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The War on Crime Increases the Time: Sentencing Policies in the United States and South Africa

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COMMENTS

THE WAR ON CRIME INCREASES THE TIME: SENTENCING POLICIES IN THE UNITED STATES AND SOUTH AFRICA

I. INTRODUCTION

"Distrust all men in whom the impulse to punish is powerful."1

Crime is more than just a national problem. Today, global interdependence means increased travel, communication, and contact between the nations of the world. As a result of this extensive international contact, it is only logical that crime and the response to crime should be international concerns as well. It is ironic that the United States—a major world power in technology and development—is plagued with crime today.2 The United States is now recognized as having one of the largest incarcerated populations in the world.3

As crime levels increase, governments respond by either increasing funding to law enforcement and correctional facilities4 or reforming sentencing measures.5 This Comment analyzes the role of strict sentencing policies as a mechanism for curtailing increased crime rates, and compares sentencing procedures in the

3. See id.
4. See Jeff Builta, Crime on the Increase, Crime & Just. Eur., Jan.–Feb. 1996, at 1, 6 (reporting that in response to studies and increased international attention focusing on the worsening of South Africa's crime problems, President Nelson Mandela vowed to give a more favorable response to requests for increased police funding).
United States and South Africa. This Comment demonstrates that strict sentencing requirements are an inadequate solution to heightened levels of crime by comparing and contrasting the sentencing policies, crime rates, and incarceration practices of these two countries. This purported solution for dealing with rising crime rates is directed solely at recidivists. The goal of these Draconian sentencing measures, such as the novel U.S. mandatory minimum sentencing and Three-Strikes approaches, is to incarcerate offenders for longer time periods.

Unfortunately, the application of these responses to heightened crime rates in both the United States and South Africa is ineffective. For example, the United States adopted a rigid sentencing guideline policy, mandatory minimum sentencing laws, and the federal Three-Strikes law—all of which skyrocketed the country's imprisoned population and pumped billions of dollars into the prison system. Statistics illustrate that these laws do not

6. See John Kaplan et al., Criminal Law Cases and Materials 29 (3d ed. 1996). "From an international perspective, American society is distinctive for both its crime and its punishment: It has both vastly more crime and vastly more punishment than any other prosperous democracy." Id. For a discussion comparing the violent crime and incarceration rates of the United States and other wealthy democracies, see id. at 29 tbl.1. This Comment explores the relationship between crime rates and sentencing policies in the United States because of the radical measures the United States employs in its efforts to eradicate recidivism.

7. See Builta, supra note 4, at 6 (explaining the sharp crime increase in South Africa along with record-breaking reports of serious crime in 1994). This Comment compares South African crime and punishment laws with those of the United States because South Africa's crime rate is excessive and constantly rising.

8. See Meredith McClain, Note, 'Three Strikes and You're Out': The Solution to the Repeat Offender Problem?, 20 Seton Hall Legis. J. 97, 99-100 (1996) (explaining that the increased sentences in the United States are directed at repeat offenders). See also generally Martin Schontech, Gov't and Opposition Need to Do Homework Urgently, Bus. Day (Johannesburg), May 21, 1999, Perspectives, at 13 (noting that South Africa's response to increased crime is to create stricter statutes). A "recidivist" is "a second offender; a 'habitual criminal'; often subject to extended terms of imprisonment under habitual offender statutes." BARRON'S LAW DICTIONARY 419 (4th ed.1996).


10. See Linda S. Beres & Thomas D. Griffith, Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation, 87 Geo. L.J. 103, 103 (1998) (explaining that many state and federal governments implement Three-Strikes laws mandating long or life prison terms for offenders who commit three serious or violent felonies). See also id. at 103 n.1.

work because crime levels have remained consistently high since their implementation.\textsuperscript{12}

While South Africa has mandatory minimum sentencing legislation, it does not have a rigid sentencing guideline policy, as does the United States.\textsuperscript{13} South Africa's downfall, however, stems from its people's distrust of the law enforcement system\textsuperscript{14} and the crime rebellion resulting therefrom.\textsuperscript{15} In addition, the South African judiciary, as a whole, has a wide range of sentencing discretion.\textsuperscript{16} This heightened judicial discretion, along with the absence of a jury system, seems to be a direct result of the fact that white male judges dominated the judicial branch in South Africa before the abolition of apartheid.\textsuperscript{17}

Part II of this Comment compares the government institutions responsible for creating sentencing policies and guidelines in South Africa and the United States. Part III examines the punishment theories underlying these sentencing policies. Next, Part IV compares the specific categories of drug laws in each country and provides a working example of mandatory minimum sentencing laws and the strict sentences they produce. Part V deals with the effects of increased sentencing penalties on minorities, specifically focusing on African-Americans in the United States and blacks in South Africa. Part VI proposes alternatives available to both countries to successfully

\begin{footnotesize}


14. See Builta, \textit{supra} note 4, at 1 (discussing the growing trend of hiring private security services, which is one of the most profitable industries in South Africa, employing over 150,000 people).

15. See id. (providing evidence of this crime rebellion; for example, a week prior to elections, fifty-seven police were murdered in Gautueng and eight police were murdered in Johannesburg).


17. See id. Judicial Systems Section, para. 3 (describing the primarily white make-up of the judicial branch and the qualifications and appointment procedures for judges). See also infra note 53 (describing the racial make-up of the judicial branch in 1993). See Scharf & Cochrane, \textit{supra} note 16, Penalties and Sentencing Section, para. 1 (noting that there is no jury system in South Africa).
\end{footnotesize}
II. WHO DETERMINES THE SENTENCE: BALANCING THE SCALES OF LIBERTY

A. The U.S. Federal Sentencing Scheme

1. The Federal Sentencing Commission

Congress had clear goals in mind when it passed the Sentencing Reform Act\textsuperscript{18} in 1984, thereby forming the Federal Sentencing Commission (U.S. Sentencing Commission).\textsuperscript{19} In creating the U.S. Sentencing Commission, Congress hoped "to promote determinate sentencing, abolish parole, insure proportionality and uniformity in sentencing, . . . and limit sentencing discretion."\textsuperscript{20}

The members of the U.S. Sentencing Commission, an independent component of the judicial branch of government,\textsuperscript{21} are selected through detailed statutory procedures.\textsuperscript{22} What the U.S. Sentencing Commission lacks in numbers, it makes up for in might. Having only seven voting members and two non-voting ex officio members,\textsuperscript{23} the U.S. Sentencing Commission sets

\begin{footnotesize}
\begin{enumerate}
\item KAPLAN ET AL., supra note 6, at 108.
\item See 28 U.S.C. § 991(a).
\item The following is an example of the detailed U.S. Sentencing Commission selection process as mandated by statute:

The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party.

\textit{Id.}
\item See McClain, supra note 8, at 102 n.26.
\end{enumerate}
\end{footnotesize}
guidelines for the entire U.S. judicial system.

