

The Politics of Punishment in the War on Drugs: Race and Racial Language in Policy Shifts

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Abstract

The Politics of Punishment in the War on Drugs: Race and Racial Language in Policy
Amendment

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In the 1970s and 1980s the United States government initiated what we call the “War on Drugs.” Soon after, state governments began to enact new legislation imposing mandatory minimum sentences for drug offenders, and eliminating judicial discretion in imposing sentences. The mandatory sentences for many drug offenses resulted in huge rates of incarceration, and disparate impacts for minority offenders. After several years of sentencing under the new laws, many citizens, politicians, and judges became disenchanted with the harsh requirements and called for change. In arguing for reform many cited the costs that increased rates of incarceration had imposed on state budgets, and some criticized the disproportionate nature of mandatory minimum sentences for non-violent offenses, while still others sought to publicize the harsh impacts of the laws on minorities and other offenders. Notably, however,

most who called for reform failed to cite the disparate impacts the policies had on racial minorities as a reason for reform. Although the policies of the War on Drugs had actually resulted in far more disparity for blacks, this fact was not cited as a reason for reform. Instead, reference to race became implicit, and politicians relied on the budget crisis to engage public support and to successfully amend the laws. Since then some states have amended their drug laws to eliminate some of the previous mandatory sentences and restore judicial discretion. Some states, however, have declined to do so. This dissertation investigates how race continued to be a factor in the policies of the War on Drugs, even though the rhetoric has shifted away from explicit references to race toward the budget crisis imposed by the harsh sentencing policies.

Table of Contents

Chapter 1.	The Punishment Policies of the War On Drugs: A Rhetoric of Being Tough On Crime, Protecting the Budget, and Racial Language.....	8
Chapter 2.	The Origins of the War on Drugs and Its Diffusion Throughout the United States.....	20
Chapter 3.	State Drug Sentencing Policy in the Context of Crime Policy Shifts and Implicit Racial Language.....	58
Chapter 4.	Drug Sentencing Policy in the 50 States.....	71
Chapter 5.	The Role of Race in the Fifty States: Race in the Population and the Legislature.....	87
Chapter 6.	New York.....	116
Chapter 7.	Michigan.....	166
Chapter 8.	Conclusion.....	207
References.....		218

List of Tables and Figures

Table 1.	States that Have Amended Their Drug Sentencing Policies and the Methods of Reform.....	83-85
Table 2.	Effects for the Determinants of Change in Drug Strict Level.....	106
Table 3.	Effects for the Determinants of Strictness of Drug Sentencing Policy in 1985 and Strictness of Drug Sentencing Policy in 2002.....	109
Table 4.	Effects for the Determinants of Drug Strict Level in 1985 and Drug Strict Level in 2002 (Excluding Hero/State Diversity Variable)....	114
Table 5.	Effects for the Determinants of Drug Strict Level in 1985 and Drug Strict Level in 2002 (Excluding <i>black population</i> , <i>Latino population</i> variables).....	115
Figure 1.	Incarceration and Crime Rates.....	118
Table 6.	The Rockefeller Drug Laws.....	129
Figure 2.	Blacks are Overrepresented in New York's Prisons and Jails.....	153
Figure 3.	Latinos are Overrepresented in New York's Prisons and Jails.....	154
Figure 4.	Whites are Underrepresented in New York's Prisons and Jails.....	155

Figure 5.	Disparity Between Black and White Drug Offenders.....	158
Figure 6.	Blacks are Overrepresented in Michigan’s Prisons and Jails.....	181
Figure 7.	Latinos are Overrepresented in Michigan’s Prisons and Jails.....	182
Figure 8.	Whites are Underrepresented in Michigan’s Prisons and Jails.....	183
Figure 9.	Crime Rate History in New York and Michigan.....	187
Figure 10.	Michigan Prison Population, 1988 - 2009.....	188
Figure 11.	Total Inflation-adjusted Corrections Expenditures by Type of Government, 1982 – 2008.....	203
Figure 12.	Corrections Budget Increases.....	204

Chapter 1

The Punishment Policies of the War On Drugs: A Rhetoric of Being Tough On Crime, Protecting the Budget, and Racial Language

The United States has been engaged in a War on Drugs since the 1920s. Even in the early years, when a few states began to criminalize certain drugs that were associated with minority communities, such as Opium which was considered the drug of Chinese immigrants in California, race has been intertwined with the issue of drugs, crime, and punishment. Later, the federal government became involved and ultimately launched what we know as the modern War on Drugs. The characteristics of this modern War on Drugs are a call to be tough on crime, harsh punishment for both users and dealers, and racial inequality in sentencing outcomes.

When states first began criminalizing drug use and possession in the 1920s they were explicit in their efforts to link particular drugs to racial minorities. During the escalation of the modern War on Drugs in the 1970s and beyond, race was often explicitly referred to, although in a different context. At that time politicians cited racial disparities in sentencing outcomes as a reason for enacting mandatory minimum sentencing laws, which would purportedly equalize sentencing for all similarly situated offenders. Also at that time, members of the black community supported a War on Drugs that would help stem the tide of drug use and the attendant problems it had brought to the black population. However, once the states began to de-escalate the War on Drugs, the rhetoric of race all but disappeared. Although the policies of the War on Drugs had actually resulted in far more disparity for blacks, this fact was not cited as a reason for reform. Instead, reference to race became implicit, and politicians relied on the budget crisis to engage public support and to successfully amend the laws. This dissertation

investigates how race continued to be a factor in the policies of the War on Drugs, even though the rhetoric has shifted to one of the budget crisis imposed by the harsh sentencing policies.

The Rhetoric of Tough on Crime

The creation of the War on Drugs and its escalation to the modern magnitude relied on a narrative that linked drugs to crime and racial minorities. Initially states warned against immigrant populations that would erode the morals and safety of the American population, and drugs that were associated with these populations were criminalized. Subsequently, the federal government began to criminalize drugs that had previously been governed by pharmaceutical laws and were administered by doctors. Eventually, politicians were able to create a link between drugs and other types of crimes, saying that drug use leads to general criminal behavior. Drugs and crime were primarily found in urban centers, and were thus associated with minority populations who resided there. Finally, through this narrative of drugs, crime, and minorities, the government created a fear in the general public that there was a national epidemic of drug use and dealing that was primarily situated in and perpetuated by minority populations. Specifically, drugs and crime were linked to blacks, and to a lesser extent Latinos.

The development of this narrative and the attendant fear within the general population set the stage for politicians to use a rhetoric of the need to be tough on crime. It became politically expedient for politicians of both major political parties to espouse this rhetoric, as all voters wanted to live in a community that was safe from drugs, crime, and the minorities who were engaging in these activities. In this climate of fear and racial distrust, the federal government, followed by the states, escalated the War on Drugs by passing increasingly harsh punishment policies for drug offenders.

Race and the impacts for racial minorities continue to be intertwined with the modern War on Drugs. Although the impetus for enacting mandatory minimum sentences was to equalize sentencing across offenders, the outcome has been even more dramatic disparate outcomes for minority offenders, particularly black offenders. The issue of the impact of the War on Drugs for blacks has become so obvious and so inherent in the policies that it seems to have become unnecessary, and undesirable, to explicitly mention it. However, because race is so inherent in the War on Drugs it is a clear reason for the need to amend these policies.

This buildup of the War on Drugs and the successful tough on crime rhetoric created a difficult situation for politicians once it became clear that the policies would be unsustainable due to the budget strain caused by incarcerating huge numbers of people. While the government could claim that the War on Drugs was successful based on the number of offenders who were being arrested and incarcerated, these very numbers also lead to the call for continued escalation of the War on Drugs to meet the public's expectations. Thus, a vicious cycle was created in which the policies of the War on Drugs themselves were creating a continued need to increase enforcement of the policies and the budget that is necessary to do that.

A Conundrum For Lawmakers: How to Amend Policies That They Had So Successfully Sold to the Public?

After years of experience with the policies of the War on Drugs it became clear to lawmakers that the policies could not be sustained. Although the states and the federal government claimed success in the War on Drugs, and continued to devote massive amounts of resources to it, the policies also created problems that had to be addressed. Specifically, the

policies were too costly to maintain, and the disparate impacts for black offenders had become so severe as to be unconscionable.

The policies of the War on Drugs created new categories of crime and imposed harsh punishments for them. The creation of new crimes, such as drug use and drug trafficking, requires punishment for people who were previously engaged in what were considered legal activities. This, in turn, leads to larger numbers of offenders behind bars. Exacerbating this are the lengthy sentences required by the policies. Mandatory minimum sentences and life sentences for some offenders resulted in a rapidly growing prison population. Many states and the federal government had to build new prisons to house these drug offenders, incurring huge costs in the process. Despite this fact, the government continues to wage the War on Drugs.

Without change in the policies of the War on Drugs the budget problems would not abate. The policies themselves have created conditions in which drug crimes have actually gotten worse. The creation of a black market for drugs that were previously legal has in turn created a hugely lucrative market for traffickers. The threat of punishment under the policies of the War on Drugs creates risk for dealers, which drives the price of drugs up in an effort to compensate for this risk. The extent of the black market is so vast and complex that it would require never ending resources to continue to fight. Thus, the costs of the War on Drugs would only increase without a change in policy.

An attendant problem is the increasing disparities in sentencing outcomes experienced primarily by black offenders. Although the policies should have created fewer disparities for similarly situated offenders, the result has been longer sentences for black offenders. This occurred for several reasons. First, the punishments required for offenses involving drugs

associated with blacks, particularly crack, are far more severe than for those involving drugs associated with white offenders, particularly cocaine. This has resulted in blacks receiving excessively long sentences for crack offenses, while whites receive sentences that are much shorter for cocaine offenses, despite the fact that these are simply two forms of an identical drug, with crack being cheaper and more accessible to inner city blacks.

