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OVERVIEW OF MASS INCARCERATION IN THE UNITED STATES

Nationwide

Over the last four decades, the rate of incarceration in the United States has more than quadrupled – growing from 200,000 individuals in 1973 to 2.2 million individuals today.¹ This growth has resulted in the United States having the largest penal population in the world.² Indeed, despite the fact that the United States makes up only around 5 percent of the world’s population, almost 25 percent of the world’s prisoners are held in prisons in the United States.³ Nearly 1 out of every 100 adults in the United States is in jail or prison – an incarceration rate that is 5 to 10 times higher than rates in Western Europe and other democracies.⁴

This growth in the prison population was driven by changes in laws on the state and federal level, increasing penalties for non-violent drug offenses, violent crimes, and repeat offenses, making many of those penalties mandatory, and enacting “truth-in-sentencing” laws.⁵ These legal changes were shaped by a policy choice to be “tough on crime,” but have created serious questions about whether the costly penalties we have imposed are sensible, fair and appropriate public safety or harsh, excessive and cruel punishment that can’t be reconciled to a just society. As a report from the National Research Council recently found, these policies “that increased the incarceration rate to unprecedented levels violated traditional jurisprudential principles, disregarded research evidence that highlighted the ineffectiveness and iatrogenic effects of some of those policies, and exacerbated racial disparities in the nation’s criminal justice system.”⁶

This massive increase in prison population has had sweeping collateral consequences on our society. Spending on jails and prisons has risen from about 6 billion dollars in 1980 to close to 80 billion today. Taxpayers are left to pay the rising cost of prison and jail expenditures, which rank behind only Medicaid and education in most state budgets.⁷ From 1980 to 2009, per-prisoner spending remained virtually flat; however, there was still a 400% increase in nationwide prison expenditures during this period due to the increasing number of people being held behind bars.⁸

The effects of these policies on the families of incarcerated individuals and communities are acute. An estimated 2.7 million minor children today are

growing up with at least one parent behind bars,⁹ with two thirds of those parents serving time for a nonviolent offense.¹⁰ More than 10% of African American children lost their fathers to incarceration during their childhood, while 1% lost their mothers.¹¹ Men who were married when incarcerated are three times more likely than their peers to divorce after their release,¹² while the lost wages and extra expenses associated with paternal incarceration mean that the partners and children of incarcerated men are more likely to suffer homelessness and to depend on public assistance.¹³ The children of incarcerated fathers are also more likely to develop behavior problems such as aggression and to be arrested as juveniles.¹⁴

The rise in incarceration predominately impacts communities of color – more than half the prison population is African American or Latino.¹⁵ In some African American communities, 3 out of 4 young men are likely to spend time in prison.¹⁶ Overall, 1 out of every 3 African American men can expect to go to prison over the course of their lifetimes, while this is true for only 1 out of 17 white men.¹⁷ These statistics are driven in large part by drug arrests. While white individuals are at least as likely as African Americans and Latinos to use and sell drugs,¹⁸ African Americans and Latinos account for three quarters of all those imprisoned on drug charges.¹⁹

When prisoners are released, studies suggest that the economic productivity of former inmates undergoes lasting damage. A multitude of barriers exist to prevent the formerly incarcerated from finding employment which compounds their inability to support their families and contribute to society. Even among those who do find employment, all other things being equal, incarceration reduces future wages by 11%, cuts annual employment by 9 weeks, and reduces yearly earnings by 40%.²⁰ Not surprisingly, former inmates enjoy far less economic mobility than their peers; two thirds of those who were in the bottom quintile of earnings nationally in 1986 remained in that position in 2006, while only one third of men who weren't incarcerated remained stuck at the bottom.²¹

In addition to this reduction in expected earnings, formerly incarcerated individuals often suffer what has been deemed “civil death,” or the loss of certain civil rights due to a criminal conviction.”²² Based on prior felony convictions, many states deny individuals licenses to work in certain professions.²³ In addition, some states revoke driver’s licenses, thus preventing individuals from being able to get to work or school.²⁴ A felony conviction can also eliminate your eligibility for most forms of public assistance, including food stamps, public

housing, and student loans – and many states ignore federal guidance to the contrary and terminate felons from the rolls of Medicaid, taking no steps to re-enroll them following their release.²⁵

Previously incarcerated citizens are often stripped of many basic rights of citizenship. Nearly 1 in 40 adults and 1 in 13 African Americans of voting age are forbidden to vote by laws that disenfranchise former felons, despite their having served their full sentences.²⁶ Meanwhile, current prisoners in all but two states are forbidden to vote; however, those prisoners are counted in their prison districts by the census for the purpose of determining political representation, often shifting political power from the poor urban districts from which prisoners originate to the rural districts in which prisons are located.²⁷ For all intents and purposes, these policies create a new “class” of individuals in our society, who are pushed to the margins and given little chance to succeed.

Federal Incarceration

Like the United States prison population as a whole, the federal prison population has exploded over the last few decades, rising from 24,252 individuals in 1980 to 209,771 individuals in 2010.²⁸ While in the past decade more than half the states have reduced their prison population, the federal prison population has continued to grow – increasing in size by more than 40% from 2001 to 2010.²⁹ More than half of the federal prison population is in prison for non-violent drug offenses – offenses which are most commonly the subject of mandatory minimum sentences.³⁰ As of September 30, 2010, 58.1% of the individuals in the custody of the Federal Bureau of Prisons were convicted of an offense carrying a mandatory minimum penalty and 39.4% of the individuals in the custody of the Federal Bureau of Prisons, were subjected to a mandatory minimum sentence at sentencing.³¹

In addition to the huge societal costs discussed in the above section, the cost of running the federal prison system has skyrocketed over the last three decades. In 1982, the federal corrections budget was a little over 1 billion dollars.³² In 2012, the federal corrections budget was 6.6 billion dollars.³³ Even accounting for inflation, this is an increase in expenditures of more than 450%.³⁴ This unsustainable and fiscally irresponsible increase must be curtailed in the coming years and can only be remedied with a change in policy focused on reducing the incarceration of individuals in the federal system.