Section 991(b) of Title 28 of the U.S. Code provides that the purposes of the U.S. Sentencing Commission are:

(1) establish sentencing policies and practice for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of the general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective of meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.24

2. The U.S. Judge’s Role in Sentencing

The U.S. Sentencing Commission created guidelines to encompass all federal crimes; the first guidelines took effect in 1987.25 Before a judge sentences a defendant, the judge must first

24. 28 U.S.C. § 991(b) (emphasis added). 18 U.S.C. § 3553(2) (1994) mandates that the purpose of a sentence is:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.


employ a three-step process to determine the appropriate sentence. First, the judge consults a schedule, which delineates the “base offense level” for the particular offense at issue. Next, using the offender’s prior convictions, the judge tabulates the “criminal history score.” Finally, the judge uses a two-dimensional grid to calculate the offender’s presumptive sentence. Theoretically, the guidelines should obliterate the gross inconsistencies in the federal sentencing process.

It is important to note, however, that federal sentencing guidelines allow judges to consider mitigating and aggravating circumstances. Thus, it is possible for judges to manipulate the guidelines from their rawest form of the presumptive sentence. For example, in United States v. Floyd, the Ninth Circuit Court of Appeals upheld a departure from the original guidelines and reduced a sentence from thirty to seventeen years. The court cited the defendant’s “lack of guidance and education” as the reason for its departure from the sentencing guidelines.

26. See generally O'Connor, supra note 25, at 855-856 (summarizing the use of sentencing guidelines).
27. A schedule establishes the base score for a given offense. The score can increase and decrease based on aggravating and mitigating circumstances. See Kaplan et al., supra note 6, at 109. For an example of a robbery schedule, see id. at 109 tbl.1.
28. The “base offense level” is the presumptive figure the judge should use when consulting the sentencing tables in the federal guidelines. This base level can increase or decrease depending on specific offense characteristics and aggravating or mitigating circumstances. See USSG § 1B1.1(b)-(c), supra note 13, at 12.
29. See Kaplan et al., supra note 6, at 109.
30. Id. (noting that the “criminal history score” is mostly just a measure of prior convictions).
31. See id. A “presumptive sentence” is the sentence that is presumed appropriate based on his or her “criminal history score” and the “base offense level.” See id. For an example of the configurations used to decide a given sentence, see id. at 110-111 tbl.2.
32. See id. at 108. See also Baylson, supra note 9, at 169.
34. 945 F.2d 1096 (9th Cir. 1991).
35. See id. at 1097, 1098-1102.
36. Id. at 1097, 1098. Note, however, that a judge’s opportunity to depart from the guidelines is very limited. The judge must show that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from . . . [the guidelines],” 18 U.S.C. § 3553(b). In addition, departures for conventional reasons, for example the sentence’s potential effect on the defendant’s dependents or employment status, are expressly prohibited. See Kaplan et al., supra note 6, at 112. Moreover, application of the guidelines does not depend on the offense to which the defendant pled guilty or of which the defendant is convicted at trial. See id. The guidelines require instead that the “actual offense behavior” be used as the “relevant
3. Sentencing Guidelines and Mandatory Minimums

Sentencing guidelines are often compared to mandatory minimum sentencing laws. Mandatory minimum sentencing laws prohibit any departure from a mandated sentence, unless the prosecutor motions for such departure. For example, a prosecutor can motion for a departure for an individual who provides "substantial assistance in the prosecution of another." Some judges argue that because of the prosecutor's ability to depart from mandated sentences, mandatory minimums have shifted the power of sentencing discretion from judges to prosecutors. With sentencing guidelines, however, there may be less need for mandatory minimums because the purpose of the guidelines is to reduce sentencing disparity and enable uniformity in sentencing. Furthermore, the federal Three-Strikes law targets recidivists in two categories: (1) those with two prior serious violent felony convictions; and (2) those with both a serious violent conviction and a serious drug conviction. This law mandates that an offender falling within either category be sentenced to a life term. State "Three-Strikes" statutes, discussion of which is outside the scope of this Comment, may be drafted differently. The term "serious violent felony" means:

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder . . . ; manslaughter other than involuntary manslaughter . . . ; assault with intent to commit murder . . . ; assault with intent to commit rape . . . ;

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

Id. § 3559(2)(F)(i)–(ii).
serves as a catchall "safety net," to deter criminals from repeating crime by threatening them with lifelong imprisonment.43

At first glance, it appears that the United States conceived a foolproof sentencing scheme for reducing crime, eliminating sentencing inconsistencies, and punishing repeat offenders. Upon closer inspection, however, these measures evince a different picture: one laden with loopholes and potential inconsistencies.

B. The South African Sentencing Scheme

1. The National Council for Correctional Services

South Africa's sentencing branch, the National Council for Correctional Services (South African Council),44 is similar in purpose and form to the U.S. Sentencing Commission.45 Like the members of the U.S. Sentencing Commission, all members of the South African Council are appointed.46 The South African Council, however, has a greater number of members than does the U.S. Sentencing Commission.47 Further, the U.S. Sentencing Commission issues strict guidelines, whereas the South African Council legislates in more of an ad hoc manner.48

As provided by the Correctional Services Act, the duties of the South African Council are as follows:

(1) The primary function of the [Council] is to advise, at the request of the Minister or on its own accord, in developing policy in regards to the correctional system and the sentencing process.

(2) The Minister must refer the draft legislation and major proposed policy developments regarding the correctional system to the National Council for its comments and advice.

44. See § 84 of Correctional Services Act 111 of 1998 (S. Afr.). The National Council referred to herein is the Council for Correctional Services, see id. § 1. For more on the duties of the National Council, see id. § 84.
46. See § 83(2)(a)–(h) of Correctional Services Act 111 of 1998.
(3) The Commissioner must provide the necessary information and resources to enable the National Council to perform its primary function.

(4) The National Council may examine any aspect of the correctional system and refer any appropriate matter to the Inspecting Judge.49

The language of the above statute, namely "[t]he National Council may examine any aspect of the correctional system," seems to give unbridled discretion to members of the South African Council. This statute also illustrates that the South African Council has the power to legislate in a more ad hoc fashion than does the U.S. Sentencing Commission. The South African Council is not limited to mere sentencing issues, but rather is free to examine any aspect of the correctional system.50

2. The South African Judge's Role in Sentencing

"[C]ourts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;"51 "[n]o person or organ may interfere with the functioning of the courts."52 These quotes suggest that after the South African Council promulgates the sentencing statutes, the judges' decisions in applying and interpreting these statutes become the law of the land.53

49. § 84 of Correctional Services Act 111 of 1998. The term "Minister" means the Minister of Correctional Services. See id. § 1. The term "Commissioner" means the Commissioner of the Correctional Services. See id.

50. For example, in May 1999, 6,000 inmates were reportedly released to ebb the overflowing prison population. See News24.com, Plans to free 6,000 convicts 'absolute nonsense', May 20, 1999 (visited Nov. 23, 1999) <http://news.24.com/archive/english/south_africa/south_africa/ENG_51178_384104_SEO.asp>.


52. Id. § 165(3). The following statute serves as an example of the discretion South African judges are allowed in determining appropriate sentences:

(1) A person liable to a sentence of imprisonment for life or any period, may be sentenced to imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount.

