THE WAR ON DRUGS IS OVER (IF YOU WANT IT): STATE DRUG COURTS AS AN ALTERNATIVE TO CRIMINAL COURTS FOR LOW-LEVEL, NONVIOLENT DRUG OFFENDERS

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INTRODUCTION

On August 12, 2013, United States Attorney General Eric Holder revealed that he recommended a modification of the Department of Justice's charging policies regarding mandatory minimum sentences for certain low-level, nonviolent drug offenders, giving federal prosecutors discretion based on the circumstances of the case and no longer requiring the imposition of a charge necessitating a statutorily imposed mandatory minimum sentence.[1] In his remarks, the Attorney General stated that the Department of Justice is taking "steps to identify and share best practices for enhancing the use of diversion programs—such as drug treatment and community service initiatives—that can serve as effective alternatives to incarceration."[2] By making these directives, the Attorney General is moving in the right direction to undo the damage caused by the ill-conceived War on Drugs initiated in the 1970s that continues to this day. The Attorney General, however, can still do more by directing the federal courts to leave the adjudication of low-level, nonviolent drug offenders to state drug courts. The War on Drugs waged by the federal government has left an indelible negative impact on minority and poor communities, the prison system, and our nation's economy, without showing any proof of lowering drug consumption levels or the amount of drugs being trafficked into and within the United States.[3]

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1 Eric Holder, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

2 *Id.*

3 Asma Jahangir et al, *War on Drugs: Report of the Global Commission on Drug Policy,* GLOBAL COMM'N ON DRUG POLICY (June 2011), *available at* http://www.scribd.com/fullscreen/56924096?access_key=key-xoixompyejnky70a9mq (noting that "40 years after President Nixon

Part I of this Note describes the social, political, and legal reasons behind the rise of mandatory minimum sentencing in the 1980s and their path towards becoming advisory in the 2000s, as held by the Supreme Court in *United States v. Booker*. Part II provides a description of drug courts and argues for the use of drug courts as an alternative to the criminal sanctions for all nonviolent, low-level drug offenders. As part of this discussion, this Note examines the use of mandatory minimum sentencing post-*Booker* and the procedural method of divesting federal jurisdiction of nonviolent, low-level drug offenses and placing these cases solely within the jurisdiction of state drug courts. Part III analyzes the legal, economic, and social benefits of adjudicating nonviolent, low-level drug offenses in state drug courts as opposed to federal and state criminal courts.

I. BACKGROUND

A. *Media-Induced Fear Gives Rise to Mandatory Minimum Sentences*

In the early to mid 1980s, media coverage of the so-called crack epidemic intensified as the term "crack baby" made its way into national headlines.[4] Public concern over the dangers of cocaine-based drugs grew after the 1986 death of University of Maryland basketball star and first-round NBA pick, Len Bias.[5] CBS beamed the dangers of the crack epidemic into America's living rooms with its two-hour report, "48 Hours on Crack Street," in which Dan Rather and Diana Sawyer, among others, ventured into New York to question teenagers about drug use and examine addicts going through supervised withdrawal.[6] President Ronald Reagan and First Lady Nancy Reagan further stoked the flames, appearing on television to proclaim that crack would "steal our children's lives."[7] Especially in urban areas, the belief was that "crack cocaine use was rampant and considered a particularly vio-

launched the US government's war on drugs, fundamental reforms in national and global drug control policies are urgently needed.").

4 LaJuana Davis, *Rock, Powder, Sentencing–Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 387 (2011).

5 *Id.* at 381.

6 John Corry, *TV Reviews*: *CBS on "Crack Street*," N.Y. TIMES (Sept. 4, 1986), *available at* http://www.nytimes.com/1986/09/04/arts/tv-reviews-cbs-on-crack-street.html.

7 Davis, *supra* note 4, at 382.

lent drug."[8] Heightened public awareness regarding the devastating effects of drugs caused Congress to take action to impede the flow of drugs into the country.[9]

In 1984, Congress passed the Controlled Dangerous Substances Penalties Amendments Act, which introduced mandatory minimum sentencing to drug laws.[10] The Controlled Dangerous Substances Penalties Amendments Act of 1984 levied punishments based on the pure weight of the narcotic and the particular drug involved.[11] Worried about the "revolving door process" of drug traffickers being arrested, prosecuted, convicted, and quickly released, Congress worked to enact penalty provisions that would impose lengthy prison terms that would, in theory, end this "revolving door."[12]

In 1986, Congress passed the Anti-Drug Abuse Act of 1986, which calculated minimum sentences for drug offenders based on enumerated quantities.[13] The sentences for equivalent drugs of equivalent weights varied. In just one egregious example of the Anti-Drug Abuse Act of 1986's disparate impact on minorities, the Act provided that an individual convicted of possessing five grams of crack cocaine received a mandatory minimum sentence of five years, while an individual would need to possess one hundred times that amount of powder cocaine to receive the same sentence.[14] Indeed, "the overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about eighty-five percent in 2000."[15]

Congress reasoned that crack cocaine was more dangerous than powder cocaine and, thus, the discrepancies in sentencing were justified.[16] Crack cocaine abuse was more associated with "certain urban crime and risky sexual behavior" and, in addition, crack cocaine, because it is ingested through smoking as opposed

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8 Jim Abrams, *Congress Passes Bill to Reduce Disparity in Crack, Powder Cocaine Sentencing*, WASH. POST (July 29, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072802969.html.

9 Hon. William Wilkins, Jr., Phyllis Newton, and John Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 316 (1993).

10 21 U.S.C.A. § 841(b) (West 2013).

11 Kristen Balding, *It is a "War on Drugs" and it is Time to Reload Our Weapons: An Interpretation of 21 U.S.C. § 841*, 43 ST. LOUIS U. L.J. 1149, 1458 (1999).

12 *Id.*

13 21 U.S.C. § 841 (West 2013).

14 Abrams, *supra* note 8.

15 U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (2002)

16 *Id.* at 93.

to being snorted, presents a greater risk of addiction than powder cocaine.[17] Congress also justified increased penalties for crack cocaine offenses in the interest of protecting unborn children. In the mid 1980s, "crack baby syndrome" was believed to be reaching epidemic levels[18] and leaving devastating effects on babies prenatally exposed to crack cocaine.[19] Recent studies have found, however, that the negative effects of prenatal crack cocaine exposure are no different from the effects of prenatal powder cocaine exposure, effectively nullifying Congress' protection of unborn children as justification for the sentencing disparity between crack cocaine and powder cocaine.[20]

B. *Mandatory Minimums Become Advisory, At Least in Name*

In the years leading up to Attorney General Holder's announcement, mandatory minimums have come under scrutiny. In 2005, the Supreme Court held, in *U.S. v. Booker,* that sentencing decisions should be reviewed on appeal using a reasonableness standard.[21] *Booker* consisted of two cases being reviewed by the Supreme Court jointly.[22] In the first case, respondent Booker was charged with possession with intent to distribute at least fifty grams of crack cocaine.[23] The jury found that Booker possessed 92.5 grams of crack cocaine and found Booker guilty of violating 21 U.S.C. § 841(a)(1),[24] which prescribed a mandatory minimum prison sentence of ten years and a maximum sentence of life.[25]

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17 *Id.* at 92.

18 *Id.* at 94.

19 *See* Suzanne Daley, *Born on Crack, and Coping With Kindergarten*, N.Y. TIMES, (Feb. 7, 1991), *available at* http://www.nytimes.com/1991/02/07/us/born-on-crack-and-coping-with-kindergarten.html?pagewanted=all&src=pm, for a report on the fears of the impact of those born with "crack baby syndrome."