MANDATORY MINIMUM SENTENCES

The Problems with Mandatory Minimum Sentencing

As the term itself defines, mandatory minimum sentences mandate that individuals receive certain penalties without any consideration for the individual's background, criminal history, or involvement in the crime, the circumstances of the crime, any other available mitigating evidence, and in many instances, even the severity of the crime.³⁵ This approach often leads to disproportionate sentences, with individuals receiving increasingly harsh penalties for crimes that we, as a society, have generally felt did not warrant such extreme punishment. Such harsh and disproportionate sentences cannot be justified, especially since the "benefits" of mandatory minimum sentencing have never come to fruition.

The increased use of mandatory minimum sentencing laws was driven by many supposed rationales. Primarily, policy-makers argued that mandatory minimums would deter crime. In addition, they argued that such laws would equalize punishment, by removing discretion from judges, create more just sentences as a whole, and eliminate racial bias in sentencing.³⁶ Repeated studies over the following decades have shown that mandatory minimum sentences fail to achieve any of these goals.

Deterrence

Despite the fact that deterrence is the primary reason given for mandatory minimum sentences, the vast majority of studies on this subject have proven that mandatory minimum sentences have little to no deterrent effect on crime.³⁷ As the National Research Council recently concluded, "estimated effects [of mandatory minimum sentences on deterring crime] are so small or contingent on particular circumstances as to have no practical relevance for policy making."³⁸ Indeed, research has shown that it is the certainty of conviction, not the severity of the sentence, which has the biggest deterrent impact on an individual.³⁹ Moreover, in the past decade, 17 states have undertaken sentencing and prison reform, including eliminating or reducing mandatory sentencing schemes that had been created, and in all 17 states crime rates fell.⁴⁰ As a result, the deterrence rationale can no longer be used to justify these harsh mandatory minimum sentences.

Equalizing Punishment and Eliminating Bias

Mandatory minimum sentences are simple in definition – every person who commits a particular offense is punished with the same minimum amount of time in prison. However, this simple definition is almost never borne out into reality. Rather than result in uniformity, the mandatory sentencing systems in place in the United States result in disparate, inconsistent, and disproportionate sentences.

As the National Research Council concluded, “[t]he evidence is overwhelming that practitioners frequently evade or circumvent mandatory sentences, that there are stark disparities between cases in which the laws are circumvented and cases in which they are not, and that the laws often result in the imposition of sentences in individual cases that everyone directly involved believes to be unjust.”⁴¹ This evidence makes clear that mandatory minimum sentencing schemes do nothing to create equality in outcome. In fact, if anything, such schemes create less equal outcomes, and certainly less just ones, by allowing certain individuals to avoid the Draconian penalties due to circumvention, while others, who are often even less deserving of this punishment, are not so lucky. As the study notes, and as the examples discussed below illustrate, rather than creating equal and appropriate sentences, these mandatory minimum sentences often result in disproportionate sentences that no just society should tolerate.

An example of this inequality in treatment under mandatory schemes is Mandy Martinson, who had no prior criminal history, but whose involvement with a drug-dealing boyfriend resulted in her being sentenced to a 15-year mandatory minimum sentence – a term more severe than the boyfriend himself received.⁴² Ms. Martinson, who unfortunately was struggling with an addiction to methamphetamine at the time, began dating a man who was a known drug dealer in December 2003.⁴³ Mandy never sold any drugs or carried a gun, but she would travel with her boyfriend when he would go to buy or sell drugs.⁴⁴ The police began investigating her boyfriend and when they searched their home in 2004, they found a duffel bag with drugs and two guns.⁴⁵ While awaiting trial, Mandy was released on bond, successfully completed drug treatment, and was working as a dental hygienist.⁴⁶ Meanwhile, her boyfriend took a plea deal from prosecutors and testified against Mandy, stating that he was a better drug dealer with her help and that he had given her a gun.⁴⁷ She was convicted of conspiracy and possession of the drugs and of possession of the gun.⁴⁸ As a

result, the trial judge regrettably imposed the mandatory 15 year sentence – 10 years for the drug charges and 5 years for the firearms enhancement – despite a finding that “the Court does not have any particular concern that Ms. Martinson will commit crimes in the future.”⁴⁹ Her boyfriend, due to his cooperation, received a lesser sentence than Ms. Martinson.⁵⁰

Another example of the disproportionate sentences that result in this system is Sharanda Purlette Jones, a woman with no criminal record, who, in November of 1999, was sentenced to die in prison for a nonviolent offense.⁵¹ At the time, Ms. Jones, age thirty-two, was raising her 8-year old daughter by herself and caring for her paraplegic mother.⁵² Ms. Jones became a subject of law enforcement interest after a couple she was friendly with was arrested on drug charges as a result of a drug task force operation in Terrell, Texas.⁵³ After their arrest, the couple decided to act as government informants, and during a taped phone conversation with Ms. Jones asked her if she knew where they could purchase drugs.⁵⁴ Ms. Jones “told the couple she might know someone she could introduce them to so that they could buy drugs.”⁵⁵ Ms. Jones was indicted on six counts of crack cocaine possession and one count of conspiracy to distribute cocaine.⁵⁶ She was acquitted of the possession counts and convicted of conspiracy to distribute cocaine. Because the sentencing judge found that crack cocaine was the final result of the conspiracy, the judge converted the 30 kilograms of powder cocaine, which her co-conspirators alleged Ms. Jones bought over time from a supplier in Houston, to cocaine base, making Ms. Jones culpable for crack cocaine, which carried harsher sentences than powder cocaine.⁵⁷ Ms. Jones’s sentence was then enhanced by six levels based on her role in the conspiracy, possession of a firearm that she had a license to carry in Texas, and obstruction of justice for testifying in her own defense – the judge concluded that because Ms. Jones was convicted, the jury in essence found that her testimony under oath was false.⁵⁸ This resulted in a sentence of mandatory life without parole.⁵⁹ She has now served more than 14 years of her sentence.⁶⁰