Second, although there is little discretion allowed to judges in imposing sentences, prosecuting attorneys still have discretion in deciding what charges to file in each case. This discretion has left open the possibility of blacks being charged with offenses that will require longer prison sentences. As a result the disparities that previously were thought to be a result of judicial bias have been passed on to prosecutors who may impose their bias on black offenders.

Finally, the methods of implementing the War on Drugs on the street level result in increased disparities for black offenders. Police patrols that are designed to catch drug offenders are focused on the inner cities, where minorities reside. Drug crimes there tend to occur in the open on street corners. Minorities who live there and engage in drug related crimes are arrested more often and subsequently serve long sentences. Whites who engage in drug related crimes are more likely to do so in the relative safety of their homes, offices, and inside gated suburban communities. As such they are less likely to be arrested, prosecuted, and sentenced under the policies of the War on Drugs.

These problems, when considered in light of the wildly successful tough on crime rhetoric of the buildup of the War on Drugs, presented a conundrum for politicians. How would they now argue in favor of amending the policies they had championed years before? The public was very receptive to lawmakers' efforts to be tough on crime. They had adopted the rhetoric of

fear and the association of drugs with crime and minorities. It would be difficult at this point for politicians to abandon this rhetoric, and argue for more lenient policies. Resolution of this conundrum, and the problems associated with the War on Drugs, would require a new rhetoric that would be politically safe and could be accepted by the public.

A Bi-partisan Solution that Would Appeal to the Public's Concern for the Budget

The solution to the challenge faced by politicians was to appeal to another, perhaps larger public concern – the budget. It was clear that it was in the interest of both political parties to resolve the issues posed by the War on Drugs and move to reform the policies. Thus a bipartisan effort led to way to reform, working together to create a new rhetoric that the public could accept.

This bipartisan group was made up not only of lawmakers, but also interest groups, judges, lawyers, and police officers. The effort to reform the policies focused on the budget crisis caused by incarcerating huge numbers of people. Highlighted was the inability of states to fund other important public interests, like education and healthcare, as a result of the portion of the budget that was required to sustain the policies of the War on Drugs. This focus on the budget and the cost to citizens of continuing the policies allowed the reform coalition to sell the idea of amending the policies as necessary to meet this important public interest.

Race was rarely mentioned in the move for reform, despite the fact that it was one of the two major problems created by the policies of the War on Drugs. With the focus on the budget, little to no effort was made to explicitly invoke concerns about the racial disparities. Race, however, was still an inherent issue and concern. While no one seemed eager to explicitly raise

the issue, racial disparities were overwhelming, and implicit racial language was used to acknowledge them.

A Complex Landscape of Race, Punishment, and Politics

The way that the issue of race played out in the escalation and de-escalation of the War on Drugs was far more complex than contemplated by the current crime and race literature. The literature predicts that individual factors contribute to crime legislation becoming either more or less harsh. For example, crime trends should correlate with changes in crime policy. As crime rates go up, crime policy should be more strict. Similarly, partisan politics should impact crime policy. Governments dominated by Republicans should enact more strict crime policies, while those dominated by Democrats should enact less strict crime policies. The presence or absence of minorities in each state should also influence the nature of crime policy. States with larger minority populations should have more strict crime policies, while less diverse states should have less strict crime policies. The picture I uncover with this dissertation, however, is far more complicated and interesting than the previous literature would suggest.

None of these factors played a role in the escalation or de-escalation of the War on Drugs in the way the literature would predict. Race in particular exhibits complexities that are not contemplated by the previous literature. The escalation of the War on Drugs was not the product of increasing rates of crime, rather the government created new crimes and implied a link between these new drug crimes and other types of crimes as well as minorities. Similarly, the de-escalation did not follow a drop in crime rates. Instead, crime rates remained mostly stable and the government used continuing crime as a reason to continue to fund the War on Drugs.

Similarly, partisan politics played out in a more complicated way than the literature predicts. Rather than displaying the traditional values of Republicans as tough on crime and Democrats as softer on crime, the parties converged on the drug war issue and all politicians called for harsh legislation. Because the War on Drugs was such a politically successful issue for Republicans, Democrats co-opted the issue by becoming just as tough on crime as Republicans. Once the parties had adopted a similar position that was popular with the public, it could not simply be abandoned when the need for reform became apparent. Therefore, the move for reform was led not just by one party, but by a bipartisan coalition that moved toward a smart on crime policy, rather than just being tough on crime.

The issue of race in the War on Drugs, however, is perhaps the most complicated. It was not the case that the presence or absence of minority populations in any given state determined the relative harsh or lenient nature of that state's drug war policies. All states passed the harsh policies of the War on Drugs. Many at this point have amended those policies. The literature that discusses the way racial rhetoric is used also fails to adequately explain the racial rhetoric we see in the escalation and the de-escalation of the War on Drugs. Mendelberg argues that politicians use implicit racial messages to prime the racial resentment of white voters without violating the norms of racial equality. They play the race card in this way to garner support for legislation or a political position that will ultimately be unfavorable to racial minorities.

In the rhetoric surrounding the escalation and de-escalation of the War on Drugs we see both explicit and implicit racial messages. They are used in various ways, but are not always consistent with Mendelberg's theory. During the escalation race was explicitly raised as a reason for enacting mandatory minimum sentencing laws. The purported reasoning was that the disparities in sentencing outcomes that minorities experienced at that time were a result of

judicial bias, and that eliminating judicial discretion with a mandatory sentencing scheme would reduce or eliminate those disparities. The result, however, was even larger disparities in sentencing outcomes, particularly for black offenders. It is unclear whether this was truly an unintended consequence of the policies of the War on Drugs, but this was a use of explicit racial language.

During the de-escalation of the War on Drugs the use of explicit racial language virtually disappeared, even in the face of the huge racial injustices that had occurred as a result of the policies. There were instances, however, of implicit racial language being used by those advocating for changes to the policies. However, rather than use these implicit racial messages to prime racial resentment on the part of white voters to support legislation that would disadvantage blacks, the messages were used in the effort to reform the policies in a way that would benefit blacks by reducing their sentences and eliminating certain punishments altogether.

Thus, a more complicated picture emerges than the one painted by the previous literature. The fact that those calling for reform failed to discuss the racial injustices that had been called for by the policies does not mean that race did not matter, or that it was not a factor in the decision making. Race does matter. Racism and racial injustices are a historical and inherent part of the American criminal justice system and are clearly evidenced in the case of the War on Drugs. But race doesn't matter in the way the previous literature predicts it should.

The issue of drug sentencing policies in the War on Drugs is informed by race. Due to the inherent nature of race in the War on Drugs, there are several possibilities for how the issue is informed by race. It is possible that the issue is informed by race and the issue of race is explicit and articulated by politicians and others. It is also possible that the issue is informed by

race, but that it is not articulated because the racial injustices are so evident and obvious that it is unnecessary and undesirable for politicians and those involved in the criminal justice system to make it explicit. It is also possible that the issue is not informed by race at all, but I argue that this is not possible given the overwhelming racial injustices that have occurred as a result of the War on Drugs.

What is clear is that race and racial injustice are a constant undercurrent of the issues surrounding the War on Drugs. Race was an issue during the escalation and it was an issue during the de-escalation. During the de-escalation racial language was abandoned and implicit racial messages were rare. Although race was important and ever-present as an issue, it ultimately took a back seat to a stronger policy issue – the budget. It appears that while race was clearly a factor in the move to amend the policies of the War on Drugs, politicians adopted a more palatable rhetoric of budget crisis to sell the amendments to the public and to successfully reform the policies of the War on Drugs.

Structure of the Dissertation

This dissertation will address these issues by reviewing the previous literature and conducting an empirical analysis as well as two intensive case studies. Chapter 2 provides the history and background of the War on Drugs and introduces the research question. With this history I introduce the escalation and de-escalation of the War on Drugs, and find that the history of the War on Drugs is rife with evidence of racism and racial disparities in sentencing outcomes.

Chapter 3 reviews the previous literature on the politics of the War on Drugs, the politics of criminal justice, and the politics of race and crime. After a review of the previous literature it

becomes clear that the factors used to predict trends in drug war policy are incomplete and simplistic. I find that a far more complex set of factors interacted to influence policies in the War on Drugs. Chapter 4 provides an overview of variation in state drug sentencing policies on a national level. It will also provide a review of court cases that have ruled on mandatory minimum sentencing laws. It allows for a comparison of the methods states used to reform their drug sentencing policies during the de-escalation of the War on Drugs and how the Supreme Court and its rulings on drug sentencing policies have informed those amendments.

Chapter 5 is a statistical analysis of the racial and ethnic composition of state legislatures and the impact of that on state drug sentencing laws. In this chapter I test previous theories that predict how the presence or absence of minorities in state populations as well as state legislatures will impact the relative strictness or lenience of state drug sentencing policies. I find that the theories lack depth in their ability to accurately predict how minority populations will impact sentencing policies, and that there is more complexity to the interaction. Specifically, the presence of a large minority population does not necessarily lead to more strict drug sentencing laws. In some cases, but not all, increased numbers of minorities in the state legislatures leads to less strict drug sentencing laws. Factors other than simply the numbers of minorities are equally important in determining changes in drug sentencing laws. Those factors include the support of the War on Drugs among members of the minority community, as well as how the public in general views the particular minority community.

Chapter 6 presents the findings from the New York case study. In this case I find that there was a concerted effort during the escalation of the War on Drugs to win public support by creating a widespread fear of drugs and crime, and to link both with racial minorities. During the escalation the black population was generally supportive of the War on Drugs as they hoped it

would solve the problem of drug use in their community. I find further that during the de-escalation of New York's drug war the language of race was abandoned in favor of the rhetoric of the budget crisis. However, a few implicit racial messages do support my argument that race continued to be an issue and a constant undercurrent of the need to amend the policies.