(2) The provision of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefor.

§ 283 of Criminal Procedure Act 51 of 1977 (S. Afr.).

53. As of 1993, the South African judicial branch was primarily composed of whites. See SCHARF & COCHRANE, supra note 16, Judicial System Section, para. 3. "There [were]
Africa's laws allow judges to impose sentences for indefinite amounts of time,\textsuperscript{54} thereby allotting judges a great deal of discretion, unlike U.S. sentencing guidelines and mandatory minimum sentencing laws.

3. Mandatory Minimum and Maximum Sentences

South Africa has minimum sentencing statutes similar to the U.S. mandatory minimum statutes.\textsuperscript{55} Unlike the U.S. statutes,

\begin{quote}
146 Judges of the Supreme Court. There [was] only one woman Judge. There [was] one Indian Judge. All other Judges [were] white males." \textit{Id}. The fact that the judges had such wide discretion over sentencing could be attributable to the old apartheid system. It was only in 1994 that the first South African democratic elections were held guaranteeing human rights for all. \textit{See} Annenberg/CPB, \textit{South Africa: Can a country overcome its history?} (visited Mar. 20, 2000) http://www/learner.org/exhibits/southafrica/>. As a result, the wide discretion these judges received could be a product of the pre-apartheid era in which whites dominated and governed South Africa in all aspects. \textit{See} Annenberg/CPB, \textit{South Africa, Apartheid: The Beginning} (visited Mar. 20, 2000) http://www/learner.org/exhibits/southafrica/aparthied.html>.

54. \textit{See}, e.g., § 286B of Criminal Procedure Act 51 of 1977, Imprisonment for indefinite period, which provides:

\begin{enumerate}
\item The Court which declares a person a dangerous criminal shall—
   \begin{enumerate}
   \item sentence such person to undergo imprisonment for an indefinite period; and
   \item direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court.
   \end{enumerate}
\item Whenever a court reconsiders a sentence in terms of this section, it shall have the same powers as it would have had if it were considering sentence after conviction of a person.
\item After a court has considered a sentence in terms of this section, it may—
   \begin{enumerate}
   \item confirm the sentence of imprisonment for an indefinite period, in which case the court shall direct that such person be brought before the court on the expiration of a further period determined by it, which shall not exceed the jurisdiction of the court;
   \item convert the sentence into correctional supervision on the conditions it deems fit; or
   \item release the person unconditionally or on such conditions as it deems fit.
   \end{enumerate}
\end{enumerate}

\textit{Id}. § 286B(1), (4).

55. \textit{See}, e.g., § 51 of Criminal Law Amendment Act 105 of 1997:

\begin{enumerate}
\item Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall—
   \begin{enumerate}
   \item if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person, in case of—
      \begin{enumerate}
      \item a first offender, to imprisonment for a period not less than 15 years;
      \item a second offender of any such offense, to imprisonment for a period not less than 20 years; and
      \item a third or subsequent offender of any such offense to imprisonment for a period not less than 25 years.
      \end{enumerate}
   \end{enumerate}
\end{enumerate}

\textit{Id}. Because drug trafficking has become a major concern in South Africa since the
however, South Africa’s mandatory minimum statutes allow courts very little discretion.\textsuperscript{56} Moreover, South Africa’s statutes specify different types of sentencing,\textsuperscript{57} and contain maximum sentence laws that create a sentencing ceiling, which prison terms cannot exceed.\textsuperscript{58} In contrast to South Africa,\textsuperscript{59} the U.S. court system has no formalized maximum sentencing policy, with the exception of some individual federal statutes.\textsuperscript{60} Instead, the Federal Sentencing Guidelines provide all necessary formulas for each particular offense.\textsuperscript{61}

The main parties involved in the sentencing process are the judge, the prosecutor, and the accused.\textsuperscript{62} The prosecutor and the accused argue about circumstances before the judge to either increase or mitigate the offender’s sentence.\textsuperscript{63} The judges’ can involve other parties in the sentencing process; for example, South African courts employ a unique feature called an assessor system.\textsuperscript{64} Once a defendant is found guilty, the judge appoints an assessor, who is a member of the community, to decide whether a

\textsuperscript{56} See SCHARF \& COCHRANE, supra note 16, Penalties and Sentencing Section, para. 1.

\textsuperscript{57} The South African judicial system imposes a variety of different criminal sentences. “The following penalties are presently in use: a jail sentence with the possibility of a fine, periodic imprisonment, being declared a habitual or dangerous criminal, being placed in an institution such as a juvenile reformatory, a fine, corporal punishment, community service, correctional supervision, caution or reprimand . . . .” \textit{Id.} Penalties and Sentencing Section, para. 2.

\textsuperscript{58} See \textit{id.} Penalties and Sentencing Section, para. 1.

\textsuperscript{59} See § 17(e) of Drugs and Drug Trafficking Act 140 of 1992 (S. Afr.) (maximum sentence statute).

\textsuperscript{60} Because of U.S. consecutive sentencing and mitigating/aggravating circumstances practices, both of which potentially add numerous years to an original sentence, an offender’s sentence may be virtually unlimited.

\textsuperscript{61} See generally USSG, supra note 13. See supra Part II.A.3 (explaining how U.S. judges calculate sentences pursuant to the Federal Sentencing Guidelines).

\textsuperscript{62} See \textit{id.}

\textsuperscript{63} See \textit{id.}; see also § 274 of Criminal Procedure Act 51 of 1977 (S. Afr.), which reads:

(1) A Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

\textit{Id.}

\textsuperscript{64} See SCHARF \& COCHRANE, supra note 16, Penalties and Sentencing Section, para. 1.
community-based sentence is appropriate. Because South African courts do not utilize juries, judges seem armed with an unbridled amount of discretion.

C. Comparing the U.S. Sentencing Commission and the South African Council

The U.S. Sentencing Commission and the South African Council serve similar functions in creating sentences: they both advise the appropriate legislative bodies on the policy for their respective sentencing processes. The South African Council is much larger in size than the U.S. Sentencing Commission, and it is composed of members involved in all aspects of civil service—the U.S. Sentencing Commission draws from a small civil service pool.

The major difference, however, between the South African Council and the U.S. Sentencing Commission is the power and discretion their respective judicial branches receive in imposing sentences. The South African Council imparts a great degree of autonomy to its judges in delegating the form and length of sentences, provided there is no mandatory minimum or maximum sentencing requirement already in place for the particular crime at issue. In contrast, the U.S. Sentencing Commission established sentencing guidelines and implemented a mandatory mode of operation that judges must follow. Although the U.S. Sentencing Commission and the South African Council are responsible for sentencing determinations, it is equally important to examine the theories of punishment behind sentencing to understand why certain sentences are conferred.

