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The Smarter Sentencing Act: Achieving Fairness Through Financially Responsible Federal Sentencing Policies, 48 J. Marshall L. Rev. 911 (2015)

Colleen Shannon

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THE SMARTER SENTENCING ACT:
ACHIEVING FAIRNESS THROUGH
FINANCIALLY RESPONSIBLE FEDERAL
SENTENCING POLICIES

COLLEEN SHANNON

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I. INTRODUCTION

John Horner is a 47-year-old father of three who lost his eye in an accident and was prescribed medication to help with the pain.¹ He had no prior drug arrests and worked a modest job at a fast food restaurant.² One day at work, he met a man that he instantly connected with.³ John could tell the man was in pain; but the man explained that he did not have enough money for rent and pain medication, so he asked if he John would sell his pain medication.⁴ John agreed and, on several occasions, sold him some prescription morphine and hydrocodone.⁵

During their last exchange, John was arrested and charged with drug trafficking, a crime that carries a twenty-five year mandatory sentence.⁶ After his arrest, John discovered that his new “friend” was a confidential informant working with the government to find drug traffickers in exchange for a reduced prison sentence.⁷ When prosecutors offered John a similar deal, he agreed to plead

1. Connor Friedersdorf, *A Heartbreaking Drug Sentence of Staggering Idiocy*, THE ATLANTIC (Apr. 3, 2013), <http://www.theatlantic.com/politics/archive/2013/04/a-heartbreaking-drug-sentence-of-staggering-idiocy/274607/>.

2. *Id.* Although Horner was a first-time drug offender, he had a prior conviction for statutory rape at the age of 18. *Id.* However, this did not play a part in the imposition of his mandatory minimum sentence and does not detract from the unfairness of his sentence. *Id.*

3. Rob Walker, *The Trouble with Using Police Informants in the U.S.*, BBC NEWS MAGAZINE (Mar. 26, 2013), http://www.bbc.co.uk/news/magazine-21939453?utm_source=dlvr.it&utm_medium=twitter.

4. *Id.* Horner claims that he also loaned the confidential informant (“Matt”) money. *Id.* There is still some dispute as to whether the money paid to Horner by the informant was for the pills or as a repayment for the loan. *Id.* The Sheriff’s Office’s records indicate three separate payments totaling \$1,800. *Id.*

5. Morphine, also known as “MS Cotin” or “morphine sulfate,” and hydrocodone are different types of prescription narcotics prescribed to treat moderate to severe pain. *Morphine*, DRUGS.COM, <http://www.drugs.com/morphine.html> (last visited April 1, 2014); *Hydrocodone and Acetaminophen*, DRUGS.COM, <http://drugs.com/hydrocodone.html> (last visited April 1, 2014). The Drug Enforcement Administration (DEA) classifies drugs into five categories, Schedule I (most dangerous) through Schedule V (least dangerous), based on acceptable use, potential for abuse, and risk of dependency. *Drug Scheduling*, JUSTICE.GOV, <http://www.justice.gov/dea/druginfo/ds.shtml> (last visited April 1, 2014). Morphine and hydrocodone are Schedule III narcotics. *Id.* By itself, Hydrocodone is a Schedule II drug, but it is frequently combined with acetaminophen, a non-narcotic pain reliever, to create Vicodin, which raises its classification to Schedule III. *Id.*

6. Friedersdorf, *supra* note 1. Horner was prosecuted in Central Florida, where the court applied Florida law. *Id.* Horner explained that, upon the advice of his public defender, he decided it was best not to go to trial because the prosecutors had such a solid case against him. *Id.*

7. *Id.* It was later revealed that the confidential informant had an extensive record of drug trafficking offenses and was facing a fifteen-year mandatory minimum for drug trafficking at the time. *Id.* After helping the government convict more drug offenders, the informant was sentenced to eighteen months and is now free. *Id.*

guilty and become an informant in exchange for a ten-year sentence.⁸ Unfortunately, because John was not able to help prosecute any new cases, he received the mandatory minimum⁹ and will likely be 72 years old when he is released from prison.¹⁰ John's entire prison term will end up costing taxpayers approximately \$475,000.¹¹

Situations like John's illustrate the drastic impact mandatory minimums have on the lives of non-violent drug offenders and society as a whole.¹² Congress tried to deal with the problem by passing the Fair Sentencing Act of 2010 (FSA), which aimed to restore fairness to federal cocaine sentencing.¹³ But the FSA has not remedied the problem. Judges are still restricted by excessive mandatory minimums and many offenders cannot benefit from the FSA because it does not apply retroactively.¹⁴ As a result, federal prisons are filled beyond capacity with nearly half of all inmates incarcerated for drug-related offenses.¹⁵ Of those, roughly sixty

8. *Id.* In Horner's case, he was given two options: (1) plead guilty and receive a fifteen year sentence or (2) plead guilty, become an informant for the government, and receive a ten year sentence if he helped build cases against five other drug traffickers. *Id.*

9. *Id.* Criminal informants are used by the government to penetrate crime by using the low level dealers (often, defendants arrested for trafficking offenses) to get to individuals higher up in the drug scheme that are harder to find because they are not the ones actually selling. *Id.* However, because John was not involved in a broader drug scheme and had no previous drug arrests, he was not able to find people to "snitch" on. *Id.* Thus, John's case demonstrates how this practice can result in worse criminals serving lower sentences. *Id.*

10. A minimum of eighty-five percent of a federal sentence must be served. THE SENTENCING PROJECT, TRUTH-IN-SENTENCING IN THE FEDERAL PRISON SYSTEM 1 (2004), available at http://www.sentencingproject.org/doc/publications/inc_truthinsentencing.pdf.

11. Walker, *supra* note 3. Even assuming the costs do not fluctuate with inflation or other factors, the cost of \$19,000 per year multiplied by twenty-five years produces a total cost of \$475,000. Oversight of the Dept. of Justice Before the House of Representatives Committee on Appropriations, 113th Cong. 7–10 (2013) (statement of Michael E. Horowitz, Inspector General, U.S. Dept. of Justice), available at <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>; *Annual Determination of Average Cost of Incarceration*, FEDERAL REGISTER (Mar. 18, 2013), <https://www.federalregister.gov/articles/2013/03/18/2013-06139/annual-determination-of-average-cost-of-incarceration> (summarizing the degree to which federal prisons deplete the Department of Justice budget and the average cost to keep a federal inmate in prison for one year).

