Initiative's eligibility criteria, but only three percent of drug offenders were actually granted clemency through the program.¹⁵³ The Center on the Administration of Criminal Law at NYU Law School ("NYU Law School") stated that many petitioners "were ideal candidates who were, for reasons unknown, passed over by the [Clemency] Initiative."¹⁵⁴ For instance, Alice Marie Johnson's clemency petition was denied twice before the launch of the Clemency Initiative and a third time by the Clemency Initiative.¹⁵⁵

The NYU Law School suggested that the Clemency Initiative's poor results were attributable to several factors.¹⁵⁶ First, the Clemency Initiative was a bureaucratic maze that involved many levels of review during the initial screening and application process before the OPA reviewed the clemency petition, and an additional six levels of review before the clemency petition reached President Obama.¹⁵⁷ Second, the Clemency Initiative's eligibility criteria was vulnerable to subjective review.¹⁵⁸ For example, what constituted a significant criminal history, history of violence, or a low-level drug offense was undefined and left open to interpretation.¹⁵⁹ This subjective analysis might have contributed to the lengthy review process.¹⁶⁰ Third, the Clemency Initiative was overwhelmed by the large number of clemency petitions and

<https://theintercept.com/2016/12/24/obamas-clemency-problem-and-ours/>. In 2016, the Intercept reported that President Obama rejected approximately 14,000 petitions and that number likely increased between 2016 and 2017. *See id.*

¹⁵² *See Clemency Initiative*, *supra* note 152.

¹⁵³ *See Hardnett*, *supra* note 78.

¹⁵⁴ OBAMA ADMINISTRATION'S CLEMENCY INITIATIVE, *supra* note 136 at 3.

¹⁵⁵ *See Law*, *supra* note 4; *see also Johnson*, *supra* note 2.

¹⁵⁶ *See OBAMA ADMINISTRATION'S CLEMENCY INITIATIVE*, *supra* note 136 at 3.

¹⁵⁷ *See id.* at 24-25. There were up to five internal levels of review, and this was a time-consuming process because the pro bono attorneys needed to track down hard copy presentence reports for some petitioners or request these reports from the Bureau of Prisons. *Id.* The Clemency Initiative "estimated that it took an attorney an estimate of roughly 30 days to complete a full applicant review." *Id.*

¹⁵⁸ *See id.* at 25.

¹⁵⁹ *See id.*

¹⁶⁰ *See generally id.*

lacked resources.¹⁶¹ Deborah Leff resigned in January 2016 out of frustration, because her office was asked to review thousands of petitions with inadequate staffing.¹⁶² Fourth, clemency in general does not mirror judicial transparency and this was a feature of the Clemency Initiative.¹⁶³ None of the actors involved in the Clemency Initiative provided a rationale for clemency denials and petitioners did not have the right to an appeal.¹⁶⁴ Rather, “petitioners and their attorneys [were] left to guess at reasons for the denial,”¹⁶⁵ and “[t]he words ‘random’ and ‘lottery’ that had temporarily disappeared from conversations about clemency began to surface as soon as the grants were announced.”¹⁶⁶

Yet, the problems with the Clemency Initiative stretched beyond bureaucracy to issues of inherent (or subconscious bias) and the perceived conflict between the DOJ and the OPA.¹⁶⁷

A study by NYU Law School opined that the success of the Clemency Initiative was less likely because it was controlled by the DOJ.¹⁶⁸ Deputy Attorney General Sally Yates changed many of Deborah Leff’s positive clemency recommendations to negative and denied Leff access to the White House Counsel’s Office to explain her recommendations.¹⁶⁹ It seems that Yates’ decisions were influenced by her worldview where she believed that public safety trumped early release of federal inmates and retroactive application of amended sentencing laws.¹⁷⁰

In sum, President Obama attempted to use his clemency power to achieve mass commutations, but the totality of his efforts left

¹⁶¹ *See id.* at 24.

¹⁶² *See id.* Nearly 10,000 petitions. *See id.*; *see also* Letter from Deborah Leff, Pardon Att’y, U.S. Dep’t of Justice, to Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice (Jan. 15, 2016) [hereinafter Deborah Leff Resignation Letter].

¹⁶³ *See* OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE, *supra* note 136, at 22.

¹⁶⁴ *See id.*; *see also* Hardnett, *supra* note 78.

¹⁶⁵ OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE, *supra* note 136, at 22.

¹⁶⁶ Margaret Love, *Clemency is Not the Answer (Updated)*, COLLATERAL CONSEQUENCES RESOURCE CTR. (July 17, 2015), <https://ccresource-center.org/2015/07/17/clemency-is-not-the-answer-updated/>.

¹⁶⁷ *See* OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE, *supra* note 136, at 23-24.

¹⁶⁸ *See generally id.* at 3.

¹⁶⁹ *See* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L. J. F. 791, 807 (2019). “Leff said, ‘I believe that prior to making the serious and complex decisions underlying clemency, it is important for the president to have a full set of views.’” *Id.* *See* OBAMA ADMINISTRATION’S CLEMENCY INITIATIVE, *supra* note 136, at 25; *see also* Deborah Leff Resignation Letter, *supra* note 163.