65. See id.
66. See id.
67. Compare supra Part II.A.1 (discussing the U.S. Sentencing Commission's role in developing the Sentencing Guidelines) with supra Part II.B.1 (discussing the National Council's role in developing sentencing policy).
69. See SCHARF & COCHRANE, supra note 16, Penalties and Sentencing Section, para. 1.
70. See generally supra Part II.B.2 (discussing the judges' discretion once the Council has established a sentence for an offense).
71. See generally supra Part II.A.3 (describing the judicial sentence calculation process).
III. THEORIES OF PUNISHMENT

A. Background

There are two main schools of thought underlying the theories of punishment: retributivism and utilitarianism. The retributivist believes that punishment is merely a way of giving criminals their just desserts. This belief is similar to the Mosaic laws of biblical times dictating the retributive theory of an "[e]ye for an eye." According to the Retributivist view, "the severity of the appropriate punishment depends on the depravity of [the criminal's] . . . act." The utilitarian, on the other hand, considers punishment in light of potential future consequences. This philosophy does not consider the offender's past wrongs. Utilitarianism presupposes that "[i]f punishment can be shown to promote effectively the interest of society[,] it is justifiable, otherwise it is not." This utilitarian perspective speaks to the main theories of crime prevention: deterrence, reformation, rehabilitation, and incapacitation.

B. The Theories of Punishment

1. Deterrence

Generally, the premise underlying the deterrence theory of punishment is that the fear of punishment by imprisonment will discourage both the offender and potential offenders from committing future crimes. For effective deterrence, however, certain prerequisites must be fulfilled. These requirements are as follows: first, the risk of being apprehended must outweigh the...
benefits of committing the offense;\textsuperscript{82} second, the severity of the punishment should increase as the likelihood of catching the offender decreases;\textsuperscript{83} and, finally, if two offenses are committed, the more severe offense should receive a longer sentence, thereby providing an incentive for the offender to stop at the lesser crime.\textsuperscript{84} The United States and South Africa both practice some form of deterrence.\textsuperscript{85} In fact, both countries recognizably have maintained the highest recorded incarceration rates throughout the past decade.\textsuperscript{86}

2. Reformation and Rehabilitation

The basis of the reformation theory of punishment is that imprisonment extinguishes a person's desire to commit future crimes after his or her release from imprisonment.\textsuperscript{87} Reformation involves helping prisoners via educational and therapeutic programs.\textsuperscript{88} U.S. penitentiaries were initially established solely on the premise of rehabilitating criminals.\textsuperscript{89} The institutions were intended to be models of proper social organization created to reform criminals.\textsuperscript{90} For example, these institutions kept inmates in isolation while establishing routines for discipline.\textsuperscript{91} "[T]hey believed that a setting which removed the offender from all temptations and substituted a steady and regular regimen would reform him."\textsuperscript{92} The only logical conclusion from history is that criminal sentencing in the early 1820s in the United States served primarily rehabilitative purposes.\textsuperscript{93} Conversely, modern U.S.

\textsuperscript{82} See Kaplan et al., supra note 6, at 40.
\textsuperscript{83} See id. at 41.
\textsuperscript{84} See id.
\textsuperscript{85} The purpose of specific deterrence is to discourage the offender at hand with imprisonment; the purpose of general deterrence is to discourage other potential offenders. See Beres & Griffith, supra note 10, at 112-113.
\textsuperscript{86} See Mauer, The Sentencing Project, supra note 2, at 3-5. See also Mauer, supra note 11, at 3-5 (explaining that 1991 was the first year in which the United States' recorded rates of incarceration surpassed South Africa's. Before that time, South Africa and the Soviet Union were the leaders in incarceration rates).
\textsuperscript{87} See Beres & Griffith, supra note 10, at 113.
\textsuperscript{88} See Kaplan et al., supra note 6, at 46.
\textsuperscript{89} See id. at 46-47.
\textsuperscript{90} See id. at 47. See also Francis T. Murphy, Moral Accountability and the Rehabilitative Ideal, N.Y. St. B.J., Jan. 1984, reprinted in America's Prisons Opposing Viewpoints 17, 18 (David L. Bender et al. eds., 5th ed. 1991).
\textsuperscript{91} See Kaplan et al., supra note 6, at 47-48.
\textsuperscript{92} Id. at 48.
\textsuperscript{93} See generally id. at 47-48 (describing the competing rationales behind the purpose
recidivist statutes focus on incapacitating prisoners.94

Compared to U.S. statutes, South Africa’s statutory requirements provide a wide range of opportunities to rehabilitate prisoners.95 Unfortunately, like U.S. laws, South Africa’s recidivist statutes also focus largely on incapacitating prisoners.96 Nonetheless, South Africa has not completely abandoned the notion of rehabilitation within its sentencing and statutory schemes.97 For instance, the purpose of South Africa’s correctional system is “[to] promot[e] the social responsibility and human development of all prisoners . . . .”98 The two countries, however, seem to mirror each other in that they both turn to incapacitation to prevent criminals from committing future crimes.99

3. Incapacitation

Incapacitation is premised on the logic that if a person is imprisoned, he or she cannot physically commit a crime.100 “Selective incapacitation,”101 a more precise incapacitation theory, targets specific criminal conduct.102 Examples of selective incapacitation include U.S. Three-Strikes statutes,103 both U.S.

of imprisonment and noting that the end goal to isolate the prisoner and purge evil from the criminal mind and body).

94. See O’Connor, supra note 25, at 848. See also Beres & Griffith, supra note 10, at 113.

95. See §§ 44-45 of Correctional Services Act 111 of 1998 (S. Afr.) (providing, for example, that South Africa’s “Department of Correctional Services has established education and training program[s] to equip prisoners with the knowledge and skills that are necessary to obtain a job after release from prison.”). See also SCHARF & COCHRANE, supra note 16, Prison Section, para. 3.

96. See generally Willie Hofmeyr, For Some Crimes ‘Life’ Will Now Mean Exactly That, BUS. DAY (Johannesburg), Nov. 27, 1997, Analysis, at 14. See also generally Schonteich, supra note 8, at 13 (noting that South African politicians push for harsher sentencing measures to combat crime).

97. See § 2 of Correctional Services Act 111 of 1998 (S. Afr.).

98. Id. § 2(c).

99. See discussion infra Part III.B.3 (explaining how the theory of incapacitation drives the trend of the United States and South Africa sentencing policies).