12. The result appears to contradict many of the sentencing policies and goals. 18 U.S.C. § 3553(a) (2012). The employed, non-violent drug offender with three young children is in jail, while a repeat drug offender is out of jail because he was more connected in the drug industry and able to help the government secure more convictions. Walker, *supra* note 3.

13. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, § 2 (codified as amended in scattered sections of 21 U.S.C.)

14. *Id.*

15. *Offenses*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Feb. 22, 2014) (showing

percent received sentences subject to mandatory minimums.¹⁶

The current sentencing policies must be reformed to achieve the purposes set forth by the factors under the statutory sentencing provisions.¹⁷ Senators Dick Durbin and Mike Lee recently introduced The Smarter Sentencing Act of 2013 (SSA),¹⁸ which may be the answer.¹⁹ The SSA would permit retroactive application of the FSA, expand the existing “safety valve”²⁰ exception, and allow for increased individualized review by reducing mandatory minimums for certain drug offenses.²¹

This comment discusses the SSA, explores the need for a financially responsible sentencing reformation, and ultimately argues that Congress should pass the SSA. Part II explains how federal courts determine sentences based on the current Federal Sentencing Guidelines and statutory factors under 18 U.S.C. § 3553(a) and how mandatory minimums affect the sentencing process.²² Part III analyzes the SSA’s proposed amendments, how these changes would complement the FSA, and why the SSA is both an economical and practical approach to sentencing. Finally, Part IV proposes that Congress pass the SSA to align sentencing practices with sentencing goals.²³

While this comment discusses the Smarter Sentencing Act of 2013, the SSA has undergone a few minor, but noteworthy changes. First, the text of the Smarter Sentencing Act of 2013 was slightly amended on March 11, 2014 and the bill became known as the “Smarter Sentencing Act of 2014.”²⁴ Then, the most devastating change occurred when the new version of the bill did not pass in the

47% of the prison population incarcerated for drug offenses).

16. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 43 [hereinafter 2012 SOURCEBOOK], available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2012/sourcebook-2012> (last visited Oct. 25, 2013).

17. Pierce Williams, *Democrats and Republicans Agree: Reform Our Racist, Wasteful Drug Laws*, POLICYMIC (Aug. 2013), <http://www.policymic.com/articles/58547/democrats-and-republicans-agree-reform-our-racist-wasteful-drug-laws>.

18. Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (2013).

19. *S. 1410 (113th)*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/s1410> (last visited Apr. 17, 2015).

20. 18 U.S.C. § 3553(f) (2010).

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

22. *United States v. Booker*, 543 U.S. 220, 233 (2005). The Supreme Court was faced with the constitutional conflict that arises when a defendant receives an enhanced sentence (above the guideline range) based on additional findings by the judge while another defendant receives a lower sentence that falls within the guidelines, based on the jury’s verdict. *Id.* at 227–29.

23. 18 U.S.C. §§ 3553(a)(2)(A)–(D) (2012).

24. Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2013), available at <https://www.govtrack.us/congress/bills/113/s1410/text> (last visited Apr. 6, 2015).

113th Congress.²⁵ However, that was not the end of the Smarter Sentencing Act. On February 12, 2015, the Smarter Sentencing Act of 2015²⁶ was introduced in the 114th Congress.²⁷ The new version of the bill is substantially similar to the Smarter Sentencing Act of 2014 and shares the same general goal – modernizing federal drug sentencing policies with respect to certain non-violent drug offenses.²⁸ Like the previous bill, the Smarter Sentencing Act of 2015 has received tremendous bipartisan support, but will face the same uphill battle in its journey to become a law.²⁹

II. BACKGROUND

A. *A Brief History of the Federal Sentencing Process*

The United States Sentencing Commission (“the Commission”) was created through the The Sentencing Reform Act of 1984.³⁰ The Commission is made up of seven members who are appointed by the President to serve six-year terms.³¹ As an independent agency of the Judicial Branch, the Commission was established to assist Congress in creating federal sentencing policies.³² Most notably, the

25. S. 1410 (113th): Smarter Sentencing Act of 2014, GOVTRACK, <https://www.govtrack.us/congress/bills/113/s1410> (last visited Apr. 6, 2015). The bill was first introduced on July 31, 2013, reported by Senate Committee on January 30, 2014, and amendments were made to the text on March 11, 2014. *Id.* The updated version was not enacted. *Id.*

26. Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015), *available at* <https://www.govtrack.us/congress/bills/114/s502/text>; Smarter Sentencing Act of 2015, H.R. 920, 114th Cong. (2015), *available at* <https://www.govtrack.us/congress/bills/114/hr920/text>.

27. Press Release, Lee, Durbin Introduce Smarter Sentencing Act of 2015, (Feb. 12, 2015), *available at* <http://www.lee.senate.gov/public/index.cfm/2015/2/lee-durbin-introduce-smarter-sentencing-act-of-2015>.

28. *U.S. House and Senate Reintroduce an *Even Smarter* Smarter Sentencing Act*, FAMM (Feb. 12, 2015), <http://famm.org/u-s-house-and-senate-reintroduce-an-even-smarter-smarter-sentencing-act/>.

29. S. 502: *Smarter Sentencing Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s502> (last visited Apr. 6, 2015) (projecting an eight percent chance of being enacted by the Senate); *H.R. 920: Smarter Sentencing Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr920> (last visited Apr. 6, 2015) (projecting a two percent chance of being enacted by the House of Representatives).

30. Pub. L. No. 98-473, §211–39, 98 Stat. 1987, 1987–2040 (codified as 28 U.S.C. §§ 991–998 (2000)).

31. 28 U.S.C. § 991(a) (2008). The Sentencing Reform Act requires at least three members of the Sentencing Commission to be federal judges and no more than four members can belong to the same political party. *Id.*; U.S. SENTENCING COMM’N, OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, *available at* http://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf.

