

God, Country, and Cash: Why the Right should Re-Think Mandatory Sentencing

*Justice must always question itself,
just as society can exist only by means of
the work it does on itself and on its institutions.*

— Michel Foucault

Clementine Jacoby

Dance in Prison

Janice Ross

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INTRODUCTION

I ask Justin why he doesn't like these Bollywood moves and he shrugs. The boys seldom articulate their feelings beyond a cursory adjective, and it doesn't take an anthropologist to postulate why. Elaboration is rare, coaxed out gently: *Why is 'it better' at camp?* Probably because this is the first practice they've had in a while. I push Justin on the Bollywood thing: *I'm not White*, he says finally, flatly. Their teenage predispositions to emote seem atrophied—shriveling in this space where they are rarely asked to express, expound, *What about dancing made you feel free?* Arbitrariness feels pervasive—rules govern choices so small that we'd never count them among our freedoms. *Why can't they share their doughnuts?* I watch the boys save their prized confections for later, carefully swaddling them in napkins to protect their sprinkled exteriors. I watch them be commanded to throw them away as they leave the gym. Injustice plays the antagonist on silly stages, ever tinier—*Why are the boys' underwear pink?*—always in the name of some higher cause that never felt concrete. It's easy for me to get lost in these details—to dive in too deep and, when I finally come up for air, find myself gasping, light-headed, and sputtering the same abstract but piercing thesis statement: *something is wrong here.*

It's hard to step back from that and argue empirically that peer-reviewed data supports the nausea that I feel when I leave Hillcrest—the sense of wasted time, resources, and lives. It's hard to narrow in on a small part of a broken machine and attempt to methodically, and with focus, apply oil. It feels trite (to use Grady Hillman's metaphor) to put out the fire in one square foot of Hell, and ignore the inferno licking at my back. But that's my goal for the next twelve pages. Over-sentencing is one square foot of the Hell of the American prison system, but extinguishing tiny fires can only make the place cooler.

THE SMARTER SENTENCING ACT AT A GLANCE

Early last month, the U.S. Sentencing Commission published a bill aimed at addressing overcrowding in federal prisons by reducing jail time for nonviolent drug offenders. Federal

prisons currently operate at around 140% capacity¹; drug offenders account for 50% of the federal prison population. Spending on federal prisons exceeds \$6 billion a year—more than 25% of the entire budget for the Department of Justice². The new bill, called The Smarter Sentencing Act (SSA) will take effect on November 1st unless Congress acts to stop it.

Fig. 1 The Smarter Sentencing Act Summarized

Reform	Who Qualifies	Impact
Reduce Mandatory Minimums (MM)	20 years → 10 years for 2nd offense (for some quantities) 10 years → 5 years for 1st offense (for some quantities) 5 years → 2 years for 1st offense (for some quantities)	In 2012, 15,295 people were subject to MMs.
Expand the “Safety Valve”	Two criminal points AND has not been convicted of a crime involving violence, firearms, sex, federal terrorism, racketeering, or investing drug proceeds, AND All of the following are true: She “came clean” She did not possess a weapon She used no violence or threats She was not a leader No death or serious injury resulted from crime	Expanded safety valve could apply to up to 820 additional people per year.
Make Fair Sentencing Act (FSA) retroactive	Those sentenced before Aug. 3, 2010, who received MMs based on the 100-to-1 crack-to-powder ratio (deemed racially discriminatory and unanimously rejected by Congress). Prisoners may petition courts for a reduction, which may only be granted with a court review. Under the FSA: 28 g crack (1 oz.) = 5yr mandatory minimum 280 g crack (10 oz.) = 10yr mandatory minimum	8,829 people, 87.7% of which are black, would be eligible to petition courts for sentence reductions.

The SSA reduces mandatory minimums, and is coupled with a clemency designed for individuals who, “have a clean prison record, do not present a threat to public safety, and were sentenced under out-of-date laws that have since been changed, and are no longer

¹ *Letter to House Appropriations re Prison Spending*, September 10, 2012
<http://www.drugpolicy.org>

² Families Against Mandatory Minimums, Quick Facts, Prison Costs

seen as appropriate,” according to Deputy Attorney General James Cole³. The effects of the SSA are summarized in the table above⁴.

