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Brown v. Plata: Renewing the Call to End Mandatory Minimum Sentencing

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BROWN V. PLATA: RENEWING THE CALL TO END
MANDATORY MINIMUM SENTENCING

*Steven Nauman**

Abstract

After more than twenty years of litigation, the United States Supreme Court finally determined whether California’s overcrowded prison system created a constitutional violation in *Brown v. Plata*. With prisons and jails across the country operating at well over 100% capacity, the Court concluded what advocates had been screaming for over a decade: prison overcrowding cannot be tolerated, and the only remedy is to reduce prison populations. What the Court failed to resolve, however, was what the primary cause of prison overcrowding is and how states and the federal government are supposed to comply with capacity expectations amid concerns for public safety and tough-on-crime politics.

This Note explores the most significant cause of prison overcrowding in the United States: mandatory minimum sentencing. Part I examines the evolution of mandatory minimum sentencing schemes and how the United States has arrived at the situation it finds itself in today. Part II discusses the current state of prison overcrowding in the United States and its economic implications. Part III analyzes how the Supreme Court’s ruling in *Brown v. Plata* relates to mandatory minimum sentences. Finally, Part IV suggests solutions to our mandatory minimum mayhem. Overall, this Note offers the unavoidable conclusion that mandatory minimum sentencing in the United States must end.

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* J.D. expected May 2013, University of Florida Levin College of Law; B.A. 2008, University of Florida. I dedicate this Note to my Mom, Marcia, my Dad, Mark, and to all of my friends and family who have been there for me no matter what.

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INTRODUCTION

With almost 2.3 million inmates (representing 743 inmates per 100,000 citizens), the United States jails the largest share of its population in the world. Unsurprisingly, this zeal for incarceration has led to overcrowding at many federal, state, and local jails and prisons. At the end of 2008, the federal prison system was operating at 135% capacity. At the same time, twenty-eight states and seventeen of the nation’s largest counties were operating at over 100% capacity, while many more flirted with overcrowding. The numbers continue to soar, and with them the consequences: violence, disease, civil rights violations, and budgetary costs, to name a few.

In the summer of 2011, the United States Supreme Court addressed California’s dire prison overcrowding situation in *Brown v. Plata*.¹ The Court ultimately determined that conditions at California’s overpopulated prisons had become so horrendous that the only appropriate remedial measure was to require the State to drastically reduce its number of prisoners.² California is not the only state suffering from an enormously overpopulated prison system. Indeed, states across the country face similar dilemmas.

What the Court failed to address, however, was how California (and other states) are to accomplish the unenviable task of relieving its overcrowded prisons. The most obvious solution, of course, is that a certain number of prisoners must be released from prison in some manner—whether through parole, community control, or reduction in sentence to time served. Unfortunately, this solution is only cosmetic at

1. 131 S. Ct. 1910, 1922 (2011).
 2. *Id.* at 1947.

best. While releasing prisoners might meet the facial requirements of the Court's ruling in *Brown v. Plata*, the prison-overcrowding problem will only resurface unless something is done on a systemic level.

Instead of asking how to go about releasing prisoners in order to reach a constitutionally permissible capacity, one should ask why American prisons are overcrowded in the first place. This Note explores the most significant cause of prison overcrowding in the United States: mandatory minimum sentencing. Part I examines the evolution of mandatory minimum sentencing schemes and how we have arrived at the situation we are in today. Part II discusses the current state of prison overcrowding in the United States and its economic implications. Part III analyzes how the Supreme Court's ruling in *Brown v. Plata* relates to mandatory minimum sentences. Finally, Part IV offers solutions to our mandatory minimum mayhem.

I. INDETERMINATE VS. DETERMINATE SENTENCING: AMERICA'S INCREASING OBSESSION WITH PUNISHMENT

A. *Indeterminate Inadequacy*

To fully realize the implications of determinate (or mandatory minimum) sentencing, one must understand how mandatory minimum schemes have come to dominate American sentencing jurisprudence. Prior to mandatory minimum sentencing as it exists today,³ convicted

3. It is important to note initially that mandatory minimum sentences have always existed in some form for certain offenses throughout American history. At our country's inception, the bulk of mandatory minimum sentencing was aimed at the most egregious crimes against our newly formed republic: treason, piracy, insurrection, riot, and unlawful assembly. *See, e.g.*, Crimes Act of 1790, ch. 9, 1 Stat. 112 (punishing treason and piracy with mandatory death penalty); Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596 (punishing insurrection, riot, and unlawful assembly with mandatory minimum six month prison term); Act of Jan. 30, 1799 (Logan Act), ch. 1, 1 Stat. 613 (punishing undermining U.S. interests with mandatory minimum six month prison term). Mandatory minimum punishments similarly continued to target treason and insurrection during and after the Civil War. *See, e.g.*, Act of July 31, 1861, ch. 33, 12 Stat. 284 (punishing conspiracy to overthrow United States government with mandatory six month prison term); Act of Feb. 13, 1862, ch. 25, 12 Stat. 339 (punishing spies against the Union with mandatory death penalty); Act of Feb. 25, 1863, ch. 60, 12 Stat. 696 (punishing correspondence with the Confederacy with mandatory minimum six month prison term); Act of July 1, 1864, ch. 204, 13 Stat. 343 (punishing desertion from U.S. Navy with mandatory minimum six month prison term). Later in the Nineteenth Century, mandatory minimum punishments began targeting slave trafficking along with various revenue offenses such as tax evasion, tax fraud, and counterfeiting. *See, e.g.*, Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (imposing mandatory minimum five year prison term for counterfeiting notes); Act of July 20, 1868, ch. 186, 15 Stat. 125 (imposing mandatory minimum two year prison term for tax stamp fraud). And during the Prohibition Era, mandatory minimum punishments targeted the manufacture and sale of alcohol. *See, e.g.*, National Prohibition (Volstead) Act, Pub. L. No. 66-66, 41 Stat. 305 (1919) (punishing second and subsequent convictions for manufacturing or selling alcohol with mandatory minimum one month prison term). However, it was not until

criminals were primarily punished with indeterminate sentences; the length of a sentence was determined during imprisonment rather than at the actual sentencing.⁴ While the sentencing judge would order the prison term to be served, a parole board or commission ultimately decided whether a prisoner could be released before the end of that term based on his behavior in prison.⁵ It was therefore possible for a prisoner to be released early for good behavior, completion of drug treatment programs, or at any point when he was no longer viewed as a threat to society.⁶ Alternatively, a prisoner would be required to complete the maximum sentence prescribed by law because of poor behavior or any other indication that he was not fit to reenter public life.⁷ Judges themselves also contributed to sentence variation based on political or regional ideological influences.⁸

The goal of indeterminate sentencing was, therefore, rehabilitation. It was believed that inmates should only spend the amount of time behind bars necessary to cure them of their criminal behavior.⁹ The concepts of blame and just deserts, although not completely rejected,

1951 that we began to see the Congress employing mandatory minimums to punish such a wide array of criminal activity. See U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 22 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm (noting that most mandatory minimum penalties now relate to drug offenses, firearms, identity theft, and child sex offenses). Furthermore, mandatory minimum punishments today are, in general, far lengthier, far harsher, and far more expansive than those in earlier eras. See *id.*

4. See JONATHAN P. CAULKINS ET AL., RAND DRUG POL'Y RESEARCH CTR., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 8 (1997).

5. *Id.*

6. See *id.*

7. See *id.*

8. See Neil Steinberg, *The Law of Unintended Consequences*, ROLLING STONE, May 5, 1994, at 33, reprinted in CRIMINAL SENTENCING 41, 43 (Robert Emmet Long ed., 1995) (noting that sentences for similarly situated defendants differed greatly between liberal and conservative regions of the country). Correcting this sentence disparity across the United States emerged as the overall theme of determinate sentencing's proponents and in the eventual evolution of the Federal Sentencing Guidelines. See Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 187 (1993) ("An unjustifiable variation existed in the sentences imposed by judges on similarly situated defendants."); CAULKINS ET AL., *supra* note 4, at 15 (speculating that sentencing disparity among similarly situated defendants resulted in part from emotional considerations such as a judge's character for sympathy or toughness).

9. See Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 455 (1928) ("[S]ociety . . . has an interest in the welfare of the individual life Even a socially harmful criminal has a right, in justice, to be treated with those instrumentalities that give him the greatest promise of self-improvement and rehabilitation.").

had no functional place under indeterminate sentencing.¹⁰ Indeterminate sentencing instead focused on “look[ing] forward, not backward” and pursuing the “more constructive goals”—as accomplished through the social sciences—of determining the roots of criminal activity within society as a whole and implementing appropriate social reforms and programs.¹¹ As a result, probation and parole quickly emerged as essential institutions to divert defendants away from prisons and into more rehabilitative activities such as drug treatment, educational, or vocational programs.¹²

Critics attacked indeterminate sentencing for not accomplishing the primary goals of incarceration. First, critics argued that indeterminate sentences did not effectively incapacitate career criminals or violent offenders.¹³ Judges gave reduced sentences to individuals who had never previously been convicted or who were willing to complete certain drug treatment or educational programs.¹⁴ Gain-time reductions were also awarded to inmates who sufficiently demonstrated good behavior while incarcerated, regardless of the inmate’s criminal history.¹⁵ And judges exercised even greater discretion by suspending prison sentences in favor of probation.¹⁶ Serious and repeat offenders, therefore, could spend only a fraction of the allowable sentence behind bars if they played the prison “game,” or even skip prison entirely by being placed on probation.¹⁷ Consequently, indeterminate sentences were thought not to adequately incapacitate criminals.

Coupled with inadequate incapacitation was inadequate rehabilitation—the admitted core of the indeterminate sentencing concept¹⁸—creating what critics called a “revolving door” prison

10. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 2 (2003).

11. *Id.*

12. See Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 175–77 (2003) (commenting on the rise of probation); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 814–15 (1975) (commenting on the rise of parole).

13. CAULKINS ET AL., *supra* note 4, at 14.

14. *Id.* at 15.

15. See Chet Kaufman, *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and its Ex Post Facto Implications*, 26 FLA. ST. U. L. REV. 361, 366–69 (1999).

16. Hatch, *supra* note 8, at 186.

17. Jill Smolowe, . . . *And Throw Away the Key*, TIME, Feb. 7, 1994, reprinted in CRIMINAL SENTENCING 46, 49 (Robert Emmet Long ed., 1995) (quoting Antoine McClarn, an inmate at the Cook County Jail).

18. See CAULKINS ET AL., *supra* note 4, at 8.

system.¹⁹ Opponents of indeterminate sentencing emphasized large rates of recidivism—the tendency of previously released prisoners to commit additional criminal offenses.²⁰ For example, an eleven-state study for 1983 revealed that 62.5% of state and federal prisoners who were released that year were rearrested within three years, and 46.8% of state and federal prisoners who were released were reconvicted within the same time period.²¹ Such enormous and intolerable rates, critics argued, suggested that the rehabilitative purpose behind indeterminate sentencing was not being accomplished.²² Instead, indeterminate sentencing released dangerous criminals into the general public only to wreak havoc and return to prison again.²³

19. See Smolowe, *supra* note 17, at 50–51; see also Hon. William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 305 (1993) (“In the 1970’s, members of the public and Congress denounced the ineffectiveness of the ‘revolving-door’ criminal justice system.”). A “revolving door” syndrome generally refers to a practice in which individuals return to a certain behavior or status, such as when children return in adulthood to live with their parents, when employees frequently gain and lose employment within the same occupation, or when recovering alcoholics relapse. See *Revolving Door Syndrome Definition*, BING DICTIONARY, <http://www.bing.com/Dictionary/Search?q=defin+e+revolving+door+syndrome> (last visited Jan. 6, 2013). In criminology, the term “revolving door” refers to the idea of recidivism, meaning that criminals are prone to return to criminal behavior after being punished. Specifically, the concept of a “revolving door” prison system was first popularized by a negative television advertisement that aired during the 1988 United States presidential campaign. In the famous advertisement, produced on behalf of Republican candidate George H. W. Bush’s campaign, prisoners casually enter and leave a prison facility through a common revolving door, as if at their leisure. See REVOLVING DOOR (Bush-Quayle ‘88, broadcast Oct. 5, 1988), available at <http://www.youtube.com/watch?v=PmwhdDv8VrM> (last visited Jan. 6, 2013). The advertisement was an attack on Democratic presidential nominee Governor Michael Dukakis’ policies, implying that dangerous criminals who were subjected to indeterminate sentencing schemes were being released into the general public before their full rehabilitation. See DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952–2008 120 (5th ed. 2010).