20 *See* Testimony of Deborah Frank, M.D. Before the United States Sentencing Commission (Feb. 25, 2002) (noting "there are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical.").

21 U.S. v. Booker, 543 U.S. 220 (2005).

22 U.S. v. Booker, 375 F.3d 508 (7th Cir. 2004); U.S. v. Fanfan, No. 03-47 2004 WL 1723114 (D. Me. June 28, 2004).

23 *Booker*, 543 U.S. at 226.

24 "[I]t shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C.A § 841(a)(1) (West 2013).

25 *Booker,* 543 U.S. at 226.

Based upon Booker's criminal history and the quantity of drugs found by the jury, the Federal Sentencing Guidelines required the District Court judge to select a sentence of not less than 210 months and not more than 262 months in prison.[26] At post-trial sentencing proceedings, the District Court judge found, by a preponderance of the evidence, that Booker had possessed an additional 556 grams of crack cocaine and, in addition, was guilty of obstructing justice.[27] These further findings mandated a sentence between 360 months and life imprisonment; the judge imposed a thirty-year sentence.[28] On appeal, the Seventh Circuit held that the increased sentence violated the Sixth Amendment's jury requirement.[29] The Seventh Circuit relied on *Apprendi v. New Jersey*[30] and *Blakely v. Washington*[31] in holding that "other than the fact of a prior conviction . . . the statutory maximum . . . is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[32]

In the second case, respondent Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of powder cocaine in violation of 21 U.S.C. §§ 846,[33] 841(a)(1)[34] and 841(b)(1)(B)(ii).[35] Under the Federal Sentencing Guidelines at the time, the maximum sentence authorized by the jury verdict was imprisonment for seventy-eight months.[36] At a post-trial sentencing hearing, the District Court judge found, by a preponderance of the evidence, that Fanfan was responsible for 2.5 kilograms of powder cocaine, 261.6 grams of crack cocaine, and that Fanfan had been an organizer, leader, manager, or supervisor of criminal activity.[37] Under the Sentencing Guidelines, these additional findings would have required an enhanced sentence of fif-

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26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 228.

30 Apprendi v. New Jersey, 530 U.S. 466 (2000).

31 Blakely v. Washington, 542 U.S. 296 (2004).

32 *Booker*, 543 U.S. at 232.

33 "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C.A § 846 (West 2013).

34 "In the case of a violation of subsection (a) of this section involving . . . 500 grams or more of a mixture or substance containing a detectable amount of coca leaves . . . cocaine . . . ." 21 U.S.C.A § 841 (2002) (amended 2006).

35 *Booker*, 543 U.S. at 228.

36 *Id.*

37 *Id.*

teen-to-sixteen years.[38] The District Court judge imposed a sentence based solely on the jury verdict, refusing to impose a heightened sentence.[39]

The Supreme Court held that post-jury verdict sentencing violates the jury requirement of the Sixth Amendment, finding that *Blakely's* holding of requiring all facts that might increase a defendant's sentence to be proved to a jury beyond a reasonable doubt applies to the Federal Sentencing Guidelines.[40] Most importantly, the Supreme Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), must be severed and excised.[41] As a result, the Supreme Court held that the Guidelines system is no longer mandated, but advisory.[42] The Court stated that the Guidelines shall remain a factor in sentencing in order to maintain a "strong connection between the sentence imposed and the offender's real conduct."[43]

The *Booker* reasonableness standard of review was upheld in *Gall v. United States*.[44] In *Gall*, petitioner had joined an ecstasy distribution enterprise while in college, but ended his affiliation after seven months.[45] After severing ties with the drug ring, petitioner used no illegal drugs and worked towards graduating college.[46] Petitioner pled guilty for his role in the drug ring three-and-a-half years later.[47] A presentence report recommended a sentence of thirty-to-thirty-seven months in prison.[48] The District Court judge sentenced petitioner to thirty-six months' probation based on his voluntary severing of ties with the drug ring and post-offense conduct.[49] The Eight Circuit reversed the District Court's ruling, holding that a sentence outside the Federal Sentencing Guidelines must be supported by extraordinary circumstances.[50]

The Supreme Court overruled the Eighth Circuit, holding that "extraordinary" circumstances are not necessary under the reason-

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38 *Id.*
39 *Id.* at 229.
40 *Booker*, 543 U.S. at 244.
41 *Id.* at 245.
42 *Id.*
43 *Id.* at 246.
44 Gall v. U.S., 552 U.S. 38 (2007).
45 *Id.* at 41.
46 *Id.* at 41–42.
47 *Id.* at 42.
48 *Id.* at 43.
49 *Gall*, 522 U.S. at 43.
50 *Id.* at 45.

ableness standard when issuing a sentence that departs from the Federal Sentencing Guidelines.[51] Although the Guidelines are advisory and not mandatory, the district judge "must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."[52] Although the Guidelines were made advisory, their role as a factor in sentencing is still an important factor as "the guidelines must still be 'considered' and are one of the factors in 18 U.S.C. § 3553(a) that must be taken into account when imposing a sentence."[53] All sentencing calculations must begin by determining the applicable range within the guidelines and then the other factors of § 3553(a) can be considered.[54]

In *Kimbrough v. United States*,[55] decided the same day as *Gall*, the Supreme Court found that, although Congress rejected a one-to-one ratio in enacting sentencing guidelines, this did not require lower courts to impose a one-hundred-to-one ratio and, thus, the district courts freedom to deviate from the one-hundred-to-one ratio did not violate the federal sentencing statue.[56] Following *Kimbrough*, district courts began to set penalties for crack cocaine offenders that departed from the one-hundred-to-one ratio, most notably the Western District of Pennsylvania[57] and the District of Columbia.[58]

In 2010, Congress passed the Fair Sentencing Act to help to continue to remedy the issue of sentence disparity.[59] The 2010 Act amended "the Controlled Substances Act and the Controlled Substances Import and Export Act to: (1) increase the amount of a controlled substance or mixture containing a cocaine base (i.e., crack cocaine) required for the imposition of a mandatory mini-

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51 *Gall*, 522 U.S. at 46.

52 *Id.*

53 FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 139 (5th ed. Sept. 2007).

54 *Id.*

55 Kimbrough v. U.S., 552 U.S. 85 (2007).

56 *Id.* at 108–11.

57 U.S. v. Russell, Crim. No. 06–72 Erie, 2009 WL 2485734 (W.D. Pa. Aug. 12, 2009) ("I find that a 1-to-1 crack-to-powder ratio is appropriate in this case and will apply this ratio in all future crack cocaine cases.").

58 U.S. v. Lewis, 623 F.Supp. 2d 42 (D.D.C. 2009) ("Henceforth, this Court will apply a 1-to-1 crack-to-powder ratio and then, in appropriate cases, will vary upward to take account of any aggravating factors that may exist.").