Chapter 7 presents the findings from the Michigan case study. In this case I find that race was similarly present as an issue throughout both the escalation and the de-escalation of the War on Drugs. I find further that during the de-escalation there was more use of explicit racial language in the effort to gain support for the reforms to Michigan's drug war policies. I argue that this is because of the presence of a large coalition of active public interest organizations that joined the fight for reform and that drew attention to the racial injustices that had been caused by the policies.

Chapter 8 presents the conclusions drawn from this study. It reconciles the inconsistencies found in the empirical chapter and the two case studies and explains the likely causes of those inconsistencies. The conclusion addresses the role of race in criminal justice and in the War on Drugs. I argue that race is a significant factor on the American criminal justice system and in American Politics. This is true regardless of whether the rhetoric used includes explicit or implicit racial language. I suggest that the literature going forward should consider the complexities that I have uncovered with this dissertation in exploring new ways to study race in politics and criminal justice.

Chapter 2

The Origins of the War on Drugs and Its Diffusion Throughout the United States

In the 1970s and 1980s the United States government initiated what we call the “War on Drugs.” Soon after, state governments began to enact new legislation imposing mandatory minimum sentences for drug offenders, and eliminating judicial discretion in imposing sentences. The mandatory sentences for many drug offenses resulted in huge rates of incarceration, and disparate impacts for minority offenders. After several years of sentencing under the new laws, many citizens, politicians, and judges became disenchanted with the harsh requirements and called for change.¹ In arguing for reform many cited the costs that increased rates of incarceration had imposed on state budgets, and some criticized the disproportionate nature of mandatory minimum sentences for non-violent offenses, while still others sought to publicize the harsh impacts of the laws on minorities and other offenders. Notably, however, most who called for reform failed to cite the disparate impacts the policies had on racial minorities as a reason for reform. Since then some states have amended their drug laws to eliminate some of the previous mandatory sentences and restore judicial discretion. Some states, however, have declined to do so.

What we do know about the War on Drugs is that it inspired extremely punitive sentencing policies for drug offenses in many states. These policies came in the form of mandatory minimum sentences for many offenses, life in prison for some offenders, and a

¹ Beckett, Katherine. 1994 “Setting the public agenda: ‘Street crime’ and drug use in

American politics.” *Social Problems* 41:425-447

reduction in judicial discretion all around.² The policies have had dramatically disparate impacts on minorities, particularly blacks. We also know that many states have retreated from the harsh policies enacted during the War on Drugs in favor of increasing judicial discretion and reducing the reliance on incarceration for drug offenses. What we don't know is why many states have amended the harsh policies, how it was politically feasible for state legislatures to do so, and how they did so without referring to the racial disparities the policies exacerbated.

Many elected officials claimed the changes were made in response to public opinion which had grown tired of the harsh sentencing practices and the social and economic costs they imposed.³ But the political science literature lacks any real attempt to uncover the political circumstances surrounding the amendments of the harsh policies of the War on Drugs. The initial policies were enacted with little political risk, as politicians took credit for being tough on crime and addressing potential racial disparities in sentencing outcomes. The subsequent move toward reform, and away from the punitive policies, seems contrary to the literature's predictions of why states enact strict drug sentencing policies. This raises the question of why politicians risked their chances of reelection by reversing course on policies that were politically and publicly popular years before. With this dissertation I attempt to answer this question by focusing on Michigan and New York, both of which enacted some of the most harsh sentencing policies during the War on Drugs, and have since nearly completely reversed those policies.

²Meier, Kenneth J. *The Politics of Drug Abuse: Laws, Implementation, and Consequences*. *Western Political Quarterly*, 45, no. 1 (1992); Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol and Public Policy*. M.E. Sharpe, Inc. 1994

³ Greene, Judith and Vincent Schiraldi. 2002 "Cutting correctly: New prison policies for times of fiscal crisis." Justice Policy Institute, Center for Juvenile and Criminal Justice

The question addressed in this dissertation has largely been neglected by political scientists. Previous theories make predictions about why states enact more or less harsh criminal policies. These theories consider the impact of crime rates, political parties, and perceived threats from minority communities. However, as will be demonstrated in this dissertation, the existing theories do not explain why states have retreated from the harsh policies of the War on Drugs. Rather, the politics surrounding the complete reform of drug sentencing policy in New York and Michigan demonstrate that the current political science literature fails to explain the full complexity of how state crime policy is made and amended. This dissertation fills the void in the literature by delving into this complexity, and more completely addressing the politics surrounding state drug sentencing policy.

Causes for the Escalation of Drug Sentencing Laws

The political science literature addresses several factors that are deemed causes of the escalation of the punitive nature of drug sentencing laws. These factors include political party competition, crime trends, and race. While these factors are indeed important in the trajectory of drug sentencing laws, they do not act independently of each other, and are not necessarily the most important factors. This study will demonstrate which of these factors are most important, and illustrate how additional factors, specifically money, are even more important than the ones studied in the existing literature.

One main theory in the existing literature is that political party competition will influence the punitive nature of crime and sentencing legislation. The literature posits that Republican controlled legislatures will enact more punitive crime legislation. While it is true that the Republican Party has historically tended to be more conservative and more supportive of

punitive crime legislation, this has not remained the case, particularly in relation to the War on Drugs. It has always been politically expedient to be tough on crime and to support such legislation. In the infancy of the War on Drugs, Democrats realized that they would lose votes if they did not move toward acceptance of punitive drug sentencing laws. Subsequently, Democrats began not only to accept the legislation, but to advocate for it in their own platforms. In essence, the Democratic Party began to co-opt the tough on crime rhetoric, and take such legislation from the Republican Party as a campaign issue.

Once the Democrats began to take this on as an issue, there was continuing competition between the parties to “out-tough” each other. This in part led to the swift build up of the tough sentencing policies of the War on Drugs, and the parties’ seeming inability to abandon the harsh legislation and advocate for reform. In this study I find that the parties converged in a tough on crime stance to support the escalation of the War on Drugs. Further, I find that states that have amended their punitive sentencing policies have done so as a result of a bi-partisan effort. This is likely because the attempt to reform tough crime policies in favor of more lenient policies is bound to be unpopular among the public.

However, due to the financial strain caused by the drug sentencing laws, legislators in these states found that it was impossible to maintain them. The only way for them to advocate for and successfully reform their drug sentencing laws without risking their political careers was to do so as a bipartisan effort. Thus, political party competition does emerge as an important factor in the sentencing policies of the War on Drugs, but not in the way that the existing literature predicts it will. Instead, I find a more complex picture of the parties converging in their policy positions regarding crime, leading to the buildup of the War on Drugs, and subsequently allowing for its de-escalation in some states.

The literature further argues that crime trends will have an impact on crime legislation. According to this theory, as crime rates, arrest rates, and incarceration rates increase, crime legislation will get more punitive. This is because evidence of increases in crime will spur public fear and spark the perceived need for more punitive legislation. However, I find that this is not the case with the War on Drugs and its sentencing laws. A paradox is created by the War on Drugs and the way that the laws have come into effect, and the impacts they have had. Initially, the War on Drugs created new categories of crime by criminalizing previously legal activities, such as using certain drugs, possessing those drugs, and selling or delivering those drugs. As a result, crime rates rose dramatically because arrests and convictions were being made for activities that had previously been occurring, but had been lawful. This created the appearance that crime was rampant and needed to be controlled.

Subsequently, as the War on Drugs has drawn on, there has been no increase in crime rates, and in fact there has been a reduction in most types of crime. However, advocates in the War on Drugs perpetuate the appearance that there is increasing drug use, increasing crime, and the increasing need for harsh legislation to control and punish that crime. This is done by publicizing statistics related to drug arrests, seizures, and incarceration rates. But again, this is largely the result of the policies themselves. These statistics are touted as proof that the War on Drugs is “working.” But they obscure the fact that drug crimes and related crimes have not reduced as a result of the War on Drugs. Rather, engaging in the drug trade has become more profitable, and drug use and related crimes have continued to flourish. Therefore, in this study I find that whether or not states have amended their punitive drug sentencing laws is not directly related to crime trends.

Finally, the literature argues that race plays a role in crime politics and legislation. Meier and Beckett argue that states with large minority populations will have more punitive drug sentencing policies. The sentencing policies are seen as an attempt to control minority populations that are seen as a threat to the majority population. As such, this theory would predict that states with smaller minority populations would have less punitive drug sentencing policies.

I find, however, that the conventional theories regarding race and crime policy do not bear out in relation to the policies of the War on Drugs. When legislators were initially criminalizing drug use long before this effort was called the War on Drugs, it does appear that they did so in an apparent attempt to control particular minority populations. However, during the 1970s and the following decades, many argued that the sentencing policies of those decades were necessary to eliminate racial disparities in sentencing outcomes. For example, policies such as mandatory minimum sentences were intended to equalize sentences for offenders who had committed identical crimes. This was supposed to reduce the racial disparity because it took discretion away from judges, who were potentially biased against minority offenders. Similarly, prominent members of the African American community expressed support for the harsh sentencing policies because they believed they would help to reduce drug use in their communities and help reduce crime there.

Unfortunately, the result of the punitive policies has been an ever widening gap between sentences received by white offenders and minority offenders. By far black offenders have borne the greatest disparate impact of the policies. Latino offenders have also suffered disparate impacts. However, despite this apparently unintended consequence, those advocating for reform do not raise this issue in support of the effort to reform. Remarkably, legislators do not argue

that black offenders are the victims of injustices as a result of the policies, even though reduction of those very disparities was one of the reasons for the implementation of the mandatory minimum sentencing policies to begin with.

Rather than highlight the disparate impacts for minorities, legislators gloss over, or completely ignore, the fact in favor of highlighting the financial woes the legislation has caused. Again, this is likely because drawing attention to racial discrimination, and attempting to create more lenient consequences for minority offenders, is unlikely to be popular with the public. I find that, rather than do the right thing and draw attention to the need to correct racial injustices, legislators take an easier route in appealing to the public's concern about money.