20. See ALEXIS M. DURHAM III, CRISIS AND REFORM: CURRENT ISSUES IN AMERICAN PUNISHMENT 143 (1994).

21. ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 1 (1989), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr83.pdf>. Other studies throughout the 1970s confirmed similar recidivism trends. See PETER B. HOFFMAN & BARBARA STONE-MEIERHOEFER, U.S. DEP’T OF JUSTICE, REPORTING RECIDIVISM RATES: THE CRITERION/FOLLOWUP ISSUE 1 (1978) (identifying two studies that calculated recidivism rates between 50% and 80% (citing U.S. CHAMBER OF COMMERCE, MARSHALING CITIZEN POWER TO MODERNIZE CORRECTIONS 5 (1972) and R.L. GOLDFARB & L.R. SINGER, AFTER CONVICTION 9 (1977))), available at <https://www.ncjrs.gov/pdffiles1/Digitization/49098NCJRS.pdf>.

22. See Robert Martinson, *What Works?: Questions and Answers About Prison Reform*, 35 THE PUB. INT. 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”); DURHAM, *supra* note 20, at 150 (proposing that “the standard measure of program failure is recidivism”).

23. See DURHAM, *supra* note 20, at 143.

As a result of inadequate incapacitation and rehabilitation, critics pointed to the overall inability to deter future crime as indeterminate sentencing's pervading deficiency.²⁴ The idea behind deterrence is that when a person commits a crime, he is sufficiently punished to dissuade him from committing the same crime again—or any other crime for that matter—in the future.²⁵ As a corollary, the general public also sees the criminal's punishment and is similarly dissuaded from committing that crime.²⁶

Critics asserted that the problem with indeterminate sentencing was that there were no certain punishments for any specific crime.²⁷ If a defendant won the favor of a lenient judge or played the game well enough, his punishment might not be too harsh; a potential sentence of years in prison could end up being only a few months, greatly undermining the punishment's intended deterrent effect.²⁸ The general public also could not be sure of what the punishment for a certain crime would be, thus making risk-taking individuals more likely to see only the economic benefit in a criminal activity.²⁹ Moreover, the criminal who had already been punished for a crime and had become familiar with the inner workings of the penal system would realize that the cost of his crime could be a lot less than previously thought.³⁰ The expected benefit of committing a crime, therefore, increases in light of the cost of a considerably more lenient punishment.

The ideal of justice lies at the core of the American psyche, but when it came to indeterminate sentencing, our appetite simply was not satiated. "Punishment is an end in itself," yet critics argued that indeterminate sentencing did not accomplish the penal and societal

24. See CAULKINS ET AL., *supra* note 4, at 9.

25. *Id.* at 13.

26. *Id.*

27. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 199–200 (1993) (citing H.R. REP. NO. 98-1030, at 38–40 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3221–23) (expressing Congress's disappointment with indeterminate sentencing's lack of deterrent effect).

28. See CAULKINS ET AL., *supra* note 4, at 13.

29. Professor Gary S. Becker notes that the basic rules of economics apply to an individual's choice to commit a crime. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 2–14 (Gary S. Becker & William M. Landes eds., 1974). Just like any economic decision, "a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities." *Id.* at 9. The expected utility of a crime increases as the knowledge of punishment decreases. *Id.* at 9–10. Logically, therefore, if an individual lacks sufficient knowledge regarding the punishment he may receive, he will be more likely to overemphasize the utility of committing a crime. Interestingly, Professor Becker also notes the problematic lack of economic research on the "industry" of crime, speculating that such "neglect" has caused enormous societal and financial costs. *Id.* at 3–4.

30. See Smolowe, *supra* note 17, at 49 (noting that it is general knowledge among inmates how lenient sentences can be).

needs for retribution.³¹ Judicial discretion in indeterminate sentencing led to judges not imposing sufficiently harsh sentences on convicted criminals.³² Likewise, criminals did not serve enough time behind bars for the sentences that they did receive.³³ Society's goal in exacting justice against the individual who commits a crime—appropriately offsetting the evil of the crime committed—was, therefore, left unsatisfied.

Although not a classic goal of penology,³⁴ critics also touted indeterminate sentencing's inability to induce cooperation with law enforcement.³⁵ The rationale is similar to that of indeterminate sentencing's inability to deter crime: if a criminal knows that he or she will be able to receive a reduced sentence based on good behavior or a lenient judge—or avoid a prison term altogether by receiving probation—why cooperate with prosecutors?³⁶ And upon release from prison, anyone who “snitched” loses credibility and potentially faces retribution.³⁷ The cost of cooperating with law enforcement, therefore,

31. W.H. Moberly, *Some Ambiguities in the Retributive Theory of Punishment*, 25 PROC. OF THE ARISTOTELIAN SOC'Y, NEW SERIES 289 (1925) (internal quotation marks omitted); see also IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 195 (W. Hastie trans., T&T Clark 1887) (1796) (“Juridical punishment . . . must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*.”).

32. CAULKINS ET AL., *supra* note 4, at 12.

33. *Id.*

34. See JOSHUA DRESSLER ET AL., *CASES AND MATERIALS ON CRIMINAL LAW* 30–48 (5th ed. 2009) (examining history's more dominant theories behind punishment).

35. CAULKINS ET AL., *supra* note 4, at 18–19.

36. *Id.*

37. “Snitch” is a pejorative slang term meaning to act as an informer (as in informing police about the crimes of others). Likewise, “snitch” may be used as a noun to describe someone who informs on the crimes of others. See *Snitch Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/snitch> (last visited Apr. 6, 2013). Common synonyms include “betray,” “disclose,” and “tell on.” See *Snitch Entry*, THESAURUS.COM, <http://thesaurus.com/browse/snitch> (last visited Apr. 6, 2013). “Snitching” strikes at the very heart of one of our most fundamental human values: loyalty. See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 27 (2003) (“[D]isdain for cooperators is deeply embedded in our culture. In the playground, our children learn that no one likes a tattletale. In school, they learn that Benedict Arnold was despised for his treason. In church, they learn that Judas's treachery led to Jesus's death. And these lessons are continually reinforced by portrayals of the snitch and the rat in movies, in literature, and in popular culture.”). For their sin of disloyalty, cooperators are often subject to various forms of social retribution, ranging from ostracization to physical retaliation or death. See *id.* at 29–30. Even our courts have recognized the extreme aversion with which we view cooperators. See, e.g., *United States v. Ming He*, 94 F.3d 782, 785 (2d Cir. 1996) (“Many view a cooperating witness as a betrayer or informer; unquestionably, such a person is not generally held in high regard.”); *Irving v. Dormire*, 519 F.3d 441, 451 (8th Cir. 2008) (recognizing that being labeled as a “snitch” or a “rat” carries dangerous implications).

tends to outweigh the benefits under an indeterminate system.³⁸ This mindset obviously leads to ineffective law enforcement, especially in preventing and prosecuting drug crimes, where finger-pointing provides a large basis for finding and producing evidence against offenders.³⁹

B. *Determinate Sentencing to the Rescue?*

Beginning in the 1970s, following numerous studies reporting on the inefficacy of indeterminate sentencing,⁴⁰ critics of indeterminate sentencing supposedly found their solution in determinate sentencing schemes.⁴¹ Familiarly known as mandatory minimum sentencing, determinate sentencing schemes are effectively the opposite idea of indeterminate schemes; based on statutory language, a person who commits an enumerated offense must serve a specified amount of time behind bars.⁴² There is no parole, no gain-time, and no early release; the statutory minimum as defined by the legislature *must* be served.⁴³

Mandatory minimum sentencing has thrived at both the federal and state levels. In 1984, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984, creating the United States Sentencing Commission.⁴⁴ The Commission was charged primarily with the duty “to establish sentencing policies and practices . . . including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes.”⁴⁵ The Commission’s magnum opus was the enactment of the Federal Sentencing Guidelines in 1987, a nondiscretionary tool with which federal judges were to determine any given offender’s punishment.⁴⁶ During this period, President Ronald Reagan, with the

38. See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 215–16 (2009).

39. CAULKINS ET AL., *supra* note 4, at 18.

40. See, e.g., Jack Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique*, 51 WASH. L. REV. 617 (1976); Robert E. Shepherd, Jr., *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS. U. L.J. 12 (1977).

41. See CAULKINS ET AL., *supra* note 4, at 11–12.

42. See *id.*

43. See *id.* There are, however, certain exceptions to this general rule. See *infra* note 189 and accompanying text.

44. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

45. U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1, available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited Apr. 6, 2013).

46. See U.S. SENTENCING COMM’N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL 406–08 (2011) [hereinafter GUIDELINES MANUAL], available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/2011_Guidelines_Manual_Full.pdf. The Federal Sentencing Guidelines essentially take the form of a grid that pits Offense Level on the vertical axis against Criminal History Category on the horizontal axis. *Id.* at 407. The Guidelines first assign a given

help of Congress, also ramped up the much-touted “War on Drugs” by passing unprecedented legislation that provided mandatory sentences for the possession, sale, and trafficking of various scheduled narcotics.⁴⁷ Over the decades, many states have enacted mandatory minimum sentences for various drug-related offenses as well.⁴⁸

While mandatory minimum sentencing in the United States surged primarily to combat drug-related crimes, today’s mandatory minimum schemes are by no means exclusively drug-related. Although the brunt of the Federal Sentencing Guidelines was aimed at drug-related offenses, the Guidelines apply to convictions for all federal offenses.⁴⁹ Moreover, at least twenty-one states have enacted general sentencing guidelines that mirror—or at least function in the same manner as—the Federal Sentencing Guidelines.⁵⁰ Many states have also promulgated

crime to one of forty-three Offense Levels depending on severity (determined by statute). *Id.* at 408. The offender is then assigned to one of six Criminal History Categories according to the nature and recentness of any past criminal conduct. *Id.* The intersection of Offense Level and Criminal History Category on the grid indicates a narrow range of months within which the offender must be sentenced. *Id.* at 407. For example, an offender who is convicted of one count of possession of child pornography under 18 U.S.C. § 2252 with no prior criminal history would be assigned to Offense Level 22 and Criminal History Category I. The Federal Sentencing Guidelines would require a judge to sentence that offender to no less than forty-one months and no more than fifty-one months in prison. *Id.* Until 2005, these sentencing guidelines were mandatory; a federal judge had no discretion to deviate from the prescribed range of months for any reason. *See infra* note 189 (commenting on Congress’s intent to make the Federal Sentencing Guidelines nondiscretionary). Although the United States Supreme Court has since declared the Guidelines only “advisory,” the Guidelines continue to function constructively as mandatory sentences today. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (instructing trial court judges to consider a wide range of factors outside those promulgated by the Guidelines during the sentencing phase); *see also infra* Section I.D.

47. *See, e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

48. *See, e.g.*, State Info, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS (NORML), <http://norml.org/states> (last visited Apr. 6, 2013) (providing state-by-state information on mandatory minimum sentences regarding the use and possession of marijuana).

49. *See* GUIDELINES MANUAL, *supra* note 46, at 406–08.