32. 28 U.S.C. § 994(a)(1) (2000). The Sentencing Commission established a permanent committee to develop the Sentencing Guidelines. *Id.* However, the

Commission developed the Federal Sentencing Guidelines (“the Guidelines”), which became effective in 1987.³³ The purpose of the Guidelines was to reduce sentence disparities, add structure to crime control, limit judicial discretion, and target specific offenders with more serious penalties.³⁴

The United States Sentencing Guidelines Manual contains a sentencing table, which is used to arrive at the appropriate sentencing range based on the present offense and the defendant’s criminal history.³⁵ The offense level is determined by adjusting the defendant’s base offense level³⁶ up or down depending on whether she played a large role in the offense, whether there were victims, whether she accepted responsibility, and whether she obstructed justice.³⁷ The criminal history category (CHC) is reached by adding up the defendant’s criminal history points, which are accumulated for any past criminal conduct.³⁸ The sentencing table then suggests a range of months based on the intersection of the particular offense level and CHC.³⁹ Before the Supreme Court’s 2005 decision in *United States v. Booker*,⁴⁰ sentencing within the range was mandatory and judges could only depart from the guideline range

Sentencing Commission serves a variety of other functions, such as: (1) assisting Congress in the development of crime policy; (2) researching and analyzing various trends and sentencing issues; and (3) maintaining congressional goals concerning federal crime. *Id.*

33. *Id.*

34. 18 U.S.C. § 3553(b)(1) (2012). Despite the common perception that the Guidelines were mandatory, this statutory provision slightly expanded judicial discretion in some limited circumstances where judges found an aggravating or mitigating factor that was not considered by the Guidelines. *Id.*

35. U.S. SENTENCING COMM’N, GUIDELINES MANUAL Ch. 5, Part A. The Sentencing Table provides a grid of sentencing ranges expressed in months, with the exception of the recommendation of life imprisonment for some ranges, which make up the sentencing table. *Id.* The sentencing table grid is divided into four “zones” (Zone A through Zone D). *Id.* Zone A offenses allow for probation, with a range between 0 to 6 months. U.S.S.G. § 5B1.1(a)(1), § 5C1.1(b). Zone B and C offenses allow a “split” (some form of confinement followed by either probation or supervised release). U.S.S.G. § 5B1.1(a)(2), §§ 5C1.1(c), (d). Zone D recommends imprisonment. U.S.S.G. § 5C1.1(f).

36. U.S.S.G. §§ 2A1.1–2X7.2. Chapter 2 of the Sentencing Manual lists each offense and provides a corresponding base offense level. *Id.*

37. U.S.S.G. § 1B1.3. The guidelines are often determined based on relevant conduct, resulting in punishment for conduct beyond that which the defendant may have been charged or convicted. *Id.*

38. U.S.S.G. § 4A1.1. Criminal history, which makes up the horizontal axis of the sentencing table is divided into six categories, from I (lowest) to VI (highest). *Id.* Points are assigned based on the defendant’s prior sentences and juvenile adjudications. *Id.* These points (if any), which are mostly based on length of sentence, are then added to the points assigned for the instant offense to determine the total. U.S.S.G. § 4A1.3. An upward or downward departure is authorized when a defendant’s CHC does not adequately reflect the seriousness of past conduct or likelihood of recidivism. U.S.S.G. § 4A1.3(A)(4)(B), (b)(2). Such departures are still subject to some limitations. *Id.*

39. U.S.S.G. §§ 5H1.1–5H1.6.

40. *Booker*, 543 U.S. at 220.

in “exceptional cases.”⁴¹

B. Booker Shifts the Focus to the Statutory Sentencing Factors under 18 U.S.C. § 3553(a)

The Supreme Court’s decision in *Booker* was a major defining point for the Guidelines.⁴² In *Booker*, the Court held that mandatory sentencing under the Guidelines violates the Sixth Amendment right to a jury trial.⁴³ Accordingly, the Court was forced to decide how to treat the Guidelines.⁴⁴ Rather than completely eliminate the Guidelines, the Court determined that judges must consult them but are not required to apply them.⁴⁵ By rendering the Guidelines merely advisory, *Booker* returned some discretion to sentencing judges by giving them the ability to depart from the guideline range.

In particular, judges are now required to consider the factors in and goals behind § 3553(a), not just the Guidelines.⁴⁶ By analyzing these factors, courts can determine whether a departure from the Guidelines is appropriate.⁴⁷ The statutory factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to promote punishment, deterrence, and public protection;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;
- (5) any pertinent policy statement;
- (6) the need to avoid unwarranted sentence disparities; and
- (7) the need to provide

41. *Id.* at 221.

42. *Id.* at 226. The Court excised § 3553(b)(1), rendering the guidelines advisory to avoid the need for jury findings in sentencing hearings. *Id.* at 226, 245.

43. *Id.* at 267. The Court reaffirmed its holding in *Apprendi*, that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Id.* at 244. Thus, *Booker*’s sentence was unconstitutional because it was enhanced based on the judge’s findings beyond the maximum allowed under the jury’s verdict. *Id.* at 267.

44. *Id.* at 243–44.

45. *Id.* at 259–60.

46. *Id.*

47. *See* U.S.S.G. Ch. 2 Pt. H, Ch. 2 Pt. K (outlining policies the Commission recognizes as factors that might warrant a departure from the guideline range). Pre-*Booker*, these sections limiting courts’ authority and departures were only available in limited circumstances. §§ 5K2.0(a)(1), (b)(2). Today, courts rely on § 3553(a) factors when sentencing outside the guideline range, rather than Chapter 5 of the Guidelines. *See also* U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE N, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc12.htm (last visited Apr. 1, 2014) (finding that courts departed below guidelines in 2,893 cases and sentenced below the range for other reasons in 11,869 cases).

restitution to any victims of the offense.⁴⁸

The language of § 3553(a) also provides that the sentence imposed shall be “sufficient, but not greater than necessary” to achieve the goals of sentencing.⁴⁹ These goals include:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.⁵⁰

The significance of these factors and goals is that post-*Booker* sentencing courts must now consider the personal characteristics of the defendant in determining whether a departure from the guideline range is necessary.⁵¹ Since the guideline range serves only as a starting point, it is always subject to an upward or downward departure based on the existence of any mitigating or aggravating factors.⁵² Such variances can come in the form of a departure within the Guidelines framework or an application of § 3553(a) factors.⁵³

However, many post-*Booker* decisions indicate that judges still give significant weight to the guideline range and are reluctant to depart, despite its advisory nature.⁵⁴ An even more problematic scenario arises when a statutory sentencing minimum interferes with the judge’s discretion to impose a sentence outside the guideline range.⁵⁵ The conflict results in a complete deprivation of all judicial discretion to impose a sentence below the statutory

48. 18 U.S.C. § 3553(a) (2012). *See also* United States v. Cunningham, 429 F.3d 673, 676 (7th Cir. 2005) (stating that a court should look beyond the guidelines to determine a sentence and analyze the § 3553(a) factors as they apply to the particular case). The statutory factors are intended to be the starting point for sentence determinations. *Id.* However, that is not usually the case since they do not provide a numeric range to consider for sentencing in terms of months. *Id.*

49. 18 U.S.C. § 3553(a) (2012).