There is one theory regarding race however that does seem to come into play with the War on Drugs. It has been theorized that politicians can successfully address the issue of race by doing so through implicit racial messages.⁴ This is because a racial message that is explicit appears to violate the norms of racial equality, and thus causes white voters to become disaffected with the politician. In the case of the amendments to the policies of the War on Drugs it appears that politicians at times used implicit racial messages to invoke the disparities in sentences for black offenders as a cause for reform.

However, this is not entirely consistent with Mendelberg's theory. According to that theory, politicians use implicit racial messages to avoid violating norms of racial equality, but also to mobilize white voters who are racially resentful and hold negative racial stereotypes. This leads to support for the passage of laws that would be contrary to the interests of racial minorities. During the de-escalation of the War on Drugs, however, the use of implicit racial

⁴ Mendelberg, Tali. 2001. *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality*. Princeton: Princeton University Press.

messages was used to avoid violating the norms of racial equality, but they were used in support of legislation that would ultimately be favorable to minorities. Thus, this study expands upon and updates the existing theory on implicit racial messages.

In this study I add to the existing literature and offer evidence that fills gaps in the current theories. While the current political science literature illustrates individual factors that may impact crime legislation, I present a more complete picture of the complexities in the interaction among these factors, which factors emerge as important causal factors, and how the interplay among the factors causes change, or lack of change, in drug sentencing legislation. I find that the existing literature fails to address the single most important factor impacting drug sentencing policy: money. Although much of the existing literature primarily addresses the escalation of the War on Drugs, before the rising rates of incarceration caused budget shortfalls in many states, it does not consider budgets and costs of incarceration as factors influencing crime legislation.

I, on the other hand, find that the financial strain caused by skyrocketing rates of incarceration has become the primary catalyst for change in the sentencing policies of the War on Drugs. Therefore, the factors that weighed heavily in the escalation of the War on Drugs have been pushed aside in favor of arguments about money. Legislators choose to draw attention to the budget shortfalls caused by the policies to the exclusion of nearly all other factors, including the unjust disparities experienced by racial minorities as a result of the policies.

My findings are consistent with some of the existing literature in that I find that during the escalation of the War on Drugs both crime trends and race were a factor in drug sentencing legislation. However, I present a more nuanced theory, which illustrates how party competition retreated in favor of a united front of legislators, both Republican and Democrat, and other

important actors used the media to create fear among the public. A sense of fear was created with images of a drug epidemic, which purportedly would lead to an increase in all types of crime, and which was implicitly linked to racial minorities.

My findings in regards to the de-escalation of the War on Drugs are even more important, as they illustrate the importance of money in crime legislation, as well as legislators' apparent willingness to overlook, or at least to de-emphasize, the extreme injustices experienced by racial minorities as a result of the sentencing policies. The rhetoric surrounding crime legislation has always focused on protecting the public and punishing criminals. There has always been an emphasis on morality and safety, right and wrong. However, this traditional rhetoric is abandoned during the de-escalation of the War on Drugs. There is no longer the appeal to these core American values, but rather the appeal is to the public's concern with money and the state's ability to fund other policy areas that are important to the public. Similarly, there is little to no concern for the public's interest in justice, and attention is drawn away from the disparate impacts experienced by racial minorities. It is clear that when legislators see a need to amend legislation in a way that may be politically risky, they appeal to something that the public will support: money.

History of the War on Drugs

The United States has a long history of attempting to control and eventually criminalize the manufacture, delivery, possession, and use of drugs. Initially, however, many substances which are now illegal were lawfully used for many purposes including to relieve pain, treat medical conditions, and to help people sleep. Substances such as heroin, cocaine, morphine, and marijuana were prescribed by doctors and also were available in grocery stores and by mail

order.⁵ Drugs were used commonly throughout society and often lead to addiction. Some addicts, in particular those who were black and Chinese, were feared and outcast. Many, however, were members of the middle and upper class, the majority of whom were women. Addiction among this portion of the population was not considered criminal, but rather was thought of as a physiological problem which should be treated by a doctor.⁶

This attitude about drug use would soon change. By 1903 the American Pharmaceutical Association recommended that cocaine and opium be regulated, but not prohibited. It was suggested that the drugs should be available only by prescription. The intent was to prevent drug addiction, but those who were addicts were to be treated by a doctor.⁷ In 1906 the Pure Food and Drug Act required that narcotic ingredients be listed on the labels of any medicines shipped through interstate commerce.⁸ While the regulation of drugs appears to have begun as an effort to reform a medical issue in relation to addiction, there was also a movement against vice at that time, including drinking, gambling, prostitution, and drug use. Drug reform became part of the effort to control public morals and behavior.⁹

The Move Toward Criminalization and Punishment

By 1914 the effort to control drugs had taken on a more punitive nature. Legislators began to associate the increase in drug use and addiction with criminal activity. The effort to criminalize drug use was led by the federal government, with the states eventually following

⁵ James A. Inciardi, *The War on Drugs: Heroin, cocaine, Crime, and Public Policy* (Palo Alto, Calif.: Mayfield Publishing Co., 1986)

⁶ Troy Duster, *The Legislation of Morality: Law, Drugs, and Moral Judgment* (New York: Free Press, 1970)

⁷ David F. Musto, *The American Disease* (New York: Oxford University Press 1987)

⁸ Eva Bertram, Morris Blachman, Kenneth Sharpe, Peter Andreas, *Drug War Politics: The Price of Denial* (University of California Press, 1996)

⁹ Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana: University of Illinois Press, 1963); David J. Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport Conn.: Greenwood Press, 1973)

with their own legislation. Representative Francis Burton Harrison, a Democrat from New York, sponsored legislation which would preserve for the medical profession the ability to prescribe drugs as part of medical treatment, but would impose penalties for those who used and possessed drugs without a prescription.¹⁰ By this time the public generally saw drug addiction as a problem and shared the belief that control of drugs was necessary.

Southern Democrats, however, opposed the legislation as they believed it could be used by the federal government to impose upon the police powers that are reserved to the states in the Constitution. As a result, the power to control drugs was based on the power of the federal government to tax, and enforcement was carried out by the Treasury Department. The resulting legislation was the Harrison Narcotics Act of 1914.¹¹ The act required that producers and distributors of drugs register with the federal government, keep records of their transactions, and pay a purchase or sales tax. Those who wished to use drugs could purchase them only from a doctor who prescribed it to the user for medicinal purposes. The act did not make using drugs a crime, and there was no prescribed punishment for possession or use of drugs without a prescription.

It was ultimately the Treasury Department, which was in charge of enforcing the Harrison Act, which led the effort to make it a prohibitionist law. Regulations passed by the Treasury Department interpreted the act as prohibiting doctors to maintain drug addicts by prescribing drugs. The department arrested doctors and pharmacists who provided prescriptions to maintain addicts, and it arrested users for illegal possession.¹² The Supreme Court, however,

¹⁰ Charles Reardon, "The Politics of Drugs: An Inquiry in the Sociology of Social Problems," *Sociological Quarterly* 15 (Summer 1974): 392-93

¹¹ Eva Bertram, Morris Blachman, Kenneth Sharpe, Peter Andreas, *Drug War Politics: The Price of Denial* (University of California Press, 1996)

¹² David F. Musto, *The American Disease* (New York: Oxford University Press 1987)

struck down the practice of arresting physicians and addicts, as the act did not make use or possession criminal or proscribe punishment for such actions.¹³ Despite this ruling the Treasury Department continued to bring test cases to the Supreme Court in an attempt to persuade the court to accept the prohibitionist interpretation of the Harrison Act.

The Supreme Court soon began to rule in favor of the Treasury Department and uphold its actions in enforcing the Harrison Act. In 1918, the Supreme Court, in *Webb v. United States*, ruled that a doctor who sold thousands of prescriptions for fifty cents each was not exercising the legitimate practice of medicine and thereby upheld his arrest under the Harrison Act.¹⁴ In *United States v. Behrman*, the Supreme Court held that the Harrison act allowed only prescriptions for drugs that were necessary in the course of the doctor's practice, and that a prescription that was not required for the treatment of a disease other than addiction was not legitimate.¹⁵ Therefore, the Court agreed that it was criminal for doctors to prescribe drugs to addicts when the drug was not necessary for the treatment of some other illness.

These rulings by the Supreme Court established and maintained the prohibitionist nature of the Treasury Department's enforcement of the Harrison Act. The punitive attitude was accepted by politicians and the public, which further entrenched the Treasury Department's policy. Although the Supreme Court issued a ruling essentially reversing its position, this did little to alter the practices of the Treasury Department in enforcing the law. In *United States v. Linder* the Supreme Court ruled that its ruling in *Behrman* did not mean that a doctor could not treat an addict with moderate amounts of the drug to relive side effects of the addiction.¹⁶

¹³ *United States v. Jin Fuey Moy*, 241 U.S. 402 (1916)

¹⁴ *Webb et al. v. United States*, 249 U.S. 96 (1918)

¹⁵ *United States v. Behrman*, 258 U.S. 288 (1922)

¹⁶ *United States v. Linder*, 268 U.S. 5 (1925)

Despite this ruling the Treasury Department continued with its enforcement practices with no real challenge. Subsequently, the United States Congress criminalized possession of drugs with the 1932 Uniform Narcotic Drug Act, which led the way for the escalation of what became the War on Drugs.

The Escalation of the War on Drugs

In 1930 the federal government created the Federal Bureau of Narcotics in the Treasury Department. Previously the Narcotics Division within the Bureau of Prohibition, it would become the first independent drug control agency.¹⁷ The first ‘drug czar’ was created when President Hoover appointed Harry Anslinger as commissioner of the Prohibition Unit of the Federal Bureau of Narcotics (FBN).¹⁸ While many states had passed some legislation criminalizing drug use, the creation of these federal agencies to oversee the escalation of the War on Drugs set the state for the states to follow with their own drug war policies. Ultimately, the federal government would provide funds to subsidize the states in their efforts to enter and expand upon the War on Drugs.