Removing Discretion from Judges

Further, while mandatory minimum sentences do remove discretion from the trial judges, such schemes simply shift the discretion to the prosecutors. As noted in a report by the Brennan Center, “[f]ederal prosecutors today wield unprecedented influence in the sentencing of criminal defendants through discretionary decisions made at multiple stages of a criminal prosecution, including charging decisions, plea agreements, and sentencing recommendations.”⁶¹ As a result, rather than the discretionary sentencing

determination being in the hands of an individual tasked with being an impartial adjudicator, the sentencing determination is in the hands of a member of the executive branch that does not have the same accountability.

Moreover, studies show that the discretion exercised by federal prosecutors is the subject of their own racial biases, whether conscious or unconscious.⁶² Indeed, over twenty years ago, the United States Sentencing Commission recognized this problem of racial bias, finding that “[t]he disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.”⁶³ This signal two decades ago has not been answered and racial bias continues to permeate this system. For example, a more recent study has shown that there are “notable differences” in a prosecutor’s decision to seek, or not seek, a firearm enhancement based on the race of the defendant.⁶⁴

No evidence exists to show that judges, were they given discretion within a range of outcomes, would engage in a practice of imposing unequal and racially disparate sentences upon similarly situated individuals at a higher rate than exists in our current system where the prosecutors hold that discretion.

Use of Mandatory Minimums in Plea Bargaining

This Task Force is concerned that the elimination of mandatory minimum sentences will remove a “weapon” from the prosecutor’s arsenal when attempting to plea bargain. To begin with, according to the United States Sentencing Commission, mandatory minimum sentences might actually encourage people to go to trial – 94.1% of those convicted of an offense carrying a mandatory minimum pled guilty pre-trial, while 97.5% of those convicted of an offense not carrying a mandatory minimum penalty pled guilty pre-trial.⁶⁵ The Commission further found that “the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty.”⁶⁶ As a result, there is a distinct possibility that mandatory minimum penalties, as a whole, do not encourage plea bargains.

Moreover, to the extent the mandatory minimum sentences are a “weapon” of the prosecutor, studies have shown that this is an extremely coercive tool that can leave individuals with very little choice.⁶⁷ “In 2012, the average sentence of federal drug offenders convicted after trial was three times higher (16 years)

than that received after a guilty plea (5 years and 4 months).”⁶⁸ The ability of prosecutors to tell charged individuals that they will seek enhancements against them if they do not plea – enhancements that would invoke mandatory minimum penalties that will tie the hands of the judge and at least double their prison time, and possibly even result in a life sentence – provides prosecutors with a far too powerful stick that they can wield without any supervision by the judiciary.⁶⁹ This leads to tremendous unreliability where even innocent people are sometimes compelled to plead guilty to avoid more serious sentences.

Equipping prosecutors with this coercive “weapon” to get individuals to give up their constitutional right to a fair trial is hardly a sufficient justification for maintaining a system that is so clearly broken. The story of 23-year-old Weldon Angelos illustrates both the disproportionate sentences one can receive under the current broken sentencing scheme and the danger that an individual encounters for failing to accept a plea deal. Mr Angelos had his own business in the music industry, but sold a half-pound of marijuana on two occasions to one of his acquaintances, who was acting as a confidential informant to the police and arranged the sales.⁷⁰ The informant claimed that during two of the sales he observed Mr. Angelos with a gun – once in Mr. Angelos’s car and once holstered on Mr. Angelos’ ankle; however, Mr. Angelos did not use the weapon or threaten anyone with the weapon during either of these sales.⁷¹ After a search of his home turned up additional guns and drug paraphernalia, Mr. Angelos was charged with several drug, firearm, and money laundering offenses.⁷² Prior to trial, the government had offered to recommend a sentence of sixteen years if Mr. Angelos would plead guilty to the gun charges, but because Mr. Angelos denied carrying a gun during the sales, he rejected the plea.⁷³ Despite the dismissal of one charge and his acquittal of three others, Mr. Angelos, age 25, with no prior criminal record, was sentenced to a mandatory 55 years in federal prison.⁷⁴ In a sixty-seven page opinion, Mr. Angelos’s sentencing judge, Bush-appointed Paul Cassell⁷⁵ decried Mr. Angelos’s sentence as “unjust, cruel, and even irrational,” writing he had “no choice” but to impose the sentence, and recommended that President Bush “commute Mr. Angelos’s sentence to something that is more in accord with just and rational punishment.”⁷⁶ In addition, eleven of the twelve jurors that convicted Mr. Angelos thought he should only receive a five to ten year sentence.⁷⁷ Twenty-nine former judges filed an amicus brief calling for Mr. Angelos’s sentence to be overturned as unconstitutional.⁷⁸ But their pleas could not be heard under current federal sentencing law; the Tenth Circuit Court of Appeals upheld the sentence, and Mr. Angelos is still serving his sentence.⁷⁹

