

# CRUSHING EQUALITY: GENDER EQUAL SENTENCING IN AMERICA

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## I. INTRODUCTION

The sentencing laws in America have changed substantially over the last decade. Sentencing guidelines, mandatory minimum sentences, and "three-strikes-and-you're-out" laws were enacted to provide tough, uniform, fair, and economically efficient punishment for criminals in America regardless of race, ethnicity, class, or gender.<sup>1</sup> Such determinate sentencing laws gained support from both liberals and conservatives.<sup>2</sup> Though these facially neutral and generally applicable laws have been beneficial in some areas, they have also adversely affected minority communities, the poor, and women.<sup>3</sup> Lawmakers are aware of the impact, but have chosen not to act to eliminate the disparities.<sup>4</sup> Ironically, in seeking equality through gender neutral laws, women have been subjected to more unequal treatment than ever before.<sup>5</sup> Moreover, these laws also fail to achieve the additional goal of deterrence by an economically efficient means.<sup>6</sup> This Note attempts to analyze the effect of current determinate sentencing laws on women at the federal and state levels. Part II provides a look at current policy and how the sentencing laws have been enacted. Part III outlines the rationales supporting and opposing prevailing determinate sentencing policies. The arguments that Part III addresses include deterrence, uniform punishment, and economic efficiency. Particular attention is paid to the impact of these laws on African-American women and women in general. Part IV proposes alternatives to the reforms, such as expanding considerations used in sentencing, allowing judges to utilize punishments other than incarceration, and rehabilitative programs for offenders. To narrow the analysis of this broad and complex topic, this Note focuses on the federal and California sentencing schemes.

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1. See *infra* Part II.

2. See *infra* Part III.A.2.

3. See *infra* Part III.B.2.

4. See, e.g., David G. Savage, *Bias Issue in L.A. Drug Cases Goes to Supreme Court*, L.A. TIMES, Feb. 26, 1996, at A1 (citing that the Clinton administration and the Republican-controlled Congress are trying to block any changes in crack cocaine prosecutions and maintain the 100-to-1 disparity between crack and powder trafficking sentences in federal court). Lawmakers may be apprehensive about eliminating the disparities. See MICHAEL TONRY, *MALIGN NEGLECT-RACE, CRIME, AND PUNISHMENTS IN AMERICA* 179-80 (1995) (discussing how no powerful constituency will be affronted by increasing sentences, and that the general public understandably fears crime and resents criminals).

5. See *infra* Part III.B.2.b-c.

6. See *infra* Part III.B.3.b.

## II. A LOOK AT THE CURRENT SENTENCING POLICIES

For many years, liberal and conservative commentators wanted to see a change in American sentencing policies.<sup>7</sup> In addition, the public wanted the courts to increase the punishment of criminals.<sup>8</sup> Lawmakers at the federal and state level responded by passing the sentencing guidelines, mandatory minimums, and most recently, "Three Strikes" legislation.<sup>9</sup> This response by federal and state lawmakers has increased the sentences of many crimes,<sup>10</sup> while trying to address the inequalities in the sentencing system.

*A. Federal: the Sentencing Guidelines and Mandatory Minimums*

In 1984, the United States Sentencing Commission ("Commission") was created to draft sentencing guidelines ("Guidelines") for a comprehensive sentencing scheme.<sup>11</sup> The Commission is an independent agency of the judicial branch with members appointed by the President and confirmed by Congress.<sup>12</sup> The Commission drafted guidelines that have applied to all federal prosecutions of crimes committed after November 1, 1987.<sup>13</sup> The Guidelines provide a sentencing range calculated by considering the criminal conduct for which the offender has been convicted and the criminal history of the offender.<sup>14</sup> Further, the Guidelines include criteria that allow the sentencing range to be enhanced or reduced in certain circumstances.<sup>15</sup>

Federal sentencing laws also contain mandatory minimums and "Three Strikes" enhancements. Federal legislation virtually eliminates judges' discretion in imposing a sentence below the minimum required by the statute,<sup>16</sup> hence the expression mandatory minimum.

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7. See *infra* Part III.A.2.

8. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, at 203 (Timothy J. Flanagan & Kathleen Maguire eds., 1992) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991] (quoting a Gallup public opinion survey which found that 83% of Americans felt that courts did not deal harshly enough with criminals, while only 3% thought courts were too harsh).

9. "Three Strikes" is a popular term used to describe legislation that requires life imprisonment upon a criminal's third felony conviction. See, e.g., 18 U.S.C. § 3559(c) (1994); CAL. PENAL CODE § 1170.12(a)(2)(A) (West 1995).

10. TONRY, *supra* note 4, at 174 (discussing that between 1975 and 1989, the average time served per crime in prisons tripled).

11. 28 U.S.C. §§ 991-998 (1994).

12. *Id.* § 991(a).

13. 28 U.S.C. § 994 (1994).

14. *Id.* § 994 (c)-(d).

15. *Id.* § 994(s)-(u); see discussion *infra* Part III.B.2.a.

16. See, e.g., 21 U.S.C. § 841(b) (1994).

As with the Guidelines, mandatory minimums include criteria that allow the sentence range to be enhanced or reduced in certain circumstances.<sup>17</sup> "Three Strikes" enhancements exist because of federal legislation as well.<sup>18</sup> Under "Three Strikes" enhancements, a federal prosecutor may seek mandatory life imprisonment in charging a defendant with a third "serious violent felony" when the defendant meets certain criteria.<sup>19</sup>

### *B. State: Mandatory Minimums and "Three Strikes"*

States have also reformed sentencing schemes in recent years. In most states, the legislature determines the sentencing structure, but in some states voter-approved initiatives have restructured sentencing laws.<sup>20</sup> Two important modifications have taken place at the state level. First, nearly all states passed determinate sentencing schemes, similar to the federal sentencing guidelines and mandatory minimum laws.<sup>21</sup> Second, many states have passed<sup>22</sup> or have begun to pass<sup>23</sup> "Three Strikes" legislation. The enactment of "Three Strikes" laws by state legislatures or by voter-approved initiatives is an effort to prevent the commission of "serious felonies."<sup>24</sup>

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17. See discussion *infra* Part III.B.2.a.

18. 18 U.S.C. § 3559(c) (1994).

19. *Id.* § 3559(c)(1)(A) (stating that where: (1) the instant offense is a serious violent felony and (2) there are two or more prior convictions for serious violent felonies or one prior serious violent felony and one prior serious drug offense, a prosecutor may seek mandatory life imprisonment); "serious violent felonies" include: murder, sex crimes, kidnapping, extortion, arson, firearms use, attempts/conspiracies thereof, or any other offense punishable over ten years with a force element or which by its nature involves substantial risk of physical force being used. *Id.* § 3559(c)(2)(F); "serious drug offenses" are defined as anything punishable under 21 U.S.C. § 841(b)(1)(A) (1996). 18 U.S.C. § 3559(c)(1)(H) (1994). For example, knowingly or intentionally distributing, manufacturing, dispensing or possessing 1K of heroin, 5K of cocaine, 50g of crack cocaine, 100g of phencyclidine (PCP), 10g of lysergic acid diethylamide (LSD), 400g of N-phenyl-N-propylamide, 1000g of marihuana, or 100g of methamphetamine is considered a "serious drug offense." 21 U.S.C. § 841(b)(1)(A) (1994).

20. Donna Hunzeker, *Three Strikes Legislation*, 2 NAT'L CONF. OF ST. LEGISLATORS LEGISBRIEF 31 (Aug. 1994); see also CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 36-37 (1994) (announcing California's "Three Strikes" initiative).

21. Hunzeker, *supra* note 20, at 31; see, e.g., MINNESOTA SENTENCING GUIDELINES COMM'N, SUMMARY OF 1990 SENTENCING PRACTICES FOR CONVICTED FELONS (1992).

22. Hunzeker, *supra* note 20, at 31 (citing that California, Connecticut, Georgia, Indiana, Kansas, Maryland, New Mexico, North Carolina, Virginia, and Wisconsin had passed "Three Strikes" or similar legislation).

23. Hunzeker, *supra* note 20, at 31 (noting that approximately half of the states in the United States have introduced "Three Strikes" or similar legislation).

24. For example, in California, serious [or violent] felonies include: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury; (6) lewd acts on a child under 14; (7) any felony punishable by death or life imprisonment in the state prison; (8) any felony in which the defendant inflicts

## III. RATIONALES SUPPORTING AND OPPOSING THE REFORMS

*A. Benefits of Current Sentencing Laws**1. Deterrence*

Due to the perception that changes in sentencing laws were needed at the federal and state level to prevent serious felonies, lawmakers enacted current reforms.<sup>25</sup> Some proponents of the reforms argued that continuing serious felonies were a result of the judicial system's "revolving door" policies that allowed criminals to be released back into communities to commit more crimes.<sup>26</sup> Prior to the reforms, judges had the discretion to dismiss a sentence enhancement in "furtherance of justice" on his or her own motion, and impose whatever sentence the judge found necessary given the facts and law.<sup>27</sup> Under the current laws, discretion has been taken from "soft on crime" judges. Judges may now only dismiss a sentence enhancement or depart from the determinate sentence upon motion of the prosecutor<sup>28</sup> or in a few narrow circumstances.<sup>29</sup> This reduction of

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great bodily injury or uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a non-inmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary of an inhabited dwelling house, or trailer coach, or inhabited portion of any other building; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in state prison; (22) attempt to commit a felony punishable by death or life imprisonment; (23) any felony where the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give heroin, cocaine, PCP, a methamphetamine-related drug, or a precursor of methamphetamine to a minor; (25) any penetration with a foreign object, under California Penal Code § 289(a), accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; and (28) any attempt to commit one or more of the crimes enumerated in this section. CAL. PENAL CODE §§ 667(a)(4), 667.5(c), 1192.7(c) (West 1995); see, e.g. TONRY, *supra* note 4, at 179-80; see also James Austin, *Policy Consideration: "Three Strikes and You're Out": The Likely Consequences on the Courts, Prisons, and Crime in California and Washington State*, 14 ST. LOUIS U. PUB. L. REV. 239, 241-42 (1994) (arguing that reduction may follow based upon deterrent and/or incapacitation effects).

25. Austin, *supra* note 24, at 241-42.

26. See generally JOAN PETERSILIA & MARVIN LAVIN, *TARGETING CAREER CRIMINALS: A DEVELOPING CRIMINAL JUSTICE STRATEGY 1* (1978).

27. Terry J. Hatter, Jr., *Drugs and the Law: "War Games"*, 29 LOY. L.A. L. REV. 89, 90 (1995) (arguing that discretion which allowed prior offenses to be dismissed has been taken from federal judges and given to prosecutors); *People v. Thomas*, 841 P.2d 159, 162 (Cal. 1992) (allowing judges to dismiss prior offenses in the furtherance of justice according to California Penal Code § 1385(a)).