One of the first major pieces of legislation passed under Anslinger was the Marijuana Tax Act. The law was passed in 1937, but by that time forty six states and Washington, D.C., had laws that prohibited marijuana. This federal act criminalized only the non-medicinal possession or sale of marijuana. A violation of the act resulted in a fine of \$2,000 and five years in prison.¹⁹ The FBN soon began to escalate the urgency of the fight against drugs by tying the threat of drugs and drug related crime to the threat of communism during the initial stages of the Cold

¹⁷ National Archives, Guide to Federal Records, Records of the Drug Enforcement Administration

¹⁸ John C. McWilliams, “Through the Past Darkly: The Politics and Policies of America’s Drug War,” *Journal of Policy History* 3, no. 4 (1991): 365

¹⁹ Eva Bertram, Morris Blachman, Kenneth Sharpe, Peter Andreas, *Drug War Politics: The Price of Denial* (University of California Press, 1996)

War. It was during this time that the FBN initially pushed for mandatory minimum sentences for first time drug offenders.

In 1951 Congress passed a law, sponsored by Democrat Hale Boggs, which imposed a mandatory minimum two year sentence for a first offense possession conviction, five to ten years for a second offense, and ten to twenty years for a third offense.²⁰ Subsequently, in 1956, Congress passed the Narcotic Control Act of 1956, which raised mandatory minimum sentences from five to twenty years for the second offense and from ten to forty years for the third offense. It also allowed the death penalty for adults convicted of selling heroin to a minor. The mandatory minimum sentence would become the hallmark of the War on Drugs.

Initial Opposition to the Escalation of the War on Drugs

The initial attempts to escalate the War on Drugs did not come without challenges. The American Bar Association and the American Medical Association joined together in calling for scrutiny of the new harsh policies. They argued that law enforcement had a place in dealing with the narcotics problem, but was not the only way to address the issue of drug addiction. They recommended that doctors be allowed to prescribe drugs to addicts, based on the stance that drug addiction is a complicated medical issue and that addicts would not be deterred from using drugs by the threat of prison.²¹ This opinion and recommendation was eventually joined by many health officials as the federal health bureaucracy joined the debate about drugs. The Supreme

²⁰ John C. McWilliams, "Through the Past Darkly: The Politics and Policies of America's Drug War," *Journal of Policy History* 3, no. 4 (1991): 370

²¹ Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs, *Drug Addiction: Crime or Disease?* (Bloomington: Indiana University Press, 1961), 19

Court joined this aspect of the debate in 1962 when it ruled that drug addiction is a disease rather than a crime.²²

During this time the health community did make strides in their effort to treat drug addiction as a medical issue rather than a criminal one. In 1966 the Narcotic Addict Rehabilitation Act authorized Public Health Service grants for the purpose of treating addicts. In 1970 the Drug Abuse Act provided additional funding for drug treatment.²³ In 1971 President Nixon created the Special Action Office for Drug Abuse Prevention to oversee drug treatment and prevention programs. In 1973 the National Institute on Drug Abuse was established as the central federal agency overseeing drug policy. The treatment approaches that reigned during this time were a view of addiction as a psychological and social disorder, an effort to provide outpatient treatment, short term methadone detoxification, and long term methadone maintenance.²⁴ The efforts of the health community were not enough, however, to overcome the presidential politics that would eventually lead to the full blown War on Drugs.

President Nixon Declares the Modern War on Drugs

President Nixon spearheaded the movement that resulted in the declaration of War on Drugs and addiction. President Nixon made drugs a national issue and drew attention to drugs as a threat to the nation. He called for new harsh laws which would treat drugs as a criminal issue rather than a medical one, supported increased funding for the punitive laws, and created a huge federal bureaucracy that would carry out the War on Drugs. This movement was largely supported and fed by the law and order theme the Republicans had utilized during the 1968

²² David F. Musto, *The American Disease* (New York: Oxford University Press 1987), 235

²³ House Committee on Government Operations, *Role of Demand Reduction*, 46

²⁴ Eva Bertram, Morris Blachman, Kenneth Sharpe, Peter Andreas, *Drug War Politics: The Price of Denial* (University of California Press, 1996)

campaign. The nation had experienced riots and an increased rate of street crime, all of which played on the public's fear and the government's ability to link drugs and crime. The political and social scene was primed for tough on crime politics and President Nixon took advantage of the situation to escalate the War on Drugs, saying that drugs and crime were a threat to the health and safety of millions of Americans.²⁵

Soon Congress responded by passing bipartisan legislation that would enshrine the harsh policy rhetoric. The Comprehensive Drug Abuse Prevention and Control Act of 1970 took jurisdiction over drug control out of the power to tax and placed it within the interstate commerce powers, giving Congress much more leeway in legislating the issue. This legislation expanded the powers of law enforcement by allowing them to seek and utilize "no-knock" warrants which allowed them to enter and search homes and buildings without giving notice of their authority and purpose, and also expanded the drug war to include a foreign drug war to address the supply of drugs from abroad. Spending on the drug war and the size of the federal drug control bureaucracy increased accordingly.²⁶ Nixon initially created the Office of Drug Abuse Law Enforcement, but in 1973 when it came under criticism due to its harsh enforcement policies, he consolidated federal drug law enforcement into the Drug Enforcement Administration (DEA).

The Unstoppable War on Drugs and its Growing Budget

Under President Nixon and the DEA the War on Drugs was underway and in full force. With the huge bureaucracy, dramatic spending, and public fear that was created by the Nixon administration with the War on Drugs, subsequent administrations were able to accomplish little

²⁵ "President's Message on Drug Control Programs," *Congressional Quarterly Almanac* 26 (1971): 94A

²⁶ Peter Goldberg, *Federal Government's Response to Illicit Drugs, 1969-1978*, in *Facts About "Drug Abuse,"* The Drug Abuse Council (New York: Free Press, 1980)

in terms of reform. President Ford and President Carter did not push the drug war as an important policy issue, but neither did they attempt to reform or reverse the policies put in place by President Nixon. Both Ford and Carter declined to invoke the harsh rhetoric in support of the War on Drugs, but any attempt to reform the policies was met with resistance.²⁷ Thus the stage was set for President Reagan and President Bush to continue the escalation of the War on Drugs.

President Reagan met with a public that was eager to continue the escalation of the War on Drugs. Cocaine use had increased and was considered a greater threat than marijuana or heroin.²⁸ In the 1980s crack had become a concern as well. Nancy Reagan's "Just Say No" campaign drew the attention of parents' groups and schools. During his first year in office President Reagan harnessed the entire federal intelligence bureaucracy, including the CIA, in executing the War on Drugs, and began to use the United States military to enforce the War on Drugs at the border.

President Bush carried on the War on Drugs in an equally aggressive manner. He used his first nationally televised address to draw attention to drugs, which he deemed the gravest threat facing the nation. In this speech he made the enemy in the War on Drugs anyone who used or sold drugs, or looked the other way when others did. He created a drug war in which everyone was involved either as a crusader or an enemy and urged zero tolerance. In response he called for still more spending increases and expansion of the federal government's reach in fighting the War on Drugs.²⁹ He installed his drug czar, William Bennett, in the newly created Office of National Drug Control Policy.³⁰ Like President Reagan, President Bush encountered a

²⁷ "Senate-Passed Criminal Code Dies in the House," *Congressional Quarterly Almanac* 33 (1978): 165-71

²⁸ Steven Wisotsky, *Beyond the War on Drugs: Overcoming a Failed Public Policy* (Buffalo, N.Y.: Prometheus Books, 1990)

²⁹ "Text of the Address by President Bush," *Washington Post*, 6 September 1989

³⁰ "Martinez to follow Bennett as Drug Czar," *Congressional Quarterly Almanac* 44 (1990): 503

public that willingly received his escalated drug war policies and who were willing to sacrifice democratic freedoms in the name of the War on Drugs.³¹

President Clinton did not find it politically feasible to seek major reform of the policies of the War on Drugs, and under his administration the drug war's budget grew even larger. While President Clinton did avoid use of the harsh rhetoric of his predecessors, his ability to de-escalate the War on Drugs in any meaningful way was limited by the entrenched policies as well as the mood of the public which responded to the tough on crime rhetoric of the War on Drugs and was not receptive to any softening of the policies. President Clinton did make significant cuts to the staff in the Office of National Drug Control Policy and attempted to merge the DEA with the FBI, but these efforts as well as all others were met with stiff resistance and lead to little real change. Clinton did achieve modest reforms with the National Drug Control Strategy, which urged a shift to treatment and health services, the an increase in funding for treatment, and the 1994 Crime Control Act, which advocated treatment for prison inmates and funding for treatment alternatives to prison.³²

Race as a Major Part of the History of the War on Drugs

The federal government's efforts to control drugs have almost always corresponded to its efforts to control minority populations. The campaign against vice was lined to racism and nativist concerns. There was concern over immigration in the late 1800s and early 1900, and the populations that were perceived as a threat to America's morality and its economy. The prejudice against blacks, Mexicans, and Chinese was linked to immigrant drug use and the potential for this to spread throughout American society. Many of the laws against drugs that

³¹ *Washington Post/ABC News* poll, cited in Tom Wicker, "The Wartime Spirit," *New York Times*, 3 October 1989

³² Eva Bertram, Morris Blachman, Kenneth Sharpe, Peter Andreas, *Drug War Politics: The Price of Denial* (University of California Press, 1996)

emerged during this time were aimed at minority and immigrant populations.³³ Cocaine was linked to prejudice against blacks in the South, and black cocaine users were feared as an imminent threat of attack against whites. Blacks who were using cocaine were also thought to have great strength and to be impossible to kill. In the mid-1980s crack became a concern in black and Hispanic neighborhoods, which lead to a link between this drug and poor and minorities.