50. 18 U.S.C. § 3553(a)(2) (2012).

51. *Id.* Before *Booker*, characteristics of the defendant were only applied to the guideline range in “exceptional cases.” U.S.S.G. §§ 5H1.1–5H1.6. Such characteristics are also enumerated in the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 32(d)(2).

52. *See Kimbrough*, 552 U.S. at 109 (recognizing that the Guidelines provide a sentencing range, which acts as a benchmark, subject to the application of upward or downward departures as they are warranted, based on judicial findings unique to the individual case).

53. *Id.*

54. *Id.* On appeal, a sentence within the Guidelines range may be given a presumption of reasonableness and will be reviewed using the abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 41 (2007); *Rita v. United States*, 551 U.S. 338, 354–55 (2007).

55. *Harris v. United States*, 536 U.S. 545, 568 (2002). *See also* *Edwards v. United States*, 523 U.S. 511, 515 (1998) (holding that the constitutional rule of *Apprendi* does not apply to mandatory minimum sentences).

minimum, even if the Guidelines or § 3553(a) factors warrant a shorter sentence.⁵⁶

C. The Conflict among Mandatory Minimums, the United States Sentencing Guidelines, and the § 3553(a) Factors

Under a federal sentencing system focused on individualized sentences, mandatory minimums seem entirely out of place because they fail to account for the specific offense, the particular defendant, and judicial discretion.⁵⁷ By superseding the sentencing process, mandatory minimums create vast sentence disparities, which is precisely what the Sentencing Commission set out to eradicate.⁵⁸ Federal judges are forced to apply a “one size fits all” sentence, unless one of the limited exceptions applies.⁵⁹ The most shocking disparities often result from statutory mandatory minimums for federal drug offenses – more specifically, sentences under 21 U.S.C. §§ 841(b)(1), (2) and 21 U.S.C. §§ 960(b)(1), (2).⁶⁰

D. Post-Booker Legislation Aimed at Remedying Unintended Sentencing Disparities

In 2010, Congress passed the Fair Sentencing Act (FSA) in an effort to close the gap in crack-cocaine sentencing disparities. The FSA made several significant changes to the United States Code and the Sentencing Guidelines, even eliminating certain sentences. Among other important goals, such as altering the application of mandatory minimums, the main purpose of the FSA was “to restore

56. See 2010 FEDERAL SENTENCING GUIDELINES MANUAL, UNITED STATES SENTENCING COMMISSION § 5G1.1 (Nov. 1, 2010), available at http://www.ussc.gov/Guidelines/2010_guidelines/Manual_HTML/5g1_1.htm (explaining that the statutory limit controls when there is a conflict between mandatory minimums or maximums and the guidelines, or § 3553(a) factors).

57. See Molly M. Gill, *Let's Abolish Mandatory Minimums the Punishment Must Fit the Crime*, HUM. RTS., Spring 2009, at 4 (explaining mandatory minimums, which are essentially “one-size-fits-all,” violate human rights).

58. *Id.*

59. 18 U.S.C. § 3553(f) (2012). The “safety valve” allows federal judges to sentence certain non-violent drug offenders below the statutory mandatory minimums, but only if the offenders meet the limited criteria. *Id.*

60. See 21 U.S.C. §§ 841(b), 960(b) (providing mandatory minimum sentences of five and ten years). See also U.S.S.G. § 2D1.1(c) (showing that the offense level in drug and drug conspiracy cases is generally determined by drug type and quantity, according to the table, which includes a very wide range of offense levels); U.S.S.G. § 5G1.1 (explaining how mandatory minimums affect the guideline ranges in the sentencing table). If the entire range is below the statutory minimum, the minimum becomes the guideline sentence. U.S.S.G. § 5G1.1(b); Fair Sentencing Act of 2010, § 2.

the fairness to federal cocaine sentencing.”⁶¹ However, because the FSA does not apply retroactively, disparities persist among those sentenced before the statute’s effective date.⁶² Drug-related sentences are unfair and counterproductive when they do not achieve the underlying goals and purposes of sentencing.⁶³

In response to the lingering disparities, The Smarter Sentencing Act of 2013 (SSA) was introduced with the intention of restructuring and modernizing the current federal drug sentencing policies.⁶⁴ The SSA seeks to return a certain degree of sentencing discretion to judges when dealing with certain non-violent drug offenders. In doing so, the SSA promotes sentencing procedures that are not only fair, but also shaped by the financial burdens associated with mandatory minimums. The problems with mandatory minimums will not fix themselves and the pressure is mounting for lawmakers to find a solution before more harm is done.

III. ANALYSIS

The SSA was first introduced in Congress on August 1, 2013.⁶⁵ Although it is not a law, the proposed legislation has been well received among both Democrats and Republicans who support the movement towards achieving fair and financially responsible sentencing policies.⁶⁶ Even in its current form, the SSA highlights the negative effects of mandatory minimums and reflects a challenge to the basic premise of using such minimums.⁶⁷ At the very least, the SSA has brought attention to an important issue that

61. Fair Sentencing Act of 2010, § 2. Section 2 of the FSA reduces the disparities between crack and powder cocaine sentencing by increasing the quantities necessary to trigger the mandatory minimums. *Id.* This provision reduced the 100:1 ratio between crack and powder cocaine sentences to 18:1. *Id.* Section 3 of the FSA eliminated the mandatory minimum for simple possession by striking the statutory provision. *Id.* § 3.

62. The FSA applies to offenders that meet its criteria, with offenses under the applicable statutes, and that were sentenced, or committed their offense after the FSA’s effective date of August 3, 2010. *Id.* § 2.

63. Gill, *supra* note 57, at 4–5.

64. The SSA would affect the mandatory minimum drug sentences under 21 U.S.C. §§ 841(b)(1)(A), (B) and 21 U.S.C. §§ 960(b)(1), (2). S. 1410, § 4. The current ten and twenty year minimums would be reduced to five and ten years, respectively. *Id.* The five and ten year minimums would be reduced to two and five years, respectively. *Id.* The SSA does not repeal any mandatory minimums or lower any maximum sentences for the applicable offenses. *Id.* § 2.