Mandatory Minimum Sentences Should Be Eliminated

For all of these reasons, it is clear that mandatory minimum sentences fail to achieve any of the purposes for which they were enacted and, instead, result in an unjust system with disproportionate and racially biased outcomes. As a society, we should only permit such a system to continue if it results in just outcomes and benefits to society, which the mandatory sentencing system clearly does not do. As a result, eliminating mandatory minimum sentences from our justice system is an important step forward in making our system more rational, balanced, and equal. It is worth noting that support for ending the practice of mandatory minimum sentencing is widespread across party lines shared by organizations with very diverse political perspectives. The following advocacy groups and individuals have made statements about the need to eliminate or curtail the use of mandatory minimum sentences in our government:

Organizations

- American Legislative Exchange Council (ALEC)⁸⁰
- American Correctional Association⁸¹
- American Probation and Parole Association⁸²
- American Bar Association (ABA)⁸³
- American Civil Liberties Union (ACLU)⁸⁴
- Brennan Center For Justice⁸⁵
- Committee on Criminal Law, Judicial Conference of the United States⁸⁶
- The Evangelical Lutheran Church of America (ECLA)⁸⁷
- Families Against Mandatory Minimums (FAMM)⁸⁸
- Human Rights Watch⁸⁹
- The International Community of Corrections Association⁹⁰
- The International Union of Police Associations⁹¹
- Justice Fellowship⁹²
- The Leadership Conference on Civil and Human Rights⁹³
- Major Cities Chiefs Associations⁹⁴
- National Council on Crime and Delinquency (NCCD)⁹⁵
- National Association of Evangelicals⁹⁶
- Right on Crime⁹⁷
- The Sentencing Project⁹⁸
- Southern Baptist Convention (SBC)⁹⁹
- The Urban Institute¹⁰⁰
- The United States Conference of Catholic Bishops¹⁰¹
- The Vera Institute of Justice¹⁰²

Notable Individuals

- Grover Norquist, Founder and President of Americans for Tax Reform¹⁰³
- Senator Rand Paul¹⁰⁴
- Pat Robertson, Chancellor of Regent University and Chairman of the Christian Broadcasting Network¹⁰⁵
- Judge Patti B. Saris, Chair United States Sentencing Commission¹⁰⁶
- Anthony Kennedy, Associate Justice, United States Supreme Court¹⁰⁷
- Tim Lynch, Director Criminal Justice Project, Cato Institute¹⁰⁸
- David Koch, Co-Owner and Executive Vice President of Koch Industries¹⁰⁹
- David Keene, Former National Rifle Association (NRA) President, former Chairman of the American Conservative Union, and founding member of Right on Crime¹¹⁰
- Ward Connerly, Founder and Chairman of the American Civil Rights Institute¹¹¹
- Stephen Breyer, Associate Justice, United States Supreme Court¹¹²

The wide range of support for reform provides Congress with unusual broad political consensus that action is urgently needed to eliminate extreme sentencing within the federal system.

VULNERABLE POPULATIONS IN OUR PRISON SYSTEM

As the prison population in the United States has exploded over the past four decades, the prison population has disproportionately impacted several vulnerable groups at high rates – individuals with mental illness, children, women, and veterans. This Task Force should take steps to lower the rate at which these individuals are imprisoned and work to propose laws that permit judges more discretion in sentencing.

Individuals with Mental Illness

In the 1800s, as a society, the United States had determined that incarcerating the mentally ill in jails and prisons was inhumane, and, instead, these individuals should be housed in mental health facilities where they can receive treatment.¹¹³ From the 1870s through 1970, jails and prisons rarely housed mentally ill individuals, who were treated, instead, as sick individuals that required treatment rather than as criminals.¹¹⁴ In the 1960s, the process of deinstitutionalization began, resulting in the release of numerous mentally

ill individuals from mental health facilities.¹¹⁵ Because of this process, mentally ill individuals were forced out of mental health facilities and into our criminal justice system – arrested for crimes, treated as criminals, and thrown into jails and prisons, rather than being treated as sick, treated as patients, and placed in mental health facilities.¹¹⁶ This problem has only gotten worse as the years have gone by.

A 2006 report from the Bureau of Justice Statistics found that 45% of federal inmates had a mental health problem.¹¹⁷ Individuals were classified as having a mental health problem if they either had received a clinical diagnosis or were treated by a mental health professional in the prior 12 months, or if they were experiencing symptoms of a mental disorder based on the Diagnostic and Statistical Manual of Mental Disorders, fourth edition.¹¹⁸ In addition, the majority of individuals suffering from mental illness committed non-violent offenses – 51.3% of federal prisoners with mental health problems were incarcerated for non-violent drug offenses.¹¹⁹

While these incarcerated individuals often did violate the law, in many instances their violation of the law was driven by their mental illness. As discussed above, we used to recognize, as a society, that these individuals deserved treatment rather than incarceration, but our current system simply throws them into federal prison. Moreover, across all federal and state institutions, inmates with mental health problems were more likely to be sexually victimized than others, and inmates with serious psychological distress were nine times as likely as those without mental health problems to be victimized by another inmate and five times as likely to be victimized by staff.¹²⁰ The current sentencing guidelines provide almost no ability to account for an individual's mental illness and to fashion a more appropriate punishment based on that illness. The sentencing guidelines should be revised to allow the sentencing judge to take mental illness into account in determining the appropriate punishment.