28. See UNITED STATES SENTENCING GUIDELINES § 4K1 [hereinafter U.S.S.G.]; see also CAL. PENAL CODE § 667(f)(2) (West 1995). However, the Supreme Court of California recently held that the "Three Strikes" laws did not withdraw the statutory power for a court to dismiss a prior

judicial discretion in sentencing has helped eliminate the "revolving door" and possibly decreased recidivism.<sup>30</sup>

The current sentencing laws also limit early release of criminals and allow for "truth in sentencing."<sup>31</sup> Prosecutors may now put criminals in prison and keep them there to do the time for the crime committed. No longer can a criminal receive a sentence of twenty years and serve only five years because of good behavior or probation.<sup>32</sup> Recidivists are specifically deterred from future criminal acts by knowing the punishment they have already faced and the harsh punishment that awaits should they be convicted again.<sup>33</sup> The general population is deterred by having knowledge of the punishment that current laws could impose.<sup>34</sup> Thus, it is not a stretch for proponents of the sentencing reforms to conclude that the reforms have led to decreases or reduced increases in the levels of crime nationwide, both at the federal and state levels.<sup>35</sup>

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felony conviction. *People v. Superior Court of San Diego*, 917 P.2d 628 (Cal. 1996). Other states still follow California's original lead by not allowing judges discretion to dismiss prior felonies. See, e.g., WASH. REV. CODE ANN. § 9.94A.120(4) (West 1988 & Supp. 1997) (requiring that persons who are convicted as a "Three Strike" offender must receive a sentence of life without the possibility of parole). Further, judges in California retain some discretion when determining whether the criminal's conduct amounts to a felony or misdemeanor. When a crime may be charged as a felony or misdemeanor it is referred to as a "wobbler." See Harold G. Friedman & David H. Rose, *Felony Sentencing*, in CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE § 37.5 (Anne Harris & Alys Briggs eds., 2d ed. 1994).

29. See, e.g., 18 U.S.C. § 3553(a)-(b) (1994) (discussing factors to consider when imposing sentences and possible justifications for departures from the federal guidelines); *In re Foss*, 519 P.2d 1073, 1084 (Cal. 1974) (stating that mandatory minimums that shock the conscience and offend fundamental notions of human dignity are too harsh); cf. *People v. Jackson*, 121 Cal. App. 3d 862, 869 (1981) (stating the trial court must comply with the statutory mandated sentence and the trial court has no discretion to make its own ad hoc adjustment to fit what it perceives as equity and justice because the "Legislature has the sole authority to determine the appropriate punishment for criminal behavior.").

30. See, e.g., PETER W. GREENWOOD, ALLAN ABRAMSE, JONATHAN CAULKINS, STEPHEN KLEIN, C. PETER RYDELL, JAMES CHIESA & KARYN E. MODEL, RAND CORP., *THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW 18* (1994) [hereinafter RAND STUDY] (finding that "Three Strikes" will reduce the annual number of serious crimes in California by 28% over the next 25 years).

31. See, e.g., CAL. PENAL CODE § 667(c)(5) (West 1995) (requiring that eighty percent of an offender's sentence must be served); 18 U.S.C. § 3624(b) (1994) (stating only 54 days a year may be earned for good behavior).

32. *Id.*

33. See Austin, *supra* note 24, at 241-42.

34. See Austin, *supra* note 24, at 241-42 (noting that "mandatory minimum sentencing provisions are frequently presented to the public as crime control measures.").

35. Ronald J. Ostrow, *Murder in U.S. Drops 2% in First Half of '95; Crime: Drop in FBI Figures Is Sharpest Since 1960*, L.A. TIMES, Dec. 18, 1995, at A3 (citing FBI crime statistics that show drops in crime nationwide as follows: violent crime reported to the nation's law enforcement agencies during the first half of this year dropped 5% from the first half of 1994, while property crime showed no change which added up to a 1% decrease in overall serious crime); Carl Ingram, *Serious Crime Falls in State's Major Cities*, L.A. TIMES, Mar. 13, 1996, at A3 (citing drops in crime in California). Proponents argue that prior to enactment of the reforms, crime was increasing

## 2. Uniform Punishment System

Liberals and conservatives acknowledge that the problem of race, class, and gender discrimination in sentencing existed for many years. In an effort to cure the social ills of such discrimination, the current reforms were initiated. Liberals supported sentencing changes because they believed that discrimination "in the criminal justice system was epidemic, that judges, parole boards, and corrections officials could not be trusted, and that tight controls on officials' discretion offered the only way to limit [the] . . . disparities."<sup>36</sup> Conservatives supported reform because they believed that it was necessary to achieve "greater certainty in sentencing and less coddling of criminals by liberal judges and parole boards."<sup>37</sup>

Advocates of sentencing changes contend that the reforms have led to equal punishment of criminals regardless of race, class, or gender. Criminals are sentenced under laws that do not allow for bias because the laws mandate sentences that treat each offender equally based on the crime, not the offender. Furthermore, the discretion judges once possessed to impose non-uniform sentences has been virtually eliminated. For example, classifications that favored wealthy majority individuals like education, employment history, and family obligations have practically been invalidated as acceptable sentencing considerations.<sup>38</sup> These changes in sentencing have helped to eliminate some of the problems of discrimination and sentencing uncertainty.

## 3. Economic Efficiency

Changes in sentencing laws need to strive for social benefits while maintaining economic efficiency. Studies have indicated that the benefits of current laws outweigh the costs of operating the prison

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and refer to studies showing increases in some violent crimes. See CRIME STATE RANKINGS 1994: CRIME IN THE 50 UNITED STATES 285-86, 419-20 (Kathleen O'Leary Morgan et al. eds., 1994) (reporting statistics calculated by the Morgan Quitno Corporation using data from the U.S. Department of Justice, showing a 14.92% increase in the number of murders, including non-negligent manslaughter, from 1988 to 1992).

36. TONRY, *supra* note 4, at 164.

37. TONRY, *supra* note 4, at 165.

38. TONRY, *supra* note 4, at 167-70 (referring to arguments made to keep factors such as education, employment, and family obligations from being considered at sentencing because of possible class bias); see, e.g., 28 U.S.C. § 994(e) (1994) (stating "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant"); U.S.S.G., *supra* note 28, §§ 5H1.2 (a policy statement declaring education and vocation skills ordinarily irrelevant as a sentencing consideration) and 5H1.6 (a policy statement declaring family ties ordinarily irrelevant as a sentencing consideration).

system under the reforms.<sup>39</sup> These studies rely on evidence revealing that targeted deterrence and incapacitation, caused by the heavy sentences imposed by reforms, will lead to a decrease in crime.<sup>40</sup> This reliance is not entirely unfounded since, as discussed earlier, such deterrence may have led to decreases or reduced increases in the levels of crime nationwide at federal and state levels.<sup>41</sup> The studies state that over time, when factors such as property loss, pain and suffering, lost wages, police, security, medical, and insurance costs are weighed against prison costs, the current determinate sentencing laws will save resources.<sup>42</sup> Thus, if the sentencing laws punish the criminals who are committing a vast majority of the crimes more harshly than the first-time offender, society pays a lower cost.<sup>43</sup>

### *B. Criticisms of Current Sentencing Laws*

Opponents of the current sentencing reforms argue that deterrence and uniform punishment have yet to be achieved, or are achieved at a moral and economic cost that is too high.<sup>44</sup> This view is supported by anecdotal evidence and statistical studies that show deterrence may actually be prevented by these laws.<sup>45</sup> Further, evidence of a disparate impact indicates that confusing definitions, discretion,

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39. See, e.g., PHILIP J. ROMERO, CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, *HOW INCARCERATING MORE FELONS WILL BENEFIT CALIFORNIA'S ECONOMY* (1994) (citing that operating costs for the prison system would eventually increase by \$6.3 billion by the year 2028, but the social benefits would reach \$54.5 billion during that same period); Jonathan Marshall, *Balancing the Three Strikes Equation*, CAL. LAW., Feb. 15, 1995, at 56, 58-59 (factoring estimates of jury verdict values by Mark Cohen into Rand's crime estimates and concluding that every \$5 million in spending on "three strikes" will save more than \$6.2 million in victim costs, not including the cost of arson); PETER W. GREENWOOD & ALLAN ABRAHAMSE, THE RAND CORP. PREPARED FOR THE NAT'L INSTITUTE FOR JUSTICE, U.S. DEP'T OF JUSTICE, *SELECTIVE INCAPACITATION* xiii (1982) (discussing the Executive Summary) (estimating that the rate of crime and/or the prison population would decrease by selectively incarcerating "high rate" offenders); *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 64 (Alfred Blumstein et al. eds., 1978) [hereinafter "Deterrence and Incapacitation"] (arguing that incapacitation removes offenders from society, thus reducing crime by physically preventing offenders from committing more crimes); RONALD J. PESTRITTO, IN *DEFENSE OF THREE STRIKES: ANALYZING THE IMPACT OF CALIFORNIA'S 1994 ANTI-CRIME MEASURES 9-14* (1996) (stating "[i]ncapacitation involves removing an offender from general society and thereby reducing crime by physically preventing the offender from committing crimes in that society.").

40. See *DETERRENCE AND INCAPACITATION*, *supra* note 39, at 75-76.

41. See Hatter, *supra* note 27, at 94 (arguing that juvenile crime rates are on the rise and that Congress has failed to focus on juveniles).

42. See PESTRITTO, *supra* note 39, at 9-14.

43. MARK MAUER AND MALCOLM C. YOUNG, *TRUTH, HALF-TRUTHS AND LIES: MYTHS AND REALITIES ABOUT CRIME AND PUNISHMENT* 3-4 (1996) (citing a study by Edwin Zedlewski that found the cost of incarcerating an offender was offset by the reduced crime costs for each offender locked up).

44. *Id.* at 1-2.

45. *Id.* at 2.



and biases continue the discrepancies that existed before the reforms.<sup>46</sup> In some instances, the biases in existence before the reforms have become significantly worse.<sup>47</sup>

### *1. Deterrence May Not Be Achieved*

#### *a. The Proportionality Problem*

The current sentencing laws may frustrate the goal of achieving proportionality of punishment to the crime. To achieve the maximum amount of deterrence, "[t]he maximum penalty for someone who has been a persistent criminal cannot be greater than that warranted by the seriousness of the offense for which he is being sentenced."<sup>48</sup> Any other sentence will appear arbitrary and will not achieve the maximum amount of possible deterrence.<sup>49</sup> Thus, rape and murder are punished quite severely, while petty theft is punished less.<sup>50</sup> However, under reformed sentencing laws, the punishment level gap that existed between crimes such as murder and petty theft is being narrowed because of the increase in sentences.<sup>51</sup> Further, under "Three Strikes," the same sentence could be imposed whether the felony is violent or nonviolent.<sup>52</sup> For example, if a criminal with two strikes decides to commit a felony, no deterrent exists to prevent the criminal from choosing to perform a violent felony versus a non-violent felony.<sup>53</sup> Yet, many people would argue that a violent felony

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46. MARC MAUER AND TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 11 (1995) (arguing that racial targeting and incarceration rates for young black men directly relates to biased law enforcement practices).