50. In 2008, the National Center for State Courts (NCSC) conducted a survey to examine sentencing guidelines in each state and the District of Columbia. The NCSC identified twenty-one jurisdictions with sentencing guideline structures: Alabama, Alaska, Arkansas, Delaware, the District of Columbia, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, and Wisconsin. NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 6–26 (2008), available at http://www.ncsc.org/sitecore/content/microsites/csi/home/~/_media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx. However, the NCSC noted numerous difficulties in attempting to identify jurisdictions that used sentencing guidelines. For example, some states may employ sentencing guidelines, but do not exhibit the formalities that the twenty-one jurisdictions named above exhibit, such as statutes, sentencing commissions, or review boards. *Id.* at 3. Conversely, a state

mandatory sentencing statutes that target repeat offenders or specifically enumerated violent felonies.⁵¹ For example, California's infamous Three Strikes law provides a twenty-five-year-to-life sentence for offenders who commit a third "violent" or "serious" felony.⁵² Florida's similarly infamous 10-20-Life law enhances punishments for any offender who "carries, displays, uses, threatens to use, or attempts to use any weapon or firearm" during the commission of a felony.⁵³ Mandatory minimum sentencing schemes take many forms, but their overall purpose is the same: to provide tougher punishments for criminals.

Proponents asserted that determinate, mandatory minimum sentences attended to all of the problems that indeterminate sentencing failed to address; specifically, mandatory minimums sufficiently deterred, incapacitated, and punished criminals.⁵⁴ Proponents also praised mandatory minimums for encouraging cooperation with law enforcement, leading to increased apprehension of career criminals.⁵⁵ Whether aimed at preventing drug use or doling out more severe punishments for serious offenders, mandatory minimum sentencing

may indeed present the formalities of a sentencing guideline scheme, but the sentencing guidelines are no longer operational. *Id.*

51. See James Austin et al., "Three Strikes and You're Out": *The Implementation and Impact of Strike Laws 6–11 & tbl.1* (Nat'l Inst. of Justice Research Paper, 2000) (comparing the habitual offender laws of twenty-four states), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/181297.pdf>.

52. CAL. PEN. CODE § 667(e) (Deering 2013); *id.* § 1170.12(c)(2).

53. FLA. STAT. § 775.087(1) (2012). Specifically, 10-20-Life requires mandatory ten-year, twenty-year, and twenty-five-year-to-life prison sentences for possessing a firearm, shooting a firearm, and shooting a person, respectively, while committing a felony. *Id.* However, while 10-20-Life is known publicly through its slogan "Use a Gun and You're Done," the enhanced mandatory penalties equally apply to an offender who commits any aggravated battery during the commission of a felony, regardless of whether he possesses or uses a firearm. *Id.* § 775.087(2)(a); see also FLA. DEP'T OF CORR., 10-20-LIFE, NEW MANDATORY MINIMUM PRISON SENTENCES, available at <http://www.dc.state.fl.us/secretary/press/1999/1020life.html> (last visited Apr. 6, 2013) (providing information about 10-20-Life and access to promotional materials). Although Governor Jeb Bush and the Florida legislature passed the law in 1999, 10-20-Life was actually one of several mandatory minimum schemes enacted during Governor Bush's tenure that targeted violent or habitual offenders. See, e.g., Violent Career Criminals Act, FLA. STAT. § 775.084(1)(c)–(d) (2012) (providing enhanced mandatory sentences for criminals who have previously been convicted of at least two felonies or of one of the statutorily enumerated "qualified offense[s]"); FLA. STAT. § 775.082(9)(a) (2012) (providing enhanced mandatory sentences for criminals who have committed any enumerated felony within three years of being released from any state or federal prison); Dangerous Sexual Felony Offender Act, FLA. STAT. § 794.0115 (2012) (providing an enhanced mandatory sentence of twenty-five-years-to-life imprisonment for sexual offenders who "[c]ause[] serious personal injury . . . [u]se[] or threaten[] to use a deadly weapon . . . or [v]ictimize[] more than one person" during a sexual offense).

54. CAULKINS ET AL., *supra* note 4, at 11–12.

55. *Id.* at 18–19.

finds its rationale as a tougher approach to what the American public views as increased crime in the United States.

C. *Determinate Disappointment*

What critics failed to realize about mandatory minimum sentences was that they were, in fact, mandatory. Although judges could vary prison sentences under very specific, rare circumstances,⁵⁶ manipulative, tough-on-crime politicians and a fearful public effectively destroyed judicial discretion in sentencing. Judges could deviate slightly below mandatory sentences for some defendants who cooperated with prosecutors or provided information on other criminals.⁵⁷ Likewise, judges could deviate slightly above maximum sentences for particularly aggravating factors, such as violence against minors.⁵⁸ Regardless, the majority of mandatory minimum sentences conform to the Federal Sentencing Guidelines.⁵⁹

The horror stories are endless. In 1990, Tonya Drake was persuaded by a man in a parking lot to mail a package on his behalf for \$100.⁶⁰ Not knowing what was in the package, but in desperate need of money to feed her children (Mrs. Drake was a twenty-eight-year-old mother of four), she agreed.⁶¹ The package contained 232 grams of crack cocaine.⁶² Despite the fact that Drake had no criminal history, a federal judge was required to sentence Drake to a mandatory minimum ten-year prison sentence.⁶³ On sentencing Drake, Judge Richard A. Gadbois Jr. lamented, “This woman doesn’t belong in prison for 10 years for what I

56. See *infra* note 189 and accompanying text.

57. GUIDELINES MANUAL, *supra* note 46, at 10; see also *infra* note 189 and accompanying text.

58. GUIDELINES MANUAL, *supra* note 46, at 6; see also *infra* note 189 and accompanying text.

59. In its October 2011 report to Congress, the United States Sentencing Commission found that of the 10,605 offenders who were subject to a mandatory minimum penalty at sentencing, 66.1% of sentences were within the ranges prescribed by the Federal Sentencing Guidelines. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 140, tbl.7-4 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_07.pdf. An additional 2.5% of sentences exceeded the Guidelines’ ranges because of upward departures. *Id.* Only 24.5% of judges gave downward departures below the Guidelines’ ranges. *Id.* The remaining 7.0% of sentences received prosecution-sponsored downward departures. *Id.*

60. See Smolowe, *supra* note 17, at 46.

61. *Id.* at 46–47.

62. *Id.* at 47.

63. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 141–42 (1999).

understand she did. That's just crazy, but there's nothing I can do about it."⁶⁴

Drake's is not the only "crazy" result of a mandatory minimum sentencing scheme. At the age of nineteen, Jason Cohn was sentenced to ten years in prison for mailing LSD blotter paper.⁶⁵ Keith Edwards, also nineteen years old, sold crack cocaine to a federal informant who then set up four more buys for the specific purpose of accumulating enough crack cocaine for prosecutors to get Edwards sentenced to a mandatory ten years.⁶⁶ George Norris was sentenced to a mandatory seventeen months in prison for unknowingly collecting rare orchids in violation of the Convention on International Trade in Endangered Species.⁶⁷ And Santos Reyes was sentenced to a mandatory twenty-six-years-to-life for taking the written portion of a driver's license examination for his cousin.⁶⁸

In Florida, the horror stories are similarly shocking. Richard Paey was a law student who suffered back injuries resulting from a car accident.⁶⁹ Doctors prescribed Paey various painkillers after several failed surgeries, but when he ran out, Paey began forging prescriptions to obtain the necessary medications.⁷⁰ Although he never sold or transferred medications to any other person, Paey was convicted of seven counts of trafficking oxycodone.⁷¹ Each count carried a mandatory sentence of twenty-five years, meaning that Paey was to serve a minimum of 175 years in prison.⁷² Had Governor Charlie Crist not granted Paey a full pardon on September 20, 2007, Paey would be serving a constructive life sentence at Tomoka Correctional Institution in Daytona Beach, Florida.⁷³

64. *Id.* at 142.

65. *See* Steinberg, *supra* note 8, at 41. Blotter paper is a common method by which LSD is distributed and consumed. Blotter paper is a sheet of paper soaked in LSD solution and divided into many smaller squares, each representing a single dose. *See* U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., OFFICE OF DIVERSION CONTROL, DRUGS & CHEMICAL INFORMATION, D-LYSERGIC ACID DIETHYLAMIDE (2013), *available at* http://www.dea.diversion.usdoj.gov/drug_chem_info/lsd/lsd.pdf.

66. *See* Steinberg, *supra* note 8, at 41.

67. *Rough Justice in America: Too Many Laws, Too Many Prisoners*, THE ECONOMIST, July 22, 2010, *available at* <http://www.economist.com/node/16636027>.

68. Bob Egelko, *26 to Life for Taking an Exam: Man Took Cousin's Drive Test—Strike 3*, SFGATE (Dec. 30, 2003, 4:00 AM), <http://www.sfgate.com/bayarea/article/26-to-life-for-taking-an-exam-Man-took-cousin-s-2524459.php>.

69. *Paey v. State*, 943 So. 2d 919, 920 (Fla. 2d DCA 2006), *cert. denied*, 954 So. 2d 28 (Fla. 2007).

70. *Id.*

71. *Id.* at 921.

72. *Id.*; *see also* FLA. STAT. § 893.135(1)(c)(1)(c) (2012).

73. Jamal Thalji, *Paey Given Full Pardon*, TAMPA BAY TIMES (Sept. 20, 2007, 11:58 AM), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/paey-given-full-pardon>.

In addition to the countless victims suffering the wrath of ridiculous and unjust mandatory minimum sentences, determinate sentencing has also failed to address the “problems” that critics associated with indeterminate sentencing. While critics argued that determinate sentencing would fix indeterminate sentencing’s inadequate rehabilitation, incapacitation, and deterrence issues, recidivism rates in the United States have only increased since the mandatory minimum boom. Between 1983 and 1994, the percent of criminals who re-offended within three years of being released from state or federal prison increased from 62.5% to 67.5%.⁷⁴ Furthermore, the percent of parolees successfully discharged from supervision steadily declined from 54% to 41% between 1983 and 2000, again indicating an increase in re-offending.⁷⁵ If mandatory minimum sentences were to sufficiently address society’s interest in deterring, incapacitating, and rehabilitating criminals (especially career criminals and violent offenders), why is it that the amount of crimes being committed by parolees and criminals sentenced to mandatory minimums has only gone *up*? Perhaps critics of indeterminate sentencing will next advocate indefinite sentences for *all* crimes.

Moreover, the federal government and many states have also repealed or significantly limited parole and gain-time allowances in order to maintain a tough-on-crime façade. The federal government

74. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 11 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>. By offense category, the largest rise in recidivism occurred among drug offenders; between 1983 and 1994, the recidivism rate increased from 50.4% to 66.7%. *Id.*

75. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE U.S.: SUCCESS RATES FOR STATE PAROLEES (2003), available at <http://bjs.ojp.usdoj.gov/content/reentry/tables/successtab.cfm> (noting additionally that while the overall rate of parole success decreased between 1983 and 2000, the rate held steady at 40%–42% between 1994 and 2000; years 1988 through 1990 witnessed the lowest rates of parole success at 35%–36%); see also JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST. JUSTICE POL’Y CTR., BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 21 fig.15 (2002), available at http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf (finding that the number of parole violators who returned to prison increased by about 800% between 1977 and 2000). The United States Sentencing Commission has issued numerous reports since the institution of the Federal Sentencing Guidelines commenting on various factors affecting recidivism. In one report, the Commission noticed a negative correlation between age and probability of recidivism: as an offender’s age increases, the likelihood of re-offending after release decreases. See U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 16 (2004), available at http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf. While this may seem somewhat intuitive—the older a person is, the less time remaining in his life to re-offend—the implications of such an observation should be alarming: mandatory minimum sentences are not deterring younger offenders. Instead, this correlation seems to indicate that the more powerful deterrent is age.

abolished parole for all federal offenders with the Comprehensive Crime Control Act of 1984.⁷⁶ Likewise, as of 2000, at least sixteen states have abolished discretionary parole altogether, and at least another four states have abolished discretionary parole for certain violent offenders.⁷⁷

Florida is one state that appears to be leading the way in slimming down parole and early release options. Currently, parole in Florida may only be granted by statute and is severely constrained; inmates must serve the vast majority of a mandatory minimum sentence before even being considered for parole.⁷⁸ Gain-time reductions are similarly circumscribed. The Florida legislature permits gain-time reductions “in order to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services.”⁷⁹ But the accumulation of gain-time reductions is limited to 15% of time to be served; in other words, all inmates must serve at least 85% of the original sentence imposed.⁸⁰ Overall, “little early release remains available” in Florida today.⁸¹

Without adequate parole or early release mechanisms, recidivism rates will only continue to climb. Due to the mandatory nature of mandatory minimum schemes and decades of tough-on-crime trends,

76. See U.S. DEP’T OF JUSTICE, U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1–2 (2003), available at <http://www.justice.gov/uspc/history.pdf> (affirming that while parole has been eliminated at the federal level, the U.S. Parole Commission continues to exist in order to oversee inmates who were sentenced or paroled prior to 1987 and are, therefore, still considered parole-eligible).

77. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE U.S.: RELEASES FROM STATE PRISON (2003), available at <http://bjs.ojp.usdoj.gov/content/reentry/releases.cfm>. The Department of Justice distinguishes between discretionary parole and mandatory parole mechanisms. Mandatory parole occurs when a state’s sentencing statutes require that an inmate be released after serving a specific amount of time or proportion of his sentence. *Id.* On the other hand, discretionary parole occurs when a parole board examines an inmate and determines whether or not he should be released from prison. *Id.*

78. See FLA. STAT. § 947.16(2)(g)(1)–(3) (2012). Section 947.16(g) trifurcates mandatory minimum sentences for purposes of determining when a parole interview for a given inmate may be conducted. Subsection 1 permits a parole interview for inmates serving mandatory minimum terms of seven years or less no earlier than six months before the end of their sentence. *Id.* Subsection 2 permits a parole interview for inmates serving mandatory minimums between seven and fifteen years no earlier than twelve months before their sentence ends. *Id.* Finally, subsection 3 permits a parole interview for inmates serving mandatory minimums exceeding fifteen years no earlier than eighteen months before their sentence ends. *Id.*

79. FLA. STAT. § 944.275(1) (2012).

80. FLA. STAT. § 944.275(4)(b)(3) (2012). Before 1995, Florida allowed a greater amount of gain-time reductions, which resulted in prisoners’ only serving between 30% and 60% of the sentences imposed. Kaufman, *supra* note 15, at 406–07. Public outrage over Florida’s seemingly lenient sentencing policies spurred the tough-on-crime and “truth in sentencing” movement that resulted in the state’s 85% rule that remains in effect today. *Id.* at 406.

81. Kaufman, *supra* note 15, at 413.

prisoners now lack the incentives to engage in productive and rehabilitative activities that would reduce the likelihood of re-offending upon release. “By subjecting inmates to coerced and regimented idleness” instead of allowing them to engage in socially productive activities, crime becomes the only trade that ex-inmates know.⁸² Upon release after an excessive mandatory sentence, it should not be at all surprising that ex-inmates with no experience in anything other than crime re-offend, thus creating an endless cycle of crime. Mandatory minimum schemes, therefore, yield an even crueler and costlier criminal sentencing structure than indeterminate sentencing.

D. *Pushing Back Against the Mandatory Minimum Mess*

The Federal Sentencing Guidelines have been under constant scrutiny ever since their enactment in 1987. Within two years, the United States Supreme Court was asked to rule on the constitutionality of the Commission and its Guidelines in *Mistretta v. United States*.⁸³ Petitioner John Mistretta contended that the formation of the Commission violated the separation of powers doctrine.⁸⁴ The Court, however, disagreed, concluding that Congress indeed had the authority to delegate its power to the Commission and that the Commission wielded the power to promulgate rules on behalf of Congress.⁸⁵

Critics also frequently—though unsuccessfully—attacked the Guidelines and other state mandatory minimum schemes as violating the Eighth Amendment’s Cruel and Unusual Punishments Clause.⁸⁶ The Supreme Court, however, has ruled on numerous occasions that mandatory sentences imposed at both the federal and state levels do not violate the Eighth Amendment’s proportionality requirement for punishments and are, therefore, not unconstitutionally cruel or unusual.⁸⁷ Perhaps the most well-known Eighth Amendment attack on a mandatory minimum sentence was *Ewing v. California*.⁸⁸ In *Ewing*, the trial court sentenced petitioner Gary Ewing to a mandatory minimum twenty-five-year-to-life prison sentence under California’s Three Strikes Law for stealing three golf clubs.⁸⁹ On finding that the trial court

82. James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1063 (1997).

83. 488 U.S. 361 (1989).

84. *Id.* at 370.

85. *Id.* at 374.

86. U.S. CONST. amend. VIII.

87. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Harmelin v. Michigan*, 501 U.S. 957 (1991).

88. 538 U.S. 11 (2003).

89. *Id.* at 18, 20.

did not err in imposing the sentence,⁹⁰ a majority of the Supreme Court decided that state mandatory minimum schemes do not transgress constitutional prohibitions on cruel and unusual punishment because they “reflect[] a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.”⁹¹

The Supreme Court has admitted, however, that certain problems are inherent in the Federal Sentencing Guidelines and state mandatory minimum schemes. In *Blakely v. Washington*,⁹² the Court addressed the circumstances under which a trial judge may sentence a convicted defendant above a maximum sentencing guideline range.⁹³ The *Blakely* Court ultimately commanded state trial judges to base sentencing solely on facts decided by a jury beyond a reasonable doubt or admitted by the defendant, rather than facts determined by the sentencing judge to be true.⁹⁴ Six months later, in *United States v. Booker*,⁹⁵ the Court extended the *Blakely* ruling to federal courts and expanded its rationale, instructing trial judges to consider a wider range of factors in sentencing beyond those prescribed in the Federal Sentencing Guidelines.⁹⁶ As a result, the Federal Sentencing Guidelines officially became “advisory.”⁹⁷

Even Congress has noticed certain illogical and unfair elements within the Federal Sentencing Guidelines and has responded by enacting what is referred to as the “safety valve.”⁹⁸ Under the Federal Sentencing Guidelines, defendants were originally sentenced regardless of whether they were low-level offenders, despite Congress’s intent.⁹⁹ Congress, however, linked punishment to quantity of drugs, effectively imposing the same sentences on low-level drug users as on high-level drug traffickers.¹⁰⁰ Since Congress enacted the safety valve provisions, trial court judges can now exercise their discretion to deviate below the

90. Although the Court acknowledged that, “[t]o be sure, Ewing’s sentence is a long one.” *Id.* at 30.

91. *Id.* One must wonder, however, how the Court concluded that stealing three golf clubs constituted a “serious” or “violent” felony.

92. 542 U.S. 296 (2004).

93. *Id.* at 300.

94. *Id.* at 303–04.

95. 543 U.S. 220 (2005).

96. *Id.* at 243.

97. *Id.* at 245.

98. Section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 18 U.S.C. § 3553(f), and § 5C1.2 of the Federal Sentencing Guidelines are collectively referred to as the “safety valve” provisions. Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1472 & n.7 (2000).

99. See Froyd, *supra* note 98, at 1471.

100. *Id.*

Guidelines' mandatory punishments for low-level, "less culpable" offenders.¹⁰¹ Congress also passed the Fair Sentencing Act of 2010 to address the sentencing disparity between crack cocaine and powder cocaine crimes.¹⁰² By implementing the safety valve and to some extent equalizing certain drug offenses, Congress attempted—although unsuccessfully¹⁰³—to restore some sanity to the Guidelines.

Some states are taking real steps to reduce or repeal their mandatory minimum sentencing schemes. In 2010, South Carolina enacted the Omnibus Crime Reduction and Sentencing Reform Act¹⁰⁴ as a proactive solution to address America's "counter-productive approach to criminal justice."¹⁰⁵ Among its more important modifications to South Carolina's sentencing structure are reducing punishments for nonviolent crimes and providing alternatives to imprisonment—such as probation and work release—for drug offenders.¹⁰⁶ Voters in California approved similar measures by passing Proposition 36, which allowed nonviolent drug offenders to receive probation instead of a mandatory sentence.¹⁰⁷

However, despite these numerous initiatives at the state level and calls from advocacy groups across the country to end mandatory minimum schemes,¹⁰⁸ there is actually new and pending federal legislation to enact more mandatory minimum sentences.¹⁰⁹ Overall, it appears that the debate between determinate and indeterminate sentencing is far from over.

101. 28A C.J.S. *Drugs and Narcotics* § 493 (2012).

102. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C.A. §§ 841, 844, 960 (2010)).

103. See Froyd, *supra* note 98, at 1498 (finding the safety valve "too restrictive," ultimately undermining Congress's goal in abating unfair sentences for low-level offenders).

104. S. 1154, 118th Sess. (S.C. 2010).

105. THE PEW CTR. ON THE STATES, SOUTH CAROLINA'S PUBLIC SAFETY REFORM: LEGISLATION ENACTS RESEARCH-BASED STRATEGIES TO CUT PRISON GROWTH AND COSTS 7 (2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/PSPP_South_Carolina_brief.pdf.

106. See *id.* at 6–7.

107. *Proposition 36 Ballot Initiative (2000 General Election)*, CAL. DEP'T OF ALCOHOL & DRUG PROGRAMS, http://www.adp.state.ca.us/SACPA/Proposition_36_text.shtml (last visited Apr. 6, 2013).

108. See, e.g., *About Us*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM), <http://www.famm.org/aboutus.aspx> (last visited Apr. 6, 2013); *Key Issues: Drug Sentencing and Penalties*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties> (last visited Apr. 6, 2013).

109. See, e.g., 18 U.S.C. §§ 2252, 2252A (2012) (providing mandatory penalties for child pornography offenders); 18 U.S.C. § 924(c)(1)(A) (2006) (providing mandatory penalties for firearm and drug trafficking offenses); SAFE DOSES Act, S. 1002, 112th Cong. § 2 (2011) (providing mandatory penalties for theft of medical products); LEAVE Act, H.R. 1196, 112th Cong. § 101 (2011) (providing mandatory penalties for smuggling aliens into the United States); Piracy Suppression Act, H.R. 2839, 112th Cong. § 2 (2011) (providing mandatory penalties for maritime piracy).

II. PRISON OVERCROWDING IN THE UNITED STATES

A. *Overcrowding in General*

Americans enjoy being the best. And if there is one thing the United States does better than anyone else in the world, it is imprisoning its people. By now the statistics are indisputably clear, and have been the subject of myriad studies, yet they bear repeating. Between 1980 and 2009, the total number of inmates incarcerated in state and federal prison facilities skyrocketed, increasing by approximately 361%;¹¹⁰ the total U.S. population only grew approximately 35% during the same time period.¹¹¹ In 2010, the total number of adults under some form of correctional supervision—prison, jail, pretrial detention, parole, probation, or community control—totaled 7.1 million, approximately 2.3% of the country’s population.¹¹² The total number of state and federal prisoners alone was more than 1.5 million.¹¹³

The proportion of Americans sitting in cells far surpasses that of any other country in the world. Russia and China only imprison 568 and 122 criminals per 100,000 citizens, respectively.¹¹⁴ The United States’ incarceration rate of 743 inmates per 100,000 citizens, therefore,

110. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INCARCERATION RATE: 1980–2009, available at <http://bjs.ojp.usdoj.gov/content/glance/tables/incrrtab.cfm> (last visited Oct. 19, 2012) [hereinafter INCARCERATION RATE] (reporting that in 1980, there were 139 inmates per 100,000 citizens, and in 2009, there were 502 inmates per 100,000 citizens). It is important to note here that other institutional studies report higher incarceration rates than the Department of Justice’s approximation. For example, the International Centre for Prison Studies at the University of Essex estimates that the incarceration rate in the United States at the end of 2009 was 743 inmates per 100,000 citizens, as opposed to the Department of Justice’s estimate of 502 inmates per 100,000 citizens. See ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 tbl.2 (9th ed. 2011) [hereinafter WORLD PRISON POPULATION LIST]. The key distinction between the two reports is that the Department of Justice does not consider pretrial detainees in its calculation—instead limiting the rate to include only sentenced inmates—while the International Centre for Prison Studies does. For comparative purposes, this Note will reference the International Centre for Prison Studies’ estimation of the United States’ incarceration rate.