59 U.S. SENTENCING COMM'N: COCAINE AND FEDERAL SENTENCING POLICY 93, 94 (2002)

mum prison terms for trafficking."[60] The Act also eliminated the five-year mandatory minimum prison term for first-time possession of crack cocaine.[61]

The 2010 Act, however, reduced the disparity in the sentences for possession of crack cocaine to powder cocaine to only a baffling eighteen-to-one ratio.[62]

II. DISCUSSION

The mass incarceration of drug offenders in opposition to rehabilitation and treatment has created more problems than it purports to solve. The widespread incarceration of drug offenders at the federal, state, and local levels cost $80 billion in 2010 alone.[63] This is money better spent investing in drug rehabilitation and treatment. Federal prisons are operating at forty percent above capacity, with half of all federal inmates serving sentences for drug-related crimes.[64] Forty percent of federal prisoners and sixty percent of state prisoners are rearrested or have their supervision revoked within three years of their release, often for technical or minor violations.[65] African-Americans were imprisoned at six times the rate of whites for drug offenses involving cocaine and crack.[66] Black male offenders received sentences nearly twenty percent longer than those imposed upon white males convicted of similar drug offenses.[67]

Incarceration of drug offenders is, simply speaking, not working. Alternatives to incarceration are not ideological or theoretical, but pragmatic, and can be implemented almost immediately. State drug courts that provide social and legal services to address addiction, rather than incarcerating individuals, operate in all fifty states.[68] Persons participating in drug courts have a lower rate of

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60 Bill Summary & Status: S.1789 CRS Summary (111th Cong. 2010), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01789:@@@D&summ2=4&.

61 *Id.*

62 Fair Sentencing Act of 2010, Pub. L. No. 111-220, §1, 124 Stat 2372, 2372 (2010).

63 Holder, *supra* note 1.

64 *Id.*

65 *Id.*

66 Carrie Johnson, *Bill Targets Sentencing Rules for Crack, Powder Cocaine*, WASHINGTON POST (Oct. 16, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101501992.html

67 Holder, *supra* note 1.

68 Ryan S. King and Jill Pasquarella, *Drug Courts: A Review of the Evidence*, THE SENTENCING PROJECT 1 (April 2009).

recidivism, especially when compared to individuals who were incarcerated or received probation for drug offenses.[69]

Although the Attorney General made recommendations and is investigating the fruitfulness of alternative methods of dispute resolution for low-level, nonviolent drug offenders, the fact remains that his directive falls far below the ideal regarding drug offenders and the justice system. Attorney General Holder's directive only gives federal prosecutors discretion in pursuing charges against drug offenders and does not require them to statutorily imposed minimum sentences, which had arguably been achieved by the Supreme Court's decision in *Booker*. This, however, misses the point as it continues to incarcerate drug offenders and does not offer competent rehabilitation and treatment for most drug offenders.[70]

A. *State Drug Courts are a Reasonable, Legitimate, and Effective Alternative to the Punitive Court System*

The first drug court was established in Miami-Dade County, Florida with the purpose of "bring[ing] drug treatment more fully into the criminal justice system, treating offenders with a history of drug abuse for their addiction, while simultaneously ensuring supervision and sanctions when needed, from the courts."[71] Today, there are "over 1,600 drug courts operating in all fifty states"[72] with "the mission . . . to stop the abuse of alcohol and other drugs and related criminal activity."[73] This objective is achieved through a "coordinated response to offenders dependent on alcohol and other drugs"[74] requiring the "cooperation and collaboration of the judges, prosecutors, defense counsel, probation authorities, other corrections personnel, law enforcement, pretrial services agencies,

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69 *Id.* at 5 (noting, *inter alia*, "six drug courts in New York State averaged a 29% reduction in rearrest measured over 3 years following participants' initial arrest.").

70 *Id.* at 1 (stating that "[i]n 2004, 53% of persons in state prison were identified with a drug dependence or abuse problem, but only 15% were receiving professional treatment.").

71 King & Pasquarella, *supra* note 68.

72 *Id.*

73 THE BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS (Jan. 1997).

74 *Id.*

TASC programs,[75] evaluators, an array of local service providers, and the greater community."[76]

Drug courts typically have two models for operation.[77] The first is a deferred prosecution program in which "defendants who meet certain eligibility requirements are diverted into the drug court system prior to pleading to a charge."[78] These eligibility requirements, although they vary by jurisdiction, generally limit drug court participants to defendants who are charged with a drug possession; those charged with a nonviolent offense but tested positive for drugs at time of arrest, or those who have an established substance abuse problem at arrest.[79] Recently, however, drug courts have been expanding these eligibility requirements to allow offenders with a history of violent crime.[80] If a defendant meets these eligibility requirements, they are not required to plead guilty and, for those who successfully complete the drug court program, they are not prosecuted for the particular offense.[81] The second model is a post-adjudication program. In the post-adjudication program, defendants are required to plead guilty to their charges.[82] Although defendants are required to plead guilty, their charges are suspended during the course of their participation in the drug court program and, if they successfully complete the program, the charges are waived and, in some cases, the offense is expunged from their record.[83] In both models, if the defendants do not successfully complete the program, they will face prosecution in criminal court.[84]

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75 "Treatment Alternatives for Safe Communities is a not-for-profit organization that provides behavioral health recovery management services for individuals with substance abuse and mental health disorders." About TASC, TASC, http://www.tasc.org/preview/abouttasc.html (last visited May 21, 2014).

76 *Id.*

77 The fact that participants in drug courts are coerced into entering treatment by an arrest and the threat of criminal punishment bears no negative relationship to outcomes as "research indicates that a person coerced to enter treatment by the criminal justice system is likely to do as well as one who volunteers." BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS (Jan. 1997) *reprinted* Oct. 2004.

78 King & Pasquarella, *supra* note 68, at 3.

79 *Id.*

80 Reginald Fluellen and Jennifer Trone, *Do Drug Courts Save Jail and Prison Beds?*, THE VERA INST. OF JUSTICE 5 (2000) (noting that, as of 2000, "16 percent [of drug courts] admit people with a history of violent crime.").

81 King & Pasquarella, *supra* note 68, at 3.

82 *Id.*

83 *Id.*

84 *Id.*

B. *Penalties for Nonviolent, Low-Level Drug Offenders are Too Harsh and Ineffective*

Incarceration and criminal sanctions for nonviolent, low-level drug offenses are excessively harsh and ineffective at thwarting future criminal conduct. Studies have found that harsh sentences for drug offenders have contributed to higher and faster rates of recidivism.[85] In a U.S. Department of Justice recidivism study of fifteen states, sixty-six percent of all drug offenders who were released from prison were rearrested within three years.[86] Further, evaluations of drug courts have shown that completion of drug court programs can reduce recidivism when compared to all criminal justice alternatives, including probation.[87] Drug court program participants were rearrested "about 10 to 30 percentage points below those of the comparison group."[88] In addition, drug court program participants showed recidivism reductions for different types of offenses that seem to indicate decreased involvement in substance abuse.[89] Individual states have produced even higher rates of reducing recidivism over longer periods of time through drug court programs. Drug court participants in Florida and Missouri displayed a recidivism reduction of seventy and thirty-one percent, respectively.[90] A study of six drug courts in New York measured drug court participants over three years following the offenders arrest and found that a twenty-nine percent reduction in arrest following drug court participation.[91] A drug court in Multnomah County, Oregon produced a reduction in recidivism of twenty-four percent over the course of thirteen years after participating in drug court.[92] If the "treatment of criminals . . . is directed to the criminal rather than to the crime [and] its great object should be his

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85 Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus of Drug Offenders*, 40 CRIMINOLOGY 329 (2002).

86 PATRICK A. LANGAN, PH. D. & DAVID J. LEVIN, PH. D., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 8 (2002).

87 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 12 (2005).

88 *Id.* at 45. The comparison groups consisted of, depending on the drug court, either randomly assigned similar defendants, historical rates of similar arrestees, or contemporaneous traditionally adjudicated offenders.

89 *Id.* at 49 (noting that "almost all (9 of 12) of the programs that reported data on felony offense recidivism rates (either rearrest or reconviction), drug court participants had lower felony recidivism rates or fewer recidivism events.").