¹⁷⁰ *See* Hopwood, *supra* note 170, at 807-08; *see also supra* text accompanying note 52.

thousands of petitioners in agony and hopeful that another president would be merciful.¹⁷¹

D. President Donald J. Trump's Approach to Clemency

Despite media reporting that President Trump was reviving the 'War on Drugs,' his criminal justice policies and views on clemency remained unclear in the early part of his term.¹⁷² Though President Trump expressed an interest in criminal justice reform, he did not indicate whether he would revive President Obama's Clemency Initiative or how exactly he would handle pre-FSA sentences.¹⁷³ Further, the DOJ did not indicate whether clemency was a priority for the Trump Administration, or the types of cases that would be prioritized for clemency review.¹⁷⁴ There was uncertainty among first-time, low-level, and nonviolent drug offenders who were waiting in federal prison, including inmates who had submitted clemency petitions during the Obama-era.¹⁷⁵

The angst over criminal justice reform at the outset of President Trump's tenure stemmed from Attorney General Jeff Sessions rescinding all prior DOJ policies that helped shape the Clemency Initiative.¹⁷⁶ Sessions' charge to federal prosecutors to "pursue the most serious readily provable offense[s]," ran counter to President

¹⁷¹ See Hardnett, *supra* note 78.

¹⁷² See generally Sari Horwitz, *How Jeff Sessions wants to bring back the war on drugs*, WASH. POST (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.783beb29119b.

¹⁷³ See e.g. Van Jones, *Kushner's effort to sway Trump on prison reform is smart*, CNN, <https://www.cnn.com/2018/01/11/opinions/criminal-justice-reform-trump-sessions-van-jones-opinion/index.html> (last updated Jan. 11, 2018, 6:12 PM); see also Doug Baldwin et al., *N.F.L. Players to Trump: Here's Whom You Should Pardon*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/opinion/trump-pardon-nfl-players.html?login=email&auth=login-email>.

¹⁷⁴ See Hardnett, *supra* note 78.

¹⁷⁵ See Christopher Ingraham, *It's not just Alice Marie Johnson: Over 2,000 federal prisoners are serving life sentences for nonviolent drug crimes*, WASH. POST (June 6, 2018, 4:44 PM), https://www.washingtonpost.com/news/wonk/wp/2018/06/06/its-not-just-alice-marie-johnson-over-2000-federal-prisoners-are-serving-life-sentences-for-nonviolent-drug-crimes/?utm_term=.4459b505a503. As of 2016, 1,907 federal inmates were serving life sentences for nonviolent drug offenses, and 103 serving sentences of fifty years or more without the possibility of parole. See *id.*

¹⁷⁶ See *supra* texts accompanying notes 135-38.

Obama's criminal justice policies.¹⁷⁷ Besides, Sessions did not provide any exceptions or additional considerations for first-time, low-level, and nonviolent drug offenders, except a general acknowledgement that federal prosecutors should exercise good judgment when considering a departure from this new policy.¹⁷⁸

Despite the uncertainty and concern, President Trump did exercise his clemency power in a limited number of circumstances, granting seven pardons and commuting four prison sentences during the first year and a half of his presidency.¹⁷⁹ Nevertheless, President Trump's approach to clemency was unconventional and described as a solo act.¹⁸⁰ President Trump bypassed the OPA and the DOJ and pushed White House officials to submit names for clemency consideration to him directly.¹⁸¹ A White House source commented that the President is "doing it his way and he likes seeing how quick the process has been."¹⁸² Others criticized President Trump's pardons as "scattershot, driven by television segments, celebrities, friends, and White House advisers who have pressed their cases."¹⁸³

However, President Trump's approach was not an anomaly.¹⁸⁴ Amy Ralston Povah benefited from media outcry when President

¹⁷⁷ Memorandum from the Attorney General on the Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

¹⁷⁸ See *id.* In another memo to prosecutors, dated March 20, 2018, Sessions urged prosecutors to consider the death penalty for certain drug-related offenses in light of the opioid epidemic. See Memorandum from the Attorney General on Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions (Mar. 20, 2018), <https://www.justice.gov/file/1045036/download>.

¹⁷⁹ See *Pardons Granted by President Donald Trump*, U.S. DEPT JUST., <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> (last visited Dec. 29, 2019); see also *Commutations Granted By President Donald Trump (2017 - Present)*, U.S. DEPT JUST., <https://www.justice.gov/pardon/commutations-granted-president-donald-trump-2017-present> (last visited Dec. 29, 2019); see also John Santucci, *Trump's 'solo act' Push for Presidential Pardons Likely to Grow, WH officials say*, ABC NEWS (June 7, 2018, 9:01 AM), <https://abcnews.go.com/US/trumps-solo-act-push-presidential-pardons-grow-wh/story?id=55716257>.

¹⁸⁰ See generally Santucci, *supra* note 180.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See Douglas A. Berman, *Prez Trump reportedly "obsessed" with pardons and "may sign a dozen or more in the next two months"*, SENT'G L. & POL'Y (June 5, 2018), https://sentencing.typepad.com/sentencing_law_and_policy/2018/06/-prez-trump-reportedly-obsessed-with-parsons-and-may-sign-a-dozen-or-more-in-the-next-two-months.html; see also Jensen, *supra* note 2.