47. See discussion *infra* Part III.B.2.a-c.

48. DANIEL GLASER, *SUPERVISING OFFENDERS OUTSIDE PRISON* 208-12 (1983).

49. See Mark W. Owens, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PAC. L.J. 881, 905 (1995) (describing how lower state courts have held grossly excessive statutory penalties in relation to the crime committed as violating the Eighth Amendment).

50. See *id.* (noting that judges will sentence a criminal often in accordance with the crime's severity).

51. See *id.* at 902 (stating that "Three Strikes" laws follow the principle of "collective incapacitation," meaning all second and third time convicted criminals of certain offenses receive the exact enhancement in sentences).

52. See 18 U.S.C. § 3559(c) (1994) (differentiating between violent felonies and nonviolent felonies such as "serious drug offenses" when sentencing a prisoner to life imprisonment); CAL. PENAL CODE § 667(d) (West 1995) (stating the definition of a prior felony conviction under the "three strikes" law). See also PHILLIP G. ZIMBARDO, *CENTER ON JUVENILE AND CRIMINAL JUSTICE, TRANSFORMING CALIFORNIA'S PRISONS INTO EXPENSIVE OLD AGE HOMES FOR FELONS* 5 (1994).

53. See, e.g., John Johnson & Beth Shuster, *Police Shootings Raise Questions About "3 Strikes,"* L.A. TIMES, Mar. 13, 1996, at A1 (citing statements by Los Angeles Police Department Chief Willie L. Williams that the "three strikes" law may force lawbreakers to resist arrest out of desperation); Peter J. Benekos & Alida V. Merlo, *Three Strikes and You're Out!: The Political Sentencing Game*, FED. PROBATION 3, 6 (Mar. 1995) (reflecting on beliefs of police officers that

should receive a higher deterrent, or a higher punishment, than a nonviolent felony.<sup>54</sup>

Another example of the problem in achieving proportionality is the "crack cocaine" prosecutions under the reforms.<sup>55</sup> Retail-level crack cocaine dealers are punished the same as, if not worse than wholesale and import-level powder cocaine dealers.<sup>56</sup> Moreover, sentences for crack cocaine offenses may lead to punishments that are nearly three times the average prison sentence served by a murderer, four times the prison sentence for most kidnappers, five times the prison sentence imposed on rapists, and ten times the prison sentence required for those who illegally possess guns.<sup>57</sup> If it is believed that retail-level crack cocaine dealing is a more despicable crime than importing powder cocaine or committing rape, then the harsh sentences may seem appropriate. Many, however, disagree and argue that importers of powder cocaine or rapists should receive sentences greater than retail-level crack dealers.<sup>58</sup> The Sentencing Commission advised Congress in April of 1995 to reassess the penalty guidelines for crack cocaine offenses, in order to reconcile the mandatory statutes with the sentencing guidelines.<sup>59</sup> In both examples, proportionality of punishment is lost.<sup>60</sup> Accordingly, deterrence of the most serious crimes may be prevented by the reforms.<sup>61</sup> Neverthe-

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offenders facing their third conviction under a "three strikes" system are more likely to commit violent acts); Timothy Egan, *A 3-Strike Law Shows It's Not As Simple As It Seems*, N.Y. TIMES, Feb. 15, 1994, at A1 (noting that police officers have encountered a "nothing to lose" attitude in suspects who face a potential third conviction).

54. Molly Selvin, *Preserving a Sense of Justice in a "Three Strikes" Environment*, L.A. TIMES, Mar. 17, 1996, at 3 (indicating that the District Attorney of San Francisco, Terrance Hallinan, will "no longer prosecute nonviolent offenders under the 'three strikes' law").

55. See MAUER & YOUNG, *supra* note 43, at 11 (arguing that the disparity between sentences for crack cocaine and powder cocaine is based on who uses each particular drug).

56. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 66-67, 75 (1991) [hereinafter MANDATORY MINIMUM PENALTIES] (citing that a higher percentage of street level distributors receive the mandatory minimum approximately 70% of the time, while importers receive the mandatory minimum approximately 60% of the time).

57. Richard Leiby, *A Crack in the System; This Small-Time Dealer is Doing 20 Years. He Might Be Better Off if He'd Killed Somebody*, WASH. POST, Feb. 20, 1994, at F1, F4 (reporting the story of a crack cocaine defendant, with no prior criminal record, who was convicted for crack cocaine distribution and sentenced to nineteen years in prison without the possibility of parole).

58. See Interview with the Honorable Terry J. Hatter, Jr., United States District Court Judge for the Central District of California, in Los Angeles, CA (Oct. 25, 1996) [hereinafter Hatter Interview] (on file with the author).

59. See Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 439 (1996).

60. See *id.* (noting that mandatory minimums are often a product of "extreme impulses of society").

61. See generally *id.* at 441.

less, the recommendations of the Sentencing Commission were rejected for the first time in history.

*b. The Nullification Problem*

Besides the proportionality problem, another problem preventing deterrence is the unlikelihood of conviction because of the imposition of harsh determinate sentencing.<sup>62</sup> In some cases, the victim refuses to aid in the prosecution of a defendant because the victim is aware of the punishment the defendant might incur if convicted.<sup>63</sup> Moreover, judges and prosecutors have attempted to avoid imposition of unnecessarily harsh punishments.<sup>64</sup> Some modern judges have allowed defendants to argue the injustice of federal minimum sentences to the jury, possibly as a protest against harsh sentencing guidelines.<sup>65</sup> Further, juries have also nullified by adhering to their reluctance to impose the harsh sentences imposed by determinate sentencing.<sup>66</sup>

*c. Lingering Discretion Hinders Deterrence*

Moreover, the reforms may not achieve the deterrence sought because of lingering discretion. Prior to sentencing reforms, commentators were concerned with a judge's discretion.<sup>67</sup> However with sentencing reforms, discretion appears to have been transferred from judges to prosecutors.<sup>68</sup> Instead of accusations that judges are

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62. See, e.g., *Victim Refuses to Testify in '3 Strikes' Case*, L.A. TIMES, Apr. 26, 1994, at A3 (citing to the California sentencing law signed by Governor Wilson).

63. See *id.* (quoting a woman victim that "cried foul" and refused to testify about a crime that could have sent the defendant to prison for life for automobile theft).

64. Richard Lee Colvin & Ted Rohrlich, *Courts Toss Curves at '3 Strikes'*, L.A. TIMES, Oct. 23, 1994, at A1 (reporting findings of a study conducted six months after "three strikes" law implemented which revealed that only 1 in 6 eligible defendants receives 25 years to life because California judges and prosecutors have eased sentencing).

65. See *United States v. Datcher*, 830 F. Supp. 411 (M.D. Tenn. 1993) (refusing to allow an explicit plea for jury nullification, but allowing the jury to have the information necessary for them to make an informed decision to nullify, should they be so inclined); see also Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995); cf. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 718 (1995) (suggesting that juries should nullify prosecutions of drug offenses because the crimes are victimless and non-violent).

66. See, e.g., Chi Chi Sileo, *Are Three-Strikes Laws Handcuffing the Courts?*, WASH. TIMES, Mar. 13, 1995, at A1 (explaining that one jury deadlocked on a routine burglary charge because it did not want to sentence the offender to life in prison); *Racism, Harsh Sentences Lead to More Jury Nullification*, *Suggests Law Prof.*, Jan. 26, 1996, available in 1996 WL 258186 (discussing how more juries are invoking jury nullification to acquit defendants because they believe the criminal justice system is racist).

67. See *supra* part III.A.1-2; see also, HAROLD J. VETTER & LEONARD TERRITO, *CRIME AND JUSTICE IN AMERICA: A HUMAN PERSPECTIVE* 233 (1984).

68. Hatter Interview, *supra* note 58 (arguing that discretion which allowed prior offenses to

abusing their discretion, there are now such accusations about prosecutors.<sup>69</sup> Such accusations claim that the race and economic status of a defendant remain strong factors in establishing the level of punishment a prosecutor will seek.<sup>70</sup> Thus, minorities and the poor will continue to be punished disproportionately due to the discretion of prosecutors under sentencing reform measures.<sup>71</sup>

The transfer of discretion, rather than its elimination, may prevent deterrence from being achieved.<sup>72</sup> Since non-minorities and the wealthy receive a lesser sentence for the same crimes committed than minorities and the poor, they are less deterred from committing those offenses.<sup>73</sup> Further, minorities and the poor are less deterred because of a belief that they are being punished not for their crime or criminal history, but rather for their group status.<sup>74</sup>

## 2. A Uniform Punishment System Has Not Yet Been Achieved

### a. Vague Definitions Continue to Generate Discrepancies

Sentencing reform was enacted to develop tough, uniform, and fair punishment, but instead the reforms preserve areas that allow for discrepancies. Vague definitions in determinate sentencing laws, both at the federal and state levels, allow for prosecutorial discretion<sup>75</sup> and

be dismissed has been taken from federal judges and given to prosecutors); J. Anthony Kline, Comment, *The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1092 n.43 (1995) (discussing that criminal defendants are arguing that California's sentencing laws are unconstitutional and violate the separation of powers because the laws transfer judicial discretion in sentencing to prosecutors).

69. See VETTER & TERRITO, *supra* note 67, at 236 (arguing that the transfer of power of discretion has created new problems in the criminal justice system).

70. MANDATORY MINIMUM PENALTIES, *supra* note 56, at 81 (stating that whites tend to plead guilty and receive motions for reductions of sentence for cooperation more frequently than blacks do); see also *id.* at 80 (indicating that approximately 67% of black offenders are sentenced to the mandatory minimum, while approximately 53% of white offenders are sentenced to the mandatory minimum); see, e.g., Alan Abrahamson, *D.A.'s Handling of Case Becomes Campaign Issue*, L.A. TIMES, Feb. 29, 1996, at B1 (stating that Los Angeles County District Attorney Gil Garcetti may have used his influence to remove a prior strike from a campaign contributor's grandson, thereby enabling him to receive a 16 month sentence instead of life); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1206-07 (1993) (commenting on prosecutorial abuses made possible by the relevant conduct provision of the Federal Sentencing Guidelines which state that the guidelines "impose a natural limit upon the prosecutor's ability to increase a defendant's sentence").