90 King & Pasquarella, *supra* note 68, at 6.

91 *Id.*

92 *Id.*

moral regeneration,"[93] incarceration of nonviolent drug offenders falls short. Drug courts, as evidenced by the higher rates of success in reducing recidivism, are a most viable method of achieving "the supreme aim of prison discipline . . . the reformation of criminals, not the infliction of vindictive suffering."[94]

The impetus for harsh sentences has an easy explanation and, unfortunately, it is not in the name of the reformation of criminals, but rather for political gain. The rise of mandatory minimums occurred during the 1980s, a decade when crimes rates were rising.[95] Even after the 1980s, when crime rates were lowering, the harsh sentences continued at the insistence of politicians who insist on being tough on crime because it is a platform that resonates with voters.[96] Voters, often receiving most of their information on crime from the media, "tend to overestimate the rate of crime and underestimate the response."[97] This misunderstanding by the electorate is a direct result of the media's tendency to report the most dangerous crimes and focus on the outlier lenient sentences given to offenders.[98] As a result, politicians must allay their constituents' unfounded fears by portraying themselves as tough on crime, of which a main recourse is to continue harsh sentences for offenders.

As a result, harsh sentences for drug offenders were implemented. In 2006, one year after the *Booker* decision, the mean prison term for all sentenced drug offenders was 87.2 months.[99] Whites were sentenced to an average length of 73.5 months.[100] In an indisputable fact of the racial disparities that drug sentencing imposes, African Americans were sentenced to an average prison term of 111.5 months.[101] In addition, the higher the level of education one has attained is a contributing factor to sentence length, which might also be an indicator of the differing sentences based on racial makeup. College graduates who were convicted of drug offenders received an average sentence of 73.6 months, while those

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93 THE NAT'L PRISON ASS'N, DECLARATION OF PRINCIPLES (1870), *available at* http://www.aca.org/pastpresentfuture/pdf/1870Declaration_of_Principles.pdf.

94 *Id.*

95 *See supra* Part I.

96 Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1280 (2005).

97 *Id.*

98 *Id.*

99 U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL STATISTICS 2006 – STATISTICAL TABLES NCJ 225711, at tbl. 5.4 (2006) [hereinafter STATISTICAL TABLES NCJ 225711].

100 *Id.*

101 *Id.*

who only graduated high school received an average sentence of 93.3 months.[102] Drug offenders who had not earned a high school diploma were given an average sentence of 82.9 months,[103] which might speak more to leniency in sentencing the youngest of offenders or those who might have diminished mental capabilities. Even so, college graduates still received, on average, sentences that were nine months shorter than those who did not graduate high school.[104]

Punishment for convicted drug offenders is not confined to imprisonment. Once offenders are released, the effects of the conviction continue in the form of limiting drug offenders abilities to attain higher education and, thus, limiting their opportunities to reintegrate themselves as productive members of society.[105] The Drug Free Student Loans Act of 1998 makes those who are receiving any federally funded grant, loan, or work assistance during the time they are convicted of drug possession temporarily ineligible to receive those funds.[106] After a third conviction for possession, the individual is indefinitely barred from receiving federal college loans and grants.[107] Although the statute provides for individuals to become re-eligible for federal funds upon the completion of a drug rehabilitation program or successfully passing of two unannounced drug tests,[108] this is often an "impossible burden for student who either cannot afford or cannot obtain the relatively scarce placements, or who must quit part-time jobs or miss class in order to attend meetings."[109]

C. *Despite the United States Supreme Court's Decision in* Booker*, Federal Sentencing Guidelines Are Still in Use*

Attorney General Holder's statement, although ostensibly giving discretion to federal judges, does not repeal statutorily imposed

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102 *Id.*

103 *Id.*

104 STATISTICAL TABLES NCJ 225711, *supra* note 99, at tbl. 5.4 (2006).

105 Eric Blumenson & Eva S. Nilsen, *How To Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 U. IOWA J. GENDER, RACE & JUST. 62 (2002).

106 20 U.S.C. § 1091(r)(1) (West 2002).

107 *Id.*

108 20 U.S.C. § 1091(r)(2) (West 2002) (providing "A student whose eligibility has been suspended under paragraph (1) may resume eligibility before the end of the ineligibility period . . . if (A) the student satisfactorily completes a drug rehabilitation program that (i) complies with such criteria as the Secretary shall prescribe . . . and (ii) includes two unannounced drug tests.").

109 Blumenson & Nilsen, *supra* note 105, at 70.

mandatory minimums. The distinctions set by Holder—"no mercy for drug gangs, dealers, etc."—will create complications[110] and possible undesirable consequences of nonviolent, low-level drug offenders being erroneously charged because he or she is a member of a gang or some "evidence" might turn up that the offender might be a dealer.

Federal Judge John Gleeson of the Eastern District of New York issued a statement that harshly criticized the use of mandatory minimum sentencing framework in order for federal prosecutors to obtain plea bargains from those charged with drug offenses.[111] Judge Gleeson presided over the trial of Lulzim Kupa, who was charged with cocaine trafficking.[112] Kupa had two previous convictions of distributing marijuana.[113] For the cocaine trafficking offense, Kupa was charged with a ten-to-life count because more than five kilograms of cocaine were involved.[114] The prosecutor sent Kupa a proposed plea agreement that promised a withdrawal of the ten-to-life count and recommended a sentence in the range of 110 to 137 months if Kupa pled guilty.[115] Kupa did not accept this plea bargain.[116] As a result, the prosecution filed a prior felony information that provided notice of the two previous marijuana convictions, and that also recommended a sentence of life in prison without the possibility of parole.[117] Two weeks later, the prosecution offered an agreement that would withdraw both the ten-year mandatory minimum and the prior felony information that would result into a mandatory life without parole sentence if Kupa would plead guilty; the prosecution "manipulated the Guidelines range estimate" and raised the recommended sentence to 130 to 162 months.[118] Kupa was given a single day to accept this agreement; he was unable to accept the agreement in time.[119] The prosecution proposed yet another plea agreement before trial began that changed the "estimated" Guidelines yet again to a recom-

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110 Adam Gopnik, *Mandatory Sentences and Moral Change*, THE NEW YORKER (Aug. 16, 2013), *available at* http://www.newyorker.com/online/blogs/comment/2013/08/eric-holder-mandatory-drug-sentences-and-moral-change.html.

111 U.S. v. Kupa, No. 11-CR-345, 2013 WL 5550419 (E.D.N.Y. Oct. 9, 2013).

112 *Id.*

113 *Id.* at *20.

114 *Id.*

115 *Id.* at *21.

116 *Id.*

117 Kupa, No. 11-CR-345, 2013 WL 5550419, at *21.

118 *Id.* at *22.

119 *Id.*

mended range of 140 to 175 months.[120] Kupa, based on his fear of the ever-increasing sentences recommended in the preceding pleas, said, "I want to plead guilty, your Honor, before things get worse."[121] Judge Gleeson accepted the plea and sentenced Kupa to eleven years.[122]

In his written opinion, Judge Gleeson stated that he felt Kupa's guilty plea "had been coerced by the threat of a mandatory life term if he insisted on going to trial."[123] In effect, the federal prosecutor used the threat of a mandatory life sentence for a non-violent drug offense as a means to induce the defendant to plead guilty and not go to trial.[124] This practice of using mandatory minimums as a means of extracting guilty pleas is prevalent in cases involving drug offenses, as evidenced by the testimony of the Executive Director of the National District Attorneys Association before the Senate Judiciary Committee, which read, "While federal mandatory minimum sentences sometimes result in outcomes that seem harsh, the vast majority of those cases are the result of a defendant that rejected plea negotiations [and] went to trial . . ."[125]

The use of the mandatory minimum sentencing scheme by prosecutors is not limited to extracting guilty pleas. In *United States v. Capps*,[126] which involved a guilty plea for trafficking "an amount of drugs that you can hold in your hand," the prosecutor offered Capps a deal on the day of sentencing that promised a sentence bargain of twenty-five years if Capps agreed to walk away from his possible subsequent appeal.[127] In *United States v. Wahl*,[128] in which the defendant was convicted of manufacturing and possessing marijuana, the sentencing judge said in regards to the statutorily imposed mandatory sentence that resulted in doubling the sentence because of prior felonies, "I have no discretion here . . . When it comes to these charging decisions, in many cases a line prosecutor . . . has more authority than I do . . . ."[129]

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120 *Id.* at *23.