¹⁸⁴ See Law, *supra* note 4.

Clinton, in 2000, commuted Povah's twenty-four-year prison sentence.¹⁸⁵ Povah was sentenced for her minimal involvement in her husband's large-scale ecstasy drug operation.¹⁸⁶ Arkansas Senators and community members advocated for Povah, which caught the attention of *Glamour* magazine in 1999,¹⁸⁷ and the publicity was instrumental in her release from prison a year later.¹⁸⁸ Povah, who is now the president of CAN-DO Foundation, concedes that media publicity is important in the clemency process and she provides a platform to bring awareness to women seeking clemency through the CAN-DO website, and fielding their stories to media reporters.¹⁸⁹

Moreover, both President Bush and President Obama relied heavily on the DOJ, which proved ineffective at the least, and disastrous at the most.¹⁹⁰ So, it is surprising that President Trump was not applauded when he chose to sidestep this broken system.¹⁹¹ Also, President Trump's approach is not farfetched considering former Deputy Attorney General David W. Ogden believes the "standards [for clemency] should come from the president [and] not from the pardon's office."¹⁹² Furthermore, Gregory Craig, who was President Obama's White House Counsel, believes clemency petitions should be reviewed by "an independent commission of former judges, prosecutors, defense attorneys, and representatives of faith-based groups. The commission would make recommendations directly to the President."¹⁹³

President Trump adopted a modified approach when he solicited more names for pardons and commutations.¹⁹⁴ White House Counsel Donald McGahn compiled a list of over 3,000 names sourced

¹⁸⁵ *See id.*; see also Amy Ralston Povah, *A presidential pardon saved my life. Here's why Obama should pardon hundreds more women*, SPLINTER (Sept. 9, 2015, 12:56 PM), <https://splinternews.com/a-presidential-pardon-saved-my-life-heres-why-obama-sh-1793850622>.

¹⁸⁶ *See* Law, *supra* note 4. Povah's husband was sentenced to only six years because he cooperated with authorities and informed them of Povah's involvement. *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*; see also Povah, *supra* note 186.

¹⁹⁰ *See* Linzer, *supra* note 122; see also *supra* Part III.A., III.B.

¹⁹¹ *See generally* Benner, *supra* note 135.

¹⁹² *See* Linzer, *supra* note 122.

¹⁹³ *See id.*

¹⁹⁴ *See* sources cited *supra* notes 190-93.

from the CAN-DO Foundation and FAMM;¹⁹⁵ Kim Kardashian-West recommended other nonviolent criminals as possible candidates for clemency;¹⁹⁶ and Alveda King, the niece of Martin Luther King Jr., submitted the names of 100 inmates to the White House.¹⁹⁷ President Trump even invited suggestions from NFL players in the midst of a protest against criminal and racial injustice and police brutality.¹⁹⁸ However, for the latter part of 2018, the White House remained mum concerning impending commutations or pardons.¹⁹⁹ Perhaps President Trump had set his sights on something greater and more effective—legislative reform.

IV. A BETTER SOLUTION—LEGISLATION

A. *The First Step—The First Step Act*

In 2015, Margaret Colgate Love, who served as the Pardon Attorney from 1990 to 1997, accurately predicted President Obama's commutations through the Clemency Initiative would not make a significant dent in the number of inmates incarcerated in federal prison because the Clemency Initiative's objectives were too

¹⁹⁵ See Douglas A. Berman, *NY Gov closes out 2018 with clemency grants*, SENT'G L. & POL'Y (Dec. 31, 2018), https://sentencing.typepad.com/sentencing_law_and_policy/2018/12/ny-gov-closes-out-2018-with-clemency-grants.html; see also Steven Nelson, *MLK niece urges clemency 'tidal wave' after giving White House list of names*, WASH. EXAMINER (Aug. 23, 2018), <https://www.washingtonexaminer.com/news/white-house/mlk-niece-urges-clemency-tidal-wave-after-giving-white-house-list-of-names>.

¹⁹⁶ See Douglas A. Berman, *Kim Kardashian West pushes White House for more drug sentence commutations*, SENT'G L. & POL'Y (Jun. 14, 2018), http://sentencing.typepad.com/sentencing_law_and_policy/2018/06/kim-kardashian-west-pushes-white-house-for-more-drug-sentence-commutations.html.

¹⁹⁷ See Nelson, *supra* note 196.