71. JEFFREY REIMAN, *AND THE POOR GET PRISON* 111 (1996) (stating that poor offenders cannot afford adequate legal representation and thus are punished more harshly than wealthy offenders who can afford good legal representation).

72. *Id.*

73. *Id.* at 91-92.

74. *Id.* at 93-94.

75. See Lutjen, *supra* note 59, at 419 (explaining that prosecutors often pursue lesser offenses in plea bargains).

inconsistent applications of sentencing laws by judges.<sup>76</sup> In most of the determinate sentencing schemes, two criteria are utilized in determining an offender's sentencing range.<sup>77</sup> The first set of criterion considered in sentencing is the nature and circumstances of the offense, and the second criterion is the offender's criminal history.<sup>78</sup> However, adjustments in the sentencing range are made according to various vague criteria.<sup>79</sup> Two examples where vague definitions allow for discrepancies are in determining an offender's sentencing range without enhancements or departures and in motions for downward departures for "substantial assistance or cooperation."<sup>80</sup> A closer look at the federal system will demonstrate the problems of vague terms.<sup>81</sup>

In the federal system, the first criterion considered in sentencing is the offender's criminal conduct.<sup>82</sup> Adjustments in the defendant's criminal conduct may allow for discrepancies in sentencing.<sup>83</sup> These adjustments in conduct include the defendant's acceptance of responsibility, role in the offense, and obstruction of justice.<sup>84</sup> Role in the offense and obstruction of justice are criteria that allow for prosecutorial discretion by the government.<sup>85</sup> Although the government must listen to the defendant, convincing prosecutors of the defendant's role in the offense or the defendant's truthfulness may prove impossible.<sup>86</sup> Prosecutors are then left the discretion to determine

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76. See Lutjen, *supra* note 59, at 411 (explaining Justice Scalia's opinion that judges often use their subjective values in applying the law).

77. See Lutjen, *supra* note 59, at 426.

78. See, e.g., 18 U.S.C. § 3553(a)(1) (1994); Hunzeker, *supra* note 20, at 31.

79. See Lutjen, *supra* note 59, at 430-31 (describing various criteria used by a judge when deciding an offender's sentence).

80. See Lutjen, *supra* note 59, at 445.

81. To clarify vague terms in the guidelines, the Commission has passed 422 amendments between 1988 and 1991. 56 Fed. Reg. 22, 762-97 (1991). However, vague terms remain a problem in the guidelines. See *infra* Part III.B.2.a.

82. See, e.g., 18 U.S.C. § 3553(a)(1) (1994).

83. See Keith C. Owens, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel The Criminal Justice System and Bring California to its Knees*, 25 SW. U.L. REV. 129, 144 (1995) (explaining why adjustments in a sentence do not reflect the seriousness of the crime, nor the intent of the lawmakers).

84. U.S.S.G., *supra* note 28, §§ 3B1.1 (referring to the aggravating role), and 3B1.2 (referring to a mitigating role); see also *id.* §§ 3E1.1 (referring to the acceptance of responsibility), and 3C1.1 (referring to the obstruction of justice).

85. U.S.S.G., *supra* note 28, §§ 3C1.1 (referring to the obstruction of justice) and 3B1.1 (referring to the aggravating role).

86. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 748, 755-56 (1996) (showing how prosecutors view prior convictions and how the convictions influence the decision with what to charge a defendant for the current offense).

whether these adjustments increase or decrease a criminal's sentence.<sup>87</sup>

In federal courts, adjustments for criminal conduct outside the charged offense are made by factoring conduct that is outside the charged offense as "relevant conduct."<sup>88</sup> Relevant conduct is a vague term that is difficult to apply consistently in the federal system.<sup>89</sup> In defining "relevant conduct," the guidelines consider whether the offender had "jointly undertaken" the criminal activity, and whether the activity constitutes the "same course of conduct."<sup>90</sup> This definition leaves many judges and attorneys "scratching their heads," wondering how to apply such an ambiguous term.<sup>91</sup> Such confusing definitions in determining adjustments based on the offender's instant criminal conduct continue to generate enormous discrepancies in federal and state sentencing schemes.<sup>92</sup>

The second criterion considered in the federal sentencing system is the offender's criminal history.<sup>93</sup> Criminal history designations such as "career offender"<sup>94</sup> and "armed career criminal"<sup>95</sup> boost the sentence range up to, or near, the statutory maximum for the offense.<sup>96</sup> Criminal history determinations are less complex than those for conduct, but enable discrepancies because of the significant degree of discretion retained by prosecutors and judges.<sup>97</sup> Discrepancies can

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87. *Id.*

88. U.S.S.G., *supra* note 28, § 1B1.3.

89. *See, e.g.,* United States v. Hahn, 960 F.2d 903, 909 (9th Cir. 1992) (applying "relevant conduct" increased the defendant's incarceration time six fold which "reveals the tremendous potential a haphazard application of the 'relevant conduct' provision"); United States v. Sykes, 7 F.3d 1331, 1335 (7th Cir. 1993) (applying "relevant conduct" in calculating the defendant's bare offense level under the sentencing guidelines).

90. *Hahn*, 960 F.2d 903 (interpreting "relevant conduct" specifically as the "same course of conduct").

91. The ambiguity of "relevant conduct" as applied to sentencing considerations leads to many appeals. *See* U.S. SENTENCING COMM'N, ANNUAL REPORT 1994, at 144 (1994) [hereinafter ANNUAL REPORT 1994] (stating that "relevant conduct" is the second most frequently appealed issue by defendants and the fourth most frequently appealed issue by the government). The ambiguity of "relevant conduct" also leads to greater prosecutorial discretion. *Lear, supra* note 70, at 1206 (commenting on prosecutorial abuses made possible by the relevant conduct provision of the Federal Sentencing Guidelines).

92. *See generally*, Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 772-77 (1992) (arguing that Guidelines are harsh, vague, and effectively transfer discretion to prosecutors).

93. *See* 18 U.S.C. § 3553(a)(1) (1994).

94. U.S.S.G., *supra* note 28, §§ 4B1.1 and 4B1.2 (defining career offenders).

95. U.S.S.G., *supra* note 28, § 4B1.4 (defining armed career criminals).

96. U.S.S.G., *supra* note 28, § 4B1.4.

97. *Selvin, supra* note 54, at M1 (citing discretion by judges and prosecutors that allows for the disparity in prosecution of "Three Strikes" offenses in different counties of California).

occur as a result of a prosecutor's motion to dismiss prior offenses<sup>98</sup> or a judge's refusal to dismiss prior offenses.<sup>99</sup> Vague definitions in history determinations allow for such discrepancies.<sup>100</sup>

Another example of vague definitions allowing for discrepancies is found in motions for downward departures. When the prosecution makes a motion for departure, the judge can sentence the defendant below the determinate sentencing range if a defendant meets the narrow exceptions allowing for departure from the sentencing guidelines.<sup>101</sup> These motions are usually made in conjunction with a "plea bargain"<sup>102</sup> agreement.<sup>103</sup> It should be noted that within a plea bargain there are two different components—a charge-reduction plea agreement, which is somewhat limited,<sup>104</sup> and a departure motion, which is essentially unlimited.<sup>105</sup> With motions for departures, prosecutors have the power not only to choose the crime to prosecute, but to help establish the level of punishment after the conviction.<sup>106</sup>

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98. See *supra* Part III.B.1.C (citing prosecutorial discretion in dismissing prior offenses).

99. See *supra* Part III.B.1-2.

100. See *supra* Part III.B.1-2.

101. U.S.S.G., *supra* note 28, § 5K1.1; FED. R. CRIM. P. 35(b) (permitting reduction of sentence, including reduction below minimum mandatory sentence, for cooperation and substantial assistance rendered within one year of sentencing); CAL. PENAL CODE § 667(f)(2) (West 1995) (allowing prosecutors to move for dismissal of prior felony convictions thereby reducing the defendant's sentence); see also CAL. PENAL CODE § 1385(a) (West 1995) (allowing a judge or magistrate to dismiss an action on the judge's own motion or on the prosecutor's application). However, as mentioned earlier, in California, a judge may dismiss a prior felony in "Three Strikes" cases. *People v. Superior Court of San Diego*, 917 P.2d 628 (Cal. 1996) (holding that three strikes law does not preclude courts from excluding testimony of prior convictions).

102. The term "plea bargaining" has come to mean the process whereby the accused and the prosecutor negotiate a mutually satisfactory disposition of the case. BLACK'S LAW DICTIONARY 1152 (6th ed. 1991).

103. See Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 668 (1993) (discussing how plea bargaining has affected sentencing guideline efforts).

104. This difference should be noted because charge-reduction plea bargaining has been limited. See, e.g., CAL. PENAL CODE § 1192.7(a) (West 1995) (stating that "[p]lea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence"); U.S.S.G. *supra* note 28, § 6B1.2(a) (requiring that the plea agreement "adequately reflect the seriousness of the actual offense behavior").

105. See, e.g., ANNUAL REPORT 1994, *supra* note 91, at 82 (discussing the various stated reasons for departure motions).

106. In the federal judiciary, the circuits are split as to whether a judge may depart below the level recommended by the prosecution. See, e.g., *United States v. Chavarria-Herrera*, 15 F.3d 1033, 1034 (11th Cir. 1994) (holding that a district court judge may reduce a sentence below the required minimum under Rule 35(b) but may not rely on any information other than the substantial assistance of the defendant); *United States v. McAndrews*, 12 F.3d 273, 277 (1st Cir. 1993) (holding that the government had no authority to appeal a sentence reduced under FED.

Again, focusing on the federal system, the discrepancies with regard to "substantial assistance" departures are apparent.

Federal prosecutors may make motions for downward departures for many reasons.<sup>107</sup> The most elusive concept in this arena concerns "substantial assistance."<sup>108</sup> The meaning of the term "substantial assistance" is open to interpretation and its utilization varies from district to district.<sup>109</sup> The punishment a person may receive varies between geographical areas, apparently not based on any reason other than differing prosecutorial policies from area to area.<sup>110</sup> Vague definitions allow for discretion that continues to generate discrepancies and prevent uniform punishment.<sup>111</sup>

*b. Adverse Effect on African-American Women*

Many commentators in the sentencing debate agree that the criminal justice system has had a devastating impact on African-Americans for many years.<sup>112</sup> Reforms that were supposed to lead to

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R. CRIM. P. 35(b)).