121 *Id.*

122 *Id.* at *24.

123 Kupa, No. 11-CR-345, 2013 WL 5550419, at *24.

124 *Id.*

125 *Id.* at *25-6; *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Scott Burns, Exec. Dir. Nat'l Dist. Attorneys Ass'n), *available at* http://www.judiciary.senate.gov/pdf/9-18-13BurnsTestimony.pdf.

126 U.S. v. Capps, No. 11-CR-108 (E.D. Mo. Jan. 22, 2013).

127 Kupa, No. 11-CR-345, 2013 WL 5550419, at *36.

128 U.S. v. Wahl, No. 12-CR-167 (M.D. Fl. Jan. 14, 2013).

129 Kupa, No. 11-CR-345, 2013 WL 5550419, at *40.

D. *The Pros and Cons of Drug Courts*

While state drug courts are a viable alternative, drug courts are imperfect. As to be expected with any program that deals with the rehabilitation of drug addicts and drug offenders, statistics and methodology vary by jurisdiction. Exploring the shortcomings of drug courts is a useful tool for analyzing how to improve drug court completion rates and, thus, reduce recidivism even more than has already been proven and for a wider selection of the population.

Completion of the drug court program is essential to the success of the program. Completion rates of participants "ranged from about 30 percent to about 70 percent."[130] Although no factors alone were determinative of completion of the program, participants' compliance with drug court procedures is "generally a strong predictor of program completion."[131] Compliance with drug court procedures typically includes appearing at treatment sessions, attending required meetings, and passing drug tests.[132] Unfortunately, participants who had more "within—program arrests, more instances of warrants for failure to appear, and more positive drug tests" had a higher likelihood of not completing the program.[133] These findings, however, were not completely determinative of program completion.[134]

The various components of drug court programs, such as the judge's level of interaction and regularity of status hearings, have not been shown to be determinative of participants' completion rates, furthering confirming that the various drug courts cannot fit into "a 'one size fits all approach.'"[135] Although the judge plays a distinct and important role regarding drug court participants aptitude for completing the program, the "effect of the judge on problem completion is difficult to distinguish from the requirement to attend judicial status hearings."[136] Additionally, regular status

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130 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 62 (2005) [hereinafter ADULT DRUG COURTS].

131 *Id.* at 64.

132 *Id.*

133 *Id.*

134 *Id.* (noting, "in two . . . programs, participants with positive test results in the low range actually had a higher likelihood of completing the program than participants with no positive test results . . . .").

135 ADULT DRUG COURTS, *supra* note 130, at 68–69.

136 *Id.* at 68.

hearings were not determinative factors of program completion, as opposed to hearings on an as-needed basis.[137]

Significantly, age has been shown to be a major factor in a participants' completion of a drug court program, even more so than prior substance abuse treatment, prior criminal history, type of drug used, demographic characteristics, employment and education.[138] Participants who were older were generally more likely to complete drug court programs than their younger counterparts as they were more likely to recognize their own problems, in addition to the external forces working to encourage their drug use, and, thus, were more likely to be motivated to complete the program.[139]

Relapse remains a serious problem in drug court programs, as addiction "is a complex behavioral disorder; in curing addiction, patients often experience many relapses into drug use as they attempt to break their pattern of abuse."[140] Owing to the complexities of overcoming drug addiction, drug court participants' relapse results are understandably mixed.[141] Because drug courts deal with relapses using a combination of treatment and sanctions, a participant with multiple relapses is subject to dismissal from the program, as well as prosecution.[142]

Concerns have arisen that drug courts actually *increase* the number of people arrested on drug charges instead of being used as an alternative to criminal sanctions for those who are already arrested.[143] Law enforcement officials "are encouraged to make arrests for low-level drug offenses for which they would not have previously because of a perception that the drug court is an additional resource for adjudicating claims, as opposed to a diversion meant only for those who would have been arrested anyway."[144] Drug courts have been accused of exacerbating racial disparities,[145]

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137 *Id.* (noting that "there was no 'direct' effect of the different status hearing schedules on program completion rates.").

138 *Id.* at 69.

139 *Id.*

140 King & Pasquarella, *supra* note 68, at 15 ("For these persons (who have serious drug addiction problems), more intensive and long-term inpatient treatment would be the preferred strategy.").

141 ADULT DRUG COURTS, *supra* note 130, at 60 ("[F]our of the five drug court programs that used drug test results reported reductions in use. However, self-reported data on substance use relapse show contradictory results.").

142 *Id.*

143 Michael O'Hear, *Rethinking Drug Courts: Restorative Justice As A Response To Racial Injustice*, 20 STAN. L. & POL'Y REV. 463 (2009).

144 King & Pasquarella, *supra* note 68, at 17.

145 *Id.*

as opposed to closing the gap opened by mandatory minimum sentencing, through more drug arrests and longer prison sentences for those who fail to complete drug court programs.[146] If, however, arrests lead to recovery and law-abidingness, without increasing costs because the path after arrest is drug court and not incarceration, an increase in arrests is not a fatal flaw. Assuming that the arrests are meritorious, this could lead to more individuals obtaining treatment and preventing future crimes.

E. *The Jurisdictional Issue of Divesting Federal Courts of Drug Cases*

The Federal government will better serve its interests in limiting drug trafficking, and in turn drug use, by focusing its resources on prosecuting individuals and groups who are responsible for smuggling large amounts of illegal substances into the country and throughout the country. Criminal prosecutions for drug use are typically in the domain of the states[147] and, thus, freeing the Federal government of prosecuting low-level offenses will allow the prosecution of larger cases that involve international and interstate trafficking.

In 2005, the Supreme Court upheld the federal government's ability to criminalize manufacture, distribution and possession of marijuana, even in cases that involved small amounts to be used for medical use.[148] In *Gonzales v. Raich*, two California residents who suffered from a variety of serious medical conditions used medical marijuana in accordance of California's Compassionate Use Act.[149]

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[146] Michael O'Hear presents four factors that explain why drug court programs exacerbate the racial disparities in arrests for drug offenses.

> First, [drug treatment courts] are a court-based program that comes into play only after a person is arrested . . . Second, [drug treatment courts] eligibility requirements—by disqualifying those who face distribution charges of who have serious criminal histories—tend to screen out the prison-bound; the defendants who actually qualify for the [drug treatment courts] are thus apt to be defendants who would otherwise receive time served or other relatively light sentences . . . Third, [drug treatment courts] have a high failure rate . . . failure rates are higher for blacks than whites . . . Fourth, failure (or even near-failure) may result in greater incarceration than nonparticipation.

O'Hear, *supra* note 143, at 479–80.

[147] Alex Kreit, *Federal Focus Should Be on Big Cases*, N.Y. TIMES (Jan. 14, 2014), *available at* http://www.nytimes.com/roomfordebate/2014/01/14/should-drug-enforcement-be-left-to-the-states/federal-drug-policy-should-focus-on-big-cases.

[148] Gonzales v. Raich, 545 U.S. 1 (2005).