100. See KAPLAN ET AL., supra note 6, at 59.


102. See id. at 113-114 (noting that the “Three[-]Strikes statute is grounded in the idea of selective incapacitation of the most dangerous criminals.”). See also O’Connor, supra note 25, at 848 (explaining that the general premise of selective incapacitation is that rehabilitation does not help the core group of career criminals).

and South African mandatory minimum statutes,\textsuperscript{104} and South African maximum sentence statutes.\textsuperscript{105}

Selective incapacitation is the punishment justification driving the harsh sentencing schemes of both South Africa and the United States.\textsuperscript{106} Yet, "crime is on the rise in South Africa,"\textsuperscript{107} and the U.S. prison population consistently grows, even when crime rates stabilize.\textsuperscript{108} There is clearly a flaw in these harsh sentencing provisions. Were they successful, crime would decrease and the prison population would stabilize; however, the truth is that with these sentencing provisions in practice, the inmate population in the United States and South Africa will continue to grow far beyond the facilities' maximum capacities.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{104} 21 U.S.C. § 841(b) (1994) is an example of a U.S. mandatory minimum statute. See Baylson, \textit{supra} note 9, at 167 ("Incapacitation for specific terms is guaranteed only by the existence of mandatory minimum sentences—convicted individuals are removed from society and incarcerated for the entire period of the mandatory minimum. During that period, society benefits from the individual's inability to commit further crimes.").
\item \textsuperscript{105} § 51 of Criminal Law Amendment Act 105 of 1997 (S. Afr.) is an example of a South African minimum sentence statute. See Hofmeyr, \textit{supra} note 96, at 14 (noting that the criminals who commit the most serious crimes receive the harshest sentences).
\item \textsuperscript{106} Some critics argue that strict sentencing is not a form of selective incapacitation. See THOMAS GABOR, \textit{The Prediction of Criminal Behaviour: Statistical Approaches} 3 (1986) (proffering that fixed indeterminate sentencing with standardized criteria is actually a compromise of utilitarian and retributive considerations).
\item \textsuperscript{107} Builta, \textit{supra} note 4, at 1.
\item \textsuperscript{108} See Beres & Griffith, \textit{supra} note 10, at 104 (reporting that crime rates have been relatively stable since the mid-1970s).
\item \textsuperscript{109} As of December 1992, 108,698 prisoners occupied South African prisons, which only had accommodations for 87,706. See SCHARF & COCHRANE, \textit{supra} note 16, Prison Section, para. 1. South Africa's prisons remain inadequate; as of 1999, there were 154,506 inmates, with space for only 99,000. See News24.com, \textit{supra} note 50. See also Beres & Griffith, \textit{supra} note 10, at 107 ("[A] factor contributing to the boom in the prison population was the enactment of stiffer criminal penalties for many crimes."); ALVIN J. BRONSTEIN, \textit{Sentencing Reform Can Reduce Prison Overcrowding}, in \textit{AMERICA'S PRISONS OPPOSING VIEWPOINTS}, \textit{supra} note 90, at 145, 147–148.
\end{itemize}
C. Targeting Recidivists

Selective incapacitation undoubtedly targets a certain type of criminal, such as the career offender. The notion underlying targeting career offenders is often based on studies and theories proffering that a small group of criminals commit the bulk of crime. Wolfgang, Figilio, and Sellin conducted an influential study supporting recidivist statutes. The study, conducted in Philadelphia in 1945 and 1958, involved a cohort of criminal individuals—the study formulated the "six percent solution," concluding that six percent of violent offenders commit seventy percent of all crime.

Reliance on these studies, particularly by U.S. officials, appears faulty. These studies hinge on the reliability of the criminal history factor as a predictor of future crime. There is convincing evidence, however, that criminal history is not indicative of future behavior. The theory behind the mandatory minimum sentencing laws and the federal sentencing guidelines is that potential felons are deterred when they realize that penalties for certain crimes are more severe. This theory is flawed, however, because most criminals do not weigh the risks

110. See supra text accompanying notes 103–105 (discussing how harsh sentences target criminals who commit the most serious crimes and are considered the most dangerous).
112. See O'Connor, supra note 25, at 848 n.7. See also Beres & Griffith, supra note 10, at 114; GABOR, supra note 106, at 3; Martha Kimes, Note, The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status, 35 COLUM. J. TRANSNAT'L L. 503, 503 n.1 (1997).
113. A "cohort" is "a group of individuals or vital statistics about them having a statistical factor in common in a demographic study . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, supra note 74, at 441.
114. See Egan, supra note 111, at A18. See also Beres & Griffith, supra note 10, at 114. The studies showed that in 1945, six percent of the boys in the cohort committed over fifty percent of the crimes. See id. Likewise, in 1958, 7.5 percent of the boys in the cohort committed sixty-one percent of the crimes. See id. Some critics contend that misreading of these statistics is a common misperception by the criminal justice system. See id. at 114 n.72.
115. See supra text accompanying note 30 (defining "criminal history score").
116. See GABOR, supra note 106, at 50.
117. Three Pennsylvania studies demonstrated that criminal history was a small factor in the successes and failures of people released on bail. See id.
118. See FORER, supra note 40, at 62.
involved with increased penalties before committing crimes, rather, they act impulsively.\textsuperscript{119}

South Africa may have the same goals as the United States. For example, the South African Criminal Procedure Act explicitly labels certain criminals as “habitual”\textsuperscript{120} and “dangerous.”\textsuperscript{121} Statutes such as this one are drafted with the intent to target extremely violent offenders who cannot be released back into society.\textsuperscript{122} To better understand why strict sentencing for repeat offenders is not the most efficient solution to curb recidivism, it is helpful to examine it as applied to a specific offense, as the comparison of drug regulations\textsuperscript{123} in the following Part illustrates.

IV. COMPARING THE STATUTORY WAR ON DRUGS IN THE UNITED STATES AND SOUTH AFRICA

South Africa and the United States are just two of the many countries fighting the war against drugs.\textsuperscript{124} Both countries have tried to alleviate this problem with statutes and sentences that serve to lock up multitudes of offenders for excessive periods of time.\textsuperscript{125} Yet, the problem not only continues, in most instances, it grows.\textsuperscript{126} It is unrealistic and much too costly to continue

\textsuperscript{119} See id.

\textsuperscript{120} See § 286 of Criminal Procedure Act 51 of 1977 (S. Afr.) (stating “a superior court or a regional court . . . if it is satisfied that the said person habitually commits offenses and that the community should be protected against him, declare him [a] habitual criminal . . . ”).

\textsuperscript{121} See id. § 286A (stating that “a superior court or a regional court . . . if it is satisfied that the said person represents a danger to the physical or mental well being of other persons and the community should be protected against him, declare him a dangerous criminal.”).

\textsuperscript{122} See GABOR, supra note 106, at 6.

\textsuperscript{123} It is helpful to look at drug laws because drug crimes are often committed habitually—recognizing the likelihood of repeat drug crime offenders (because of the lucrative earnings and benefits), the United States counts one serious drug offense as a “strike.” See supra text of statute accompanying note 42.

\textsuperscript{124} For a discussion regarding the exacerbation of the drug problem in South Africa, see generally Thomas Callahan, United Against the Creeps, LIVING AFRICA, Nov. 1996, at 40, 40–43; see also Gumisai Mutume, No Need to Hide for Drug Peddlers, ELECTRONIC MAIL & GUARDIAN, Apr. 9, 1997 (visited Nov. 10, 1999) <http://www.mg.co.za/mg/news/97april/9apr-drugs.html>. For discussion regarding the United States’ drug problem and the increased use of incarceration resulting therefrom, see Thomas Szasz, Preface to STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS xix (1990); see also FORER, supra note 40, at 65, 151.

\textsuperscript{125} See infra Parts IV.A–B.