¹⁹⁸ See Baldwin, *supra* note 174. The NFL players commended President Trump for commuting Alice Marie Johnson's sentence, but resisted the notion that a handful of pardons could correct systematic racial and criminal injustice. See *id.* According to the NFL players "[t]hese injustices are so widespread as to seem practically written into our nation's DNA. We must challenge these norms, investigate the reasons for their pervasiveness and fight with all we have to change them. That is what we, as football players, are trying to do with our activism." See *id.*; see also Gabriel Sherman, *"He Hate, Hate, Hates It": Sessions Fumes as Kushner Gets Pardon Fever*, VANITY FAIR (June 13, 2018), <https://www.vanityfair.com/news/2018/06/sessions-fumes-as-kushner-pushes-pardons>. In June 2018, Vanity Fair reported that Jared Kushner was "gearing up for a big pardon push." See *id.*

¹⁹⁹ See *Pardons Granted by President Donald Trump*, U.S. DEPT. JUST., <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> (last visited Jan. 5, 2019).

voluminous to accomplish before Obama left office.²⁰⁰ Love accurately stated, “the problem of unjust sentences is simply too large and too pervasive to deal with through the clemency mechanism.”²⁰¹ Vanita Gupta, the former deputy legal director of the American Civil Liberties Union, found some merit in the Clemency Initiative, but believed executive clemency could not substitute for sentencing reform.²⁰² According to Gupta, clemency “[will not] bring relief to everyone who should see relief . . . [a]nd it’s not going to change some of the laws.”²⁰³

The weaknesses of clemency means it will not correct the consequences of federal mandatory minimum sentences.²⁰⁴ Clemency is too transient, unpredictable, and prone to inherent (or subconscious) biases.²⁰⁵ Clemency’s transient and unpredictable nature flows out of the fact that clemency is a presidential power, and its use changes with each administration.²⁰⁶ President Obama’s Clemency Initiative was a discretionary policy, not a change in law, meaning another administration with a different view regarding criminal justice is not obligated to continue President Obama’s criminal justice policies.²⁰⁷ The stark differences in approach between President Obama’s and President Trump’s use of clemency to affect federal prison sentences makes this concept clear.²⁰⁸ Love agrees. She notes, “there are philosophical as well as institutional and practical reasons why our justice system is built upon accountable judicial decision-making under statutory authority, and not upon the unstructured and unexplained discretion of a president exercising a plenary constitutional power.”²⁰⁹ The truth is that

²⁰⁰ See Love, *supra* note 167; see also *Biography*, L. OFF. MARGARET LOVE, <http://pardonlaw.com/biography/> (last visited Jan. 5, 2019).

²⁰¹ See Love, *supra* note 167.

²⁰² See Kara Brandeisky, *Three Things Obama’s New Clemency Initiative Doesn’t Do*, PROPUBLICA (Apr. 23, 2014, 6:15 PM), <https://www.propublica.org/article/three-things-obamas-new-clemency-initiative-doesnt-do>. Gupta believed that the Clemency Initiative’s criteria was sensible and that the clemency tool had been grossly underutilized. See *id.*

²⁰³ *Id.*

²⁰⁴ See generally *id.*

²⁰⁵ See *supra* Part III; see also Larkin, Jr., *supra* note 105, at 869.

²⁰⁶ See *supra* Part III.

²⁰⁷ See Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL’Y REV. 375 (2017).

²⁰⁸ See *supra* Part III.C-III.D.

²⁰⁹ See Love, *supra* note 167. Love argues that the use of clemency to correct unjust sentences minimizes the role of judges and Congress in sentencing reform. See *id.*

federal prisoners should not have to wait in limbo while a presidential administration determines whether and to what extent clemency is a priority.

President Obama admitted the clemency power was not a substitute for legislative reform.²¹⁰ He emphasized the “need to pass meaningful sentencing reform. No number of commutations will ever achieve lasting structural reform of our sentencing laws.”²¹¹ Two pieces of bipartisan legislation, the Smarter Sentencing Act of 2013 and Sentencing Reform and Corrections Act of 2015, were proposed during President Obama’s tenure, but did not become law.²¹² Jared Kushner had better success shortly after his appointment in the Trump Administration.²¹³ Within a year-and-a-half, Kushner presented the Former Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (“First Step Act”) to Congress.²¹⁴ The First Step Act was passed by the House of Representatives in May 2018, but faced opposition in the Senate on both sides of the aisle.²¹⁵

The initial version of the First Step Act contemplated rehabilitation and increased funding for prison rehabilitative programs by \$250 million over five years and prioritized improving prison conditions and reducing recidivism.²¹⁶ This version of the First Step Act did not address mandatory minimum sentences or retroactively apply the FSA to adjust pre-FSA sentences.²¹⁷ Some Democrats and Republicans opposed the First Step Act for this very reason—refusing to support a bill that did not include serious

²¹⁰ See Obama, *supra* note 80, at 855-56.

²¹¹ *Id.*

²¹² See Smarter Sentencing Act, H.R. 3382, 113th Cong. (2013); see also Sentencing Reform and Corrections Act, S. 2123, 114th Cong. (2015); see also Obama, *supra* note 80, at 855-56. The Smarter Sentencing Act and Sentencing Reform and Corrections Act were introduced during President Obama’s second term. See *id.*

²¹³ See *infra* notes 215-16.

²¹⁴ See German Lopez, *Congress’s Prison Reform Bill, Explained*, VOX, <https://www.vox.com/policy-and-politics/2018/5/22/17377324/first-step-act-prison-reform-congress> (last updated May 22, 2018, 6:18 P.M.).