The initial laws to control and then criminalize the use and possession of opium were passed as the Chinese community in California began to grow in size and influence. In the late 1800s San Francisco passed laws prohibiting the smoking of opium, and shortly thereafter similar laws were passed in eleven other western states. Chinese immigrants were thought to have spread addiction to American children.³⁴

The federal government's laws in regards to the control and criminalization of marijuana have corresponded to its attempts to control the Mexican population in the Southwest, and increasingly throughout the country. In the 1920s, Mexican immigration increased the public's fear of marijuana in the South and the West. As with the Chinese in California and the West, an association was made between Mexican immigrants and crime and loss of morality. Although Mexican immigrants were initially welcomed as laborers, the Great Depression in the 1930s made Mexican laborers superfluous and there was an increased identification of Mexicans with crime and marijuana. News stories cited studies that claimed marijuana was a sexual stimulant

³³ Douglas Clark Kinder, "Shutting Out the Evil: Nativism and Narcotics Control in the United States," *Journal of Policy History* 3, no. 4 (1991): 472-73

³⁴ John Helmer, *Drugs and Minority Oppression* (New York: Seabury Press, 1975)

and least Mexicans to commit crimes out of proportion to the rest of the population.³⁵ It was shortly after this period that the federal government passed the Marijuana Tax Act.

As the prohibitionist nature of drug control grew in the United States, fears of immigrants and minorities were increased by the fears associated with World War I and the Red Scare.

The escalation of the War on Drugs and its persistence despite its clear failures has largely gone on due to the ability of the federal government to exploit a connection between illegal drugs and related crime to minority and foreign people. The government continues to create and maintain the public's fear of the black crack fiend, the marijuana smoking Latino, the opium production in Afghanistan, and the drug cartels of Mexico, Columbia, and other South American nations.

The De-Escalation of the War on Drugs

The escalation of the war on drugs lead to many years under the harsh sentencing policies. Eventually, however, many states began to feel the strain of the policies and their consequences. Primarily, states experienced huge financial costs as a result of incarcerating ever increasing numbers of non-violent drug offenders due to mandatory minimum sentences for many offenses and life sentences for others. Racial minorities, primarily African Americans, experienced disparate impacts of drug war policies. On the whole minority offenders received longer sentences than their similarly situated white counterparts. While this was the case nationwide, the de-escalation of the war on drugs did not draw attention to this fact. The government also began to realize that the harsh policies of the war on drugs had not lead to the outcomes that were ostensibly the goal of the war on drugs from the outset. Crime rates did not

³⁵ A.E. Fossier, "The Marijuana Menace," *New Orleans Medical and Surgical Journal* 84, no. 4 (1931): 247-52

decrease, drugs were not made less available, and the states were incarcerating low level users rather than the drug kingpins that the policies were meant to incapacitate.

As a result of these factors many states began to de-escalate their drug war policies. The de-escalation came in many forms, including the elimination of mandatory minimum sentences for many offenses, the elimination of life sentences for others, the creation of drug courts for diverting some offenders into treatment, and the use of other alternatives to prison for low level, nonviolent offenders. The swing from the tough on crime policies of the War on Drugs to the more lenient policies proposed and enacted during the de-escalation was a risky political move for legislators. The fact that it has been successful has been due in large part to several factors that came together to create the circumstances in which politicians could step away from the punitive policies and take a more lenient, treatment oriented stance. The first factor was the budget strain caused by the explosion in rates of incarceration caused by the policies of the War on Drugs. The second was the coalition of unlikely partners that allowed for policy change in this politically charged arena. The third was the impact on minorities which, although severe and obvious, was rarely explicitly invoked as a reason for reform of the harsh policies.

Research Question

The United States of America incarcerates more of its own citizens than almost any other developed country in the world – at a rate as much as five to eight times that of other highly developed countries.³⁶ America’s astronomical rate of incarceration is not due to increased crime rates, but “tough on crime” policies, in particular the War on Drugs.³⁷ Since the inception of the War on Drugs in the early 1970s, America has seen a 500% increase in the number of

³⁶ U.S. Department of Justice, Bureau of Statistics

³⁷ Warren, Jennifer. “One in 100: Behind Bars in America 2008.” The Pew Center on the States. 2008

people incarcerated.³⁸ While all drug offenders, including white offenders, have seen increases in the length of sentences, racial minorities in all states have borne the brunt of the increased rates of incarceration. This is true for all minorities, and in particular black offenders.

For example, while one in 30 men between the ages of 20 and 34 are currently incarcerated, one in nine black men in that age group are incarcerated.³⁹ These statistics apply to states nation-wide, but different states have handled the huge increases in incarceration rates and the impacts on racial minorities in different ways. The existing political science literature addresses the question of why states initially passed the harsh policies of the War on Drugs⁴⁰, but the question of why states have varied in their responses to the issues that have arisen after years of experience with the policies remains unanswered.

The hallmark of the tough sentencing policies of the War on Drugs was mandatory minimum sentences for many offenses, which took discretion in sentencing away from judges and required prison time regardless of an offender's individual characteristics. Many scholars have written on the question of why states enacted mandatory minimums during the War on Drugs. Their theories include reaction to a perceived threat posed by racial minorities,⁴¹ political angling to appear tough on crime,⁴² and response to criminological trends and events.⁴³ However, in recent years some states have begun to amend their laws to eliminate mandatory minimum sentences in favor of restoring judicial discretion and treatment instead of

³⁸ U.S. Department of Justice, Bureau of Statistics

³⁹ U.S. Department of Justice, Bureau of Statistics

⁴⁰ Meier, Kenneth J. The Politics of Drug Abuse: Laws, Implementation, and Consequences. *Western Political Quarterly*, 45, no. 1 (1992); Meier, Kenneth J. The Politics of Sin: Drugs, Alcohol, and Public Policy. M.E. Sharpe, Inc. 1994; Beckett, Katherine. 1994 "Setting the public agenda: Street crime and drug use in

American politics." *Social Problems* 41:425-447

⁴¹ Miller, 2007; Smith, 2004; Meier, 1992, 1994; Daly and Tonry, 1997

⁴² Miller, 2007; Meier, 1992; Smith, 2004

⁴³ Meier, 1992

incarceration for non-violent drug offenders. This has occurred despite the fact that discrimination in the criminal justice system has not been addressed, and a tough on crime stance is considered a safe strategy for winning elections.

Although some state legislators employed a rhetoric of racial equality during the escalation of the War on Drugs, this rhetoric has largely been abandoned during the de-escalation. This raises the question: why are some states taking the politically risky position of relaxing their tough on crime stance to amend their mandatory minimum sentencing policies, and how do they accomplish this without appearing to use racial language in a highly racialized policy area? Some would argue that it makes sense to amend the policies because the cost of incarcerating huge numbers of drug offenders has resulted in budget shortfalls, and because legislators now have new information on some drugs, such as the fact that crack cocaine is simply another form of powder cocaine, rather than a different, more dangerous substance. But if these issues constitute the reasons some states are amending their policies, why aren't all states making similar amendments?

These questions, which are unaddressed in the current political science literature, will be addressed in this study. The two-part research question addressed by this study is *why are some states amending their mandatory minimum policies to make their sentencing laws less strict in a political climate where a tough on crime stance is politically safe; and how are they amending these policies without addressing, or at least acknowledging, the racial discrimination inherent in the policies?* I argue that, while there are numerous factors which interact to create the policy amendments, the budget crisis created by the mandatory minimum policies has neutralized issues of crime and race to create the conditions necessary for the amendments to occur.

This study addresses state drug sentencing laws, and changes in those laws, as an example of state-level policy shift. It examines the reasons why some states have changed their state drug sentencing policies to be more lenient, while others have either made no changes, or changed their policies to be more strict. The variation in state policy changes in the area of drug sentencing laws is puzzling because all states have experienced huge increases in their rates of incarceration and the attendant budget shortfalls. Similarly, racial minorities in all states have experienced disparate impacts in the form of longer sentences as a result of the policies. Therefore this study also addresses the issue of whether minority representation in state legislatures has an impact on whether or not states amend their drug sentencing policies.

This study uses intensive case studies as well as a 50 state overview analysis to address these questions and to raise additional questions and hypotheses. I argue that states that are amending their harsh drug sentencing policies are doing so due to the budget shortfalls they face, rather than as an effort to reduce disparities in sentencing. This study, which addresses questions that remain unanswered in the political science literature, demonstrates the far-reaching nature of discrimination in criminal justice policy and the reluctance of state politicians to address, or even to explicitly acknowledge, this discrimination.

This study will address these questions by looking at the escalation of the War on Drugs, and the subsequent de-escalation, during which some states have amended their mandatory minimum policies. I posit that there is no single causal factor that caused states to enact their mandatory minimum policies, and there is no single causal factor that has caused some states to amend their policies. Rather, it is likely that there are several factors, all of which interact to create the circumstances in which states enact and amend mandatory minimum policies. The factors that come into play are probably similar for both the escalation and the de-escalation.

However, the ways these factors interact have likely changed in many states, particularly those that have amended their policies. The interplay of factors for the escalation and the de-escalation of the War on Drugs can be expressed in simple equations.

Logic says that both the escalation and the de-escalation were influenced by crime trends and race. Crime trends include the rise or fall of crime rates, whether certain neighborhoods are affected, and the types of crimes committed. Race includes the race of perpetrators as well as the race of victims, including minorities who could be considered victims due to the fact that they live in high crime areas. Another important factor is politics, as mandatory minimum policies are enacted by state legislators who always must consider the electoral consequences of their policymaking actions. An equation that expresses the escalation of the War on Drugs follows.

Esc = crime trends + race + interaction of politics driven by crime trends and race

The interaction of politics driven by crime trends and race represents how the policies were talked about by legislators, the public, and media. It will include rhetoric used, including racial language and colorblind language. It will include who supported the policies and who supported amendment of the policies.

The de-escalation of the War on Drugs appears to have been influenced by the same factors as the escalation, although probably interacting in different ways, with the addition of one crucial factor: state budget deficits caused by the incarceration of large numbers of drug offenders. Thus, an equation that expresses the de-escalation of the War on Drugs follows.