\textsuperscript{126} Although the drug problem may be an old trade, with increased globalization and international drug markets, the demand always grows. See Callahan, supra note 124, at 40
responding to the drug problem simply by overcrowding the prisons or building more prisons. Building more prisons only accommodates the increasing numbers of severe sentences incarcerating people for extended periods of time, and in some cases, forever.\textsuperscript{127}

A. U.S. Federal Drug Law

The U.S. federal drug law\textsuperscript{128} scrutinized herein has the characteristics of both a mandatory minimum sentencing statute and a Three-Strikes statute. The Three-Strikes statute is arguably ineffective in achieving the underlying goal of reducing drug-related crime. More severe penalties and sentences are almost always cited as the key solutions to deter violent repeat offenders’ criminal appetites.\textsuperscript{129} Thus, it begs the question of whether the use of non-violent crime convictions, such as those for drug possession and drug dealing, serves the purpose of deterring violent habitual offenders.

Title 21, Section 841 of the U.S. Code prohibits any person from knowingly or intentionally manufacturing, distributing, or possessing any controlled substance.\textsuperscript{130} Unlike South Africa’s statute, the U.S. statute lists in detail the quantity of a substance resulting in a specified term of imprisonment or fine.\textsuperscript{131} The U.S.

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(\textit{explaining how the United States Drug Enforcement Administration is becoming internationally oriented in response to growing international trafficking). In the early 1980s in Pakistan, there were less than 100 heroin addicts; by the mid-1990s the numbers were over one million. \textit{See id.} At a crime conference, Sylvaine de Miranda, Director of Johannesburg’s Phoenix House, noted on the growing drug problem in South Africa: “Four years ago, heroin was almost unobtainable in South Africa, ... now free samples of heroin are often provided when you buy cocaine or crack.” \textit{Id.} at 40-41.


\textsuperscript{129} Articles often report that one of the main reasons three-strike legislation was created was to directly respond to violent criminal acts. \textit{See Cuomo, supra} note 43, at A19; \textit{see also} McClain, \textit{supra} note 23, at 98–99; O’Conner, \textit{supra} note 25, at 847, 849.

\textsuperscript{130} \textit{See} 21 U.S.C. § 841(a).

\textsuperscript{131} For an example of quantity specifications, see \textit{id.} § 841(b)(1)(A)(ii), which provides:

- 5 kilograms or more of a mixture or substance containing a detectable amount of—
  - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
  - (II) cocaine, its salts, optical and geometric isomers, and salt of isomers;
law is more structured than is the South African statute because it specifies the amounts of contraband that invoke specific mandatory minimum sentences. Recall that South Africa's statute failed to quantitatively define the amount of substance (besides marijuana) required for a conviction. Both the South African and U.S. statutes may potentially imprison an offender for up to twenty-five years. In this regard, the U.S. statute is more devoted to its goal of incapacitating the worst criminals than is South Africa's statute, in that, as the amount of drugs the offender possesses increases, so does the severity of the punishment. This is especially true for proponents of the view that the more drugs an individual possesses or distributes, the more harm the individual causes to society.

The U.S. law includes a Three-Strikes component that imprisons felons for twenty-five years to life upon their third felony drug conviction. First time offenders convicted under this statute must first serve the mandatory minimum sentence before they are eligible for supervised release. The statute does not allow eligibility for parole during the term of imprisonment. In these respects, the U.S. law is more committed to its goal of punishing and incapacitating habitual offenders than is the South African law.

Congress, however, seems to have forgotten that one of the most commonly stated justifications for harsh sentencing is to prevent recidivism among "violent" offenders. In light of this fact, the United States should rethink its policy of punishing drug offenses in the same manner as it punishes serious violent crimes. Unfortunately, the theory behind this selective incapacitation aimed at drug offenses, as a whole, is ineffective.

(III) ecegonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclasses (I) through (III).

*Id.* § 841(b)(1)(A)(ii)(I)–(IV).

132. See generally *id.* § 841(b)(1)(A) (providing an example of the correlation between the amount and type of substance possessed and the length of sentence).

133. See § 21(a)(i) of Drugs and Drug Trafficking Act 140 of 1992 (S. Afr.).


136. See *id.* § 841(b)(1)(A)(viii).

137. See *id.*

138. See supra text accompanying note 129.

139. See Nkechi Taifa, Symposium, *Violent Crime Control and Law Enforcement Act of*
B. South Africa's Drug Law

A cursory look at South Africa's drug and drug trafficking statute\textsuperscript{140} reveals that it is, in some ways, both more lenient and harsh, than is the U.S. Three-Strikes drug law.\textsuperscript{141} It is more lenient because it mandates that a prison sentence for selling drugs is not to exceed twenty-five years.\textsuperscript{142} Conversely, the statute is more broad and harsh than its U.S. counterpart because it fails to specify the amount of controlled substance (for substances other than \textit{dagga}\textsuperscript{143}) necessary for an illegal possession conviction.\textsuperscript{144} Thus, it leaves open the assumption that any amount of illicit substance found on a person may warrant a sentence of up to twenty-five years imprisonment. Moreover, there is a built-in presumption in this statute: a person possessing a controlled substance, other than \textit{dagga}, is presumed to be dealing drugs.\textsuperscript{145}

Because it can generate a twenty-five year sentence, this presumption of "guilty of drug dealing until proven innocent" is a severe one for mere possession of small amounts of drugs. This line of punishment seems cruel, as well as impractical, considering the current state of South Africa's overcrowded prisons.\textsuperscript{146} Yet, this measure may be the best South African lawmakers can do until international relief, in the form of tactics and organizational efforts, helps with the advent of increased drug crime.\textsuperscript{147} The South African statute may be the result of a sheer lack of manpower to police the streets, particularly with respect to drug offenses,\textsuperscript{148} rather than a strategic plan to incapacitate habitual offenders.


\textsuperscript{140.} See generally Drugs and Drug Trafficking Act 140 of 1992 (S. Afr.).
\textsuperscript{142.} See § 17(e) of Drugs and Drug Trafficking Act 140 of 1992.
\textsuperscript{143.} See id. § 21 (1)(a)(i). "Dagga" is a South African term for marijuana. See Callahan, supra note 124, at 41.
\textsuperscript{144.} See generally Drugs and Drug Trafficking Act 140 of 1992.
\textsuperscript{145.} See id. § 21 (1)(a)(iii).
\textsuperscript{146.} See supra text accompanying note 109.
\textsuperscript{147.} See generally Callahan, supra note 124, at 40–43.
\textsuperscript{148.} The South African Narcotics Bureau employs only 340 agents, yet between approximately 1994 and 1996, thirty-one agents were killed in the line of duty or died as a result of job related stress. See id. at 42. See also Mutume, supra note 124.
The South African drug statute, however, may endeavor to incapacitate offenders in the same manner as does the U.S. statute. South African officials are trying to emulate the tactics and efforts the United States employs in combating drug related crimes. South Africa, however, is not winning "the war on drugs." In fact, if South Africa follows the United States' lead of employing stricter sentences incarcerating habitual offenders for life, it will drain the already-limited resources of the South African Narcotics Bureau, the South African Police, and South Africa's prison system even more than they currently are.