From these modest changes, one conservative estimate shows savings of at least \$2.7B and 262,000 beds years over 10 years⁵. These are only the marginal costs of caring for a prisoner—they don’t include savings from averted prison construction and prison closures as prison populations decline.

The SSA has bipartisan support, notably claiming as a co-sponsor Utahn senator Mike Lee. Legislators from across the political spectrum have spoken out in its favor. In the public eye, however, opposing mandatory minimums is still perceived as a liberal stance. Whether because the SSA debuted under Obama’s administration or because reduced sentences are seen as being “light on crime,” the SSA is strongly associated with leftist politics despite its bipartisan appeal. This paper examines the benefits of the SSA from a conservative perspective, through three lenses associated with the political right: 1) Patriotism, and the nationalist argument to be made for reducing prison sentences as part of a broader mission to improve our incarceration system 2) Religion, and the neglected role of rehabilitation in prisons 3) Money, and the dramatic financial burden that the current system puts on federal and state budgets.

³ *Remarks as Prepared for Delivery by Deputy Attorney General James M. Cole at the Press Conference Announcing the Clemency Initiative*, Washington, D.C., Wednesday, April 23, 2014.

⁴ Table adapted from Families Against Mandatory Minimums. *S.1410: Potential Impact and Cost Savings*.

⁵ Julie Samuels, Nancy LaVigne & Samuel Taxy, *Stemming the Tide, Strategies to reduce the growth and cut the cost of the federal prison system*. App. A. The Urban Institute 2013.

NATIONALISM

There is no glory in punishing.

— Michel Foucault, *Discipline and Punish*

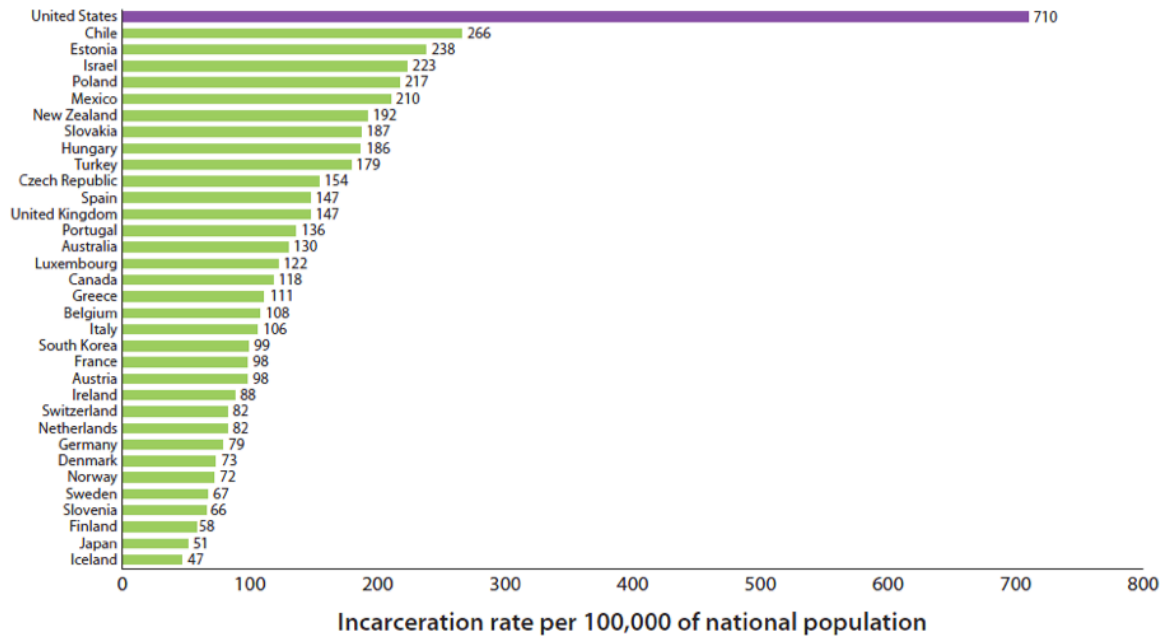
The United States is accustomed to being an outlier in many fields, but our prison system is an outlier by all the wrong measures. In a recent interview, Ronald S. Sullivan Jr., a professor of law and director of the Criminal Justice Institute at Harvard, lamented factors that have combined, “in a very nefarious kind of way to produce a result that should make us as Americans embarrassed. We certainly like to stand alone in many respects, but I don’t know if we want to be in the company of Russia and Cuba and [North] Korea in terms of the harshness of our punishment.” In our own league, the U.S.’s current incarceration rate (710 per 100,000 people) tops the Soviet Union’s in 1979 (660 per 100,000)⁶—far higher than that of any other industrialized nation. Sullivan notes that, “On a per-capita basis the U.S. incarcerates more people than any country in the world, including Rwanda, Russia, Cuba, all of the places one does not associate with a robust tradition of liberty. And that’s in many ways shocking.”