111. See Population, GOOGLE PUBLIC DATA, <http://www.google.com/publicdata> (follow “U.S. Census Bureau” hyperlink; then follow “Population in the U.S.” hyperlink; then follow “Explore the data” hyperlink) (indicating that the U.S. population grew from 226,542,300 in 1980 to 306,771,500 in 2009).

112. LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010 1 & fig.1 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>. In 2010, the population of the United States was 308,745,538. U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000–2010 2 tbl.1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

113. See INCARCERATION RATE, *supra* note 110, at 3 tbl.2.

114. WORLD PRISON POPULATION LIST, *supra* note 110, at 4 tbl.3, 5 tbl.4.

exceeds the incarceration rates of Russia and China combined.¹¹⁵ The highest incarceration rates in Europe are found in the former Soviet-bloc states Belarus, Ukraine, Latvia, Lithuania, and Estonia with 381, 338, 314, 276, and 254 inmates per 100,000 citizens, respectively.¹¹⁶ Western countries such as the United Kingdom, France, Germany, Spain, and Italy also imprison at only a fraction of the rate that the United States does.¹¹⁷ With a total of 2.29 million inmates (including pretrial detainees) at the end of 2009, the United States houses almost half of the world's sentenced prisoners.¹¹⁸ Indeed, if incarceration were an Olympic event, the United States would win gold.¹¹⁹

As a result of our prison preeminence, it should be no surprise, then, that the United States suffers from a prison-overcrowding crisis. At the end of 2008, the federal prison system was operating at 135% capacity.¹²⁰ At the same time, twenty-eight states were operating at over 100% capacity, with eleven others operating between 90% and 100% capacity.¹²¹ These numbers are a sharp increase from the capacity rates reported eight years earlier; in 2000, states reported capacity rates that

115. The International Centre for Prison Studies notes that while China houses approximately 1.65 million prisoners, an additional 650,000 inmates are held as “administrative detainees.” *Id.* at 1. Although China does not consider these detainees as prisoners for purposes of calculating incarceration rate, if these detainees are included in the incarceration rate, China’s rate rises to approximately 127 inmates per 100,000 citizens. *Id.* at 4 tbl.3. In either case, the combined total incarceration rate for Russia and China is less than the United States’ rate of 743 inmates per 100,000 citizens.

116. *Id.* at 5–6 tbl.4.

117. The United Kingdom, Spain, Italy, France, and Germany imprison at a rate of 396, 159, 111, 96, and 85 inmates per 100,000 citizens, respectively. *Id.* at 5 tbl.4.

118. *Id.* at 1, 3 tbl.2.

119. California, Texas, and Florida lead the way in terms of total prison population by state. WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 17–18 app’x tbl.2 (2009) (revised 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>. In fact, between 2007 and 2008, Florida’s prison population grew by approximately 21%, the second largest incarceration increase in the country (Pennsylvania holds the largest increase at 28%). *Id.* at 7 & fig.5.

120. *Id.* at 44 app’x tbl.24. The term “capacity” can actually be rather confusing, as the Department of Justice uses three different measures to constitute “capacity”: rated capacity, operational capacity, and design capacity. Rated capacity is “the number of beds or inmates assigned by a rating official to institutions within the jurisdiction.” *Id.* at 13. Operational capacity is “the number of inmates that can be accommodated based on a facility’s staff, existing programs, and services.” *Id.* Design capacity is “the number of inmates that planners or architects intended for a facility.” *Id.* The only data available for the federal prison system is its rated capacity. *See id.* at 44 app’x tbl.24.

121. *Id.* at 44–45 app’x tbl.24. California took the top spot, operating its prisons at 204% capacity; Alabama, Delaware, Illinois, and Nevada rounded out the top five at 188%, 167%, 150%, and 148%, respectively. *Id.* In 2008, Florida operated its prisons at 88% capacity. *Id.* Again, it is important to note the distinctions between the various measures of capacity. *See supra* note 120.

were, on average, 10%–14% lower than in 2008.¹²² Local jails are also experiencing the same misfortune. Of the fifty counties jailing the largest number of individuals in the United States in 2008, seventeen operated at over 100% capacity.¹²³ An additional sixteen counties operated between 90% and 100% capacity.¹²⁴ Again, these rates can only be expected to increase; considering the rate at which we imprison, overcrowding is inevitable.

B. *Economic Implications of Incarceration*

With such a significant number of individuals sitting in cells, the cost to maintain our prison population is mammoth. In 2007, federal, state, and local governments spent more than \$74 billion on corrections.¹²⁵ Adjusted for inflation, this represents a 255.3% increase in correctional spending from the approximately \$21 billion spent in 1982.¹²⁶ Per capita, this means American taxpayers paid approximately \$246 per citizen on corrections in 2007, up from \$92 per citizen in 1982 (an increase of 267%).¹²⁷

Because the majority of inmates are held within state and local facilities, the brunt of the cost of maintaining our current correctional system falls squarely on state and local governments.¹²⁸ Over the past thirty years, state governments have generally accounted for about 60% of all corrections expenditures in the United States and spend seven to ten times more than the federal government on incarceration costs per year.¹²⁹ In 2001, states spent a total of \$29.5 billion on corrections,

122. *Id.* at 9.

123. *See Jails Stuffed to Capacity in Many U.S. Counties*, NPR (Jan. 20, 2010, 6:20 PM), <http://www.npr.org/templates/story/story.php?storyId=122336311>. In Florida, Polk, Lee, and Miami-Dade Counties were operating at 131%, 131%, and 121% capacity, respectively. *Id.*

124. *See id.* In Florida, Orange, Broward, and Hillsborough Counties made the list at 99%, 96%, and 92% capacity, respectively. *Id.*

125. TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURES AND EMPLOYMENT, FY 1982–2007: STATISTICAL TABLES 5 tbl.2 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jee8207st.pdf>. Between 2002 and 2007, the amount spent on the corrections function of our legal system actually decreased 2.3%. *Id.* *But see* JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf> [hereinafter BUDGETARY COST] (noting that, in 2008, the total amount expended on corrections again surpassed \$75 billion).

126. *See* KYCKELHAHN, *supra* note 125, at 5 tbl.2. This equals a little over \$202 million per day.

127. *See id.* at 6 tbl.6.

128. The budgetary cost of corrections is actually spread relatively proportionally among federal, state, and local governments according to the number of inmates that each level monitors. *See* BUDGETARY COST, *supra* note 124, at 10 & fig.6.

129. *See* KYCKELHAHN, *supra* note 125, at 6 tbl.5; BUDGETARY COST, *supra* note 125, at 10 & fig.6.

representing a cost of \$22,650 per inmate per year.¹³⁰ Although California, New York, and Texas spent the most total money on corrections, the District of Columbia, Alaska, and Delaware spent the most money per capita, at \$251, \$243, and \$204 per citizen, respectively.¹³¹ In 2001, Florida spent the fifth most total money on corrections out of all states, but spent one of the lowest amounts per capita at \$89 per citizen.¹³² Although not to the same extent as state governments, local governments share similarly large financial burdens when it comes to paying for incarceration. Since 1982, local governments have generally accounted for one-third of all corrections expenditures in the United States.¹³³ The cost of incarceration in the United States, therefore, clearly impacts state and local governments far more than the federal government. And, like all of the other aforementioned trends, state and local corrections expenditures will only continue to increase.¹³⁴

The economic toll that our exuberant incarceration rates take on society is not limited to government expenditures. An astonishing study conducted by Pew's Economic Mobility Project in 2010 revealed the damning implications that incarceration has on economic mobility, employment, lost earnings, and the American labor market.¹³⁵ For example, whether an individual is incarcerated at any point in his life has a significant negative correlation to wage, weeks worked, and

130. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001 3 tbl.2 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>; see also NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES 1 (2011), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/FSS1111.PDF> (finding that the average state spends 7.4% of its budget on corrections—the third largest piece of the pie in all state budgets—below only expenditures on education and Medicaid).

131. STEPHAN, *supra* note 130, at 3 tbl.2. California, New York, and Texas spent \$4.2 billion, \$2.8 billion, and \$2.3 billion on corrections, respectively. *Id.* To get an idea of how greatly states vary on total correctional expenditures, North Dakota spent the least total money on corrections at \$26.8 million (0.6% of California's total expenditures) and West Virginia spent the least money per capita at \$34 per citizen (13.5% of the District of Columbia's rate). *See id.*

132. *Id.*

133. KYCKELHAHN, *supra* note 125, at 6 tbl.5; BUDGETARY COST, *supra* note 125, at 10 & fig.6.

134. *See, e.g., Budget Summary*, FLA. DEP'T OF CORR. (2010), <http://www.dc.state.fl.us/pub/annual/0910/budget.html> (reporting that total correctional expenditures soared to \$2.3 billion in 2010, an approximately 153% increase in expenditures since 2001). Cost per capita also increased 137% to \$126 per citizen. *Compare id. with State & County QuickFacts: Florida*, U.S. CENSUS BUREAU (Jan. 10, 2013, 3:06 PM), <http://quickfacts.census.gov/qfd/states/12000.html> (reporting Florida's 2010 population at 18.8 million).

135. *See THE PEW CHARITABLE TRUSTS, ECON. MOBILITY PROJECT, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 9–17* (2010), available at [http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs\(1\).pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs(1).pdf).

overall annual salary after being released from prison.¹³⁶ Only 16% of men who had previously been incarcerated earned over \$36,400 in 2006, while 21% earned less than \$7,800; the remaining 63% of former inmates, therefore, only earned between \$7,800 and \$36,400 in 2006.¹³⁷ The Economic Mobility Project also found that incarceration decreases the likelihood that an ex-inmate will be able to improve his economic position.¹³⁸ Overall, the Economic Mobility Project study concludes that “[w]ith so many people and families affected . . . discussions of mobility in America must include reference to crime policy and the criminal justice system.”¹³⁹ Undoubtedly, the American obsession with prison as punishment leads to nothing but economic disparity for those who have served their time and perpetuates an endless cycle of poverty and crime for society.

Incarceration has similarly dire implications for children and families. In 2010, 52.2% of all inmates reported having minor children.¹⁴⁰ Approximately 58% of children with at least one parent in prison or jail are under the age of ten.¹⁴¹ According to the Urban Institute Justice Policy Center, “[l]osing a parent to prison affects multiple aspects of children’s lives and affects them to varying degrees.”¹⁴² In fact, in 2003 the Institute issued a report indicating the numerous developmental impacts that result when a child loses a parent to incarceration. In significant part, the report found that younger children (ten years or younger) endured abnormal stress, exhibited low self-esteem, and could not bond properly to family and peers.¹⁴³ Perhaps more troubling, however, was the finding that older children (those between the ages of eleven and eighteen) exhibited abnormal behavior, rejected social norms, and were far more likely to engage in criminal activities, again perpetuating a criminal society.¹⁴⁴ Continuing to incarcerate at such a high rate will only continue to fragment our families and ensure that a cycle of crime will exist in our culture. At some point, the social and economic consequences of incarceration prove unbearable.

136. *Id.* at 11 & fig.4. At age 45, the average previously incarcerated man made \$14.57 per hour and worked thirty-nine weeks per year, earning \$23,500. *See id.* The average 45-year-old man who had never been incarcerated made \$16.33 per hour and worked forty-eight weeks per year, earning \$39,100. *See id.*

137. *Id.* at 17 & fig.8.

138. *See id.* at 16 & fig.7.

139. *Id.* at 27.

140. *See id.* at 18.

141. JEREMY TRAVIS ET AL., URBAN INST., JUSTICE POL’Y CTR., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1 (2003) (revised 2005), *available at* http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf.

142. *Id.* at 2.

143. *See id.* at 3 tbl.1.