107. ANNUAL REPORT 1994, *supra* note 91, at 82 (citing reasons given for downward departures other than substantial assistance which include:

pursuant to plea agreement (676), criminal history category over-represents defendant involvement (431), general mitigating circumstances (372), family ties and responsibilities (213), physical condition (200), offense behavior was an isolated incident (192), diminished capacity (175), age (76), role in the offense (75), acceptance of responsibility (75), mental and emotional conditions (70), rehabilitation (51), coercion and distress (45), to put defendant's sentence in line with codefendant (38), dollar amount (38), adequate to meet purposes of sentencing (34), no prior record/first offender (32), voluntary disclosure (\$5k2.16)(32), restitution (26), convictions on related counts (22), cooperation motion unknown (22), victim (20), lesser harm (20), currently receiving punishment under state/federal jurisdiction (18), community ties (17), deterrence (14), cooperation without motion (13), previous employment record (12), guidelines too high (11), drug dependence or alcohol abuse (10), military record (10), not representative of the heartland (10), other (282)).

108. See ANNUAL REPORT 1994, *supra* note 91, app. A.

109. See ANNUAL REPORT 1994, *supra* note 91, app. A (citing discrepancies in the federal system when looking at substantial assistance departures; for example, in the Central District of California there are few departures (6.7% or 62), while there are more in the Southern District of California (22.6% or 396) and nationwide (19.5% or 7,524)).

110. Vague terms within California's determinate sentencing laws allow for varied enforcement from county to county. For example, San Francisco does not prosecute nonviolent offenses as a third strike, while Los Angeles does prosecute some non-violent offenses as a third strike. See Selvin, *supra* note 55, at 5 (citing statements by district attorneys of San Francisco and Los Angeles discussing how prosecutorial and judicial discretion affects the "three strikes and you're out" law).

111. See Selvin, *supra* note 54, at 5.

112. See, e.g., Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23 (1994) (citing the historical and continuing disparities in the criminal justice system of issues such as: selective enforcement, incarceration of African-American males, racial disparities in sentencing, racial disparities in prosecutorial decisions, law enforcement and police brutality, racial bias in the death penalty, and racial bias in the juvenile system).



uniform punishment instead continue to permit discretion and subsequent discrimination.<sup>113</sup> Unfortunately, the current sentencing laws have not eliminated or eased problems faced by this minority group.<sup>114</sup> The failure to eliminate discretion and bias, increased sentences and the criminalization of certain activities have a particularly adverse effect on African-Americans.<sup>115</sup> The changes in sentencing laws have adversely affected both the African-American male and female populations, albeit in different ways.<sup>116</sup>

In particular, African-American women have apparently been subject to selective prosecution.<sup>117</sup> The "war on drugs" has greatly accelerated the incarceration of young women from this minority group.<sup>118</sup> For example, the number of African-American women imprisoned in California for drug-related offenses rose from 55 in 1984 to 1,006 in 1994.<sup>119</sup> Women of this minority group are now arrested and going to prison in California at rates close to that of white men.<sup>120</sup> Moreover, 4.8 percent of women from this minority group serve prison sentences nationwide, while only 1.4 percent of white women serve sentences.<sup>121</sup> Overall, African-American women make up over forty percent of women in state prisons.<sup>122</sup> Therefore, a white woman is less likely to serve a prison sentence than an African-American

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113. See *supra* Part III.B.2.a (discussing vague definitions that continue to generate discrepancies in sentencing).

114. See Weatherspoon, *supra* note 112, at 23 (discussing that from arrest to incarceration or execution the criminal justice system penalizes African-American males without "conscience, remorse, or constitutional protection").

115. See Weatherspoon, *supra* note 112, at 24 (citing studies demonstrating that 48% of all drug violators are African-Americans, however, that African-Americans are eight times more likely to be in prison than whites).

116. See Weatherspoon, *supra* note 112, at 24.

117. Greg Krikorian, *Study Questions Justice System's Racial Fairness*, L.A. TIMES, Feb. 13, 1996, at A5 (citing a study by the Center on Juvenile and Criminal Justice and the Sentencing Project which utilized figures from the California Department of Corrections that reveals the war on drugs accelerated the number of African-American women incarcerated for drug-related offenses).

118. *Id.*

119. *Id.*

120. *Id.* at A1 (citing a study by the Center on Juvenile and Criminal Justice and the Sentencing Project that indicated about 3% of African-American women in their twenties are under the control of the state's criminal justice system compared to 5% of white men in the same age group).

121. Sam Fulwood, III, *Farrakhan Calls Men Shunning March 'Fools'*, L.A. TIMES, Oct. 15, 1995, at A1 (citing a study by the Sentencing Project utilizing Bureau of Justice Statistics discussing the disparity between minority women and white women serving prison sentences).

122. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, *supra* note 8, at 648 (noting that in 1986 46.0% of prison inmates were Black, no-Hispanic females). However, African-Americans only comprise approximately 12% of the United States population. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 215 (114th ed. 1994).

woman.<sup>123</sup> These numbers indicate that African-American females are punished at a much higher rate than are non-minorities. Two examples of the continuing bias in the prosecution of African-American females are federal and state drug prosecutions.<sup>124</sup> These are discussed in turn below.

Some commentators argue that the federal drug prosecution laws are the most clear examples of racism in the criminal justice system.<sup>125</sup> Others argue that it is the application of drug laws that is problematic.<sup>126</sup> For example, in *United States v. Armstrong*,<sup>127</sup> federal public defenders sought to challenge the constitutionality of the selection process utilized by the United States Attorney in the Central District of California for prosecution of drug offenses in federal court.<sup>128</sup> However, prosecutors denied defense lawyers access to statistics that could prove discrimination in the selection process.<sup>129</sup> The Supreme Court agreed with the prosecutorial policies in the Central District and denied access to the statistics.<sup>130</sup> Therefore, any appearance of

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123. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, *supra* note 8, at 648 (noting that in 1986 39.6% of prison inmates were White, non-Hispanic females and 46.1% were Black, non-Hispanic females).

124. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, *supra* note 8, at 657 (illustrating that black females had the highest percentage of commitment to federal prisons for drug offenses).

125. See, e.g., Butler, *supra* note 65, at 695-96 (discussing evidence of racism in the criminal justice system including past and present administration of death penalty cases, negative racist imagery of crime, the disparities in punishment and race, and the acquittal of the police officers who severely beat Rodney King).

126. For example, Richard A. Berk, professor of social policy at the University of California at Los Angeles, compared charges by different Los Angeles law enforcement agencies for selling crack and powder cocaine between the years 1988 and 1992. The study concluded that three African-Americans to one white were charged by state and county officers, and where two and one-half African-Americans were charged for every one Latino. At the federal courthouse for Los Angeles, no whites were charged with selling crack, whereas the ratio of African-Americans to Latinos jumped to four and one-half to one. Mary Pat Flaherty & Joan Biskupic, *Rules Often Impose Toughest Penalties on Poor, Minorities; Justice Dept. Says the System Is Free of Bias*, WASH. POST, Oct. 9, 1996, at A1 (discussing racial discrepancies in criminal sentencing).

127. 48 F.3d 1508 (9th Cir. 1995).

128. Federal Public Defenders cited that all twenty-four crack cases handled by its lawyers in 1991 involved an African-American defendant. *Id.* at 1515; see also ANNUAL REPORT 1994, *supra* note 91, at 107 (citing that 90.4% of those convicted for violation of the crack laws were African-American); Savage, *supra* note 4, at A1 (stating that "between Jan. 1, 1992, and Mar. 31, 1995, the U.S. Attorney in the Central District filed 144 indictments in crack-trafficking cases and of those indicted, 102 were African-American, 29 were Latino, eight were Asian and one was white, while the other four were fugitives whose race was not recorded").

129. *Armstrong*, 48 F.3d at 1508.

130. *United States v. Armstrong*, 116 S. Ct. 1480, 1487-89 (1996) (holding that "to establish entitlement to discovery on claim of selective prosecution based on race, defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not"); see also *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) (overturning selective prosecution findings by the district court because the district court failed to consider several additional factors that play substantial roles in prosecutorial decisions such as involvement in the crime or the amount of cooperation from the alleged criminal).

selective federal drug prosecution of African-Americans and other minority groups will need to be challenged in another fashion.<sup>131</sup>

Another area demonstrative of the selective prosecution of African-American women is that of prosecutions aimed at preventing prenatal substance abuse. Prenatal substance abuse is a serious problem in the United States.<sup>132</sup> Studies estimate that every year 430,000 infants born in the United States are exposed to drugs in utero.<sup>133</sup> Criminal prosecutions of pregnant women for substance abuse have occurred in nineteen states and the District of Columbia.<sup>134</sup> Interestingly, while African-American females do not comprise a majority of substance abusers,<sup>135</sup> they have been targeted for these prosecutions.<sup>136</sup> Evidence of selective prosecution demonstrates that the criminal justice system has yet to achieve a uniform system of punishment.

Current equal protection doctrines require the defendant to prove purposeful discrimination in order to demonstrate that selective prosecutions are unconstitutional.<sup>137</sup> However, it is difficult for a defendant to meet this burden when prosecutors refuse to release information that may prove purposeful discrimination. As a result of decisions that fail to recognize discrimination,<sup>138</sup> minority communi-

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131. *Armstrong*, 116 S. Ct. at 1489.

132. Julia Elizabeth Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1160 (1992) (discussing how states have attempted to protect unborn children from substance abuse, and the constitutionality of criminalizing mothers who abuse substances during pregnancy).

133. Terry A. Adirim & Nandini S. Gupta, *A National Survey of State Maternal and Newborn Drug Testing and Reporting Policies*, 106 PUB. HEALTH REP. 292, 293 (1991) (analyzing a survey of all fifty states and the current policies regarding legislating drug testing of pregnant women).

134. See Michael R. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519, 570 n.278 (1991) (citing prosecutions by Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Nevada, North Carolina, Ohio, South Carolina, South Dakota, Texas, and Wyoming).

135. Ira J. Chasnoff, H.J. Landress & M.E. Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990) (pointing out that a slightly higher percentage of white women test positive for drug use than African-American women; nevertheless, African-American women are 9.6 times more likely than white women to be reported for substance abuse during pregnancy).

136. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1433-36 (1991) (arguing African-American women are easy targets for prenatal substance abuse prosecutions); Dorothy E. Roberts, *The Bias in Drug Arrests of Pregnant Women*, N.Y. TIMES, Aug. 11, 1990, at A25 (stating nationwide, minority women make up about seventy percent of prenatal substance abuse prosecutions); see also Laurie Rubenstein, *Prosecuting Maternal Substance Abusers: An Unjustified and Ineffective Policy*, 9 YALE L. & POL'Y REV. 130 (1991) (commenting that many of Florida's prosecutions for drug abuse during pregnancy have been brought against African-American women).