²¹⁵ See First Step Act, H.R. 5682, 115th Cong. (2018); see also *Congress’s Prison Reform Bill, Explained*, *supra* note 215. The First Step Act was introduced to the House of Representatives on May 7, 2018, and the bill passed the House on May 22, 2018. See *id.*

²¹⁶ See *Congress’s Prison Reform Bill, Explained*, *supra* note 215. The goal of the rehabilitative programs was to facilitate federal inmates early release. See *id.*

²¹⁷ See *supra* Part I.

sentencing reform.²¹⁸ The bill was amended in November 2018 and broadened to include both prison and sentencing reform.²¹⁹ The amended bill amassed “the support of pivotal Republicans and Democrats in Congress, President Donald Trump’s senior White House advisors, and advocacy groups including the Brennan Center for Justice at NYU School of Law, and law enforcement groups.”²²⁰ The First Step Act was signed into law in late December 2018.²²¹

The sections of the First Step Act that directly impact first-time, low-level, and nonviolent drug offenders are: (i) section 402—the prospective expansion of the safety valve, which allows courts to depart from mandatory minimums when sentencing drug offenders;²²² (ii) section 102(b)—prerelease custody in the form of retroactive application of the new ‘good time credits’ formula;²²³ and

²¹⁸ See *Congress’s Prison Reform Bill, Explained*, *supra* note 215. Democratic Senators Cory Booker (NJ), Dick Durbin (IL), and Kamala Harris (CA) vehemently opposed the bill and urged other Democratic Senators to vote against it. See *id.* Republican Senate Judiciary Chair Chuck Grassley (R-IA), also opposed the bill because it did not include sentencing reform. See *id.*

²¹⁹ See *New Compromise on Federal Criminal Justice Reform Should Be Priority for Congress*, BRENNAN CTR. FOR JUST. (Nov. 13, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/new-compromise-federal-criminal-justice-reform-should-be-priority>.

²²⁰ See *id.*; see also *Congress’s Prison Reform Bill, Explained*, *supra* note 215.

²²¹ See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of the U.S.C.).

²²² See 18 U.S.C. § 3553 (f) (2020) (A drug offender will qualify for the expanded safety valve if:

(1) (A) defendant does not have “more than four criminal history points, excluding any criminal history points resulting from a 1-point offense . . . ; (B) a prior 3-point offense . . . ; and (C) a prior 2-point violent offense . . . ; (2) defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . ; (3) the offense did not result in death or serious bodily injury . . . ; (4) defendant was not an organizer, leader, manager, or supervisor [in the drug organization] . . . ; and (5) . . . defendant has truthfully provided to the Government all [relevant] information and evidence . . .”).

²²³ See Congressional Research Service, *The First Step Act of 2018: An Overview*, CRS, (Mar. 4, 2019), at 16. <https://fas.org/sgp/crs/misc/R45558.pdf>. A maximum of 54 days of good time credits for each year the sentence was imposed rather than served. *Id.*; see also U.S. Sentencing Commission, *Sentence and Prison Impact Estimate Summary*, https://www.usc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf. “Offenders with a sentence of more than one year but other than a term of imprisonment for life may receive credit towards the service of their sentence if they demonstrate ‘exemplary compliance with institutional disciplinary regulations.’” *Id.* Telephone Interview with Priya Raghavan, Counsel, Justice Program, Brennan Center for Justice at NYU School of Law (Jan. 30, 2019) (agreeing that in the aggregate the change to “good time credits” will positively impact the size of the prison population).

(iii) section 404—retroactive application of the FSA to pre-FSA sentences.²²⁴

Recent studies revealed that within seven months after the First Step Act was enacted, the DOJ released 3,100 federal prisoners on section 102(b) good time credits and Congress employed the judiciary to administer section 404 retroactive application of the FSA.²²⁵ In only nine months the courts granted 1,987 FSA sentence reductions.²²⁶ Plus, 1,100 federal inmates were released from confinement.²²⁷ The average FSA sentence reduction was from 253 months to 183 months and the reductions were made primarily for African Americans (91.2%) and Hispanics (4.2%).²²⁸ Already, the numbers confirm that legislative criminal justice reform promotes expediency, predictability, and stability.²²⁹ These very characteristics are incongruent with the flaws of using executive clemency to correct mass incarceration.²³⁰

The provisions of the First Step Act are laudable changes to sentencing laws that will affect thousands of federal inmates: 40,900 eligible for the prospective safety valve over the next twenty years; 142,448 eligible for prerelease custody as of May 2018; and 2,660

²²⁴ See Congressional Research Service, *supra* note 224, at 9.

²²⁵ See U.S. Dep't of Justice, *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System* (July 19, 2019), <https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>. Courts are now charged to exercise judicial discretion to determine if a petitioner should be granted an FSA sentence reduction after the petitioner has made a motion. See also *supra* note 54; see also American Bar Association, *First Step Act Already Shows Success* (Aug. 15, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august_2010_WL/first_step_act_article/. Judges have not abused this discretion. Compare Part III.C.

²²⁶ See U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, (Oct. 2019), at 5, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20191030-First-Step-Act-Retro.pdf>. Of those granted sentence reductions, 1,894 were sentenced from 1990 to 2000 and 84 from 2011-2013. See *id.* Compare Part III.C.

²²⁷ See Sadie Gurman, *Justice Department Set to Free 3,000 Prisoners as Criminal-Justice Overhaul Takes Hold*, WALL STREET J., <https://www.wsj.com/articles/justice-department-set-to-free-3-000-prisoners-as-criminal-justice-overhaul-takes-hold-11563528601> (July 19, 2019, 04:26 PM).