65. S. 1410 (113th), *supra* note 19.

66. *Id.*

67. See Lauren-Brooke Eisen, Nicole Austin-Hillery & Jessica Eaglin, *Re: Support for Bipartisan “Smarter Sentencing Act of 2013” Introduced by Senators Durbin and Lee*, BRENNAN CENTER FOR JUSTICE 1 (July 31, 2013), http://www.brennancenter.org/sites/default/files/analysis/073113_Comments_Smarter_Sentencing_Act.pdf (providing a press release to show support for the SSA and spread awareness about the current problems with federal prison populations that are caused by mandatory minimum sentences).

Democrats and Republicans agree needs to be addressed.⁶⁸

A. If Passed, the SSA Requires the Sentencing Commission and the Attorney General to Take Immediate Action

1. The SSA's Directive to the U.S. Sentencing Commission

If the SSA becomes law, the Sentencing Commission will experience the most immediate effects of its amendments.⁶⁹ To maintain a uniform and cohesive sentencing system, the SSA would require the Sentencing Commission to amend the Federal Sentencing Guidelines to reflect the changes.⁷⁰ Specifically, the Sentencing Commission would have to adjust the mandatory minimums and incorporate the SSA's goals for reducing federal prison capacities in its own efforts to improve the sentencing system.⁷¹ The SSA's goals would also be incorporated into the Commission's efforts to fulfill Congress' intent of finding ways to achieve a fair and efficient sentencing system.⁷²

2. The Attorney General's Report

Additionally, if the SSA became law, the Attorney General would be required to prepare a report for Congress about how sentencing practices impact the allocation of financial resources.⁷³

68. There has been broad, bipartisan support for the SSA. Press Release, Durbin and Lee Introduce Smarter Sentencing Act, *supra* note 21 (providing a list of supporters of the SSA). Supporting organizations include the National Association of Evangelicals to the United Methodist Church, Heritage Action, Justice Fellowship of Prison Fellowship Ministries, the ACLU, Grover Norquist, the National Organization of Black Law Enforcement Executives, the Leadership Conference on Civil and Human Rights, the NAACP, the Sentencing Project, Open Society Policy Center, the American Bar Association, NAACP Legal Defense and Educational Fund, the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, the Constitution Project, Drug Policy Alliance, Brennan Center for Justice, and Lawyers' Committee for Civil Rights Under Law. *Id.*

69. S. 1410, § 5. Section five of the SSA, "Directive to the Sentencing Commission," directs the Commission to review and amend its guidelines and policy statements to ensure consistency with the SSA's amendments and accurately reflect Congress' intent. *Id.* The Commission must also consider the SSA's goals and formulate the guidelines in a way that reduces the likelihood that federal prison populations will continue to exceed capacity. *Id.*

70. *Id.* The Commission must ensure the guidelines remain consistent with the goals of all new sentencing laws. *Id.*

71. *Id.*

72. *Id.* § 6. See also U.S. SENTENCING COMM'N, *supra* note 31 (explaining that the principle purposes of the Sentencing Commission include researching, gathering, and analyzing data for advising and assisting Congress in developing effective and efficient crime policy).

73. S. 1410, § 6. The Attorney General must provide Congress with a report

The Attorney General's report must provide specific details on cost savings and how the excess money generated by the SSA will be invested in law enforcement and used to fund programs for increasing crime prevention and reducing recidivism.⁷⁴ These reports are crucial for Congressional review and monitoring of the effects of the SSA.

B. The SSA Would Return Necessary Discretion to Judges for Imposing Sentences in Accordance With the Statutory Factors of 18 U.S.C. § 3553(a)

The Supreme Court's decision in *Booker* gave a great deal of discretion back to federal judges by allowing a judge to stray from the Guidelines when determining sentences. However, many post-*Booker* decisions involving non-violent drug offenders show that this discretion is often obstructed by the application of statutory mandatory minimums.⁷⁵ Generally, mandatory minimums impede any efforts of federal judges to impose sentences in accordance with the § 3553(a) factors when they fall below the mandatory minimum.⁷⁶ The negative effects of this can be seen in federal prisons throughout the country, where many non-violent drug offenders are currently serving excessive sentences based entirely on the mandatory minimum.⁷⁷

The SSA proposes a slight reduction in the severity and scope of certain mandatory minimums, which would give judges more liberty to exercise their discretion in reaching an appropriate sentence based on the U.S. Sentencing Guidelines and the § 3553(a) factors.⁷⁸ Federal judges would be able to conduct more individualized reviews and not be forced to impose a sentence that

outlining how the SSA's cost savings will be used towards more effective Federal criminal justice spending within six months of the date the SSA is enacted. *Id.*

74. *Id.*

75. The Supreme Court has decided twelve cases directly involving federal sentencing under the advisory Guidelines since *Booker*: *Dorsey v. United States*, 132 S. Ct. 2321, 2321 (2012); *Freeman v. United States*, 131 S. Ct. 2685, 2685 (2011); *Pepper v. United States*, 131 S. Ct. 1229, 1229 (2011); *Tapia v. United States*, 131 S. Ct. 2382, 2382 (2011); *Dillon v. United States*, 130 S. Ct. 2683, 2683 (2010); *Nelson v. United States*, 555 U.S. 350, 350 (2009); *Spears v. United States*, 555 U.S. 261, 261 (2009); *Irizarry v. United States*, 553 U.S. 708, 708 (2008); *Moore v. United States*, 555 U.S. 1, 1 (2008); *Gall v. United States*, 552 U.S. 38, 38 (2007); *Kimbrough v. United States*, 552 U.S. 85, 85 (2007); *Rita v. United States*, 551 U.S. 338, 338 (2007).

76. *Id.*

77. See 2012 SOURCEBOOK, *supra* note 16, at Table 43 (showing the amount of offenders subjected to mandatory minimums that sometimes impose excessive sentences based on the characteristics of the offender). Each year, roughly sixty percent of all federal drug offenders are subject to mandatory minimums. *Id.* In 2012, over half of all convicted federal drug offenders had little or no criminal record. *Id.* at Table 37.

78. S. 1410, § 4.

does not reflect the characteristics of the defendant and seriousness of the offense.