Children

In the 1980s and 1990s, because of a fear of increased youth crime, the United States shifted from treating children as delinquents to prosecuting children as adults and sentencing them to time in adult prisons.¹²¹ In the federal system, children as young as thirteen years old can be transferred to adult courts and sentenced as adults.¹²² While federal-specific statistics are not maintained, nationwide statistics indicate that in 2010, 6,000 juvenile cases

were transferred to adult court, with the children being tried and sentenced as adults.¹²³ According to the Bureau of Justice Statistics, 1,325 children under the age of 18 were being held in state and federal prisons at the end of 2012.¹²⁴ Thousands more are held daily in state adult jails.¹²⁵

This change in practice occurred despite repeated scientific studies establishing that children are, in fact, developmentally distinct from adults.¹²⁶ The OJJDP recently concluded that “[d]evelopmental psychologists strongly question whether juveniles have the cognitive ability, psychosocial maturity and judgment necessary to exercise their legal rights.”¹²⁷ Moreover, the United States Supreme Court recently recognized this distinction, finding that “children are different” and that a sentencer must be given the opportunity to consider youth and all that accompanies it before imposing a mandatory life-without-parole sentence on a child.¹²⁸ Thus, children should not continue to simply be charged and sentenced as adults when all the established evidence proves that children are inherently different from adults.

Further, recent studies have determined that not only are these policies of treating children as adults incredibly misguided, they are, in fact, counter-productive, as transferring children to the adult criminal justice system has been found to increase, rather than decrease, rates of violence.¹²⁹ Indeed, in February of this year, given this established evidence of ineffectiveness, the OJJDP issued a report recommending that policymakers “[c]onsider raising the minimum age for criminal court to 21 or 24” years old.¹³⁰

Not only is placing children in the adult criminal justice system ineffective, it exposes those children to horrific abuse and violence – children are five times more likely to be sexually assaulted when placed in an adult facility than when placed in a juvenile facility.¹³¹ Given this risk of abuse, coupled with the documented ineffectiveness of treating children as adults, this Task Force should work to raise the minimum age at which children can be prosecuted in adult court.

Women

Over the last three decades, the number of women in federal facilities has increased exponentially, from 1,627 women in federal prisons in 1982 to 13,925 in federal prisons in 2012 – an increase of over 700%.¹³² As of 2012, only 3.8% of women incarcerated in federal prison had been convicted of violent offenses while 57.9% of women in federal prison had been convicted of non-violent drug

offenses.¹³³ Since women are often the primary, or sole, caregivers in a family unit – almost two-thirds of mothers incarcerated in state prisons were living with their child or children prior to incarceration, “many in single-parent households” – removing mothers from their homes for violation of federal drug crimes can have devastating effects.¹³⁴ While studies into this issue have been limited to date, available data reveal “that maternal incarceration is associated with a host of negative child outcomes, including poor academic performance, classroom behavior problems, suspension, and delinquency.”¹³⁵ This Task Force should take into consideration the collateral consequences associated with unnecessarily imprisoning women at this incredibly high rate, mostly for the commission of non-violent offenses.

Veterans

In 2007, the Bureau of Justice Statistics reported that as of 2004 just under 10% of all federal prisoners were veterans, that 64% of those individuals served during a wartime period, and that 26% of those individuals saw combat duty.¹³⁶ While the percentage of incarcerated veterans in federal prisons in 2004 represented a low point from the high of 20% in 1991,¹³⁷ these numbers will likely increase due to our military involvement in Iraq and Afghanistan, though this increase could take some time to materialize. Indeed, the co-author of this study by the Bureau of Justice Statistics, Margaret Noonan, recently stated that it would take years for the numbers to reflect the veterans of Iraq and Afghanistan because “[g]enerally, veterans don’t get in trouble immediately.”¹³⁸ While no recent comprehensive study has been done, a 2012 survey by Iraq and Afghanistan Veterans of America (IAVA) of its members found that 12% reported being involved with the criminal justice system since returning from combat.¹³⁹ Another recent study found that incarcerated Iraq and Afghanistan veterans are three times more likely to suffer from combat-related PTSD than incarcerated veterans from other wars.¹⁴⁰ These studies indicate a growing need to be able to account for these and other concerns involving veterans at sentencing.

All of these populations are disproportionately impacted by our current system’s inability to account for legitimate factors that should influence sentencing. Mandatory sentencing schemes require judges to disregard disabilities and life circumstances that unfairly punish vulnerable members of our society. There is an urgent need for reform.

OVERCRIMINALIZATION: THE FEDERAL DEATH PENALTY

Our government's administration of the death penalty provides yet another example of both overreaching and misuse. While there is a popular notion that the federal capital punishment system sets a "gold standard" to which states should aspire, this is far from the case, as the federal death penalty is tainted by problems both familiar and unique. Expansion of the federal death penalty has contributed to racial disparity and arbitrariness in its application. The federal death penalty was traditionally reserved for treason, espionage and terrorist activity or for jurisdictions solely under federal control (i.e. murder of a federal prison guard, murder on a military facility). Yet the Anti-Drug Abuse Act of 1988 and the Federal Death Penalty Act of 1994 extended the federal death penalty's reach, making more than 60 crimes eligible for federal death sentences. These offenses now include conduct that, historically, had been left to states to prosecute. "Among the most frequently charged federal capital crimes are the use of a gun to commit homicide during and in relation to a crime of violence or drug trafficking in violation of 18 U.S.C. § 924(j), murder in aid of racketeering activity in violation of 18 U.S.C. § 1959(a), and murder in furtherance of a continuing criminal narcotics enterprise in violation of 21 U.S.C. § 848(e)(1)(A)—all targeting conduct proscribed by every state."¹⁴¹ This great expansion of the federal death penalty has opened the door to arbitrary federal prosecutions as local United States Attorneys' offices pursue low level drug deals or robbery-murders, offenses that are difficult to differentiate from crimes that local D.A.s or states' attorneys have prosecuted for years.