²²⁸ See U.S. Sentencing Commission, *supra* note 227, at 7, 9. Compare Part III.B, III.C.

²²⁹ See Claire Ashley Saba, *A Roadmap for Comprehensive Criminal Justice Reform to Employ Ex-Offenders: Beyond Title VII and Ban the Box*, 56 AM. CRIM. L. REV. 547, 566 (2019).

²³⁰ See *id.*

defendants eligible for retroactive application of the FSA as of May 2018.²³¹

The irony is that Alice Marie Johnson would still be in federal prison even after the passage of the First Step Act.²³² Presumably, Alice Marie Johnson would have met the substantive requirements of the safety valve because Congress made a huge misstep with its ‘first step’ when it failed to make section 402 retroactive.²³³ This error would have denied Alice Marie Johnson freedom.²³⁴

B. The Second Step—The Four Rs

So, what must be Congress’ second step? Legislative reform must encapsulate the “Four Rs” of sentencing reform: (1) Repeal, (2) Retroact, (3) Review, and (4) Revise.²³⁵

- (1) *Repeal* mandatory minimum sentences for federal drug offenders who are not serious drug felons in conjunction with the expanded safety valve criteria in 18 U.S.C.A. § 3553 (f).²³⁶

Since the passage of the SRA, mandatory minimums have facilitated easier convictions for first-time, low-level, and nonviolent drug offenders because mandatory minimums curtailed judicial discretion and emboldened prosecutors to charge crimes that resulted in unjust sentences.²³⁷ The primary issue with mandatory minimum sentences is that no two drug crimes are identical, but

²³¹ See U.S. Sentencing Commission, *supra* note 224, at 1.

²³² See *supra* notes 223-25. Alice Marie Johnson would not have qualified for prerelease custody because she was serving a life sentence.

²³³ See *supra* note 223.

²³⁴ See *supra* notes 223, 225-26.

²³⁵ This is a term coined by the author.

²³⁶ See 18 U.S.C. § 3553 (f) (2020); *supra* note 223. See also U.S. Sentencing Commission, *First Step Act*, (2019), https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf. A serious drug offense is one that is prohibited by 18 U.S.C. § 924(e)(2)(A) for which the defendant served a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense.

²³⁷ See *supra* Parts I and II. See also WEAPONIZING JUSTICE: MANDATORY MINIMUMS, THE TRIAL PENALTY, AND THE PURPOSES OF PUNISHMENT, 31 FED. SENT. R. 309, 310, 2019 WL 2453398.

mandatory minimums ignore this fact and institutes a one-size-fits-all sentencing scheme where standardized weight-based penalties are valued more than individualized sentencing.²³⁸ This argument is not devoid of historical context. In 1970 Congress passed the Comprehensive Drug Abuse Prevention and Control Act and repealed most drug-related federal mandatory minimum sentences.²³⁹ That 1970 Congress recognized the rigidity of mandatory minimum sentences and strived to establish “a more realistic, more flexible, and thus more effective system of punishment and deterrence of violations of the Federal narcotic and dangerous drug laws.”²⁴⁰ The House of Representatives stated, “severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make conviction . . . more difficult to obtain.”²⁴¹

Repealing mandatory minimum sentences for first-time, low-level, and nonviolent drug offenders makes sense. In 2017, “[o]nly 19.4% of federal drug cases involved a weapon. Almost two-thirds of persons convicted of offenses involving powder cocaine (63.8%) and marijuana (63.3%) had the lowest criminal history possible”²⁴² In addition, there exists an inverse correlative relationship between age and the recidivism rate.²⁴³ Mandatory minimums provide diminishing returns for first-time, low-level and nonviolent drug offenders because “people generally age out of crime. The 18-year-old who is given a long sentence for robbing a pharmacy is much less likely to engage in crime when he is 40.”²⁴⁴

²³⁸ See Molly M. Gill, *Let's Abolish Mandatory Minimums the Punishment Must Fit the Crime*, HUM. RTS., SPRING 2009, at 4, 5. The circumstances and drug offenders' criminal background, state of mind, and level of involvement varies from case to case.; see also Kevin Ring in USA Today: “I once wrote mandatory minimum laws. After ties to Abramoff landed me in prison, I know they must end.” FAMM (Oct. 17, 2018), <https://famm.org/kevin-ring-in-usa-today-i-once-wrote-mandatory-minimum-laws-after-ties-to-abramoff-landed-me-in-prison-i-know-they-must-end/>.

²³⁹ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 66 (2009).

²⁴⁰ Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941, 943 (2019).

²⁴¹ Tonry *supra*, note 240, at 71.

²⁴² Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 49 (2019).

²⁴³ See generally Haile, *supra* note 75, at 644.