[149] *Id.* at 5.

The Compassionate Use Act allows patients, with a valid doctor's recommendation, to possess and use marijuana for personal medical use.[150] The two residents began to cultivate medical marijuana for their personal use.[151] After the cultivation began, federal Drug Enforcement Administration agents seized and destroyed the residents' six cannabis plants despite local officials concluding that the use of marijuana was in accordance with the Compassionate Use Act.[152] The residents argued that Congress' commerce power does not extend to regulation of patients who use locally cultivated cannabis for medical purposes and in accordance with California law.[153] The Supreme Court rejected this argument, holding that a federal law passed under Congress' commerce power need not substantially affect interstate commerce and that Congress need only have a rational basis for the law to be constitutional.[154]

This decision is contrary to the federal government's place in criminal drug law. Nonviolent, low-level offenders solely belong in the domain of the states so that the federal government can use its resources to pursue major traffickers that operate interstate and internationally. In 2011, the FBI reported that 43.3% of all drug abuse arrests were for possession of marijuana,[155] which is approximately 750,000 arrests.[156] In comparison, federal courts sentenced 6752 marijuana traffickers in 2011.[157] It is simply smart policy for the federal government to allocate its resources in arresting and adjudicating those who traffic drugs, of which the number is comparatively small, while ceding jurisdiction to the states for low-level drug possession and manufacture crimes.

The Department of Justice is starting to take heed, in minute incremental steps. In a 2013 memorandum, the Department of Justice advised federal prosecutors to give deference to the regulatory and enforcement schemes of Colorado and Washington, two states that legalized the production and use of marijuana.[158] In this mem-

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150 CAL. HEALTH & SAFETY CODE § 11362.5 (West 2013)

151 *Gonzales*, 545 U.S. at 7.

152 *Id.*

153 Brief for Respondent at 12, Ashcroft v. Raich, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2308766.

154 *Gonzales*, 545 U.S. at 22.

155 U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2011 (2012).

156 Kreit, *supra* note 147.

157 U.S. SENTENCING COMM'N, REPORT ON THE IMPACT OF *United States v. Booker* on Federal Sentencing (2012).

158 Memorandum from James M. Cole, Deputy Attorney Gen. of the Dep't of Justice, to all United States Attorneys (Aug. 29, 2013).

orandum, Deputy Attorney General James M. Cole wrote, "The Department [of Justice] is . . . committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way."[159] The most significant threats, as identified in the memorandum, include, among other things, preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.[160] The memorandum explicitly provides, "the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," leaving this in the domain of the state and local authorities.[161] Divesting itself of jurisdiction for low-level offenses is a step in the right direction for the Department of Justice, but it still falls short.

The advisory memorandum limits itself to marijuana, allowing for the federal government to prosecute low-level possession charges for other drugs and narcotics. As of 2012, 97% of the 3278[162] prisoners who are serving life without parole are for nonviolent drug crimes.[163] Of these, 83.4% of the sentences were mandatory.[164] The federal government's ideology as applied to nonviolent, low-level marijuana charges needs to be broadened to include other narcotics. While understanding the variances and effects cocaine and crack have on the user as opposed to marijuana, the states are more than adept at handling these types of cases. Divesting the federal government of all types of nonviolent, low-

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159 *Id.*

160 *Id.*

161 *Id.*

162 Sixty-three percent of these prisoners were sentenced by federal courts. *A Living Death: Sentenced to Die Behind Bars for What,* ACLU (Jan. 31, 2014), *available at* https://www.aclu.org/living-death-sentenced-die-behind-bars-what.

163 ACLU, *A Living Death*: *Life Without Parole for Nonviolent Offenses*, at 2 (Nov. 2013). Some of the nonviolent crimes that have resulted in life without parole sentences include: possession of a crack pipe, possession of a bottle cap containing a trace, unweighable amount of heroin, having a trace amount of cocaine in clothes pockets that was so minute it was invisible to the naked eye and detected only in lab tests, having a single crack rock at home, selling a single crack rock, verbally negotiating another man's sale of two small pieces of fake crack to an undercover officer, serving as a middleman in the sale of $20 of crack to an undercover officer, sharing several grams of LSD with Grateful Dead concertgoers, and having a stash of over-the-counter decongestant pills that could be manufactured into methamphetamine. *Id.* at 4.

164 *Id.* "I think a life sentence for what you have done is ridiculous. It is a travesty. I don't have any discretion about it. I don't agree with it, either. And I want the world and record to be clear on that." Federal District Court Judge James R. Spencer on sentencing a defendant to a mandatory life without parole sentence for selling small amounts of crack cocaine. *Id.* at 4; U.S. v. Gregg, 435 Fed.Appx. 209, n. 6 (2011).

level drug offenses is, as the Department of Justice has already recognized,[165] in the best interest of the federal government as it allows for preservation of resources in order to prosecute drug traffickers and other high-level drug offenses. Most importantly, giving jurisdiction to the states will allow the state court systems to use their discretion in adjudicating low-level drug offenses, being not beholden to federally-imposed mandatory minimum sentencing schemes. Ideally, this will open up the states the use of drug courts as an alternative to punitive sentences and subsequent incarcerations that do little to reduce recidivism or deter drug use.

III. PROPOSAL

A. *The States Should Have Jurisdiction of All Charges Against Low-Level, Nonviolent Drug Offenders with an Emphasis On Rehabilitation*

Divesting the federal court system of jurisdiction over low-level, nonviolent drug offenders does not do enough to achieve the desired results of reduced recidivism rates and economic benefits. The states must employ drug courts, which exist in all fifty states, as an alternative to incarceration by placing these offenders in supervised programs with treatment and rigorous standards of accountability.[166]

B. *The States Should Have Plenary Control Over Their Own Drug Courts*

In his remarks, Attorney General Holder celebrated the successes of state drug courts,

> In Texas, investments in drug treatment for nonviolent offenders and changes to parole policies brought about a reduction in the prison population of more than 5,000 inmates last year alone. The same year, similar efforts helped Arkansas reduce its prison population by more than 1,400. From Georgia, North Carolina, and Ohio, to Pennsylvania, Hawaii, and far beyond—reinvest-

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165 ADULT DRUG COURTS, *supra* note 130.

166 OFFICE OF NAT'L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, DRUG COURTS: A SMART APPROACH TO CRIMINAL JUSTICE (May 2011), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/drug_courts_fact_sheet_5-31-11.pdf.

> ment and serious reform are improving public safety and saving precious resources.[167]

Drug courts have the capability of reducing recidivism while bestowing economic benefits in wildly varying jurisdictions. While recognizing the ability of drug courts to be successful in any jurisdiction, it is important to note that drug courts from varying jurisdictions do, and should, operate differently. The needs of the various drug courts should be scrutinized and resolved by those closest to them, the local municipalities in which the drug court resides. Implementing a "one size fits all" approach across jurisdictional lines would be to the detriment of the drug court and the individuals participating.[168] This being said, analyzing the successes and failures of different drug courts can be instructive in implementing effective procedures.

1. Brooklyn Treatment Court

The Brooklyn Treatment Court was the first drug court to open in New York City and serves those individuals who were arrested on drug felony charges in Brooklyn.[169] In order to be eligible for Brooklyn Treatment Court, defendants cannot have a prior felony conviction and cannot have any pending violent charges.[170] The defendant must be nineteen-years-old at the time of arrest.[171] Consent to enter Brooklyn Treatment Court is needed from the District Attorney's Office and will not be granted in certain types of nonviolent cases, including those cases involving search warrants, drug sales during school hours near school property, and drug sales occurring through the use of a beeper.[172] An Assistant District Attorney (A.D.A.) assigned to the Brooklyn Treatment Court makes these determinations.[173] Lastly, the defendant must have an actual drug addiction and not merely be a casual user, as determined by a Brooklyn Treatment Court case manager.[174]

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167 Holder, *supra* note 1.