Moreover, racial bias continues to be a major problem in the federal system: of the 57 prisoners currently under sentence of death (a death row population larger than that of most states), 65% are African American, Latino, Native American or Asian. Since 2009, 92% of the men (11 of 12) sentenced to die have been people of color.¹⁴² Although, according to the Bureau of Justice Statistics, fully 89% of homicides are intra-racial crimes,¹⁴³ 58% of those under federal sentence of death were convicted of killing white people and nearly a quarter of current federal death row cases are minority-on-white crimes.¹⁴⁴

Department of Justice regulations provide that where there is concurrent jurisdiction between state and federal authorities, in the vast majority of cases, the federal government should avoid involvement in what are traditionally state decisions. However, due in part to the expansion of the federal death penalty, the ideal of uniformity in federal capital sentencing remains elusive, and geographic and racial disparities persist. Two-thirds of the federal districts have never sentenced a defendant to death, and the vast majority of federal death sentences come from a few jurisdictions. "While there are ninety-four federal

jurisdictions, forty-three (75%) [federal] death sentences have come from sixteen districts; and just nine districts have returned nearly half (twenty-nine) of the death sentences.”¹⁴⁵ Over a fifth of the current death row population comes from jurisdictions within the Fifth Circuit alone: of these prisoners, 83% are African American or Latino. In several jurisdictions responsible for a large number of federal death sentences, the state county of the offense has had a much higher proportion of African Americans from which to choose a jury than has the federal district – thus, the very decision to prosecute federally can have the effect of transforming the capital defendant’s jury into one that is majority white. Geographic differences are also widely evident in the way a case is handled (in the appointment of counsel, for example, or the provision of defense resources), similarly undermining claims of uniformity in the nation’s use of the ultimate sanction.

The federal interest in seeking a death sentence, with its attendant human and financial costs, has often proved questionable. For example, in an Oklahoma case a man was arrested and tried twice in state court for the killing of a state trooper during a raid on the defendant’s home. After two state trials (the first resulting in a hung jury), the defendant was convicted of manslaughter and related crimes and sentenced to thirty years. The federal government then stepped in to prosecute him a third time for the same offense. The lawyer who had successfully defended him in state court was ultimately forced to withdraw in the federal one, and after seven new informants were produced, a capital conviction and death sentence were obtained, many years and many federal dollars later. Other federal prisoners similarly await execution after state prosecutions for the same conduct produced lengthy but non-capital sentences.

Although trial counsel may be better compensated in the federal system than in most states with capital punishment, those representing the federally accused or convicted are often the same over-worked counsel appointed in state cases or are otherwise ill-equipped to handle the high-stakes litigation, and their work often suffers from the same fatal flaws. Among other ills, this has resulted in a number of cases where trial and appellate counsel have both missed clear evidence of mental retardation – a condition which should preclude execution – and where it was discovered only after procedural rules prevented its full consideration. There are in addition to mentally retarded federal death row prisoners those who have serious mental illnesses that were never properly investigated or presented to the juries who sentenced them. Thus one prisoner believes there are devices implanted in his brain and screams endlessly at inanimate objects in his cell; another spends his days picking off his skin and

has not been outside in a decade, although the jury that decided that he should be executed never learned about his schizophrenia and its effects.

Despite such issues, our federal government continues to spend precious resources seeking and defending sentences of death across the country.

CONCLUSION

Widespread consensus supports this Task Force in making recommendations to Congress that mandatory minimum sentencing be eliminated or severely restricted, that judges be authorized to exercise discretion to more fairly sentence people with disabilities, veterans and our most vulnerable citizens and that we review and reconsider some of our most harsh punishments, including the death penalty. The financial and societal costs of overcriminalization, overincarceration and wasted federal spending on unnecessarily long prison sentences can and should be addressed.

I greatly appreciate this Task Force's invitation to appear today and thank you for this opportunity.

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ENDNOTES

1.NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis & Bruce Western eds., 2014), available at http://www.nap.edu/catalog.php?record_id=18613.

2.Id.

3.Id.

4.Id.

5.Id. at 70.

6.Id. at 71.

7.Id. at 314.

8.Id. at 315-316.

9.The Pew Charitable Trusts, *supra* note 12, at 18.

10.Id. at 20.

11.Id. at 18.

12.NAT'L RESEARCH COUNCIL, *supra* note 1, at 265.

13.Id. at 268.

14.Id. at 271-272.

15.Id. at 2.

16.MICHELLE ALEXANDER, THE NEW JIM CROW 5 (2010).

17.The Sentencing Project, Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System 1 (August 2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20J

ustice%20Shadow%20Report.pdf.

18.ALEXANDER, *supra* note 8, at 98.

19.*Id.* at 9.

20.THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 11 (2010).

21.*Id.* at 16.

22.NAT'L RESEARCH COUNCIL, *supra* note 1, at 305-06.

23.*Id.* at 306.

24.*Id.*

25.*Id.* at 227, 306.

26.*Id.* at 308.

27.*Id.* at 310.

28.THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION 1 (2012), available at http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf

29.*Id.* at 2, 39; see also BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 10 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

30.BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2010 - STATISTICAL TABLES 37 (2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>; THE SENTENCING PROJECT, *supra* note 29, at 1; UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 122 (2011), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

31.UNITED STATES SENTENCING COMMISSION, *supra* note 31, at 140, 148.

32.THE SENTENCING PROJECT, *supra* note 29, at 1-2.

33.Id.

34.Id. at 2.

35.See, e.g., UNITED STATES SENTENCING COMMISSION, *supra* note 31, at 345-46 (noting that mandatory sentences are problematic because, unlike general sentencing guidelines, they do not permit consideration of these, and other, factors).