It is important to note that the SSA lowers, but does not repeal, any mandatory minimums. Despite this, the SSA's proposed amendments still give judges more discretion to decide whether particularly harsh sentences should apply, depending on the individual offender.⁷⁹ Specifically, the SSA would only come into play for offenders charged with the various drug offenses covered by 21 U.S.C. § 841(b)(1)(A), (B), and 21 U.S.C. § 960(b)(1), (2).⁸⁰

Increased discretion is a sensitive component of the SSA because it gives more power to judges to exercise their subjective beliefs with regard to an appropriate sentence.⁸¹ Of course, it is possible that this could lead to sentencing disparities among seemingly similar offenders sentenced by different judges.⁸² However, the SSA attempts to address these concerns by imposing very modest changes to the sentencing process and ensuring certain safeguards remain in place. Moreover, the current sentencing authority of 18 U.S.C. § 3552 would not be affected in any way.⁸³ Judges will still be directed to consult the Sentencing Guidelines as a starting point and to impose a sentence in accordance with the § 3553(a) factors.⁸⁴

The SSA would also have an effect on the “safety valve” provision of 18 U.S.C. § 3553 because judges would be required to consider a larger group of non-violent drug offenders that may qualify under the slightly broader criteria.⁸⁵ However, the SSA does not explicitly address whether the amendments to certain mandatory minimums or whether the expansion of the existing safety valve will apply retroactively. The SSA's silence with regard to these matters indicates that it would likely only apply to offenders sentenced after the date it becomes law.

79. *Id.* §§ 2–4.

80. *Id.* § 4. The SSA will not apply to violent offenders. *Id.* However, it will still have a drastic affect because roughly eighty-five percent of all federal drug offenders did not have a weapon involved in the offense. 2012 SOURCEBOOK, *supra* note 16, at Table 39.

81. Keith Humphreys, *The Many Foes of Discretion in Criminal Cases*, THE REALITY-BASED COMMUNITY (Aug. 12, 2013), <http://www.samefacts.com/2013/08/drug-policy/the-many-foes-of-discretion-in-criminal-cases/>.

82. *Id.*

83. Press Release: Durbin and Lee Introduce Smarter Sentencing Act, *supra* note 21.

84. *Id.*

85. *Id.* The statutory factors under § 3553(a) will not be affected by the SSA's amendments and will continue to be the main source of sentencing authority for federal judges.

*C. The SSA Would Help Restore Fairness and Justice
to Qualifying Non-Violent Federal Drug Offenders
Currently Serving Prison Sentences Unrelated to the
Magnitude of the Crime*

In 2010, the bipartisan Fair Sentencing Act was passed in response to the continuing problems with sentencing disparities. The FSA sought to close the gap between sentence disparities for crack and cocaine offenses. In doing so, it shed light on the need for broader reforms of the non-violent drug offender sentencing regime. The SSA explicitly states that it would effectuate retroactive application of the FSA in an effort to fully achieve the FSA's goals.⁸⁶ For this reason, the SSA will likely have more of an effect on the minority groups that the FSA could not reach because such offenders were sentenced before the FSA's effective date.⁸⁷ This includes those offenders disproportionately affected by the crack and powder cocaine sentencing disparities who did not qualify for the benefits of the FSA solely based on timing reasons.⁸⁸

Since the past and current sentencing policies have the greatest impact on racial minorities, it follows that the benefits of the SSA will appear to favor those minority groups.⁸⁹ However, the SSA will not apply to offenders who already received the FSA's benefits and those individuals will not be allowed to petition for sentence reductions.⁹⁰ The SSA would only apply to certain non-violent federal drug offenders and would not affect those charged with crimes at the state level.⁹¹

86. S. 1410, § 3. Upon motion, courts may impose a sentence in accordance with the SSA's amendments as if sections two and three of the FSA were in effect at the time the defendant was sentenced. *Id.*

87. U.S. SENTENCING COMM'N FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 113 (2004), available at http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Henderson_15Year.pdf. The Commission's report criticizes mandatory minimum penalties for creating unwarranted uniformity, unwarranted disparity, and undue severity, and for bypassing collaboration with essential participants and criminological research as sources of sentencing policy development. *Id.* However, the report essentially acknowledges that the Commission took a bad idea and made it worse. *Id.* at 13.

88. *Id.*

89. *Id.*

90. Application of the SSA will be limited to defendants that have not already received sentence reductions in accordance with the FSA. S. 1410, § 3.

91. *Id.* § 2–4. Non-violent offenders will receive the benefits of the SSA with regard to its mandatory minimum reductions and the expansion of the existing federal safety valve. *Id.* The SSA's modest safety valve expansion will only extend to include those offenders with a criminal history category of two or less. *Id.* at § 2. See also 18 U.S.C. § 3553(f)(1) (requiring the defendant to have no more than one criminal history point in order for the safety valve to apply). In addition, just because certain pre-FSA offenders may now qualify for benefits of

D. The SSA Would Benefit Every Taxpayer and Citizen

1. The SSA Will Generate More Money for Improving Crime Prevention and Managing Drug Problems in Communities Throughout the Country

If the SSA becomes law, it would have a much broader effect than just changing the way judges determine sentences for those qualifying defendants.⁹² Because the SSA would reduce the amount of time certain non-violent drug offenders spend in prison, the government would no longer be forced to allocate as many of its financial resources towards funding Department of Correction's expenses.⁹³ Since it would cost much less to run federal prisons with fewer inmates, the excess government funds can be used in ways that benefit the general public as a whole.⁹⁴

The SSA aims to reallocate resources so that government funds will be put towards incarcerating only the most serious offenders.⁹⁵ Rather than spending taxpayer money on prison costs to house inmates serving excessive sentences, these funds would be put towards improving crime prevention outside the prison systems.⁹⁶ Thus, resources will be available for a more proactive approach and communities can find ways to manage the drug problem at the front end in order to keep people out of prison.

2. Federal Prisons Will Be Safer and Unburdened by Overcrowded Prison Populations

Not only would the SSA help alleviate the financial pressures on the government to fund the prison systems, it would also help alleviate the severe structural strains caused by prison

the SSA, it does not mean the SSA will automatically apply. The limited category of offenders must first petition for a sentence reduction and it is within the discretion of the judge to determine whether it will be granted. S. 1410, § 3. Federal judges still have the discretion to deny the request if they determine the person does not meet the criteria. *Id.* In addition, the Director of the Bureau of Prisons, the attorney for the Government, or the court can file a motion for a sentence reduction under the SSA. *Id.* at § 3(b).