Shocking, sure. But is it effective? The sheer number of citizens incarcerated isn’t the only metric for gauging the quality. So lots of our citizens are locked up—is it working? Do our prisons deter crime? Looking at recidivism rates (the rate at which released individuals reenter the system) is one way to answer that question. Norwegian prisons are lauded for famously low recidivism rates, hovering around 20%⁷.

⁶ *Defending Justice: An Activist Resource Kit*. The United States Versus the World Fact Sheet. Political Research Associates, 2005.

⁷ *Norway Builds the World’s Most Humane Prison*, Time Magazine, By William Lee Adams Monday, May 10, 2010

Fig. 2 Global Incarceration Rates



By contrast, an estimated 67% of U.S. prisoners are re-arrested within three years of release⁸. The UK’s rate is around 46%⁹, and is one of the *highest* in Europe. Recidivism rates are tricky to measure, which is why I cite here a conservative estimate. 67% may well be a drastic *underestimate*, stemming from the fact that many studies don’t count re-incarcerations in other states. A 20-year study (the longest study of recidivism in the country) conducted by Correctional Counseling Inc., found that “about 94% of inmates...had been rearrested and 82% of them wound up back behind bars.”

⁸ *Confronting Confinement: A Report of the commission on safety and abuse in America’s prisons*, John J. Gibbons, Nicholas de B. Katzenbach, Commission co-chairs
⁹ *Proven Re-offending Statistics*, Quarterly Bulletin, July 2010 to June 2011, England and Wales, Ministry of Justice

Fig. 3 Rates of Recidivism in Other Industrialized Nations.

Select Rates of Recidivism

Australia	39% ⁱ
Ireland	62% ⁱⁱ
Japan	43% ⁱⁱⁱ
Scotland	50% ^{iv}
United Kingdom (England & Wales)	46% ^v
United States	52% ^{vi}

ⁱ Reimprisonment rate within 10 years of release, Australian Bureau of Statistics, March 16, 2010.

ⁱⁱ Irish Prison Service Recidivism Study, May 2013.

ⁱⁱⁱ "Reducing the Rate of Recidivism," *The Japan Times*, July 8, 2013.

^{iv} Reconviction Rates in Scotland: 2010-2011 Offender Cohort, Scottish Government.

^v Rate applies to adult offenders in England and Wales released from custody in 2011. "Proven Re-Offending Quarterly Jan-Dec 2011," Ministry of Justice released October 31, 2013.

^{vi} "Confronting Confinement," Commission on Safety and Abuse in America's Prisons, June 2006.

We're not Norway. We're 26 times bigger, and 63 times as populous. We're far more ethnically heterogeneous, and we have a different criminal landscape to contend with for historical and cultural reasons. Furthermore, recidivism rates are a hairy metric—hard to compare internationally. Nevertheless, our own data shows that our prison system is broken. More recidivism means more crime. Despite steadily increasing sentence lengths, 95% of inmates are eventually released. Shifting to an approach that emphasizes rehabilitation over punishment—in an effort to lower recidivism—should be framed as a question of national security rather than one of judicial softness. The best *internal* data we have, indicates that rehabilitation programs lead to lower recidivism rates. We also know that overcrowding makes meaningful rehabilitation work almost impossible. Steps like the ones taken in the SSA to reduce prison sentences will make these programs more effective, and keep our streets safer.