137. *McCleskey v. Kemp*, 481 U.S. 279, 281 (1987) (holding that the defendant must prove "the existence of purposeful discrimination" in equal protection claims with "clear proof" before the Court will infer an abuse of discretion).

138. More detailed discussions regarding failed constitutional challenges to selective prose-

ties' confidence in the criminal justice system has plummeted.<sup>139</sup> Some in minority communities perceive rebellion against the unjust system as the only viable option because the justice system fails to provide the proper tools to dismantle its discriminatory structure.<sup>140</sup> Changes to the sentencing laws providing for uniform punishment may help to alleviate this perception and restore confidence in the criminal justice system.

*c. Adverse Effect on Women in General*

In general, the criminal justice system is incarcerating more women than ever before.<sup>141</sup> Furthermore, the length of sentences that inmates serve is increasing.<sup>142</sup> One reason for this increase is the removal of discretion from judges under the current reforms. Prior to these reforms, many believed that women received preferential treatment in sentencing, based either to notions of paternalism toward women, paternalism toward dependents of women, or to the idea that judges perceived women as less violent than male offenders.<sup>143</sup> The new reforms, however, attempt to eradicate such subjectivity under most of the current determinate sentencing laws; only criminal conduct and criminal history may be considered.<sup>144</sup> This change presents a problem to women, evident when looking at the federal sentencing policies.

In determining sentences, the Federal Guidelines do not consider pregnancy, family responsibilities, or the different recidivism rates be-

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cutions are available. See, e.g., Laura A. Wytmsa, Comment, *Punishment for "Just Us"—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 GEO. MASON INDEPENDENT L. REV. 473, 484-99 (1995) (addressing claims under the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Fifth Amendment's Due Process Clause, and the Equal Protection component of the Fifth Amendment Due Process Clause).

139. Butler, *supra* note 65, at 699 (citing a recent USA Today/CNN/Gallup poll that showed "sixty-six percent of blacks believe that the criminal justice system is racist and only thirty-two percent believe it is not racist").

140. See Butler, *supra* note 65, at 708.

141. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON 3 (1994) [hereinafter WOMEN IN PRISON] (stating that "the number of women sentenced for a violent offense rose from 8,045 to 12,400 during the [1986-1991] period"); see also RITA J. SIMON & JEAN LANDIS, THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE 78 (1991) (reporting that from 1980-1985, the female incarceration rate increased from 11 per 100,000 to 17 per 100,000).

142. TONRY, *supra* note 4, at 174.

143. See Ilene H. Nagel & John Hagan, *Gender and Crime: Offense Patterns and Criminal Court Sanctions*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91, 129-34 (Michael Tonry & Norval Morris eds., 1983) (stating that women receive preferential treatment in sentencing, possibly because of chivalry or paternalistic reasons); Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 GENDER & SOC'Y 9, 19-22 (1989) (discussing the influence that protection of children has on the sentencing of female defendants).

144. See *supra* Part III.B.2.a.

tween men and women.<sup>145</sup> Some have argued that judges should sentence pregnant female offenders more leniently to avoid harming children<sup>146</sup> and to promote economic efficiency. Proponents of leniency for pregnant women advance two compelling arguments. First, children are unable to develop the necessary attachment to the mother while the mother is in prison. The failure to develop this attachment hinders the child's mental development.<sup>147</sup> Second, the cost of health care for mother and child are passed on to taxpayers during the mother's incarceration.<sup>148</sup> However, not every jurisdiction has accepted the leniency argument.<sup>149</sup> Opponents of leniency instead opt for equal treatment of pregnant women as compared to men and non-pregnant women.

They are winning. The Federal Sentencing Guidelines have all but eliminated consideration of family responsibilities.<sup>150</sup> This elimination harms women more than men, as women prisoners are more

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145. See Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 932 (1993) ("[B]ecause the Guidelines emphasize elimination of disparity, short shrift has been given to offender characteristics other than the defendant's prior criminal history and role in the offense.").

146. See generally *id.* at 948 (suggesting that pregnancy should be consistently factored into the "departure matrix").

147. JOHN BOWLBY, 3 ATTACHMENT AND LOSS: LOSS, SADNESS AND DEPRESSION 22, 426-31 (1980) (citing other studies to confirm that the mother to infant attachment is important for normal mental development).

148. See Susan E. Rippey, Note, *Criminalizing Substance Abuse During Pregnancy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 69, 92 (1991) (indicating that the average total cost for giving birth and neonatal care for infants born to cocaine users was \$7,000).

149. *United States v. Pozzy*, 902 F.2d 133 (1st Cir. 1990) (holding that a defendant's pregnancy ordinarily cannot justify reducing a long prison term which the Guidelines would otherwise require), *cert. denied*, 498 U.S. 943 (1990).

150. See 18 U.S.C.S. app. § 5H1.5-6 (Law. Co-op. 1997) (stating that employment records, responsibilities, family and community ties are "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range"); see *United States v. Headley*, 923 F.2d 1079, 1082-83 (3d Cir. 1991) (finding that although the district court had the power to depart downward when sentencing a mother of five, no court that had considered the issue had found parenthood to be an extraordinary circumstance justifying such a departure); cf. *United States v. Chestna*, 962 F.2d 103, 107-08 (1st Cir. 1992) (affirming the district court's denial of downward departure based on the convict's position as the mother of three young children), *cert. denied*, 506 U.S. 920 (1992). In the Second and Ninth Circuits, the courts have been somewhat more willing to view a female offender's family responsibilities as a permissible basis for a downward departure under some circumstances. See, e.g., *United States v. Johnson*, 964 F.2d 124, 129-31 (2d Cir. 1992) (affirming a downward departure based on extraordinary family circumstances consisting of the defendant having sole responsibility for raising four young children); Raeder, *supra* note 145, at 942-44 (discussing the Second and Ninth Circuits' willingness to grant a downward departure for single-parent mothers and noting one case in which the Tenth Circuit did so as well). On occasion, male defendants have benefited from such departures as well. See, e.g., *United States v. Sclamo*, 997 F.2d 970, 972-74 (1st Cir. 1993) (affirming downward departure for a man who played an important role in the development of an emotionally disturbed child with whom he lived).

likely to have dependents living with them before incarceration.<sup>151</sup> The impact on those dependents should not be marginalized. When mothers are incarcerated, children are harmed by losing their primary caretaker<sup>152</sup> and are more likely to be subjected to placement outside the home.<sup>153</sup> Incarcerated women are almost five times more likely to lose their children to foster care than are male inmates.<sup>154</sup> These additional facts illuminate the disproportionate harm that gender neutral reforms cause to incarcerated women and their children.

Furthermore, the Guidelines fail to consider the difference between men and women recidivists. Many statistical studies show that women are less likely to commit violent crime than men are and are less likely to be repeat offenders.<sup>155</sup> However, statistical difference is

151. WOMEN IN PRISON, *supra* note 141, at 6-7 (noting that 66.6% of female prisoners, but only 56.1% of male prisoners, had minor children when they entered prison, and that among the prisoners who had minor children, 71.7% of the women, but only 52.9% of the men, had lived with those children before entering prison).

152. BOWLBY, *supra* note 147 (stating the loss of the primary caretaker can hinder the normal mental development of a child).

153. WOMEN IN PRISON, *supra* note 141, at 6 (finding that among male prisoners who have minor children, 89.7% report that the children are living with their mother, while only 25.4% of female prisoners with minor children report that those children are living with their father).

154. WOMEN IN PRISON, *supra* note 141, at 6 (stating that 10.7% of female inmates, while only 2.2% of male inmates, have their children placed in a foster home or institutional care).

155. See, e.g., Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 94, 104-6 (1994) (concluding, based on empirical data drawn from a longitudinal study of biological, psychological, and sociological predictors of crime, that young men begin their criminal careers earlier than young women, commit more offenses of greater seriousness, and taper off their criminal careers much later than do women). Similarly, female offenders released from prison are less likely to commit a subsequent offense and are much less likely to be returned to prison than are men. See Allen J. Beck, Ph.D. & Bernard E. Shipley, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983*, at 5 (1989) (finding that while 47.3% of men released from prison in 1983 were convicted again within three years, only 38.7% of women were convicted again); John F. Wallerstedt, U.S. DEP'T OF JUSTICE-BUREAU OF JUSTICE STATISTICS, *RETURNING TO PRISON 4-5* (1984) (finding that out of the five states reporting, California, Georgia, Massachusetts, New York, and North Carolina, all of the states except Massachusetts reported that "the proportion of recidivists among males was substantially higher than for female releasees").

There is some limited evidence to the contrary. In one study of active heroin users, self-reported crime rates were quite similar for males and females, except for burglary, an offense for which the average male offender committed five times more offenses than the average female offender. See 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 25, at 67-68 (Alfred Blumstein eds., 1986). On the basis of this data, the authors speculated that large differences in male and female arrest rates arise primarily from differences in rates of participation in crime, and that once active, females commit crime at rates similar to those of active males. See *id.* at 67. This conclusion may, however, be an artifact of the focus on the population of active heroin users and appears to differ sharply from the results observed in birth cohort studies that draw upon a more representative sample of both offenders and the general population. See, e.g., Neil A. Weiner, *Violent Criminal Careers and "Violent Career Criminals": An Overview of the Research Literature*, in *VIOLENT CRIME, VIOLENT CRIMINALS* 35, 104 (Neil A. Weiner & Marvin E. Wolfgang eds., 1989) (finding the male rate of recidivism to be approximately three times higher for men than for women in the 1958 cohort); Denno, *supra* note 155, at 155 (reporting that males are far more likely than females to be chronic repeat offenders and that "female [chronic repeat of-

not a basis for justifying categorical differences in the treatment of the sexes.<sup>156</sup> Due to sentencing reforms, judges must compare women with men when determining possible recidivism, though there may be a real difference in recidivism rates.

Judges used to have discretion to consider the differences between men and women in sentencing in order to avoid imposing unnecessarily long sentences.<sup>157</sup> Unfortunately for women inmates, children of women inmates, and society, equal treatment has won over treatment taking into account differences to achieve equality.<sup>158</sup> A proper sentencing system would not have uniform punishments for both sexes, but would have sentences necessary to protect society from crime and unnecessary expenses.<sup>159</sup> These uniform and gender neutral laws are achieving uniformity in *sentencing*, but not uniformity in *punishment* because these laws disproportionately harm women more than men.<sup>160</sup>

### 3. Costs May Be Too High

#### a. Societal Costs

In striving for deterrence, a society usually examines its choices in terms of societal goals. The current sentencing laws suggest that the limiting principle of punishment has become "if it deters then it is good." However, "[p]unishment of the morally innocent [or not morally blameworthy] does not reinforce one's sense of identification as a law-abider, but rather undermines it."<sup>161</sup> Single-minded pursuit of deterrence will ultimately defeat the paramount goal of law, which is to liberate rather than to restrain.<sup>162</sup> "One-strike-and-you're-out"

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fenders] committed fewer and less severe crimes than their male counterparts").

156. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a law that prohibited the sale of beer to males under the age of 21, but permitted sales to females over the age of 18 based on statistical evidence showing a difference between the sexes).

157. *Id.* at 210 (deferring to the legislature in redefining the cutoff age for purchasing beer, so long as it is gender-neutral).

158. See Raeder, *supra* note 145, at 951-53 (noting that the effects of a woman's incarceration are often not taken into account by the Guidelines. For example, incarcerated women must still find child care for their children).

159. See generally Harvey Wallace & Shanda Wedlock, *Federal Sentencing Guidelines and Gender Issues: Parental Responsibilities, Pregnancy and Domestic Violence*, 2 SAN DIEGO JUSTICE J. 395 (1994) (stating that gender, specifically, may not be a consideration in departing from the sentencing guidelines, but factors including age, education, mental and emotional condition, community ties, role in the offense and criminal history may be considered).

160. *Id.* at 395-96 (discussing that differences with the conditions at facilities, the impact on parental responsibilities, and the health care needs faced solely by women).

161. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 65-69 (1968).

162. *Id.* at 65-69.

laws have been adopted for some serious crimes and some seemingly not so serious crimes.<sup>163</sup> In addition, sentences have become so severe that a person could receive nineteen years for driving a car with crack cocaine in it<sup>164</sup> or twenty-five years for stealing a slice of pizza.<sup>165</sup> Under such restrictive laws, people will become prisoners of the law as autonomy becomes conditional upon human perfection. Accordingly, the societal goal of liberation through law is not served by current determinate sentencing laws.

*b. Economic costs*

Further, the current sentencing laws exact a high economic cost to the public.<sup>166</sup> Even if it is accepted that laws such as "Three Strikes" successfully deter crime, this deterrence comes at a tremendous economic cost,<sup>167</sup> and may be in vain.<sup>168</sup> New prison construction projects in 1992 cost this nation's taxpayers approximately \$6.8 billion;<sup>169</sup> yet, despite the new construction of prisons, over sixty percent of the nation's prisons continue to operate beyond capacity.<sup>170</sup> Worse yet, eighty percent of state prisons are operating under court order due to overcrowding and treatment considered "cruel and unusual."<sup>171</sup> This is not a situation destined to improve. The costs of housing

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163. Jerry Gillam, *California Laws '95*, L.A. TIMES, Jan. 2, 1995, at A3 (referring to the newly enacted "One Strike" rape law in California).

164. Leiby, *supra* note 57, at F1, F4 (discussing a crack defendant, with no prior criminal record, that received nineteen years for crack cocaine distribution).

165. Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison Crime: Judge Cites Five Prior Felony Convictions in Sentencing Jerry Dewayne Williams under 'Three Strikes' Law*, L.A. TIMES, Mar. 3, 1995, at 9.

166. RAND STUDY, *supra* note 30, at 18 (finding that "Three Strikes" will cost Californians over \$25 million over the next 25 years which would require about a \$300 per year tax increase for the average taxpayer).

167. RAND STUDY, *supra* note 30, at 18. Violent crime, however, fell by 4.6% in states that do not have three-strikes laws, compared with the 1.7% decline for states that do have those laws.

168. Greg Krikorian, *Study Challenges Effect of 3 Strikes Law: Crime Has Fallen More in States Without New, Tougher Sentencing, an Advocacy Group Says*, L.A. TIMES, Mar. 7, 1997, at A3 (citing a study by the Washington-based Justice Policy Institute).

169. John P. Flannery, *Governor Allen's No-Parole Plan: A Billion Dollar Wasteland of Prisons*, 2 VA. J. SOC. POL'Y & L. 379, 385 (1994); EDNA MCCONNELL CLARK FOUNDATION, AMERICANS BEHIND BARS 2 (1993) [hereinafter AMERICANS BEHIND BARS]; see also John Hanchette, *Cost of Building Prisons Devours State Budgets*, GANNETT NEWS SERVICE, June 2, 1993 (available in 1993 W.L. 7313822) (citing statistics from Justice Dept. in 1992).

170. JOHN DOBLE, EDNA MCCONNELL CLARK FOUNDATION, CRIME AND PUNISHMENT: THE PUBLIC'S VIEW 31 (1987) (stating that 34 states are under court order to reduce overcrowding and improve related conditions); see also AMERICANS BEHIND BARS, *supra* note 169, at 2 (stating that "[o]n average, state prisons were operating at 31 percent over capacity. The federal system was 46 percent over capacity.").

171. See AMERICANS BEHIND BARS, *supra* note 169, at 2 (stating that "[a]t the beginning of 1993, 40 states, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico were under court order for overcrowding and/or unconstitutional conditions.").



prisoners will continue to rise as the median age of prisoners increases.<sup>172</sup> Upon reflection, the inability of government to properly house inmates may indicate that the costs exacted by current sentencing laws are beyond what the public is willing to pay.

#### IV. ALTERNATE PROPOSALS TO THE REFORMS

America's reformed sentencing schemes have yet to achieve uniform punishment. Nevertheless, it seems unlikely that determinate sentencing will disappear.<sup>173</sup> Though criticisms abound, the reforms have shown some benefits.<sup>174</sup> Therefore, corrections must be made in current sentencing laws. First, discretion could be transferred back to judges and away from prosecutors by expanding the considerations used in sentencing, thus permitting judges to depart from sentencing schemes in certain situations. Second, effective alternatives to incarceration could be used.<sup>175</sup> Third, programs could be implemented and funded to provide inmates with an education, enhancing their employment opportunities after release, and to provide substance abuse treatment to inmates.<sup>176</sup>

##### *A. Expand Considerations Used in Sentencing*

Today, the only legitimate considerations in sentencing laws are the offender's crime and criminal history.<sup>177</sup> However, a prosecutor may consider many other conditions in deciding to make a motion for a downward departure.<sup>178</sup> Unfortunately, in an adversarial system, the prosecutor may not be in the best position to make such sentencing judgments. First, a prosecutor's goals may be contrary to the need for a just sentence. One of the criteria used in determining promotions within prosecutors' offices is successful prosecutions.<sup>179</sup>

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172. ZIMBARDO, *supra* note 52, at 7.

173. See Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. J. 1 (1993) (arguing that the guidelines do work and addressing the recent criticisms).

174. See Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 562 (1993) (including enhancing the integrity of a plea and simplifying and facilitating the bargaining process).

175. See David C. Levin, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 641-42 (1993).

176. See *id.*, at 648 (noting that drug and alcohol abuse must be treated as a "public health problem rather than a social problem").

177. See discussion *supra* Part III.B.2.a.

178. See discussion *supra* Part III.B.2.a.

179. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58 (1991) (stating that "because [a prosecutor's] success is measured by the conviction rate, [the prosecutor] may be tempted to ignore the rights of defendants, victims, or the community in order to obtain pleas or guilty verdicts").

In striving to achieve the maximum number of convictions, a prosecutor may lose sight of what constitutes a just sentence. Second, a prosecutor's decisions are not often subject to public scrutiny. Plea bargain agreements and other prosecutorial decisions are usually not reviewable,<sup>180</sup> and are not publicly available. Further, the low level of diversity in many prosecution offices may lead to bias in prosecutions.<sup>181</sup> The low level of diversity prevents the consideration of alternate perspectives in the prosecutorial decision process.

If there is going to be discretion in sentencing, it must rest in the hands of the judge rather than the prosecutor. Providing judges with greater discretion is not contrary to the goals of the criminal justice system, but rather helps in achieving its goals. First, justice would best be served by sentencing defendants based on a totality of circumstances approach.<sup>182</sup> This approach includes considerations outside criminal conduct and criminal history.<sup>183</sup> For example, a judge should consider categories such as education, employment, and family obligations to arrive at a just sentence.<sup>184</sup> Second, it has not been shown that having a fixed sentence for a particular crime is a greater deterrent than allowing flexible sentencing.<sup>185</sup> Moreover, as indicated earlier, some fixed sentencing schemes may not deter criminal behavior.<sup>186</sup> Third, the concern that additional considerations by judges may favor wealthy individuals is overstated. Most defendants are not wealthy,<sup>187</sup> and continuing judicial discretion already allows for class and race bias.<sup>188</sup> Further, judges are under more scrutiny than ever.<sup>189</sup>

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180. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 862 (1995) (stating that "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense, the prosecutor is entitled to bring the charge.").

181. See, e.g., Krikorian, *supra* note 168, at A3 (citing information provided by Los Angeles, San Diego, Orange, San Bernardino, and Sacramento counties that shows 82% of prosecutors in those counties are white, while 8% are Latino, 5% are African-American, and 4% are Asian). It should be noted that the bench is not very diverse. See, e.g., ALLIANCE FOR JUSTICE, *JUDICIAL SELECTION PROJECT: ANNUAL REPORT* (1996) (citing a demographic portrait of the federal judiciary as follows: 75.4% are white, 16.7% are women, 8.5% are African-American, 4.3% are Hispanic-American, 0.6% are Asian-American, and 0.2% are Native-American).

182. TONRY, *supra* note 4, at 149-61, 191-95.

183. TONRY, *supra* note 4, at 149-61, 191-95.

184. See *supra* Part III.B.2 (discussing the adverse effect on women of the inability to consider family obligations). See, e.g., Judge Jose A. Cabranes, Address at the *Justice Lester W. Roth Lecture* (Oct. 17, 1996) (stating that the inability to consider military employment and service has an adverse effect on minority defendants).

185. TONRY, *supra* note 4, at 173-80, 195.

186. See *supra* Part III.B.1 (discussing problems of proportionality, nullification, and lingering discretion).

187. TONRY, *supra* note 4, at 167-70, 195.

188. See *supra* Part III.B.2.

Accordingly, it is not as easy for a judge to make biased rulings as it is for a prosecutor to make biased prosecutions.

Fourth, most judges already sentence consistently with determinate sentencing laws, opting for few downward departures and even fewer upward departures.<sup>190</sup> Concerns that judges will be "soft on crime" or too harsh on minority defendants are valid. However, judges are subject to a greater amount of scrutiny and receive more education on these issues than ever before.<sup>191</sup> Judges are in the best position to determine the appropriate punishment for a defendant, while simultaneously protecting society. The judge can protect society from recidivism and prevent wasted resources in housing a defendant that is undeserving. Therefore, determinate sentencing laws must be reduced to recommendations to judges, who may then depart from such laws upon a sound justification subject to clear error appellate review, not mandates that effectively take away judicial discretion.