De-Esc = crime trends + race + budget deficit + interaction of politics driven by crime trends, race, and budget deficit

Contribution of This Study

The literature on the War on Drugs and mandatory minimums has focused primarily on the escalation of the War on Drugs and why states enacted the mandatory minimum policies in the first place. Theories on the escalation of the War on Drugs can be placed into three schools of thought, including race factors, political factors, and criminological trends and events. Each of these will be addressed below. My analysis of the literature on the escalation of the War on Drugs will lead to a set of hypotheses about the de-escalation of the War on Drugs.

Exploration of the de-escalation of the War on Drugs will be an important and novel contribution to the political science literature, as this phase of the policy process remains to be investigated. While the existing literature provides a framework for evaluating the escalation of the War on Drugs, there is no proposed or tested framework for evaluating important aspects of the de-escalation. This study addresses issues that arise from the de-escalation, including the political processes involved, the language and rhetoric used in advocating for amendments, and the maneuvering that has allowed politicians to take the politically risky position of repealing ‘tough on crime’ policies while maintaining the appearance of acting without regard to issues of race and ethnicity.

This analysis constitutes a valuable addition to the literature. It opens an exploration of a rich area of state policy-making. The escalation already addressed by the literature was a largely cohesive process among the states. The de-escalation, which is as yet unexplored by the literature, has been idiosyncratic and has varied throughout the states. This analysis of the de-escalation will make the literature on the War on Drugs more complete by replicating some of

the work and variables used in the existing literature, while also looking at additional variables and the interplay among the new and complex factors involved in the de-escalation.

- **Race Factors**

This study addresses the question *how is racial language, or implicit racial messages, used to address a problem that is largely racially based, and created by discrimination?* I argue that race related factors contributed to the drug sentencing policies of the War on Drugs, both during its escalation and its subsequent de-escalation. I hypothesize that during the escalation of the War on Drugs states enacted harsh drug sentencing policies as a way to control or minimize a perceived threat from racial minorities. If this hypothesis is correct, the data will show that states with large, or growing, minority populations enacted the most strict drug sentencing policies. If the hypothesis is incorrect minority population size will have no correlation to the status of drug sentencing laws. To test this hypothesis I analyze state sentencing laws in relation to minority populations as a percentage of the state population, minority presence in the state legislature, and immigrant population size.

I hypothesize that race was also a factor in the de-escalation of the War on Drugs, although in a different way than in the escalation. It is unlikely that the de-escalation was influenced by a reduced perceived threat from minorities, or with shrinking minority populations. Rather, it is more likely that in the face of budget deficits caused by the incarceration of large numbers of drug offenders, states had to abandon such considerations to save money. Thus, while politicians during the escalation invoked the need to reduce racial disparities in sentencing, this language was abandoned during the de-escalation in favor of rhetoric about financial crisis.

I theorize that this is likely because it is far more difficult to publicly discuss racism and the racist impacts of legislation. It is controversial to argue that legislation should be reformed

because the legislation previously enacted by the same legislature has had disparate and racist impacts on minorities. It is also difficult to engage the public and garner support for reforms on this basis. The public is far more likely to respond to the budget as a reason for reform, because their lives are directly impacted on a daily basis by the ways that state budget is used. Thus, those who advocated for reform took the safer route of essentially ignoring the racial disparities that resulted from the policies in favor of appealing to the public's concern about the budget.

To answer the question of how racial language, or racially colorblind language, was used during the de-escalation of the War on Drugs I looked at rhetoric used in legislative speeches made when the legislation was introduced and debated, in the media, and in statements by interested parties such as police departments, prosecuting and defense attorneys, and public interest organizations in the states I have selected for my case studies. I hypothesize that legislators abandoned the rhetoric of racial equality used during the escalation of the War on Drugs, not because discrimination within the criminal justice system has been overcome, but because the budget crisis has created an overwhelming need to amend the policies regardless of the impacts on racial minorities.

- **Political Factors**

In this study I address the question *given what we know about the political safety of advocating on a 'tough on crime' position, why are some politicians advocating the repeal of tough drug sentencing laws without incurring political costs?* I argue that Democrats were able to successfully neutralize the issue of crime during the escalation of the War on Drugs by taking the traditionally Republican stance of being tough on crime. Because both parties took the same stance on crime policy, it was no longer an issue of contention that candidates could use to gain leverage in campaigns. This cleared the way for candidates to take the opposite position during

the de-escalation of the War on Drugs, of advocating for repeal of the strict policies, without taking a huge political risk.⁴⁴ To test this hypothesis I look at the party composition of state legislatures and governorships in order to determine whether the position taken on this issue varied according to political party. I also look at campaign speeches and other party rhetoric to assess the positions taken by each party, as well as to analyze how, and whether, politicians used language to either deal with or to avoid the issue of race in mandatory minimum policies.

Political factors as a potential catalyst for the escalation of punishment for drug offenses can be analyzed by assessing factors such as the political party in control of the state legislature, the political party in control of the governorship, and whether escalation and de-escalation occurred in an election year. In states where drug sentencing policies have undergone change, such as an escalation in punishment and then a subsequent de-escalation in punishment, political factors can be observed within the state over time. Political factors can also be observed as a point of variation among different states at any one point in time.

- **Criminological Trends and Events (arrest rates, conviction rates, incarceration rates)**

In this study I address the question *was the escalation in punishment for drug offenses during the beginning of the War on Drugs a response to increased drug arrest/conviction/incarceration rates and concern over the attendant consequences?* I hypothesize that states enacted harsh sentencing policies based on a perceived increase in drug crime rates. If this is the case, a reduction in such rates should lead to a de-escalation of punishment policies. However, I further hypothesize that the de-escalation of the harsh punishment policies was a reaction to the costs of incarceration caused by the strict policies, rather than an attendant reduction in drug crime rates.

⁴⁴ Gottschalk, 2006

I test this hypothesis by comparing crime rates and budget difficulties to policy amendments in the states I have chosen for the case studies. Change in punishment policies for drug offenses can be observed as intra-state variation over time, as well as variation among states at any given point in time.

Data and Research Methods

This study is an in depth analysis of two case studies. I use the case studies to test my hypotheses regarding the three main independent variables, including race factors, political factors, and criminological trends and events. I also provide a 50 state overview to set up the background and describe the circumstances in which the escalation and de-escalation of the War on Drugs took place. This allows me to exclude possible explanations for my hypotheses and to hone in on other explanations and develop new hypotheses, as well as to set the stage for the study with descriptions of nationwide trends in incarceration rates, crime rates, and minority populations.

Case Studies

This study employs case studies to address the three key independent variables, including race factors, criminological trends and events, and political factors.⁴⁵ For each state I test my hypotheses with regard to race factors by focusing on rhetoric used in legislative speeches, public statements, and advocacy statements. I also take into consideration racial minorities as a percentage of each state's population as well as in each state's legislature. This allows me to determine whether racial language was invoked, or avoided, in the rhetoric used to advocate for policy amendments. Additionally, for each state I conduct an in depth comparison of crime

⁴⁵ In addition to the three key independent variables, I will also include some control variables to account for other possible factors, such as income level and education level.

trends, budget shortfalls, and policy amendments to test my hypotheses with regard to criminological trends and events. This will provide a determination of whether policy amendments were made in response to crime trends, budget shortfalls, or both. I also look at party composition of state legislatures and governorships to determine who took the lead in proposing and enacting the policy amendments. This helps illustrate how parties and other political factors, such as tough on crime rhetoric, or the subsequent abandonment of such rhetoric, was politically feasible for legislators advocating for the policy amendments. The states selected for intensive case study here are New York and Michigan.

These states were selected with the intention that they will help illustrate the complex factors which have come into play in each state which has considered amending their mandatory minimum policies. While it is important for sample cases to represent the broader population of cases, it is equally important for the cases selected to embody the characteristics necessary to provide analytical leverage and make a comparison to other states viable. Typically cases selected should also vary on important dimensions. A key role of sample cases can also be to provide background information which can be essential for the broader analysis.⁴⁶ New York and Michigan have some of the largest prison systems in the nation. This is largely a product of their history of tough on crime policies like mandatory minimums. However, both of these states have largely gutted their mandatory minimum legislation. They are thus emblematic of the questions asked in this dissertation: why are legislators taking the politically risky position of abandoning their tough on crime policies in order to amend their mandatory minimum policies, and how are they avoiding the appearance of acting based on race considerations?

⁴⁶ Seawright, Jason and John Gerring. "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options" *Political Research Quarterly*, Vol. 61, No. 2. June, 2008

Case selection in the political science literature places cases into a number of different categories, including typical cases, diverse cases, extreme cases, deviant cases, influential cases, and most similar/most different cases.⁴⁷ Although many cases are selected according to the most similar, where cases chosen are similar on all independent variable except the variable of interest, here I have chosen cases which are deviant cases. Deviant cases are those which demonstrate a surprising result relative to the general understanding of relevant theory or common sense.⁴⁸ Throughout the War on Drugs states and legislators have capitalized on their tough on crime stances by passing mandatory minimum legislation. However, some states, like New York and Michigan have reversed these policies despite the political risk they faced in doing so. Thus, while existing theory would suggest that politicians would continue to be tough on crime, and support mandatory minimum policies, these states have taken the surprising position of reversing the policies. Further, they have done so while appearing to avoid using racial language or addressing discrimination in sentencing, despite the fact that the criminal justice system and mandatory minimum policies are rife with discrimination and racial considerations and consequences.