Rehabilitation is also better for inmates; that hardly needs to be argued. On those grounds alone, politicians and much of the public are reluctant to trade punitive measures for rehabilitative ones. But the American desire to punish costs the nation in both human

and financial terms. Beyond inmates and their families, it costs communities and individuals victimized by reoffenders. It costs taxpayers; it costs the economy. Good data indicates that other options would be more effective at reducing crime and less costly by many metrics. As summarized in a report on recidivism by the Pell Center, “Punishment for the sake of punishment isn’t justice, but retribution. The American criminal justice system should aspire to more than that.”¹⁰

MONEY

Our prison system is expensive. The strain that our incarceration system puts on both state and federal budgets is dazzling. Spending continues to climb due, in large part, to increasing sentence lengths across states over the last 20 years. The growth over this time span has been dramatic. By 2008, one out of every 100 American adults was behind bars. Costs have risen proportionally. Nationwide, spending on incarceration has risen 300% in the last twenty years. The average cost per inmate is \$29,000 a year by conservative estimates.

Modest changes in our sentencing policies would reduce spending dramatically. A 10% reduction in the number of drug offenders entering our prisons would save \$644 million over 10 years. A 10% reduction in the sentences themselves would save \$538 million over 10 years¹. These are short-term savings. Even more substantial savings would accrue in the long term through prison closures and reductions in security.

Reducing our prison populations can be done without increasing the risk to public safety, as we’ve seen at the state level. State-level tests have revealed several effective,

¹⁰ *Incarceration and Recidivism: Lessons from Abroad*, Carolyn W. Deady, March 2014

low-risk strategies that could be applied nation-wide. The Fair Sentencing Act, so named because it reduced racially discriminant disparities between crack and cocaine sentences, was enacted in 2010 and has saved over half a billion dollars in California alone without harming public safety or increasing recidivism¹¹. Texas slashed sentences for drug offenses and expanded treatment for drug addiction in 2007. The state's prison population, which had been growing rampantly, has been stable or declining since, and violent crime has *decreased*¹².

Smart, incremental policy changes like the SSA could save taxpayers billions, and make prisons safer for both inmates and staff. By reducing overcrowding, policies like the SSA could also improve the quality and reach of programs designed to keep inmates from reoffending. Such programs are the focus of the next portion of the paper.

RELIGION

We have to build a society in which it is easier for people to be good.
— Dorothy Day

Many argue that Christian ethics underpin the American prison system¹³—protestant Christianity certainly played a role in scaffolding its first incarnation. Why then, has the system so fully embraced the punitive values of Christianity without embracing the (arguably more predominant) values of forgiveness and redemption?

¹¹ Julie Samuels, Nancy LaVigne & Samuel Taxy, *Stemming the Tide, Strategies to reduce the growth and cut the cost of the federal prison system*. App. A. The Urban Institute 2013.

¹² *Smarter Sentencing*. New York Times Editorial Board. August 13, 2013.

¹³ Dwight Conquergood

One thing is clear: it wasn't always this way. The United States' articulated goals of punishment have transformed dramatically since the architecting of our prison system. Retribution has overtaken rehabilitation: "Back in the '70s and before, rehabilitation was an articulated goal of the criminal justice system. The Supreme Court has said clearly now rehabilitation is no longer a penological goal." This ideological shift underlies the very concrete ballooning of prison sentence lengths. Deemphasizing rehabilitation and meaningful reintegration into communities de-incentivizes shorter sentences, plain and simple.

Forgiveness has been resolutely annulled from among the religious underpinnings of our incarceration system. Felons are never forgiven in the eyes of the state. In addition to long sentences, ex-cons face extreme adversity in seeking employment. They permanently lose their right to vote. Sullivan argues that, "We should think seriously about expunging records after a person has been outside of the criminal justice system with no contacts for a reasonable period of time. One prior contact shouldn't continue to exert these negative pressures on their job prospects and living prospects." According to most predominant ideologies in the U.S., one crime shouldn't preclude a person from meaningful reintegration into their communities. The SSA takes us closer to a system that reflects that conviction.