This humane approach to sentencing balances the needs for uniform and tough punishment with societal values and economic efficiency. It provides discretion for unique cases when justice requires a departure, while providing uniform punishment. Under the scrutiny of appellate review, liberal or biased judges will not have the discretion to sentence below or above the recommended range without a stated and strongly supported justification. Moreover, judges will have the discretion to avoid imposing draconian sentences that are inappropriate and costly to society. Further, this alternative would aid judges in the most difficult, dreaded, and burdensome part of the job, of sentencing.<sup>192</sup> The return of judicial discretion to sentencing is gaining support across the country.<sup>193</sup> Allowing judges to use the determinate sentencing guidelines serves the goals of determinate sentencing proponents, and aids in addressing criticisms by opponents.

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189. TONRY, *supra* note 4, at 171-73, 195.

190. ANNUAL REPORT 1994, *supra* note 91, app. A (citing that there are few downward departures nationwide (27.1% or 10,456), while there are even fewer upward departures nationwide (1.2% or 451)); TONRY, *supra* note 4, at 171-73, 195.

191. TONRY, *supra* note 4, at 171-73, 195.

192. *See, e.g.*, Hatter Interview, *supra* note 58; *see also* Cabranes, *supra* note 184.

193. The Supreme Court of California has already started to move discretion back into the judge's hands. *See, e.g.*, *People v. Superior Court of San Diego*, 917 P.2d 628 (Cal. 1996) (allowing judge's discretion to dismiss prior felonies in "Three Strikes" cases); *see also* Cabranes, *supra* note 184 (proposing the elimination of mandatory sentencing guidelines in favor of either (1) automatic appellate review of sentencing or (2) nonbinding advisory guidelines).

### *B. Utilize Punishments Other Than Incarceration*

Other effective means of punishment other than incarceration and probation are available for nonviolent offenders. First, the United States has a history of putting offenders to work.<sup>194</sup> Today, community service orders impose an obligation to work for the community, either in lieu of imprisonment or as a condition of probation.<sup>195</sup> Community service orders are a significant sanction and usually less expensive than incarceration.<sup>196</sup> Second, modern technology allows for the criminal justice system to monitor offenders without incarceration.<sup>197</sup> Electronic monitoring is an effective means to punish offenders without the cost of incarceration.<sup>198</sup> These intermediate punishments provide a greater range of sanctions and facilitate a rational sentencing system.<sup>199</sup> Intermediate punishments are economically efficient because they provide alternatives to incarceration.<sup>200</sup> However, current determinate sentencing laws do not allow intermediate punishments.<sup>201</sup> Thus, the current laws must be changed so judges may utilize intermediate punishments in a way that is unbiased.

### *C. Education and Substance Abuse Treatment Programs*

Two strong reasons people resort to crime are the lack of educational opportunities and substance abuse.<sup>202</sup> Many inmates, after emerging from prison, are essentially unemployable because they are uneducated and have a criminal record.<sup>203</sup> Approximately ten per-

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194. See, e.g., BLAKE MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* 7-8 (1977) (explaining that throughout American history prisoners have been put to work by prison officials).

195. See, e.g., NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 150-2 (1990).

196. *Id.* at 173, 232-37.

197. See Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 491 (1993).

198. *Id.* at 493.

199. See, e.g., MORRIS & TONRY, *supra* note 195, at 5-8.

200. See MORRIS & TONRY, *supra* note 195, at 5-8.

201. See, e.g., 18 U.S.C. § 3553(a) (1994); CAL. PENAL CODE § 667(c)(4) (West 1995) (stating a defendant must be committed to a state prison).

202. Interview with parolees from a California State Institution, in Los Angeles, CA. (Aug. 19, 1996) [hereinafter Parolees Interview]. See also Hatter Interview, *supra* note 58.

203. See Chi Chi Sileo, *Men Forced to March to Different Drummer; Boot Camps Try to Turn Offenders Around*, WASH. TIMES, July 6, 1994, at A9 (stating that most employment programs for ex-convicts have less than 50% placement rate); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992*, at 640 (Kathleen Maguire, Ann L. Pastore, & Timothy J. Flanagan eds., 1993) [hereinafter *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992*] (indicating the number of inmates enrolled in education programs within state correctional facilities).

cent of all inmates are totally illiterate, and almost sixty percent test below an eighth-grade level.<sup>204</sup> This is understandable given that many inner-city youths expect to be incarcerated or dead, rather than attend college.<sup>205</sup> Therefore, little time is devoted to traditional education. Moreover, less than nine percent of inmates participate in basic adult education classes offered by prisons to improve their education level.<sup>206</sup> Consequently, when inmates are released without basic reading and writing skills, they are much less likely to find jobs, and have a more difficult time integrating into society.<sup>207</sup>

Only recently has the federal government acknowledged the need to educate inmates. The federal government now requires inmates attend classes until they obtain a high school equivalency degree and can read at the 12th-grade level.<sup>208</sup> However, states such as California do not require attending these classes unless the inmate is below a ninth-grade level.<sup>209</sup> Considering the high illiteracy rate for inmates, standardized educational programs must be required to prepare them for a law-abiding life outside of prison.

Substance abuse is another reason people resort to crime.<sup>210</sup> Of inmates currently incarcerated, almost one-third had a substance abuse problem before the offense.<sup>211</sup> More than fifty percent of inmates are under the influence of some substance during the commission of the convicted offense.<sup>212</sup> Yet, only approximately twenty percent of those with a history of drug use are currently attending a treatment program in prison.<sup>213</sup> The lack of a victory in the "war on drugs" is an indicator that substance abuse is a health problem, not just a criminal problem. Studies have found that for every dollar spent on treatment and education, approximately five dollars

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204. Randy Welch, *Doing Time—Education Plays a Role*, CORRECTIONS COMPENDIUM, Feb. 1988, at 1.

205. See John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 611 (1991) (finding that for every black male that goes to college, three others will go to prison).

206. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, *supra* note 203, at 640.

207. See Emily Herrick, *The Prison Literacy Connection*, CORRECTIONS COMPENDIUM, Dec. 1991, at 1, 5.

208. See *Federal Prisoners Required to Complete High School*, CORRECTIONS COMPENDIUM, Dec. 1990, at 23; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, *supra* note 203, at 644 (stating that inmates sentenced to over 120 days must attend educational classes).

209. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, *supra* note 203, at 644.

210. Parolees Interview, *supra* note 202; see also Hatter Interview, *supra* note 58.

211. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, *supra* note 203, at 602 (indicating daily drug use by inmates in the month before the offense, not including alcohol or tobacco).

212. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, *supra* note 203, at 603 (identifying substance as illegal drugs or alcohol).

213. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, *supra* note 203, at 646.

in related welfare costs is saved.<sup>214</sup> Accordingly, the criminal justice system must do everything within its power to help inmates with substance abuse.

These two factors contributing to the commission of crime may be better addressed at the sentencing phase by a judge. First, sentencing laws could be structured to permit the judge to sentence the criminal to a "mandatory" educational or substance abuse program.<sup>215</sup> Based on the results of literacy and drug tests given to offenders, a judge could determine whether such programs are necessary for each individual. Such programs should be uniformly designed and applied within the judge's jurisdiction. The programs could be designed by either the legislative or executive branch of government at state and federal levels. Nevertheless, the programs should be designed to achieve the goals of literacy and sobriety. As mentioned earlier, the federal system already requires literacy schooling. Likewise, it should require substance abuse classes in addition to literacy classes at the federal and state levels.

Second, sentencing laws could allow for a reduction of an inmate's total sentence upon completion of an optional educational or substance abuse program while incarcerated. The reduction could be calculated by a predetermined percentage, set by either the legislative or executive branch at both the state and federal levels. Some sentencing schemes allow for a reduction in sentence for taking part in educational or substance abuse programs,<sup>216</sup> but the reduction is limited.<sup>217</sup> When the maximum amount of reductions has been obtained through other means, the incentive to participate in these optional programs is removed.<sup>218</sup> If the criminal justice system wants to prevent recidivism, prisoners ought to be encouraged to participate in these programs. Thus, educational or substance abuse programs should be excluded from any limitations.

These alternate proposals to current sentencing policies in the United States would help eliminate bias in sentencing, ease the burden on the criminal justice system, and help reduce the causes of

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214. See, e.g., ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* 27 (1993) (recommending the establishment of unified family courts in all states).

215. In this instance, mandatory is meant to mean mandatory attendance of classes while incarcerated. Completion of such a program would not be a condition of release.

216. See, e.g., CAL. PENAL CODE § 2933(a) (West 1995) (permitting a prisoner to receive work-time credits for performance in work assignments or educational programs).

217. See, e.g., RAND STUDY, *supra* note 30 (citing state and federal statutes that require a large portion of an offender's sentence be served).

218. See RAND STUDY, *supra* note 30 (stating that there is a maximum amount of 54 days per year for good time in the federal system).

crime. Most important, these alternate proposals are consistent with societal goals and are more economically efficient than incarceration alone.

## V. CONCLUSION

Discretion in sentencing is a necessary evil. No magic formula exists for sentencing criminals that can account for all situations and circumstances. The best that lawmakers can do is to place discretion in the hands of the most neutral party in any particular case. Of the three players in a case—the prosecutor, the defense attorney, and the judge—usually the least self-interested party is the judge. However, whenever there is discretion in sentencing, individual sentences can never be uniform or unbiased. Such bias will continue to exist as long as diverse perspectives are lacking at the executive, legislative, and judicial branches of government. Government needs to consider perspectives that recognize, and prevent enactment of and the enforcement of laws with adverse effects on politically vulnerable groups.

The sentencing reforms have failed to avoid unfairness and harshness to women. In striving for equality, the reforms have actually crushed equality. In some instances, women have been the subject of selective prosecution.<sup>219</sup> Women are receiving longer sentences than ever before in the name of equal treatment. However, in areas where different treatment may be warranted between the sexes, women are not permitted to receive different treatment.

The sentencing reforms began by liberals and conservatives with the noblest of intentions, but the current laws have flaws. Uniform punishment does not exist, and the current laws call for imposition of draconian sentences in the name of deterrence. The discrimination that the reforms were designed to eradicate continues to exist, and in some instances has gotten worse. The status quo must not be defended when it is ineffective. These indeterminate sentencing laws are ineffective at achieving the goals of the reformers and must change. A step in the right direction would be to restore judicial discretion to sentencing, so that punishments other than incarceration are utilized, and that mandatory rehabilitation programs, such as prison education and substance abuse programs, are implemented. The sooner new sentencing options for the criminal justice system are sought, the sooner solutions will be found.

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219. See *supra* Part III.B.2.c.