36.NAT'L RESEARCH COUNCIL, *supra* note 1, at 83-85 (listing rationales for mandatory minimum sentences and concluding that studies consistently show that none of the rationales are supported by evidence).

37.Id. at 83.

38.Id.

39.VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010), available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

40.Julie Stewart, Mandatory Ineffectiveness: Mandatory Minimum Prison Sentences Don't Make Us Safer, U.S. NEWS & WORLD REPORT, Sept. 2, 2013, available at <http://www.usnews.com/opinion/articles/2013/09/02/eric-holder-is-right-to-give-courts-more-discretion-on-mandatory-minimums>.

41.NAT'L RESEARCH COUNCIL, *supra* note 1, at 83.

42.FAAM, Mandy Martinson, <http://famm.org/mandy-martinson/> (last visited May 28, 2014).

43.Id.

44.Id.

45.Id.

46.Id.

47.Id.

48.Id.

49.Id.

50.Id.

51. *United States v. Jones*, 250 F.3d 743, 743 (5th Cir. 2001).

52. AMERICAN CIVIL LIBERTIES UNION (ACLU), *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES* 41–42 (2013), available at <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf>.

53.Id. at 42.

54.Id.

55.Id.

56. *Jones*, 250 F.3d at 743.

57. *Jones*, 250 F.3d at 750. In its review of Ms. Jones sentence, the Fifth Circuit commented that for one of the amounts of cocaine base Ms. Jones was held responsible for, the court “d[id] not know how the probation office arrived at this quantity.” Id.

58. ACLU, *supra* note 53, at 43.

59. *Jones*, 250 F.3d at 743.

60. ACLU, *supra* note 53, at 43.

61. BRENNAN CENTER FOR JUSTICE, *RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 10* (2010), available at http://www.brennancenter.org/sites/default/files/legacy/Justice/ProsecutorialDiscretion_report.pdf?nocdn=1.

62.Id. at 10-11.

63. UNITED STATES SENTENCING COMMISSION, *SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM*, (August 1991), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/special-report-congress>.

64.BRENNAN CENTER FOR JUSTICE, *supra* note 62, at 10.

65.UNITED STATES SENTENCING COMMISSION, *supra* note 31, at 125.

66.*Id.* at 126.

67.HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE 1 (December 2013), available at <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse-0>.

68.*Id.*

69.*Id.*

70.FAMM, Weldon Angelos, <http://famm.org/weldon-angelos/> (last visited May 27, 2014); see also Sasha Abramsky, The Dope Dealer Who Got 55 Years, *THE PROGRESSIVE* (May 31, 2006), http://www.progressive.org/mag_abramsky0606.

71.*Id.*; see also Jacob Sullum, Gluttons for Punishment (January 14, 2005), <http://reason.com/archives/2005/01/14/gluttons-for-punishment>.

72.FAMM, *supra* note 71.

73.Abramsky, *supra* note 71.

74.*Id.*

75.Federal Judicial Center, Paul G. Cassell, <http://www.fjc.gov/public/home.nsf/hisj> (last visited May 28, 2014).

76.Abramsky, *supra* note 71.

77.*Id.*

78.FAMM, *supra* note 71.

79.*United States v. Angelos*, 433 F.3d 738, 751–54 (10th Cir. 2006); FAMM, *supra* note 71.

80.<http://thinkprogress.org/justice/2013/08/06/2416251/even-alec-may-now-support-reform-of-mandatory-minimum-sentences/>

81.<http://famm.org/wp-content/uploads/2013/09/ACA-Resolution-Supporting-Mandatory-Minimum-Sentencing-Reform.pdf>

82.http://www.huffingtonpost.com/2014/04/02/sentencing-reform-opposition_n_5065403.html

83.http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf

84.<http://www.judiciary.senate.gov/imo/media/doc/110613RecordSub-Whitehouse.pdf>

85.http://www.brennancenter.org/sites/default/files/analysis/073113_Comments_Smarter_Sentencing_Act.pdf

86.<http://news.uscourts.gov/sites/default/files/Judge-Bell-Chairman-Leahy-mandatory-minimums.pdf>

87.<http://www.justicefellowship.org/content/growing-christian-movement-prison-ministry-justice-reform>

88.<http://famm.org/wp-content/uploads/2013/09/Senate-JVSA-Hearing-Testimony-Julie-Stewart-FINAL.pdf>

89.http://www.hrw.org/sites/default/files/related_material/2013_US_MandatoryMinHearing.pdf.pdf

90.http://www.huffingtonpost.com/2014/04/02/sentencing-reform-opposition_n_5065403.html

91.http://www.huffingtonpost.com/2014/04/02/sentencing-reform-opposition_n_5065403.html

92.<http://www.prisonfellowship.org/2012/10/working-together-for-sentencing-reform/>

93.http://www.huffingtonpost.com/2013/03/20/justice-safety-valve-act-senate_n_2918823.html

94.http://www.huffingtonpost.com/2014/04/02/sentencing-reform-opposition_n_5065403.html

95.http://nccdglobal.org/sites/default/files/publication_pdf/policy-statement-criminal-justice.pdf