²⁴⁴ See *id.*

It follows that, mandatory minimums are actually only suited for high-rate or extremely dangerous drug offenders.²⁴⁵

There is overwhelming support for the repeal of mandatory minimum sentences on every hand.²⁴⁶ FAMM likens repealing mandatory minimum sentences to turning off the spigot of an overflowing bathtub and recommends that this should be the first step in criminal justice reform.²⁴⁷ Federal judges purport that mandatory minimums impose grave costs on the offender and the criminal justice system.²⁴⁸ One federal judge in Iowa stated, “in most of the over 1,000 congressionally-mandated mandatory minimum sentences that I have imposed over the past twenty-two years, I have stated on the record that they were unjust and too harsh.”²⁴⁹ Seventy-seven percent of the American public agreed that mandatory minimum sentences for non-violent drug offenders should be eliminated so that the judiciary can resume its traditional role of dispensing fair and just sentences commensurate to the crime.²⁵⁰

Further, Congress would not be alone in its repeal of mandatory minimum sentences. States have recognized the detrimental effects of mass incarceration on “prisoners, their families, and society” and have been proactive in tackling sentencing and prison reform.²⁵¹ Thus, state models can inform the federal solution for mandatory minimum sentences.²⁵²

²⁴⁵ See Michael Tonry, *Equality and Human Dignity: The Missing Ingredients in American Sentencing*, 45 *CRIME & JUST.* 459, 474 (2016).

²⁴⁶ See *infra* Part IV.B.1.

²⁴⁷ See Molly M. Gill, *The Paul-Leahy “Justice Safety Valve Act of 2013” S. 619: Preventing Lives and Money From Being Lost Down the Drain*, 26 *FED. SENT. R.* 94, 97 (2013) [hereinafter Paul-Leahy].

²⁴⁸ See Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 74 *N.Y.U. ANN. SURV. AM. L.* 277, 288-89 (2019).

²⁴⁹ *Id.* at 289.

²⁵⁰ See Christopher Ingraham, *Here’s how much Americans hate mandatory minimum sentences*, *WASH. POST* (Oct. 1, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/01/heres-how-much-americans-hate-mandatory-minimum-sentences/>.

²⁵¹ Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 *AM. CRIM. L. REV.* 1579, 1596 (2019).

²⁵² See Dartunorro Clark, *Massachusetts Has a Blueprint for What’s Next in Criminal Justice Reform*, *NBC NEWS* (Dec. 24, 2019), <https://www.nbcnews.com/politics/politics-news/massachusetts-has-blueprint-what-s-next-criminal-justice-reform-n1105911> (explaining that Massachusetts eliminated some mandatory minimum sentences for low-level drug offenders); see also Senate Approves Criminal Justice Reforms, *OKLA. ST. SENATE* (Apr. 17, 2018), http://www.oksenate.gov/news/press_releases/press_releases_2018/pr20180417a.htm (explaining that Oklahoma eliminated life without parole for drug possession with intent to distribute, distribution, manufacturing and trafficking

(2) *Retroactive application* for the expanded safety valve and the repeal of mandatory minimum sentences

Retroactivity is key in order to promote fairness in sentencing reform.²⁵³ It is inequitable that “two individuals who commit the exact same offense should . . . receive different punishments merely because they are sentenced on different dates.”²⁵⁴ An approach that allows only prospective reforms weighs the date of sentencing more heavily than the conduct and characteristics of the defendant.²⁵⁵

The Brennan Center for Justice commended Congress for its significant first step after the passage of the First Step Act but recognized that the bill represented a compromise of a compromise because most of the sentencing reform changes were not given retroactive effect when compared to legislation proposed during the Obama Administration.²⁵⁶ Specifically, the Sentencing Reform and Corrections Act of 2017 expanded the federal safety valve for low-level drug offenders (like the First Step Act) and made the change retroactive.²⁵⁷ The Commission estimated that the retroactive provisions of the Act would cause 12,000 federal prisoners to be eligible for sentence reductions.²⁵⁸

When Congress created the drug offense safety valve in 1994 it intended to address the concern that “many first-time, low-level, and nonviolent drug offenders were receiving mandatory minimums that did not fit them or their crimes.”²⁵⁹ Today, the safety

and many other mandatory minimum sentences).; *see also* *FAMM Praises Maryland Leaders for Eliminating Mandatory Minimums for Low-Level Drug Offenders*, FAMM (Apr. 12, 2016), <https://famm.org/famm-praises-maryland-leaders-for-eliminating-mandatory-minimums-for-low-level-drug-offenders/> (explaining that Maryland passed the Justice Reinvestment Act in 2016 which repealed mandatory minimum sentences for low-level drug offenders, expanded the existing safety valve, and made the changes retroactive so that low-level offenders can petition for revised and reduced sentences).

²⁵³ *See* Haile, *supra* note 75, at 640-42.

²⁵⁴ *Id.* at 640.

²⁵⁵ *See id.*

²⁵⁶ *See* Raghavan, *supra* note 224.

²⁵⁷ *See S. 1917: Sentencing Reform and Corrections Act of 2017 (115th Congress)*, FAMM (Apr. 27, 2018), <https://famm.org/s-1917-sentencing-reform-corrections-act-2017-115th-congress>.

²⁵⁸ *See* Haile, *supra* note 75, at 641. This is likely the sum total for *all* of the retroactive provisions of the Act.