144. *See id.*

III. *BROWN V. PLATA*: AN APPEAL TO HUMAN DIGNITY, OR UPHOLDING THE ABSURD?

California is certainly no exception to the prison overcrowding epidemic that plagues the United States. For the last twenty years, The Golden State has been the epicenter of the prison reform debate, primarily as a result of extreme overcrowding and undeniable civil rights violations.¹⁴⁵ In fact, overcrowding at several prisons in California has become so severe that inmates have staged hunger strikes to protest the poor conditions.¹⁴⁶ Of course, the United States Supreme Court is no stranger to hearing prison overcrowding issues,¹⁴⁷ but the Court was called on to answer a question of monumental effect in *Brown v. Plata*.¹⁴⁸ What is the correct remedy for California's overcrowded prison system?¹⁴⁹

Brown v. Plata came before the Court as two separate class action lawsuits drawing from numerous court battles beginning in 1990.¹⁵⁰ A class of mentally ill prisoners filed the first class action, *Coleman v. Brown*, in 1990.¹⁵¹ A class of prisoners with other serious medical conditions filed the second, *Plata v. Brown*, in 2001.¹⁵² Both classes alleged that California's overcrowded prison system had caused years of serious, uncorrected constitutional violations in defiance of the Eighth Amendment's Cruel and Unusual Punishments Clause,¹⁵³ specifically that neither groups' medical needs were being adequately addressed pursuant to statute.¹⁵⁴ The district courts in both cases issued various

145. See David Muradyan, *California's Response to Its Prison Overcrowding Crisis*, 39 MCGEORGE L. REV. 482, 484–85 (2008) (identifying California's prison system as "both the largest and most overcrowded correctional system in the nation" with many facilities operating at over 200% capacity); Arnold Schwarzenegger, Proclamation 4278, Prison Overcrowding State of Emergency Proclamation, Oct. 4, 2006 (noting increased violence, transmission of infectious illnesses, inadequate sewage and wastewater systems, blackouts, contaminated drinking water, double- and triple-bunking, and an inability to provide adequate security as among the most serious civil rights violations throughout California's prisons).

146. See, e.g., Lateef Mungin, *Thousands of California Prisoners on Hunger Strike*, CNN (Oct. 4, 2011, 1:36 AM), <http://edition.cnn.com/2011/10/04/justice/california-prison-hunger-strike/index.html?iref=allsearch>.

147. See, e.g., *Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991) (holding that prison overcrowding by itself is not per se unconstitutional); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (considering the question whether double-celling—the practice of assigning two inmates to one cell—violates the Constitution).

148. 131 S. Ct. 1910 (2011).

149. *Id.* at 1922.

150. *Id.*

151. *Id.* at 1926.

152. *Id.*

153. U.S. CONST. amend VIII.

154. *Brown*, 131 S. Ct. at 1926–27. Both classes asserted a violation of the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(a)(3)(E)(i), for failing to provide adequate medical and mental health care. *Id.* at 1923.

injunctive relief, ordering the California Department of Corrections and Rehabilitation to “provide . . . the minimum level of medical care required under the Eighth Amendment.”¹⁵⁵

However, after finding that prison conditions continued to violate the Eighth Amendment, the prisoners from *Coleman* and *Plata* moved in 2006 to convene a three-judge panel pursuant to 18 U.S.C. § 3626(a) to limit California’s prison population so that it would be in compliance with the district courts’ orders for injunctive relief.¹⁵⁶ Both district court judges granted plaintiffs’ motions and requested that the Ninth Circuit Court of Appeals establish the panel.¹⁵⁷ In 2007, the chief judge of the Ninth Circuit established a panel including himself and the two district court judges from *Coleman* and *Plata*.¹⁵⁸ In 2009, the panel issued an order mandating a population limit on California’s prison system.¹⁵⁹ Finding that California had failed to comply with the previous orders for injunctive relief, the panel commanded California to reduce its prison population by 40,000 prisoners within two years.¹⁶⁰ California appealed the panel’s order to the U.S. Supreme Court in 2010.¹⁶¹

Writing for a 5–4 majority, Justice Anthony Kennedy began by observing the Court’s long-held view of prisoners’ liberties in light of the Eighth Amendment:

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”¹⁶²

Although society may deplore their choices to act criminally (and society certainly has the right to punish these choices), prisoners are nevertheless endowed with the unalienable right to human dignity. The Court recognized that this human dignity includes the right to food,

155. Opinion and Order at 12, *Plata v. Schwarzenegger*, 603 F.3d 1088 (No. C01-1351 TEH), available at <http://www.caed.uscourts.gov/caed/Documents/90cv520o10804.pdf> (citation and internal quotation marks omitted).

156. *Brown*, 131 S. Ct. at 1922.

157. *Id.*

158. *Id.*

159. *Id.* at 1946.

160. *Id.* at 1923.

161. *Id.* at 1922.

162. *Id.* at 1928 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion))) (internal quotation marks omitted).

clothing, and sufficient healthcare, since prisoners are unable to procure these provisions themselves and must rely entirely on the State.¹⁶³ “A prison that deprives prisoners of . . . adequate medical care,” for example, “is incompatible with the concept of human dignity and has *no place* in civilized society.”¹⁶⁴

In affirming the panel’s finding that conditions in California’s prisons violated the Eight Amendment, the Court noted the deplorable state of California’s penal institutions: “Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve.”¹⁶⁵ Moreover, the Court also found that California’s prisons were severely understaffed; even if the prison system were operating at a reasonable capacity, there was no way to provide adequate healthcare given the dearth of surgeons, physicians, nurse practitioners, and psychiatrists.¹⁶⁶ Consequently, California’s substantial prison overcrowding resulted in the State’s failure to provide adequate medical care, thus infringing on the human dignity that is guaranteed by the United States Constitution.

The Court then addressed the State’s argument that reducing prison population numbers was not the ideal solution to remedy these constitutional violations. Instead of releasing a certain number of prisoners in order to meet a specified population cap—arguably endangering the public—the State contended that other, less dangerous options were still available, such as new construction, transferring prisoners to other states, and hiring more medical personnel.¹⁶⁷ While the majority agreed in theory, explaining that courts should “exercise [their] jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public policy,” what seemed to be the breaking point for the Court was California’s inability to comply with previous orders demanding compliance with capacity plans.¹⁶⁸ For example, in 2009, the three-judge panel enjoined the State of California to meet an agreed quota; the State failed.¹⁶⁹ Early in the litigation, California had also offered a plan of its own to reduce prison

163. *Id.*

164. *Id.* (emphasis added).

165. *Id.* at 1923.

166. *Id.* at 1932. The trial record documented that 20% of surgical positions, 25% of physician positions, 39% of nurse practitioner positions, and 54.1% of psychiatrist positions within California’s prison system were vacant. *Id.*

167. *Id.* at 1937.

168. *Id.* at 1946.

169. *Id.* at 1926.

overcrowding, but the panel rejected this plan as insufficient.¹⁷⁰ Two years of actual notice (not to mention at least two decades of constructive notice) and the subsequent failure to even remotely reduce prison overcrowding rendered the use of alternative remedies too little, too late. The Court concluded that the only remedy available was to order the State to reduce its prison population.¹⁷¹

Justice Antonin Scalia crafted an unforgiving dissent in which Justice Clarence Thomas joined. Justice Scalia characterized the majority's holding as "disregard[ing] . . . the governing statute, and traditional constitutional limitations upon the power of a federal judge, in order to uphold the absurd" and as "a judicial travesty."¹⁷² Justice Scalia's primary argument against the majority was that it deviated too far from well-established substantive and procedural laws.

First, Justice Scalia doubted the concept that prison overcrowding can create a substantive violation of the Eighth Amendment for an entire prison population.¹⁷³ The fact that a prison system may be inadequate on a systemic level does not mean that every prisoner within that system is subject to cruel and unusual punishment.¹⁷⁴ Justice Scalia contended that facing a "substantial risk" of future constitutional violations was not itself enough to establish a systemic constitutional violation.¹⁷⁵

Second, Justice Scalia asserted that the majority opinion made no sense considering the nature of the litigation. *Brown v. Plata* was a consolidation of class action claims. How is it an appropriate remedy, he asked, to release tens of thousands of prisoners who were never even members of the complaining class in the first place?¹⁷⁶ Even if the individual members of the class (or the class as a whole) suffered injuries from constitutional violations, only *those individual members of the class* (or the entire class) were entitled to relief, no one else:

[T]he vast majority of inmates most generously rewarded by the re-lease order—the 46,000 whose incarceration will be ended—do not form part of any aggrieved class even under the Court's expansive notion of constitutional violation. Most of them will not be prisoners with medical conditions or severe mental illness; and many will undoubtedly be fine physical specimens who have

170. *Id.* at 1941 ("At this time, the State has not proposed any realistic alternative to the [panel's] order.").

171. *Id.* at 1947 ("This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding.").

172. *Id.* at 1950–51 (Scalia, J., dissenting).

173. *Id.* at 1951.

174. *Id.*

175. *Id.*

176. *Id.* at 1952.

developed intimidating muscles pumping iron in the prison gym.¹⁷⁷

At the very most, Justice Scalia maintained, only those members composing the aggrieved class should be removed from California's prison system.

Third, Justice Scalia argued that the Court's ruling was a "structural injunction" that exceeded the Court's powers as defined by Article III of the U.S. Constitution.¹⁷⁸ Essentially, Justice Scalia believed that the majority acted as the administrator of California's prisons, crafting policymaking decisions strictly reserved for the appropriate state administrative agency.¹⁷⁹ In a second dissenting opinion joined by Chief Justice Roberts, Justice Samuel Alito echoed these same sentiments, writing that "[t]he Constitution does not give federal judges the authority to run state penal systems."¹⁸⁰

Regardless of whether one views *Brown v. Plata* as protecting human dignity or "uphold[ing] the absurd," the implications are clear: prison overcrowding can violate important substantive constitutional rights to which inmates are entitled. Moreover, *Brown v. Plata* paves the way for prisoners in other states to bring class actions. What remains unclear, however, is how to achieve court-imposed prison population limits—and, therefore, achieve constitutionally acceptable prison conditions—in light of overwhelming public opposition to releasing prisoners before they serve their full terms.¹⁸¹

IV. THE ELEPHANT IN THE ROOM: HOW TO REDUCE PRISON POPULATIONS

So far, this Note has demonstrated that the United States suffers from a prison-overcrowding crisis of unprecedented proportions, primarily resulting from a spike in mandatory minimum sentencing that began in the mid-1980s. Fortunately, after decades of skyrocketing incarceration rates, it seems that the United States Supreme Court finally addressed the issue in *Brown v. Plata*: overcrowding must end.

In order for states and the federal government to comply with the Court's ruling in *Plata*, immediate action is needed. There are myriad solutions to consider in remedying the prison-overcrowding crisis across the country. Some are simple, requiring very little to implement. Others, on the other hand, necessitate fundamental institutional change.

177. *Id.* at 1952–53.

178. *Id.* at 1953 (internal quotation marks omitted); U.S. CONST. art. III, § 2.

179. *Brown*, 131 S. Ct. at 1953.

180. *Id.* at 1959 (Alito, J., dissenting). Justice Alito also dissented on two evidentiary grounds: the three-judge panel refused to consider evidence regarding prison conditions and gave improper weight to evidence regarding public safety. *Id.* at 1959–60.

181. See Smolowe, *supra* note 17, at 55.

This Part proposes three primary solutions: (1) end mandatory minimum sentencing and return to judicial discretion; (2) reform prosecutorial practices and adhere to prosecutorial ethics; and (3) institute economically optimal punishments instead of punishments designed to maximize society's retribution interest.

A. *End Mandatory Minimums and Return to Judicial Discretion*

After decades of absurd results, political fear-mongering, and an overall failure to achieve the underlying goals of criminal punishment, it is finally time for our mandatory minimum experiment to end. As examined above, mandatory minimum sentencing schemes leave much to be desired. This Note therefore proposes a return to indeterminate sentencing and the restoration of judicial discretion to our criminal justice system.