The argument, often made by religious groups, to refocus our prison system on rehabilitation predates this bill. Famously, the Catholic nun Sister Helen Prejean has dedicated her life to a full-time campaign against the death penalty and spends her days visiting men on death row. Many religious groups have expressed explicit support for the SSA. One letter drafter by 'conservative signers' laments that, "prolonged incarceration

contributes to the disintegration of family structures, increases dependency on state aid, and reduces the economic viability of individuals, families, and communities, thus hindering their reintegration into society.¹⁴” Their argument applies to the prisoners who remain behind bars as much as it does to those given clemency. It is difficult, even impossible, to operate effective (faith-based or otherwise) rehabilitation programs under conditions of extreme overcrowding.

Another letter penned by Rabbis, Ministers, and Reverends, who came together to express their support for the SSA emphasized healing, restoration, and deterrence: “As faith-based organizations, we witness and often bear this human cost first-hand as we visit those who are in prison, care for their families, and provide a support network for those who have paid their debt and can return to our communities. We believe that the aim of the criminal justice system should be to bring healing to the victim and their community, to restore the offender, and to deter crime.¹⁵” Shorter sentences—grounded in the basic tenet of forgiveness, and the belief that humans deserve new beginnings—should play a role in shifting the emphasis of our incarceration system away from retribution toward redemption.

CONCLUSION

This paper has made three arguments about why the political right should support the SSA. First, a nationalist argument: we need to bring our incarceration and recidivism rates into step with other industrialized nations to boost our economy, protect

¹⁴ Supporters of the Smarter Sentencing Act: Conservative Leaders, [famm.org S. 1410](#), The Smarter Sentencing Act

¹⁵ Faith Community Supports the Smarter Sentencing Act, [famm.org S. 1410](#), The Smarter Sentencing Act

communities, and stem crimes by repeat offenders. Second, an economic perspective: we need to reduce the financial burden that the current incarceration system puts on taxpayers via bloated federal and state budgets. Finally, I've highlighted the central argument made by religious groups in support of the SSA: our system is overly punitive. Putting a greater focus on rehabilitation would be more humane and more transformative.

These three goals—reducing crime, cutting costs, and helping inmates undergo meaningful transformations—are stymied by overcrowding in our prisons. The SSA takes meaningful steps toward addressing this problem: “Our current scheme of mandatory minimum sentences is irrational and wasteful...by targeting particularly egregious mandatory minimums and returning discretion to federal judges in an incremental manner, the SSA takes an important step forward in reducing the financial and human cost of outdated and imprudent sentencing policies,” said the bill’s co-sponsor Mike Lee.

EPILOGUE

This quarter, we developed personal connections with ‘inside students’. Our experience at Hillcrest, and the relationships built there, has surely impacted *me*—data and personal witness both attest that programs like ours help the students, too. But for these programs to flourish, we need legislation like the SSA. On a micro level, we saw our ability to teach weakened when the class size grew too big. We experienced lively reflections with three or four inside students; we saw engagement drop off precipitously beyond that range. We’ve seen, heard, and read accounts of how the connections fostered by programs like ours can help individuals serving time¹⁶. Those connections were

¹⁶ FLY Youth Stories “*Learning to FLY*”

critical in developing our own perspectives on the system; in some cases, they deepened convictions to agitate for change.

The importance of having a small number of students was palpable in the work we did this quarter—we all recognized it. Those who have seen first-hand how overcrowding thwarts programs beneficial to inmates—the police union, federal prison guard, judges and attorneys—overwhelmingly support this bill. But few have had those experiences. Recognizing that, this paper addresses concerns with the SSA on a macro level (What is it? Why should I support it?). Data is a poor substitution for first-hand insight; assigning dollar values to the cost of restoring a does and should make me uncomfortable. Furthermore, these numbers are overwhelming and hard to mentally distill. But I've presented them here in order to highlight how critical it is to address overcrowding before programs like ours can be offered to a larger percentage of our incarcerated population. Both our time at Hillcrest and my research on the SSA have left me convinced that Americans across the political spectrum should support this bill.

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