168 ADULT DRUG COURTS, *supra* note 130, at 68–69.

169 CENTER FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 157 (Oct. 2003) [hereinafter CENTER FOR COURT INNOVATION].

170 *Id.* at 158.

171 THE BROOKLYN TREATMENT COURT, POLICIES/PROCEDURES, *available at* http://www.nycourts.gov/courts/2jd/brooklyntreatment/policies.pdf.

172 *Id.* at 3.

173 CENTER FOR COURT INNOVATION, *supra* note 169, at 158.

174 *Id.* at 159.

The Brooklyn Treatment Court uses a post-plea model in which "participants plead guilty to an eligible drug charge in advance of participation and agree to a specific jail or prison sentence to be imposed in the event of program failure."[175] This plea is vacated and the case is dismissed when the participant graduates.[176] Participants must agree to one of four treatment mandates, which dictate the length of participation and the possible jail time the participant will face for failing to complete the program.[177] Participants pleading to a misdemeanor are mandated to a minimum of eight months in Brooklyn Treatment Court and generally will be jailed for six months for failure to complete the program.[178] Those pleading to a felony must participate in Brooklyn Treatment Court for twelve months or face one-to-three years in prison.[179] Those pleading to two or more felonies, and who do not have a prior felony conviction, must complete eighteen months in Brooklyn Treatment Court or face a prison sentence ranging from one-and-a-half to six years.[180] Those who are pleading guilty and have at least one prior felony conviction must complete eighteen months in Brooklyn Treatment Court, the same as those pleading to multiple felonies, but face a longer prison sentence for failing to complete the program.[181]

Once participants enter the program, a case management team responsible for all key clinical decisions supervises them.[182] Participants meet with their case management team at regular intervals to discuss successes and stumbling blocks and receive help with any issues or problems.[183] Participants are also required to appear in court regularly, typically at weekly intervals in the beginning of treatment and monthly intervals thereafter.[184] The judge is responsible for administering rewards and sanctions.[185] During court ap-

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175 *Id.*

176 *Id.*

177 *Id.*

178 CENTER FOR COURT INNOVATION, *supra* note 169, at 160.

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.* at 160–61.

183 CENTER FOR COURT INNOVATION, *supra* note 130, at 161.

184 *Id.*

185 A new arrest or involuntary return on a warrant while participating in the program . . . calls for a jail sanction . . . . A voluntary return on a warrant or a tampered drug test . . . calls for a non-jail sanction the first time and a jail sanction on any subsequent occasion. Three or more positive or missed drug tests, missed appointments, or instances of rule-breaking at the treatment program within a 30-day period . . .

pearances, the judge will recognize accomplishments by the participants with praise and "forcefully admonish participants" who are out of compliance with their mandated treatment program.[186]

Participants in the Brooklyn Treatment Court have shown positive results. Among all participants, including those who failed, seventeen percent were reconvicted within one year, compared with twenty-three percent for those who did not participate in Brooklyn Treatment Court.[187] After two years, twenty-eight percent of all drug court participants were reconvicted, compared with thirty-three percent for those who did not participate.[188] Graduates of the program showed even better results. Six percent of all graduates were reconvicted within one year and only eleven percent were reconvicted within two years.[189]

2. San Francisco Drug Court

The San Francisco Drug Court uses a pre-plea model, in which the participant is given a stay of prosecution and is discharged without a criminal record upon successful completion of the program.[190] If the participant does not successfully complete the program, charges will be filed and the case will be adjudicated.[191] The District Attorney's Office determines eligibility during the drug offender's felony preliminary hearing.[192] Eligibility is a "legal determination based on the nature and type of charges filed against defendant as well as that defendant's prior criminal history and the facts of the case."[193] In addition to meeting eligibility requirements, the defendant must be deemed suitable, which is "based upon an individual's level of addiction and considers the individuals needs in designing a treatment plan."[194]

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calls for a non-jail sanction the first time and a jail sanction on any subsequent occasion.

Id.

186 *Id.* at 161–62.

187 *Id.* at 175.

188 *Id.*

189 *Id.*

190 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, DRUG POLICIES AND PROCEDURES MANUAL, app.1 at 1 (July 2005) [hereinafter SUPERIOR COURT OF CALIFORNIA].

191 *Id.*

192 *Id.*

193 *Id.* at app. 1, 2.

194 *Id.* "An individual may be deemed to be unsuitable for [drug court] participation when that person is likely to pose a danger to the physical and emotional well-being and recovery efforts of other participants." *Id.* at 3.

Once the participant is deemed eligible and suitable for the program, the participant is supervised by a collaborative treatment team that includes the drug court judge, the district attorney, the defense attorney, case managers at the drug court treatment center, community treatment providers, and probation officers.[195] The collaborative treatment team creates a flexible treatment plan that is based on the participant's individual goals and needs.[196] The participant attends regular status hearings before the judge where the participant might receive incentives or sanctions depending on the participant's compliance with his or her treatment program.[197] Incentives include verbal reinforcement from the court, applause, certificates of achievement, and/or less restrictive treatment while sanctions include admonishment or reprimand, community service work, and/or increased intensity of treatment.[198] In severe cases, a bench warrant can be issued or the participant can be terminated from drug court and returned to criminal court for adjudication.[199] The drug court can request termination of a participant's participation for reasons such as new allegations of a felony, violent misdemeanor, or a domestic violence offense, as well as for other reasons involving lack of compliance with treatment obligations as determined by the court.[200] Graduation is based on a number of factors, which may include a minimum of six-to-twelve months participation, passing drug tests, successful completion of a primary treatment program, and/or satisfaction of victim restitution.[201] Before graduation, the treatment team works with the participant to create an exit plan that creates strategies to avoid relapse, have stable income and become gainfully employed.[202]

Participants in the San Francisco Drug Court, including graduates and those who did not successfully complete the program, had a fifty-seven percent recidivism rate within two years, lower than the sixty-seven percent recidivism rate for the same period of time

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195 *Id.* at 8.

196 SUPERIOR COURT OF CALIFORNIA, *supra* note 190, at 10 (taking into account "the client's baseline functioning, individual capabilities, and holistic needs including addiction level, physical, mental, and spiritual interests.").

197 *Id.* at 10–11.

198 *Id.* at 11.

199 *Id.* at 12.

200 *Id.* at 4–5.

201 *Id.* at 6.

202 *Id.*

for the comparison group.[203] Drug court graduates had a forty-three percent recidivism rate within two years.[204] Savings to the state as a result of reduced recidivism is estimated to be $48,023,623.[205]

C. *The Legal and Economic Benefits of Drug Courts are Ample Justification for the Decriminalization of Low-Level, Nonviolent Drug Offenders*

Treatment and rehabilitation of low-level, nonviolent drug offenders is in the best interests of the federal and state governments, in addition to the individual, as evidenced by an analysis of recidivism of incarcerated individuals compared with those who have gone through drug court.[206] In a five-year study of nearly 1800 drug courts from twenty-nine rural, suburban, and urban jurisdictions, the National Institute of Justice reported that drug court participants, in comparison to comparable probationers, self-reported less drug use, were less likely to test positive for drug use, and had fewer rearrests.[207]

The economic benefit the government receives, without any further harm inflicted upon the public, by having the federal government withdraw from prosecuting these types of cases and ceding jurisdiction to the states, who are better equipped to handle drug offenses through the use of drug courts that do not incarcerate drug offenders.[208] Putting more money into drug treatment results in economic benefit to the states by virtue of the money saved from having fewer individuals incarcerated and rearrested.[209] The National Institute of Justice reported that the net benefit of drug court participants as compared with similarly charged probationers

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203 San Francisco Superior Court, San Francisco Drug Court Cost Study Fact Sheet, *available at* http://www.sfsuperiorcourt.org/sites/default/files/pdfs/1949%20SF%20Drug%20Court%20Cost%20Study%20Summary.pdf.