Determinate sentencing completely undermines the separation of powers and checks and balances doctrines upon which our government was founded. We entrust judges with discretionary power in all other circumstances; it is unconscionable that legislatures have robbed the judicial branch of the essence of its constitutional power.¹⁸² When a single institutional actor—the United States Sentencing Commission—holds the vast majority of power regarding its designated function, tyranny results.¹⁸³ On the other hand, “a sentencing system that sensibly distributes power—both the power to make sentencing rules and the power to determine sentences in particular cases—among the institutional sentencing actors is likely to work pretty well” and is likely to adhere to our notions of justice and separation of powers.¹⁸⁴

By now the evidence is sobering. With the largest incarceration rate in the world, the United States' obsession with mandatory minimum sentencing has led to the destruction of too many lives. Federal and state judges' hands are forced by sentencing guidelines to condemn nonviolent and simple drug offenders to years—even decades—in prison, away from their families, away from work, and away from necessary rehabilitative programs. Recidivism rates are on the rise, as recently released inmates have nothing to show for the years they have lost behind bars, forcing many to revert to crime. And the cost of our

182. See Dhammika Dharmapala et al., *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1050 (2010) (“[J]udges have been furious that guidelines spurn judges' skill and experience in evaluating deterrability and the ability [of defendants] to be rehabilitated and that the guidelines discard the individualized knowledge about the defendant that the judge gains during pretrial proceedings and trial.”).

183. See Aaron M. Clemens & Hon. Hale R. Stancil, *Unhandcuffing Justice: Proposals to Return Rationality to Criminal Sentencing*, 83 FLA. B.J. 54, 57 (2009).

184. *Id.*

obsession is also on the rise, as American taxpayers now dole out tens of billions of dollars every year for corrections.

Furthermore, with the implementation of the “safety valve,” enactment of the Fair Sentencing Act, the *Booker* Court’s ruling that the Federal Sentencing Guidelines are only “advisory,” and the fact that a number of states and judges are starting to reject mandatory minimums completely,¹⁸⁵ we are slowly eroding the foundation of determinate sentencing. Considering all of these trends, why not continue to the only logical conclusion: end mandatory minimum sentencing.

B. *Prosecutorial Reform and Adherence to Professional Standards of Ethics*

Addressing a group of United States Attorneys in 1940, then-Attorney General Robert H. Jackson observed that “[w]hile the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.”¹⁸⁶ Unknown to Justice Jackson in 1940, however, prosecutors would gradually come to victimize—and themselves become victims of—an inherently unfair prosecutorial system. It is time to both reform the American prosecutorial system to pursue the public’s interest in justice and to recommit to the codes of ethics by which prosecutors are professionally bound.

The twisted state of mandatory minimum laws and incarceration in the United States today is partly the result of a dysfunctional prosecutorial system. Prosecutors enjoy the “immense power to strike at citizens . . . with all the force of government itself.”¹⁸⁷ Their power covers nearly all aspects of the criminal justice system, from the decision to charge an individual with a crime to recommending his sentence upon conviction.¹⁸⁸ And it is the prosecutor, not the judge, who determines whether a downward or upward departure from the Federal Sentencing Guidelines is appropriate in a given case, thus permitting the prosecutor to determine questions of fact such as mitigating and

185. See *Kimrough v. United States*, 552 U.S. 85, 91 (2007) (confirming that trial court judges may impose sentences outside prescribed guideline ranges); *Gall v. United States*, 552 U.S. 38, 41 (2007) (determining that a trial judge who issues a sentence outside the prescribed guideline range is not presumed to have acted unreasonably).

186. Hon. Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (adapting a speech Justice Jackson made on Apr. 1, 1940).

187. *Id.*

188. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 626–28 (1999) (enumerating several of prosecutors’ abilities that make them “the most powerful lawyers” in our judicial system: to apply for search warrants and arrest warrants, to compel witnesses to testify, to initiate criminal proceedings, to drop charges, to accept or reject pleas, and to recommend sentencing).

aggravating factors ordinarily left to judges and juries.¹⁸⁹ Today's prosecutor is effectively judge, jury, and executioner.

Because the law presumes that prosecutors act in the public's best interest to pursue justice,¹⁹⁰ and because there are few guidelines to steer prosecutorial decisions in the first place,¹⁹¹ the prosecutor's power goes virtually unchecked.¹⁹² Justice George Sutherland poignantly expressed society's expectations of the prosecutor in *Berger v. United States*:¹⁹³

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

. . . .

[T]he average jury . . . has confidence that these obligations, which so plainly rest on the prosecuting attorney, will be faithfully observed.¹⁹⁴

189. In order for a defendant to receive a downward departure in sentence for Substantial Assistance to Authorities, the prosecution *must* make a motion to the court requesting such departure. Otherwise, the departure is not allowed. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (allowing downward departure “[u]pon motion of the government”); *see also* FED. R. CRIM. P. 35(b). The prosecution is also responsible for recommending to the court upward and downward departures in sentence for numerous other factors, such as crimes that result in death or severe physical injury, gang affiliation, or the defendant's physical impairment. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0–§ 5K2.24. In any case, the Federal Sentencing Guidelines' general policy is to dissuade both upward and downward departures. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 cmt. n.5 (“[C]ircumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission.”).

190. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS Standard 3-1.2(c) (1993) (“The duty of the prosecutor is to seek justice”); Jackson, *supra* note 186, at 4 (“Although the government technically loses its case, it has really won if justice has been done.”).

191. *See* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 557 (1999) (“[A] prosecutor's individual and independent interest in reaching fair and just decisions is often the only compass pointing to the right procedure.”).

192. *See* Green, *supra* note 188, at 627 (“[C]riminal prosecutors are the most powerful lawyers because, with rare exception, their offices have unchecked authority”).

193. 295 U.S. 78 (1935).

194. *Id.* at 88; *see also* *United States v. Wilson* 149 F.3d 1298, 1303 (11th Cir. 1998) (“[G]overnment counsel is, as an individual, properly and highly respected by the members of

However, the nature of the American adversarial system, prosecutorial compensation, and lack of proper training ultimately undermine this presumption. Many prosecutors are prone to keeping score, as if they are players on a sports team.¹⁹⁵ Prosecutors often compare conviction numbers for bragging rights.¹⁹⁶ And, too frequently, comparisons lead to competitions in which prosecutors engage each other in contests—including gambling—to obtain the most convictions.¹⁹⁷ Furthermore, prosecutors are rewarded with professional advancement based on convictions, not on whether justice has been achieved.¹⁹⁸

Surely not every prosecutor falls victim to such temptations, and this Note does not suggest that ours is a system rife with corruption at every level. But the mere fact that we propagate a system that enables, encourages, and protects malfeasance should warrant pause and deep consideration of solutions. Here, this Note proposes two.

First, and perhaps most simply, prosecutors should recommit to the ethical standards expected both within the legal profession in general and for prosecutors specifically. Lawyers in all states must take an Oath of Admission in order to practice within that state's jurisdiction. Florida's oath, in relevant part, requires the affiant to declare, "I do solemnly swear . . . I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust . . ." ¹⁹⁹ While the wording of every state's oath is unique, the overall message intended is the same: all lawyers have a responsibility to pursue causes that are just, to abandon the unjust, and to uphold the honor of their position.²⁰⁰

the jury for his integrity, fairness, and impartiality." (internal quotation marks and citation omitted).

195. Compare Kenneth Bresler, Essay, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 546 (1996) (likening prosecutors to "jocks" who "make[] criminal trials resemble sporting matches"), with Thomas A. Hagemann, Essay, *Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151, 157 (1996) (defending scorekeeping as a part of human nature).

196. See Hagemann, *supra* note 195, at 154–55.

197. E.g., Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial: Some Cook County Prosecutors Break the Rules to Win*, CHI. TRIB., Jan. 11, 1999, available at <http://truthinjustice.org/flipside.htm> (listing several contests prosecutors play, including the "Two-Ton Contest"—in which the first prosecutor to convict defendants with a cumulative weight of 4000 pounds wins a pot of money).

198. See Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, available at <http://truthinjustice.org/cookcounty.htm> ("Winning a conviction can accelerate a prosecutor's career . . .").

199. *Oath of Admission to the Florida Bar*, FLA. BAR (Sept. 13, 2011), <http://www.floridabar.org/tfb/TFBProfess.nsf/basic+view/04E9EB581538255A85256B2F006CD7D?OpenDocument>.

200. Florida's Oath of Admission appears to mandate an even higher level of professional responsibility. Judge William M. Hoeveler of Florida's Southern District observed that Florida's Oath of Admission specifically refers to "honor" twice. Hon. William M. Hoeveler, *Ethics and*

Furthermore, prosecutors owe an enhanced ethical duty simply because they wield power on behalf of the sovereignty of the United States or the state in which they practice; prosecutors are servants of the people they represent.²⁰¹ The American Bar Association (ABA) also recognizes the unique power of the prosecutor in its Model Rules of Professional Conduct, a code of ethics by which all lawyers are bound.²⁰² Model Rule 3.8—aptly titled “Special Responsibilities of a Prosecutor”—prohibits a prosecutor from “prosecuting a charge that the prosecutor knows is not supported by probable cause.”²⁰³ Many jurisdictions, including Florida, have also adopted the ABA’s Prosecution Function Standards, which enumerate various prosecutorial obligations.²⁰⁴ Of significant importance here are Discretion as to Noncriminal Disposition²⁰⁵ and Discretion in the Charging Decision,²⁰⁶ both obliging prosecutors to consider trial diversion options and overarching concepts of justice instead of criminal prosecution.

the Prosecutor, 29 STETSON L. REV. 195, 195 n.1 (1999). First, the Oath requires Florida lawyers to employ only practices that are “consistent with truth and honor.” *Id.* (internal quotation marks and citation omitted). Immediately following this vow is another requiring the lawyer to “advance no fact prejudicial to the honor or reputation of a party or witness” *Id.* (internal quotation marks and citation omitted). Judge Hoeweler concludes that Florida’s emphasis on honor means that “[t]he Florida Bar clearly enjoins the members to even higher standards than those set forth as rules of ethics.” *Id.* at 195.

201. *See id.* at 195–96 (examining the enhanced duties of the prosecutor in relation to other lawyers).

202. Interestingly, the Model Rules of Professional Conduct do not recognize any unique responsibilities owed by government-appointed public defense attorneys. *See generally* MODEL RULES OF PROF’L CONDUCT (2012). Although the ABA later promulgated the ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARDS in 1993 to specify defense counsel’s duties and ethical standards, this notable absence of public defender responsibilities in the Model Rules indicates how truly significant the ABA views adherence to prosecutorial ethics. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION STANDARDS (1993).

203. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2012); *see also id.* R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that . . . guilt is decided upon the basis of sufficient evidence . . .”).

204. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2012); FLA. RULES OF PROF’L CONDUCT R. 4-3.8, cmt. (1993).

205. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS Standard 3-3.8 (1993) (requiring prosecutors to consider and be familiar with noncriminal avenues for disposing of cases involving first offenders or where “the nature of the offense may warrant noncriminal disposition”).

206. *Id.* Standard 3-3.9(b) (“The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are . . . (ii) the extent of the harm caused by the offense; [and] (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender . . .”).

When prosecutors initiate and maintain criminal prosecutions against individuals like Tonya Drake, Jason Cohn, Keith Edwards, George Norris, Santos Reyes, and Richard Paey,²⁰⁷ they abandon their oaths and ethical responsibilities to seek justice. When prosecutors recommend the harshest possible sentences to courts in lieu of diversion programs, they cost taxpayers and states millions of dollars, destroy families, and perpetuate generations of criminals. When prosecutors initiate and maintain prosecutions that lack probable cause, they violate the ethical canons with which they have been charged both as lawyers and as representatives of the State. And when prosecutors pursue convictions for personal gain, they mock the very principles of justice on which our country was founded.²⁰⁸ All prosecutors should always exercise their discretion in favor of justice, in favor of honor, and in favor of their ethical duties.