V. THE DISPROPORTIONATE AFFECT ON MINORITIES

The United States must either take a stand by punishing strictly violent crimes, such as murder and rape, or find another mechanism to deal with repeat offenders. It is not coincidental that the United States and South Africa have histories of racism against blacks—both countries having a disproportionate amount of arrests and prosecutions of blacks.

149. See generally Drugs and Drug Trafficking Act 140 of 1992.
152. See generally Callahan, supra note 124, at 40–43. See also Mutume, supra note 124.
154. See SCHARF & COCHRANE, supra note 16, Prison Section, para. 1. Based on the daily average number of prisoners from July 1991 to December 1992, the racial breakdown for prisoners in South Africa was: 4,225 white, 71,811 black, 721 Asian, and 25,511 coloured. See id. "Coloured" means "persons of mixed race." Id. General Overview Section, para. 3. In the United States, African-Americans are imprisoned at rate that is alarmingly disproportionate to their numbers in the population. See Taifa, supra note 139, at 724. In 1995, the increase in the number of African-Americans arrested for drug crimes was the largest increase of all ethnic groups. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1996 282 (1997) [hereinafter CRIME REPORTS]. Table 5.4 provides statistics of drug
If South Africa emulates the United States by formulating Three-Strike laws and similar incapacitation methods, as trends reflect it does in other areas of law,155 the disproportionate amount of blacks imprisoned in South Africa may increase.156 The U.S. sentencing scheme has been found to disproportionately affect African-Americans outside the Three-Strikes realm because of sentencing laws like those distinguishing between “crack” and powder cocaine.157 “The sentencing disparities between powder cocaine and crack cocaine have been well documented, showing that punishments for these two forms of the same drug are correlated with the race of the user...”158

When comparing the incarceration rates of African-Americans in the United States and blacks in South Africa, the statistics are alarming. In both 1991 and 1992, the United States incarcerated four times more black males than did South Africa.159 Even more disturbing, in 1992, the number of African-American men imprisoned in the United States was higher than the number of those enrolled in higher education institutions.160 Take notice that all of these numbers were reported in the years following the onslaught of mandatory minimums and sentencing guidelines. The “war on drugs”161 also increased arrests and prosecutions of minorities because the focus of the drug law enforcement efforts is primarily on inner city communities with dense populations of ethnic minorities.162 “Black, Latino and Asian youths... were 2.8 times more likely to be arrested for a violent crime, 6.2 times more likely to end up in adult court and 7

arrests and the races of the corresponding offenders. See id. at 282 tbl.5.5.  
155. See Schonteich, supra note 8, at 13 (arguing that current South African law mandates tough minimum sentences to combat crime; for example, murdering a police officer now warrants life imprisonment). 
156. See SCHARF & COCHRANE, supra note 16, Prison Section, para. 1. 
157. See Taifa, supra note 139, at 719.  
158. MAUER, supra note 127, at 22. 
159. According to the Sentencing Project’s findings, in 1991, the U.S. Government incarcerated 3,109 African-American males per 100,000 people, while the South African Government incarcerated 729 black males per 100,000 people. See MAUER, supra note 11, at 3–4. From 1992 to 1993, the United States’ rate increased to 3,822 per 100,000 in comparison to South Africa’s 851 per 100,000. See id. at 1, 7. 
160. See id. at 2. The number of African-American men in jail or prison in 1992 was 583,000 while the number enrolled in higher education institutions was 537,000. See id. 
161. Szasz, supra note 124, at xviii. 
162. See Taifa, supra note 139, at 724. See also generally CRIME REPORTS, supra note 154, at 280–284 (discussing the overall increase of drug arrest across the board).
times more likely to be sent to prison than their white counterparts."\textsuperscript{163}

Whenever there is disparity between the treatment of races within a criminal justice system, a rise in the overall incarceration rates ultimately increases the inequity. Thus, it logically follows that the U.S. and South African Governments should respond to these phenomena with alternatives other than increased sentences. This is especially true in light of abundant evidence that increased sentencing does not decrease crime.\textsuperscript{164} Furthermore, there are heavy cost factors associated with increased sentences and inadequate prison space.\textsuperscript{165} Since 1990, the number of local, state, and federal prisons rose by 676,700 and is estimated to surpass two million by the end of 2000.\textsuperscript{166} “Adding to this tragedy is that despite enormous expenditures on prison construction and operations, prisons are likely to be as overcrowded and the public as vulnerable to crime in the year 2000,” as it was at the time strict sentencing policies were implemented.\textsuperscript{167}

VI. ALTERNATIVES TO INCREASED SENTENCING

A. Assessing the Sentence Situation

Neither South Africa nor the United States possesses the ideal sentencing scheme. In fact, both countries continue to pay a high price for their heavy incarceration practices that overcrowd prisons.\textsuperscript{168} Moreover, some argue that, “the reasoning behind [habitual offender statutes]\textsuperscript{169} is flawed because high-rate

\textsuperscript{163} Ellis Cose, Locked Away and Forgotten, NEWSWEEK, Feb. 28, 2000, at 54, 54.

\textsuperscript{164} See Taifa, supra note 139, at 723. “In 1992, of 25,000 offenders imprisoned in New York State, only 286 were sentenced as three time violent offenders. Thus a ‘three strikes’ law would have kept ‘only’ 286 murderers, rapists, armed robbers and other violent felons off our streets.” Cuomo, supra note 43, at A19. See CHRISTOPHER BAIRD, Building More Prisons Will Not Solve Prison Overcrowding, in AMERICA’S PRISONS OPPOSING VIEWPOINTS, supra note 90, at 118, 119.

\textsuperscript{165} See BAIRD, supra note 164, at 119. See also BRONSTEIN, supra note 109, at 146–149; AMERICAN BAR ASSOCIATION, Responsible Lawmakers Can Reduce Prison Overcrowding, in AMERICA’S PRISONS OPPOSING VIEWPOINTS, supra note 90, at 135, 136–138.

\textsuperscript{166} See Cose, supra note 163, at 54.

\textsuperscript{167} Id.

\textsuperscript{168} See supra text accompanying note 109.

\textsuperscript{169} See supra Part III.B.3 (explaining that the incapacitation theory of punishment underlies many harsh sentencing laws).
offenders will spend a majority of their criminal careers in prison, even if the prison term is modest and the apprehension rate is low. Most high-rate offenders are likely to be behind bars regardless of Three-Strikes laws."

"We tried soft on crime, and that didn’t work. Now we’ve tried tough on crime, and the results have been just as unimpressive. Maybe we should try smart on crime." One thing is certain: a change in sentencing policies must occur. This Comment maintains that sentencing is directly correlated to overcrowding in prisons, but not correlated to crime reduction. Yet ironically, incapacitation and crime reduction are the alleged reasons behind the stricter sentences imposed.