92. See Press Release: Durbin and Lee Introduce Smarter Sentencing Act, *supra* note 21 (explaining how the SSA seeks to improve crime prevention and public safety with the funds generated by lower sentences).

93. *Id.*

94. Senators Dick Durbin and Mike Lee describe mandatory minimums as “financially wasteful and irresponsible”, and expect the SSA's amendments could save taxpayers billions of dollars just in the first year of its enactment. *Id.*

95. *Id.*

96. *Id.* Sections five and six of the SSA also further this purpose through the directives to the Sentencing Commission and Attorney General. S. 1410, §§ 5, 6.

overcrowding.⁹⁷ When prisons exceed maximum capacity, there is no way to effectively maintain the overwhelming population of inmates and prison infrastructures are put in jeopardy.⁹⁸

If passed, the SSA would help create a safer work environment for federal prison personnel and guards and reduce the threat of safety risks to the inmates.⁹⁹ The SSA also addresses threats to public safety that exist beyond the prison doors.¹⁰⁰ A sense of distrust for the criminal justice system is often felt among communities that either experience first-hand or become aware of the harsh results of mandatory minimums.¹⁰¹ It creates an incredibly hostile environment not only in the federal prisons but also throughout the community when offenders receive sentences that are not proportionate to their crime.¹⁰²

3. *The SSA Will Not Have an Adverse Economic Effect on the Prison Industry*

Many critics are reluctant to accept legislation that seeks to reduce prison sentences because they fear it will negatively impact the prison industry and eliminate jobs.¹⁰³ The resistance is

97. See Press Release: Durbin and Lee Introduce Smarter Sentencing Act, *supra* note 21 (stating that the United States has experienced a 500 percent increase in the number of federal inmates over the past thirty years). Currently, the Bureau of Prisons is about forty percent overcapacity and more than fifty percent over capacity in high-security facilities. *Id.*

98. See John Irwin, Vincent Schiraldi and Jason Ziedenberg, Justice Policy Inst., America's One Million Non-Violent Prisoners 5 (Mar. 1999), available at http://www.justicepolicy.org/images/upload/99-3_REP_OneMillionNonviolentPrisoners_AC.pdf (explaining that the 1,185,458 nonviolent offenders we currently lock up represents five times the number of people held in India's entire prison system, even though it is a country with roughly four times our population). In addition, the European Union's prison population is only roughly 300,000, which is one third the number of prisoners the United States incarcerates even though the country's population consists of roughly one million fewer people. *Id.*

99. THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION 1 (Mar. 2012), available at http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf. See also THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1 (Jan. 2006), available at http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf (finding approximately three-fourths of the federal prison population are serving time for non-violent offenses and have no history of violence).

100. *Id.*

101. *Id.*

102. *Id.*

103. See John Fuquay, *Expanding Prison Mean More Jobs*, FAYETTEVILLE OBSERVER (July 20, 2008), http://www.fayobserver.com/news/local/expanding-prisons-mean-more-jobs/article_fd48e438-47f3-526e-a268-7163e594cf64.html (highlighting how some economic incentives support mass incarceration trends that promote the expansion of the prison industry). For some communities, prisons lead to new jobs and stimulate the local economy, which makes them a

primarily from those who rely on prisons as the primary source of employment in their community.¹⁰⁴ However, the desire for continued job creation in a thriving prison industry should not bear any weight on the need to modernize sentencing policies so that offenders are only in prison for as long as their characteristics and offense require.¹⁰⁵

IV. PROPOSAL

Congress never intended the federal sentencing process to be set in stone as a perfect and complete system, immune from modifications and improvements.¹⁰⁶ The evolution and development of the sentencing system has proven to be a challenging process that requires patience and adaptability.¹⁰⁷ The system must change with the times, accommodate competing interests, and address unintended negative consequences. Unfortunately, the process has turned out to be one of “trial and error.” The need for change only comes to light through unfair sentencing trends and developments that are observed and analyzed over time. But, there is a solution, and although it might not always be a quick fix, Congress has the power to pass new legislation that takes small steps towards remedying the negative effects of the current sentencing regulations.

This section will discuss the reasons why the SSA deserves Congress’ immediate attention and why it should be passed into law. It will argue that the amendments proposed by the legislation are necessary to move forward and combat the reoccurring dilemma

positive and desirable addition to the community. *Id.* Rather than fearing that prisons in the community will put the citizens’ safety in jeopardy with the risk of escaped inmates, “[m]ost people are excited about the jobs.” *Id.* The increase in jobs is so desirable that a county in rural North Carolina even went as far as to scrap plans for a landfill in favor of a prison instead. *Id.*

104. *Id.*

105. *Id.*

106. As just one example, through the Sentencing Reform Act of 1984, Congress directed the Sentencing Commission to ensure the purposes of § 3553(a)(2) were met, that the Guidelines were effectively promoting and achieving those purposes, and that they reflected the advancement in knowledge of human behavior. This was largely based on Congress’ efforts to minimize the likelihood of prison overcrowding, and avoid unwarranted sentence disparities and the intent that the sentencing policies afforded sufficient discretion to judges to impose individualized sentences when necessary to achieve those goals. Also, it should be noted that prison overcrowding was a concern as early as 1984, and is not something that just came to light in recent years.

107. The Commission was not directed with precise directions on how to achieve Congress’ directive. Congress merely conveys the underlying objectives and it is the Commission’s responsibility to find and implement a solution based on the analysis and findings. Congress did not require an immediate solution that wiped away the problem, it just recognized the needs and what it sought to avoid, with the understanding that this will be a continual process.

that arises when a judge is bound by mandatory minimums that force the imposition of a sentence beyond what they believe is necessary or deserving. It will analyze the ways in which restoring discretion to judges and reducing certain statutory mandatory minimums for non-violent drug offenders can have an overall positive effect on the prison system and redirect resources to the community for crime prevention efforts. In addition, it will focus on the many financial benefits the SSA would offer and the need for a modern sentencing policy that is more financially responsible. Finally, it will conclude that it is imperative for Congress to pass the SSA to solve this problem.