Second, it is time to reform the American prosecutorial system to properly reflect the prosecutor's duty to seek justice. A problem that arises here, however, is how to induce prosecutorial agencies to abide by ethical standards in light of political concerns and overwhelming public pressures to be "tough-on-crime." Professors Gary Becker and George Stigler propose a dual solution in which proper enforcement is rewarded and malfeasance is punished.²⁰⁹

First, proper enforcement should be rewarded. At first glance it would appear that this is, in fact, how our system currently works; prosecutors are de facto compensated for the number of convictions earned through promotion. However, Professors Becker and Stigler emphasize that this piecemeal approach to enforcement only leads to abuse.²¹⁰ Instead of inducing prosecutors to haphazardly amass prosecutions in order to meet a quota, the government should pay prosecutors a larger flat salary with no room for promotion; regardless of whether a prosecutor accumulates two prosecutions or two hundred in any given year, he or she should be compensated equally.²¹¹ By raising economic compensation for all prosecutors regardless of performance, we would increase the economic utility of doing a good job—pursuing justice—and reduce the economic utility of violating ethical and professional standards.²¹²

207. See *supra* notes 60–73 and accompanying text.

208. See Hoeveler, *supra* note 200, at 198 ("In the prosecutor's charge lies the integrity of the criminal justice system, which gives validity to the Bill of Rights. If personal ambition or misguided zeal interfere with such a sacred mission, not only does the affected accused suffer, the virus of excess infects and weakens the system.").

209. See Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 6–16 (1974).

210. *Id.* at 13–14.

211. *Id.* at 14.

212. *Id.* at 8 n.10.

In addition to rewarding proper enforcement, we must punish malfeasance. In a sense, we already punish malfeasance to some extent through the possibility of dismissal.²¹³ Professors Becker and Stigler again emphasize, however, that dismissal is not enough. Because enforcers are already prone to cover up malfeasance and detection is expensive, we must provide a stronger economic disincentive—strong enough to overcome such evasion.²¹⁴ Instead of dismissal, Professors Becker and Stigler advise that prosecutors should be forced to pay fines to defendants in cases where prosecution fails.²¹⁵ Fines would ensure that prosecutors move forward only with meritorious cases and would encourage prosecutors to pursue trial diversion options such as probation, drug treatment, and community service, at the risk of losing money. In order to guarantee that prosecutors realign their interests with the interests of the public they serve, the government must properly reward and punish their conduct.

C. *Optimal Fines as Punishment for Certain Crimes*

If an individual's decision to commit a crime is essentially a balance between the risk of punishment and the potential fruits of the crime,²¹⁶ it should be easy to sufficiently deter the optimal amount of people from committing that crime. Yet in the United States, our society has opted for a criminal punishment system that, in general, does not make the risks of crime sufficiently known to deter the potential criminal. The result has been painful, both economically and on a humanitarian level. Here, this Note offers Professor Gary Becker's approach to punishing, deterring, and rehabilitating most nonviolent and drug-related offenses: optimal fines.²¹⁷

Professor Becker's proposition is really quite simple: determine the value at which Crime *X* pays to the offender and impose a fine above that level.²¹⁸ Simple economics takes care of the rest; the vast majority of criminals acting in their best interests will happily forgo an economic activity that has risks exceeding the rewards. Where the difficulty emerges is determining at what value above the tipping point of the risk–utility balance to set the fine.²¹⁹ Surely a fine that is only \$1 more

213. *Id.* at 6.

214. *Id.* at 6, 8 n.10.

215. *Id.* at 15 (condemning the failure in the United States to compensate falsely accused and acquitted defendants as “a shameful flaw in our system of enforcement”).

216. See *supra* note 29 for a brief discussion on the economic considerations involved in the decision to commit a crime.

217. See Becker, *supra* note 29, at 27–33.

218. *Id.* at 14.

219. See *id.* at 28–29. Professor Becker notes that a number of factors contribute to this consideration, such as premeditation, sanity, age, sex, and income level, thus muddling the analysis. *Id.*

than the expected payoff would be rather useless, and a fine of \$1 million would be extreme (and likely unconstitutional under the Eighth Amendment).

Professors Lucian Bebchuk and Louis Kaplow further explain that Becker's idea of optimal fines as punishment cannot truly be effective in a world where every criminal actor is different.²²⁰ For example, Bebchuk and Kaplow argue that some criminal actors are easier (and, therefore, more economically efficient) to apprehend than others.²²¹ It will be difficult, if not impossible, to set an optimal level of punishment when each individual actor is deterred and apprehended in unique ways. Furthermore, it will not be possible to know what level of punishment is optimal for a particular crime until a sufficient number of criminal actors are apprehended (that is, when the population n is large enough to analyze).

Professor Becker acknowledges these problems and suggests that the middle ground can be determined simply by observing criminal activity.²²² By gradually increasing fines, we will eventually be able to establish where the optimal amount lies—the amount where the greatest number of people are deterred and the greatest amount of revenue is earned.²²³ In fact, as Professor Becker notes, most countries, including the United States, have drastically increased the use of fines to punish.²²⁴ In some European countries, for example, fines are imposed based on the offender's annual or daily income.²²⁵ Sometimes called a “day fine,” this concept of income-based punishment has found limited application in the United States.²²⁶ It is now time to extend the concept of income-based punishment to nonviolent crimes and drug offenses in order to limit the number of offenders we incarcerate.

Professor Steven Levitt suggests that Becker's use of optimal fines as punishment (whether based on the offender's income or not) might

220. Lucian Arye Bebchuk & Louis Kaplow, *Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection*, 13 INT'L REV. L. & ECON. 217, 217–18 (1993).

221. *Id.*

222. *See* Becker, *supra* note 29, at 14.

223. *See id.*

224. *Id.* at 27–28, 32–33.

225. *See, e.g.*, Jason Paur, *Swiss Slap Speeder With \$290K Fine*, WIRED (Jan. 8, 2010, 9:00 AM), <http://www.wired.com/autopia/2010/01/record-speeding-fine-dents-swiss-bank-account>; *Swede Could Face Huge Speeding Fine—Up to \$962,000*, NBCNEWS (Aug. 11, 2010, 2:44 PM), http://www.msnbc.msn.com/id/38660951/ns/world_news-europe/t/swede-could-face-huge-speeding-fine.

226. *See, e.g.*, Mel Reisner, *Phoenix to Match Offense to Offender's Daily Income: Crime and Punishment: A 'Fine' Idea*, L.A. TIMES (July 23, 1989), http://articles.latimes.com/1989-07-23/news/mn-497_1_daily-income; *see generally* SUSAN TURNER & JOAN PETERSILIA, RAND, DAY FINES IN FOUR U.S. JURISDICTIONS (1996), available at <https://www.ncjrs.gov/pdffiles1/pr/163409.pdf> (reporting the methods and results of day fine experiments in four areas: Maricopa County, Arizona; Des Moines, Iowa; Bridgeport, Connecticut; and Marion, Malheur, Coos, and Josephine Counties in Oregon).

not be desirable because governments cannot effectively enforce fines unless a harsher punishment is also threatened, namely prison.²²⁷ According to Levitt, fines are only useful if the criminal actor can actually pay (or is willing to pay) the fine.²²⁸ Levitt explains that governments will have a hard time enforcing fines for non-traffic related offenses for two reasons. First, only the criminal actor has perfect knowledge of his own resources.²²⁹ Criminal actors will undoubtedly lie or conceal sources of income and assets in order to avoid paying a fine or to pay a lesser fine. Furthermore, spending resources on discovering income and assets might be costly, so costly as to undermine the ultimate purpose of fines in the first place. Second, a criminal actor's wealth might primarily consist of nonmonetary wealth (that is, human capital) that cannot be used to pay a fine.²³⁰ Levitt argues that in both cases, incarceration should be used as the primary stick to compel deterrence of criminal activity—although he agrees that mandatory minimum sentencing schemes ultimately result in inefficient punishment no matter whether fines or incarceration are imposed.²³¹

The problems raised by Professor Levitt are undoubtedly true. If a criminal actor is already willing to engage in criminal activity, he is probably not opposed to concealing income or assets in order to avoid or lessen his punishment. And there will always be some criminal actors who are simply unable to pay a fine. But Professor Levitt's criticisms apply only to a small segment of society. Those individuals who earn enough money or own enough assets to be able to conceal that money or those assets are not committing the nonviolent street crimes for which Becker's optimal fines would be imposed, namely minor drug use and possession offenses. And those individuals who are completely unable to pay a fine likely need other types of help, such as employment assistance, drug rehabilitation, or mental health services. For the vast majority of street crime, the general population will be sufficiently deterred from committing crimes through the use of optimal fines.

In the end, fines are socially costless (or at the most, the cost to society is *de minimis*) and incarceration is socially costly.²³² The estimated impact of converting our mandatory minimum prison sentencing schemes for nonviolent offenses to mandatory fine schemes

227. Steven D. Levitt, *Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L REV. L. & ECON. 179, 180 (1997).

228. *Id.*

229. *Id.* at 181.

230. *Id.*

231. *Id.* at 190–91.

232. A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89, 89–90 (1984) (“When fines and imprisonment are used together [as possible punishments], . . . it is desirable to use the fine to its maximum feasible extent before possibly supplementing it with an imprisonment term. This is simply because fines are socially costless while imprisonment is socially costly.”).

is considerable. The Center for Economic and Policy Research estimates that the savings from implementing fines for only *half* of nonviolent offenders in 2009 would have totaled almost \$17 billion.²³³ Moreover, our total prison population would have decreased by more than 700,000 inmates—approximately 30%.²³⁴ The budgetary savings alone warrant reflection on optimal fines as a viable alternative to imprisonment for certain offenses. And this of course does not even consider the potential revenue earned through fines.

Let there be no doubt that fines would *not* present an adequate alternative to imprisonment for punishing all crimes. Society does have substantial noneconomic interests in punishing crime; the need for retribution—our innate desire for an eye for an eye—cannot be denied. However, when dealing with nonviolent offenses where there is no identifiable, individual victim, we must allow our retribution interest to yield to common sense. We need to be smarter. We simply cannot afford to incarcerate our people at the rate that we do.

CONCLUSION

Over the past three decades, the United States has become the world's largest jailor. It is no coincidence that this period also corresponds with the boom in mandatory minimum sentencing and the promulgation of the Federal Sentencing Guidelines. Empirically, there can no longer be any doubt that the American obsession with punishment—ideologically embodied within mandatory minimum schemes—created our incarceration disease.

Now with *Brown v. Plata*, the United States Supreme Court has finally indicated that it is willing to recognize and address the issue: overcrowded prisons create unconstitutional conditions that cannot be tolerated. Furthermore, the correct remedy is to reduce prison populations. Although the Supreme Court did not venture to answer the remaining question of *how* to reduce prison populations, the primary solution should be clear: if the proliferation of mandatory minimum sentencing is the disease, their abolition is the cure.

In addition to ending mandatory minimum sentencing and restoring judicial discretion to our criminal justice system, there are two other viable solutions that also warrant consideration. First, prosecutorial reform and scrupulous adherence to professional standards of ethics will ease the burden on our entire judicial system. When prosecutors properly employ their discretion in favor of justice instead of compensation or career advancement, they ultimately serve the public.

233. See BUDGETARY COST, *supra* note 125, at 11 & tbl.4. The federal, state, and local levels would have saved \$2.1 billion, \$7.6 billion, and \$7.2 billion, respectively. *Id.*

234. See *id.* The federal, state, and local levels would have reduced their prison sizes by 91,000 (46%), 329,000 (25%), and 293,000 inmates (37%), respectively. See *id.*

Moreover, proper compensation and punishment structures can adequately incentivize prosecutors to perform their duties as ministers of justice.

Second, using optimal fines as punishment whenever possible for nonviolent criminals and drug offenders in lieu of imprisonment can yield astonishing results. Public knowledge regarding punishments would increase, thus effectively deterring individuals who would otherwise engage in crime. America's overall incarceration numbers would drop as much as 30%, saving tens of billions of dollars per year in correction costs. And, of course, revenue from fines would create much needed income during tough economic times.

Overall, the United States will likely adhere to mandatory minimum schemes for the foreseeable future. But there is hope. The Court's ruling in *Brown v. Plata* is the first step toward spurring initiative to reduce prison populations. Coupled with progressive thinking in states such as South Carolina and California, the American criminal justice system can gradually chip away at the mandatory minimum mess it has created. In time, our failed mandatory minimum experiment will end.