²⁵⁹ *See* Paul-Leahy, *supra* note 248 at 94.

valve is an important feature of federal sentencing because it allows this category of federal drug offenders to escape prison sentences that do not match their crimes and level of culpability.²⁶⁰ But, when Congress failed to make section 402 retroactive in the First Step Act, it maintained the status quo for defendants like Alice Marie Johnson and left thousands in federal prison.²⁶¹ So, it is necessary to make a sentencing reform bill retroactive to expedite “the reduction of the federal prison population, and [correct] . . . unwarranted disparities.”²⁶²

The retroactive application of the repeal of mandatory minimum sentences for first-time, low-level, and nonviolent drug offenders would have a tremendous impact on the federal prison population while also incurring a negligible impact on public safety.²⁶³ A decrease in the prison population does not necessarily result in an increase in the crime rate.²⁶⁴ The Federal Bureau of Prisons reported that, as of December 26, 2019, there were 175,858 inmates housed in federal prison.²⁶⁵ Of the total federal inmates, 58.3% and 16.6% were serving original sentences from five to twenty years, and twenty years to life imprisonment respectively.²⁶⁶ Of the total federal inmates, 73,784 (or 45.3%) were serving time for drug offenses.²⁶⁷ Therefore, “any efforts to reduce federal incarceration should start with drug offenses.”²⁶⁸

- (3) *Judicial Review* of drug offender petitions, and (4) *Revise* sentences on account of the retroactive expanded safety valve and repealed mandatory minimum sentences and in

²⁶⁰ *See id.* at 94, 97.

²⁶¹ *See supra* note 176.

²⁶² Haile, *supra* note 75, at 640.

²⁶³ *See Column: 5 charts show why mandatory minimum sentences don't work*, PBS (June 1, 2017, 11:45 A.M.), <https://www.pbs.org/newshour/politics/5-charts-show-mandatory-minimum-sentences-dont-work>.

²⁶⁴ *See Leipold, supra* note 252, at 1595-96.

²⁶⁵ *See Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last updated Dec. 26, 2019).

²⁶⁶ *See Sentences Imposed*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last updated Dec. 21, 2019).

²⁶⁷ *See Offenses*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Dec. 28, 2019). The percentage of federal inmates for other categories ranged from 0.2% to 19%. *Id.*

²⁶⁸ Ryan King et al., *How to reduce the federal prison population*, URBAN INST., (Oct. 2015) <http://apps.urban.org/features/reducing-federal-mass-incarceration/>.

accordance with 18 U.S.C.A. § 3582 (c)(1)(B) and 18 U.S.C.A. § 3553 (a)²⁶⁹

The retroactive application of the FSA marks a shift of the balance of power from prosecutors to the judiciary where judges can exercise discretion and grant sentence reductions considering 18 U.S.C.A. § 3553 (a) criteria.²⁷⁰ It will be the same effect with this proposed solution to ‘repeal’ and ‘retroact.’

The Commission’s most recent amendment to the Guidelines for drug offenses indicate courts can handle “resentencing with relative ease” when it does not need to engage in “backward-looking factual determinations or . . . complicated legal analysis.”²⁷¹ Amendment 782, also known as “Drugs Minus Two” went into effect in November 2014 and the change was made retroactive.²⁷² The role of the judiciary in the execution of Amendment 782 illustrated that judges are neither ineffective nor inefficient in administering sentence reductions based on retroactive sentencing reform.²⁷³ Federal judges granted over 30,000 sentence reductions with an average sentence reduction of 25 months.²⁷⁴ Similarly, the proposed second step retroactive solutions can be implemented by foregoing prosecutorial, evidentiary, and other investigative inquiry, and embracing the Guidelines ranges to sentence first-time, low-level, and nonviolent drug offenders.²⁷⁵ Simply, the judiciary can “recalibrate the offender’s sentence within a new sentencing range, as courts successfully did when implementing Amendment 782.”²⁷⁶

²⁶⁹ See 12 U.S.C.A. § 3553; see also 18 U.S.C.A. § 3582 (c)(1)(B).

²⁷⁰ See 12 U.S.C.A. § 3553.

²⁷¹ Nathaniel W. Reisinger, *Redrawing The Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality*, 54 HARV. C.R.-C.L. L. REV. 299, 304 (2019); see also *2014 Drug Amendment*, U.S. SENT’G COMMISSION, <https://www.ussc.gov/topic/2014-drug-amendment>.

²⁷² Reisinger, *supra* note 272, at 304.

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.* at 312.

²⁷⁶ See *id.*

CONCLUSION

Though the Framers provided broad discretion to the President to exercise the clemency power, one cannot imagine the Framers intended clemency to replace the role of the legislature to correct inequities in the criminal justice system.²⁷⁷ Rather, the clemency tool should be used in extenuating and individualized circumstances when the law fails to effectuate justice. The evidence reveals a legislative solution that institutes retroactive sentencing reform is a more viable solution than clemency to solve America's mass incarceration problem. Certainly, this is true reform—and clemency alone could not achieve the desired results. While Congress took a solid first step towards legislative reform with the First Step Act, strong second steps must come next. The four Rs—Repeal, Retroact, Review, and Revise—should be the core of the next legislative reform.

²⁷⁷ See James Pfiffner, *Pardon Power*, HERITAGE, <https://www.heritage.org/constitution/#!/articles/2/essays/89/pardon-power>.