There are numerous studies connecting poor socioeconomic conditions with the fostering of criminal behavior. It follows that strict sentencing may remove the criminal from society, but it does not eradicate the breeding ground for criminal conduct. As a result, new criminals will constantly replace the old because the motivation is omnipresent. Furthermore, upon release from prison, criminals have little financial or social support to discourage their criminal motives and help them integrate back into mainstream society. Additionally, studies indicate that greater sentences actually lead people to commit repeat offenses. What good is incapacitation if it only guarantees deterrence at the high financial and social costs of long-term

170. Beres & Griffith, supra note 10, at 123.
172. See supra Part III.B.3 (noting that the incapacitation theory of punishment is most often cited as the rationale for harsh prison sentences).
173. See GABOR, supra note 106, at 44–47.
174. Judge Forer describes the process of prisoners who “max out” by serving their entire sentence. Yet, when they are released, there is no support to help the ex-convicts obtain employment, living arrangements, medical care, or assistance with the host of other social issues they face. See FORER, supra note 40, at 142.
175. See generally GABOR, supra note 106, at 56–58. Data indicates that less prison time can have a more favorable outcome than can longer sentences, although, there are an equal amount of opposite outcomes in some studies. As a whole, the studies indicate that the level of intervention was related to recidivism and that the more intrusive forms of intervention had adverse affects. See id.
176. The cost of incarcerating a prisoner can range from $20,000.00 to $40,000.00 a year. See Taifa, supra note 139, at 722. See also FORER, supra note 40, at 151.
imprisonment until old age?\textsuperscript{177}

\textbf{B. Alternative Sentences and Reform Suggestions}

"The National Council on Crime and Delinquency found that only 18 percent of prisoners had been convicted of serious or very serious crimes; 29 percent were convicted of moderate crimes, and 53 percent of petty crimes."\textsuperscript{178} In 1992 in New York, for example, of 25,000 imprisoned offenders, only 286 were repeat violent offenders.\textsuperscript{179} With statistics such as these, it is obvious that laws sentencing all criminals, even non-violent offenders, to lengthy prison terms, are over inclusive and potentially do more harm than good.

There are several suggested alternative methods to deal with non-violent or non-serious offenders. Increasingly, governments utilize the option of requiring non-violent offenders to pay restitution to their victims.\textsuperscript{180} In addition, more money could go into programs that help increase post-prison opportunities. For example, "the Vera Institute of New York . . . found that misdemeanants fared better when they were referred to work programs."\textsuperscript{181} In a Michigan program, misdemeanants on work probation\textsuperscript{182} had only half the recidivism rate of those on regular probation.\textsuperscript{183}

Other alternatives include utilizing electronic monitoring of offenders,\textsuperscript{184} increasing probationary periods, and providing

\textsuperscript{177} "Incarcerating an aging prisoner is estimated to cost . . . over $60,000.00 a year." Taifa, supra note 139, at 722.

\textsuperscript{178} FORER, supra note 40, at 159.

\textsuperscript{179} See supra text accompanying note 164.

\textsuperscript{180} See FORER, supra note 40, at 122. In a study of 605 of Judge Forer's consecutive cases, two thirds of the offenders involved therein served probation and paid restitution; moreover, they were not re-arrested. See id. at 123. See also Mauer, supra note 171, at 202.

\textsuperscript{181} FORER, supra note 40, at 150.

\textsuperscript{182} The misdemeanants were sentenced to probation on the condition that they work and pay restitution to their victims. See id.

\textsuperscript{183} See id.

\textsuperscript{184} Examples of these devices include ankle bracelets and other forms of computer-tracking devices monitoring the offender's movements from his or her home. See generally Russell Carlisle, \textit{Electronic Monitoring as an Alternative Sentencing Tool}, GA. ST. B.J., Feb. 1998, reprinted in \textit{AMERICA'S PRISONS OPPOSING VIEWPOINTS}, supra note 90, at 214, 214--221. But see generally Steven G. Calabresi, \textit{Designer Sentences and the Justice System}, AM. ENTERPRISE, Jan.-Feb. 1990, reprinted in \textit{AMERICA'S PRISONS OPPOSING VIEWPOINTS}, supra note 90, at 206, 206--213 (explaining that creative sentences should not be used because they tend to be tailored to the affluent, and it is unclear as to whether
better training for probation personnel. Some sources indicate that methods such as these would cost a mere fraction of the total cost of imprisonment.\footnote{185 See FORER, supra note 40, at 159. See also generally JOHN P. CONRAD, Intensive Probation is Effective, in AMERICA'S PRISONS OPPOSING VIEWPOINTS, supra note 90, at 230, 230–236. But see Michael Tonry, Stated and Latent Functions of ISP, 36 CRIME & DELINQUENCY 174, 174–181, 183–186, 188–189 (1990), reprinted in AMERICA'S PRISONS OPPOSING VIEWPOINTS, supra note 90, at 238, 238–245 (arguing that intensive probation programs do not reduce prison overcrowding or save money, but rather are simply an unrelenting form of surveillance).}

In addressing the disparate effect of increased incarceration and strict sentencing on blacks, some propose that a National Commission should be established to focus on the sentencing and incarceration policies and how they affect minorities.\footnote{186 See MAUER, supra note 11, at 12.} Along the same lines, Marc Mauer of the Sentencing Project, suggests a review of socioeconomic factors and their effects on crime.\footnote{187 See id.} Mauer recommends that the General Accounting Office examine socioeconomic circumstances such as unemployment, school dropout rates, and access to health care in relation to crime.\footnote{188 See id.} These suggestions could be helpful because they would provide national organizations an opportunity to observe the other effects of increased sentencing, outside the traditional realm of the criminal justice system. An outside perspective may make officials and constituents recognize the detrimental causal effects of Draconian sentencing trends.

An obvious sentencing reform measure, especially in the United States, is to end the "war on drugs." For many reformists, the increased sentencing measures for drug crimes have not only failed, but also have worsened matters.\footnote{189 See Szasz, supra note 124, at xx.} Some reformists recommend that the drug problem be treated as public health concern rather than a criminal justice problem.\footnote{190 See MAUER, supra note 127, at 24.}

Lastly, in regards to statutory changes, many sources point to mandatory sentencing laws as the principle source of prison overcrowding.\footnote{191 See FORER, supra note 40, at 151.} These laws could be repealed, and in fact, they have been known to "thwart the purposes of a sentencing guidelines system designed to introduce a rational basis into
sentencing." 192

VII. CONCLUSION

South Africa and the United States have been the world leaders in incarceration rates for far too long. 193 This Comment demonstrates that stricter sentences aimed at preventing recidivism remain a large cause of this phenomenon. As the new millennium begins, it is time to spend government dollars wisely and take a long-term approach to recidivism. Legislatures must explore the social reasons causing offenders to habitually turn to crime. 194 Moreover, they must examine alternatives other than the quick fixes of long sentences, more prisons, and vast monetary expenditures because:

Important as the criminal justice system is, it is only one small facet of the social order. It is a reactive system, not proactive. It can respond only after crime has been committed and only on a one-by-one basis. It is unreasonable to expect such a system to make material changes in a society and its culture. 195

The renowned philosopher, Plato, expressed this Comment’s theme best when he said, “[t]he Law, like a good archer, should aim at the right measure of punishment.” 196

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