204 *Id.*

205 *Id.*

206 King & Pasquarella, *supra* note 68, at 6 ("[I]t is generally accepted that drug courts effectively reduce rearrest rates relative to simple probation or incarceration. . ."); *see supra* Part II.B.

207 John Roman, *Cost-Benefit Analysis of Criminal Justice Reforms*, 272 Nat'l Inst. of Justice Journal 31, 34 (Sept. 2013).

208 Adult Drug Courts, *supra* note 130, at 7 ("[S]even drug courts evaluated had net benefits of between $1,000 and $15,000 per participant due to reduced recidivism and avoided costs to potential victims.").

209 King & Pasquarella, *supra* note 68, at 8 (noting that the average annual cost of an inmate is $23,000, while the average annual cost of a drug court participant is estimated to be $4,300).

is $5,680 per participant, resulting from social productivity, costs to the criminal justice system, and, most significantly, the costs of further crimes.[210]

Drug courts, opponents argue, make the criminal justice system more punitive towards addiction.[211] Participants, in exchange for entry into a drug court program, waive the opportunity to plead to a lesser charge and, thus, face the prospect of a longer sentence upon failure to complete the treatment program.[212] In addition, incarceration is often used as a sanction for a participant's failure to comply with the treatment program.[213] Since drug court completion rates range from thirty to seventy percent,[214] a potentially substantial number of participants are in danger of longer prison sentences.

For exactly this reason, drug courts need to be operated as an alternative to our punitive court system, not in conjunction. At worst, the pre-plea model, as used by the San Francisco drug court,[215] should be used in order to avoid the possible negative consequences of having a participant waive his or her right to plead to a lesser charge. At best, low-level, nonviolent drug offenders should not face criminal charges, but rather be placed into a drug court program, with an emphasis on treatment and rehabilitation, without the threat of incarceration looming for failing to complete the program. Drug courts already have incentives and sanctions in place that are effective and beneficial to the individual and do not include the threat of prolonged incarceration.[216]

Termination from a drug court treatment program should be reserved for extraordinary circumstances and not as a sanction for minor infractions. Cases such as Latisha Floyd's need to be avoided at all costs. Ms. Floyd was arrested for distributing one

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210 Roman, *supra* note 207, at 34.

211 DRUG POLICY ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 2 (Mar. 2011); *see supra* Part II.D.

212 *Id.*

213 *Id.*

214 ADULT DRUG COURTS, *supra* note 130, at 62.

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

216 *See* National Association of Drug Court Professionals & National Drug Court Institute, *List of Incentives and Sanctions*, NATIONAL DRUG COURT RESOURCE CENTER (last visited July 7, 2014), *available at* http://www.ndcrc.org/sites/default/files/sanctions_and_incentives_ndci_annotated_document.pdf, for a list of incentives and sanctions used by drug courts, including community service, increased supervision requirements, electronic surveillance, and increased community restrictions.

gram of cocaine to two undercover Georgia police officers.[217] Ms. Floyd entered into a drug court program, but was unable to comply with the requirements of the program because she did not own a car and was unable to pay for her regular drug tests and other drug court service fees.[218] Ms. Floyd was terminated from the program for missing appointments and missing drug court payments; she was subsequently incarcerated in accordance with the guilty plea she entered in order to be eligible for drug court.[219]

Ms. Floyd's unfortunate experience provides a cautionary tale of what drug courts should not be, but is also instructive as to how drug courts should operate. Unlike the Georgia drug court involved in Ms. Floyd's treatment program, drug courts should be a viable alternative to the punitive court system and not just a divergent path to incarceration. Termination from the program and resulting adjudication in criminal court should be reserved for the rare, extraordinary cases where drug treatment programs have proven fruitless after an elongated period in which all other incentives and sanctions have been exhausted.[220] Addiction is highly variable from person to person and relapse is a reality for most persons going through drug treatment. Drug court judges and treatment teams need to be allowed to exercise discretion in the participant's needs in order to make necessary changes in the participant's program without being allowed to resort to the easy out of termination. Only then will drug courts, which have been proven to meet the valleys and plateaus of drug addiction,[221] optimally provide society with the indelible benefits of reduced recidivism and the government with the tangible benefit of reduced costs.

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217 Mike Riggs, *Want to Go to Drug Court? Say Goodbye to Your Rights*, REASON (Aug.17, 2012), *available at* http://reason.com/archives/2012/08/17/want-to-go-to-drug-court-say-goodbye-to.

218 *Id.*

219 *Id.*

220 *Proposition 36 Revisited*, CALIFORNIA SOCIETY OF ADDICTION MEDICINE (2011), *available at* http://www.csam-asam.org/proposition-36-revisited. ". . .[T]he use of jail time as a 'sanction' to enforce treatment compliance is not supported. . .not a single study isolates the impact of jail sanctions in generating improved treatment outcomes."

221 *See supra* Part II.D.

IV. CONCLUSION

Attorney General Holder's directive[222] to federal prosecutors to examine the circumstances of drug offender's cases and not automatically charge these offenders in accordance with federal mandatory minimum sentencing guidelines represents a paradigm shift in ending the iniquities brought upon by the War on Drugs. Despite the directive, harsh and ineffective mandatory minimum sentences are still in use as either a plea bargaining tool for federal prosecutors or as a sentencing determinant that takes the discretion out of judges' hands. This falls short of best legal practices with regards to low-level, nonviolent drug offenders, while failing to remedy the problem that is drug addiction in our society.

By utilizing state drug courts that are already in existence in all fifty states and equipped to handle low-level drug offenders, the goals of reduced recidivism while contributing substantial economic benefits to federal and state governments can be achieved. In order to fully realize the positive results of drug courts on government, society, and the individual, the drug courts need to be an alternative to the criminal court system and not relegated to a red herring on the road to incarceration. Drug court treatment programs need to be rigorous, flexible, and patient. Termination and incarceration should only be reserved for the rare, extraordinary cases in which all treatment options have been exhausted. States need to have control over their own drug courts and judges, along with treatment teams, need to have discretion in implementing treatment and rehabilitation programs for participants.

We are currently at a crucial stage regarding how the justice system handles drug addiction, as evidenced by changing attitudes towards drug addiction in society and in the directives from the Department of Justice. The War on Drugs, although ostensibly conceived with the best of intentions, has not curbed drug use or drug trafficking and the disparate effect it has had on minority communities has been devastating. Drug courts have increasingly been supported by leaders from differing political perspectives and ideologies for their ability to reduce recidivism and conserve resources.[223] The time is ripe to take low-level, nonviolent drug of-

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222 Holder, *supra* note 1.

223 *See States Seek to Expand Drug Courts*, NAT'L ASS'N OF DRUG COURT PROF'LS (Feb. 8, 2014), *available at* http://www.nadcp.org/state-news, for examples of various state governors advocating for expansion of drug courts, including Maryland Governor Martin O'Malley (D) and Pennsylvania Governor Tom Corbett (R).

fenders out of the criminal justice system and place them in drug court treatment programs that produce positive legal, social, and economic outcomes for the individual, government, and greater community.