- 96.<http://www.prisonfellowship.org/2012/10/working-together-for-sentencing-reform/>
- 97.<http://www.rightoncrime.com/priority-issues/prisons/>
- 98.http://www.sentencingproject.org/detail/advocacy_material.cfm?advocacy_material_id=116&id=118
- 99.<http://www.post-gazette.com/opinion/editorials/2013/07/12/Sensible-sentences-One-size-fits-all-justice-doesn-t-work/stories/201307120117>
- 100.<http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>
- 101.<http://www.prisonfellowship.org/2012/10/working-together-for-sentencing-reform/>
- 102.<http://www.vera.org/topics/sentencing-and-corrections>
- 103.<https://docs.google.com/viewer?url=http://www.texaspolicy.com/sites/default/files/documents/2010-01-PP02-conservativesaresaying-ml.pdf&chrome=true>
- 104.http://www.paul.senate.gov/?p=press_release&id=919
- 105.<http://www.famm.org/aboutsentencing/WhattheExpertsSay.aspx>
- 106.<http://www.judiciary.senate.gov/imo/media/doc/091813RecordSub-Leahy.pdf>
107. Anthony Kennedy, William French Smith Memorial Lecture, Pepperdine University, February 3, 2010.
- 108.<http://www.msnbc.com/msnbc/presumed-guilty-libertarians-join-liberals>
- 109.<http://america.aljazeera.com/watch/shows/ajam-presents-the-system/articles/2014/5/20/mandatory-minimums.html>
- 110.<http://www.nationalreview.com/article/349118/prison-sentence-reform-david-keene>
- 111.<http://townhall.com/columnists/wardconnerly/2013/05/07/onesize-a-need-for-prison-reform-n1588369/page/full>

112.Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent'g Rep. 180 (1999)

113.TREATMENT ADVOCACY CENTER, THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 9-11 (2014), available at <http://tacreports.org/treatment-behind-bars>.

114.Id. at 11.

115.Id. at 11-12.

116.Id.

117.BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 3 (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

118.Id. at 1.

119.Id. at 7.

120.BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012 26, available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>

121.OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (OJJDP), YOUNG OFFENDERS: WHAT HAPPENS AND WHAT SHOULD HAPPEN 1 (Feb. 2014), available at <https://ncjrs.gov/pdffiles1/nij/242653.pdf>.

122.18 U.S.C. § 5032.

123.OJJDP, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2010 1-2 (Feb. 2014), available at <http://www.ojjdp.gov/pubs/243042.pdf>.

124.BUREAU OF JUSTICE STATISTICS, QUICK TABLES, REPORTED NUMBER OF INMATES UNDER AGE 18 HELD IN CUSTODY IN FEDERAL OR STATE PRISONS, DECEMBER 31, 2000-2012 (2013), available at <http://www.bjs.gov/index.cfm?ty=nps>. Though federal prisons did not house any children, federal prisons contract with other facilities to house children prosecuted under federal law. Id.

125.Juvenile Justice Bulletin, OJJDP, Dec. 2012, at 3, available at <http://www.ojjdp.gov/pubs/232932.pdf>.

126. See, e.g., OJJDP, *supra* note 122, at 2.

127. *Id.*

128. *Miller v. Alabama*, 132 S. Ct. 2455, 2469-70 (2012).

129. OJJDP, *supra* note 122, at 2.

130. *Id.* at 2.

131. EQUAL JUSTICE INITIATIVE, *CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON* 14 (2008).

132. BUREAU OF JUSTICE STATISTICS, *QUICK TABLES, PRISONERS UNDER THE JURISDICTION OF STATE OR FEDERAL CORRECTIONAL AUTHORITIES, DECEMBER 31, 1978-2012, FEMALE* (2013), available at <http://www.bjs.gov/index.cfm?ty=nps>.

133. BUREAU OF JUSTICE STATISTICS, *QUICK TABLES, ESTIMATED PERCENT OF SENTENCED PRISONERS UNDER STATE AND FEDERAL JURISDICTION BY SEX, RACE, HISPANIC ORIGIN, AND AGE, DECEMBER 31, 2012* (2013), available at <http://www.bjs.gov/index.cfm?ty=nps>.

134. NAT'L RESEARCH COUNCIL, *supra* note 1, at 273-75.

135. *Id.* at 274.

136. BUREAU OF JUSTICE STATISTICS, *SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON, 2004-1* (2007), available at <http://www.bjs.gov/content/pub/pdf/vsfp04.pdf>.

137. *Id.*

138. Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, *THE DAILY BEAST* (July 28, 2013), <http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html>.

139. IAVA, *IAVA 2012 MEMBER SURVEY* 36 (2012), available at <http://iava.org/iavas-2012-member-survey>.

140. Jack Tsai, et al., *Risk of Incarceration and Other Characteristics of Iraq and Afghanistan Era Veterans in State and Federal Prisons*, 64 *PSYCHIATRIC SERVICES IN ADVANCE* 36, 4, 7 (2013), available at <http://www.justiceforvets.org>

/sites/default/files/files/Risk%20of%20Incarceration%20and%20Other%20Characteristics%20of%20Iraq%20and%20Afghanistan%20Era%20Veterans%20in%20State%20and%20Federal%20Prisons.pdf.

141. Eileen M Connor, The Undermining Influence of the Federal Death Penalty on Capital Policy Making and Criminal Justice Administration in the States, Vol. 100 *Journal of Criminal Law and Criminology*, No. 1 NORTHWESTERN UNIVERSITY SCHOOL OF LAW (2010).

142. See Federal Capital Habeas Project, Federal Death Row Population by Race (chart, 5/5/14), available at http://www.capdefnet.org/2255/pubmenu.aspx?menu_id=32&id=332.

143. See BUREAU OF JUSTICE STATISTICS, *HOMICIDE TRENDS IN THE UNITED STATES* (2007), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=966>.

144. G. Ben Cohen, McCleskey's Omission: The Racial Geography of Retribution, 10 *OHIO ST. J. CRIM. L.* 65, 76 (2012).

145. G. Ben Cohen & Robert J. Smith, The Racial Geography of the Federal Death Penalty, 85 *WASH. L. REV.* 425, 436 (2010).