Federal courts cannot continue to function under a system where statutory mandatory minimums force judges to impose unfair and excessive sentences.¹⁰⁸ The SSA specifically targets these mandatory minimums and the narrow “safety valve” exception that exists under the current statute. It does this in recognition of the fact that citizens of every state are surrounded by the negative consequences of mandatory minimums, which are the driving force behind skyrocketing prison populations.¹⁰⁹

With a struggling economy and a steadily rising national debt, the imperative for Congress to bring fiscal sanity to sentencing policies has never been greater. Federal prisons are filled beyond capacity with many offenders whose release date is nowhere in sight. New arrests and convictions will continue to accumulate, regardless of whether prisons have the space for them. Under the current system, prisons will consume enormous sums of the government’s scarce financial resources every year because it has no choice but to continue to fund prisons. In light of the national debt that continues to steadily rise, the government needs to more closely scrutinize the allocation of its limited resources to ensure each taxpayer dollar is being spent wisely. Every citizen bears the cost of over-incarceration and rapidly expanding prison populations.¹¹⁰

108. U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 47–48 (Nov. 2004), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf. According to the report, sentence lengths for drug offenses have been the major cause of federal prison population growth and racial disparities in sentencing. *Id.* at 76. See also U.S. Sentencing Comm’n, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991) [hereinafter Special Report to Congress], available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/special-report-congress> (blaming mandatory minimums for disproportionate severity in sentencing, a lack of uniformity, and increased disparities).

109. Special Report to Congress, *supra* note 108.

110. See also DEP’T OF JUSTICE FEDERAL PRISON SYSTEM OPERATING COST PER INMATE 118-19, available at http://www.justice.gov/archive/jmd/1975_

It is undisputed that the cost of housing federal inmates will continue to grow and that the number of federal inmates will likely grow as well.¹¹¹ When that happens, there will be no choice about how much money to allocate to the Department of Justice (DOJ) to cover facility expenses, and the DOJ will be forced to pay whatever it costs to run the prisons.¹¹² Keeping offenders in prison longer than necessary to achieve the purposes of punishment is a waste of money and the government simply does not have excess resources to spare.¹¹³ The result is wasteful and unfair to inmates, prison officials, and every taxpayer whose tax dollars are not being put back into their community, or towards efforts to reduce crime and recidivism.¹¹⁴

The SSA places several pressing and controversial sentencing practices in the spotlight. The SSA has a bold approach towards achieving economically conscious sentencing practices and straightforward goals, which have caught the attention of many lawmakers and sentencing advocates. Unfortunately, this attention is not enough. Congress needs to pass the SSA and not wait any longer to implement fair sentencing policies that consider the country's economic needs as well. The financial repercussions

2002/2002/html/page117-119.htm (charting data representing various trends in federal prison system salaries and expenses from 1975 through 2003 as well as costs attributable to inmates).

111. Matthew G. Rowland, *Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons*, 77 FEDERAL PROBATION 3–16 (Sept. 2013), available at <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2013-09/too-many.html#overcrowding>. The growth rate in federal prisons is largely due to the legislative history, and the current legislature will only continue to add to the problem. *Id.*

112. *Id.* More people are being convicted and sentenced to lengthy prison sentences, and less people are getting out on parole or supervised release. *Id.* The result is concerning for prison infrastructure and the future of prisons, which are not built to house so many offenders. *Id.*

113. *See Costs of Imprisonment Far Exceed Supervision Costs*, UNITED STATES COURTS (May 12, 2009), http://www.uscourts.gov/News/NewsView/09-05-12/Costs_of_Imprisonment_Far_Exceed_Supervision_Costs.aspx (suggesting that the financial costs associated with general deterrence do not justify the punishment once it becomes ineffective). It is wasteful to continue to pay to keep an inmate in prison when the deterrent effect of incapacitation is no longer serving its purpose. *Id.*

114. U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 13–16 (May 2004), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2004/200405_Recidivism_Criminal_History.pdf. *See also* U.S. SENTENCING COMM'N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE 15–17 (Jan. 4, 2005), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf (suggesting that being a drug offender is one of several factors that predict a reduced risk of recidivism).

associated with excessive sentences cannot be ignored and Congress needs to recognize that this outweighs the resistance against legislation that appears to promote shorter prison sentences.

The overly harsh and outdated policies that currently shape sentencing determinations promote excessive and unnecessary incarceration in certain situations and do not consider the financial repercussions whatsoever. There is no problem with conceding that certain mandatory minimums are too strict or that, in some limited situations, the “tough on crime” mentality does not serve a legitimate purpose. The federal sentencing process might never obtain a perfect result, but, through the SSA, underlying issues can be addressed and managed in an effective manner.

The harm caused by unfair, senseless, and uneconomical sentencing policies is not speculative.¹¹⁵ The SSA recognizes what is already occurring in the federal prison system, traces it to the source, and offers a practical solution to the problem. The SSA is imperative for changing unfair sentence policies at the front end, with sentence imposition, which can only happen if discretion is returned to judges by relaxing mandatory minimums that do not serve a valid sentencing purpose or public interest.¹¹⁶

V. CONCLUSION

Congress must reduce the financial strain that is currently being placed on taxpayers by wasteful sentencing practices. The SSA is the necessary means for significantly reducing the cost of federal prisons. By returning discretion to judges, reducing certain mandatory minimums, and expanding the existing safety valve, the prison populations will stop expanding at such unmanageable rates. These minor adjustments will generate overwhelming cost-savings and alleviate the financial and structural strains that are so heavily burdening federal prisons.

The SSA should not be confused with being “soft on crime.” The SSA is carefully crafted with significant attention to the continued need to impose punishments that reflects the magnitude and seriousness of the crime. Reducing prison sentences does not mean federal courts are being more lenient on punishment. It simply means judges are being afforded the discretion to consider the

115. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT. REP. 12 (July–Aug. 1999), available at 1999 WL 1458615 (reporting that prisoners with minimal risk of recidivism were serving long prison sentences despite the lack of need for deterrence). Over ten years ago the Commission shared its findings that the average time served has dramatically increased, without proper justification for it, yet nothing was done to fix the problem. *Id.*

116. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 590 (2005).

individual offender and arrive at an appropriate sentence based on the § 3553(a) factors and the Sentencing Guidelines, as opposed to an overly harsh “one size fits all” mandatory minimum sentence. Congress must realize how important the SSA is for remedying the devastating effects of mandatory minimums, and should act swiftly to make this bill a law.