Thus, by selecting these deviant cases I have selected states that exhibit surprising legislative outcomes which are currently poorly explained. Such cases will allow me to explore possible explanations for these outcomes, and discovery of some causal factor in these cases will allow a

⁴⁷ Seawright, Jason and John Gerring. "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options" *Political Research Quarterly*, Vol. 61, No. 2. June, 2008

⁴⁸ Seawright, Jason and John Gerring. "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options" *Political Research Quarterly*, Vol. 61, No. 2. June, 2008

generalization to other deviant cases, and will provide a basis for exploration of causal factors in non-deviant cases.⁴⁹

The War on Drugs in New York

At the forefront of the War on Drugs and the push to enact mandatory minimums was the state of New York. In 1973 the New York state legislature passed what would become some of the most punitive drug sentencing laws in the nation. The Rockefeller drug laws established mandatory minimum prison sentences for many offenses, such as unlawful possession and sale of controlled substances, and were intended to deter drug use and sales and to punish those who violated drug laws.⁵⁰

After four years under the strict laws, in 1977 the Committee on New York Drug Law Evaluations issued a report that criticized the laws after finding that drug use and related crime was as widespread as it was prior to the enactment of the laws. In 1979 and again in 1988 the laws were amended to increase the amount of drugs needed to reach the mandatory sentence of 15 years to life in prison. Amendments were also made to lower the threshold for cocaine possession to allow the arrest of people possessing small amounts of the drug, due to concern over crack cocaine.⁵¹

⁴⁹ Seawright, Jason and John Gerring. "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options" *Political Research Quarterly*, Vol. 61, No. 2. June, 2008

⁵⁰ Wilson, Aaron D. "Rockefeller Drug Laws Information Sheet." Partnership for Responsible Drug Information. 2009

⁵¹ Wilson, Aaron D. "Rockefeller Drug Laws Information Sheet." Partnership for Responsible Drug Information. 2009

Despite these minor amendments to the laws, the consequences of their enforcement were severe. From 1980-1992 New York's prison population tripled from 20,000 to nearly 62,000. The percentage of offenders incarcerated for drug offenses increased from 9% in 1980 to 32.3% in 1997. The cost of the rising prison population has been approximately \$4 billion, and the prison system remains severely overcrowded.⁵² Racial minorities and women offenders have borne the brunt of the Rockefeller drug laws' consequences. While blacks and Latinos comprise about 23% of New York's population, they comprise 91% of those incarcerated for drug offenses.⁵³ This is despite research that shows that drug selling and use are approximately equal between races.

The New York legislature, however, soon began to chip away at the mandatory minimum policies until it ultimately gutted the Rockefeller drug laws in 2009. In 2004 the New York state legislature passed limited amendments to the laws, and finally, on April 2, 2009, the legislature passed comprehensive reforms, gutting the Rockefeller drug laws. These new laws eliminated mandatory minimum sentences and restored judicial discretion, giving judges authority to order treatment instead of jail.⁵⁴ There is still controversy in the face of these reformed laws, and advocates for reform are calling for still further reforms. Opponents of reform, however, continue to warn of potential consequences of more lenient sentencing laws.⁵⁵ It thus appears that this state, which has swung dramatically from having some of the strictest

⁵² Wilson, Aaron D. "Rockefeller Drug Laws Information Sheet." Partnership for Responsible Drug Information. 2009

⁵³ Drug Policy Alliance Network

⁵⁴ New York Civil Liberties Union, 2009

⁵⁵ Toscano, John. "New Drug Law Stirs 2010 Election Battles." The Queens Gazette, October 14, 2009

drug sentencing policies in the nation to a full repeal of those laws, may remain in flux due to continuing controversy over those laws.

The War on Drugs in Michigan

At the beginning of the war on drugs, during the 1970s, Michigan enacted some of the most harsh drug sentencing policies in the nation. In the 1990s, however, after more than twenty years of experience with the harsh policies, the Michigan legislature began to reverse many of the policies by enacting new legislation that significantly altered drug sentencing in the state. Since then the legislature has continued to amend the policies and to entertain further amendments. In 1978, Michigan enacted mandatory minimum sentences for many drug offenses, which were the most harsh drug sentences in the nation.⁵⁶ The most well known of those laws, the ‘650 Lifer Law,’ mandated life in prison without parole for offenders convicted of delivery of over 650 grams of heroin or cocaine. This law was signed by Republican governor William Milliken.⁵⁷ In 1987 Michigan enacted statutes requiring mandatory consecutive sentences for some drug offenses, which required that sentences for drug offenses be served consecutively to sentences for another felony.⁵⁸

During these initial years of the war on drugs in Michigan policy makers drew attention to disparities in sentencing outcomes for minority offenders. In 1979 the Michigan Felony Sentencing Project, “Sentencing in Michigan,” reported that there were disparities along racial lines in the state’s drug sentencing. In this study of 6000 felony cases the authors found that the sentencing system in Michigan of the 1970s produced marked disparities in sentencing outcomes. They found that the discrimination was not deliberate, but was so severe that it could

⁵⁶ Families Against Mandatory Minimums (FAMM) www.famm.org

⁵⁷ stopthedrugwar.org/chronicle-old/268/Michigan.shtml

⁵⁸ FAMM, www.famm.org

not be accounted for solely by offense or offender characteristics.⁵⁹ Subsequently, the Sentencing Commission was created to address disparities where two offenders who had similar criminal histories were being sentenced to wildly differing minimum terms. The Michigan legislature responded by passing statutes that required mandatory minimum sentences for many drug offenses and lifetime probation for some drug offenses, among other things.⁶⁰

Years later, Michigan began to move toward reform of these harsh policies. The reform movement urged that rather than require jail or prison sentences, for some, particularly nonviolent, offenders the state should eliminate mandatory minimum sentences and life probation for some offenses, eliminate mandatory stacking for convictions involving multiple felony offenses, and eliminate a section of the state's constitution that guaranteed the rights of crime victims.⁶¹ The reform movement was lead by FAMM, along with a coalition of citizens and organizations, and their initial goal was reform of the '650 Lifer Law.' In 1998 Governor John Engler signed a bill amending the '650 Lifer Law,' thereby eliminating the mandatory sentence of life without parole and providing parole eligibility to those sentenced under the law.⁶² This bill reduced mandatory minimum sentences to 15 to 20 years for offenses which previously carried life sentences.⁶³ In 2002 Representative Bill McConico, a Democrat, sponsored three bills that would reform drug sentencing in Michigan. The proposed bills, HB 5394, HB 5395, and HB 6510, would make drastic changes to the existing drug sentencing laws. HB 5394 and HB 5395 addressed mandatory minimum sentencing laws. They proposed to eliminate mandatory minimum sentences and lifetime probation for most drug offenses. In 2002,

⁵⁹ Zalman, et al., 1979

⁶⁰ www.legislature.mi.gov

⁶¹ www.legislature.mi.gov

⁶² FAMM, www.famm.org

⁶³ Grand Rapids Press, November 28, 2000

Governor John Engler signed these reforms to the mandatory minimum sentencing policies, which would take effect on March 1, 2003, in the form of Public Acts 665, 666, and 670.⁶⁴

Empirical Analysis

The statistical tests conducted as part of this study are based on a dataset that I created. I use these data to answer more specific questions about the importance of minority representation in the policy process. The dataset contains data for a number of variables, both dependent and independent. The data are primarily composed of population and demographic information for each state from 1979 through 2002, as well as information regarding state immigrant populations. The demographic information includes median household income, education, and minority population.⁶⁵ Additionally, data was collected regarding the composition, in terms of race and gender, of each state's legislature during the time period in question.⁶⁶ Finally, a measure of the strictness of each state's drug sentencing laws and the change in those laws over the time period studied will be included as a dependent variable. The data allow the creation of three dependent variables using the data regarding state drug sentencing laws. The first captures the level of strictness of each state's drug sentencing laws in 2002, the second captures the level of strictness of each state's drug sentencing laws in 1985, and the third reflects the change in each states level of strictness in drug sentencing laws, if any, from 1985 to 2002.

⁶⁴ FAMM's guide to the Michigan sentencing reforms, www.famm.org

⁶⁵ The source of the data regarding median household income, education, and minority populations is the United States Census Bureau website.

⁶⁶ The data for the racial and gender composition of each state's legislature was provided by Rene Rocha, University of Iowa.

Chapter 3

Literature

A number of scholars have entered the debate on why states enact criminal justice policies, and in particular, why they enacted the strict drug sentencing policies during the war on drugs. A major strand of theory addresses the presence of minority populations and the general underclass in state populations, based on the proposition that race and racial politics remain significant factors in crime legislation.⁶⁷ Some scholars argue that states with larger minority populations will pass more strict drug sentencing laws and will implement them aggressively.⁶⁸ A large minority population as well as a sizeable underclass is related to greater perceived threat to the dominant group, usually whites.⁶⁹ As these populations grow, the use of incarceration to

⁶⁷ Miller, Lisa. "The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited" *Perspectives on Politics*, Vol. 5, No. 2, June 2007; Smith, Kevin B. "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates" *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)

⁶⁸ Meier, Kenneth J. "The Politics of Drug Abuse: Laws, Implementation, and Consequences" *The Western Political Quarterly*, Vol. 45, No. 1 (Mar., 1992); Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol, and Public Policy*. M.E. Sharpe, Inc., 1994

⁶⁹ Smith, Kevin B. "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates" *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004); Meier, Kenneth J. and Kevin B. Smith. "Say It Ain't So, Moe: Institutional Design, Policy Effectiveness, and Drug Policy" *Journal of Public Administration Research and Theory* 4, no. 4 (1994); Bobo, Lawrence D. and Mia Tuan. *Prejudice in Politics: Group Position, Public Opinion, and the Wisconsin Treaty Rights Dispute*. Harvard University Press, 2006; Marcus, George E., John L. Sullivan, Elizabeth Theiss-Morse, and Sandra L. Wood. *With Malice Toward Some: How People Make Civil Liberties Judgments*. Cambridge University Press, 1995; Davis, Darren W. *Negative Liberty: Public Opinion and the Terrorist Attacks on America*. Russell Sage Foundation, 2007

control them also increases. Accordingly, under this theory we would expect to see strict drug sentencing laws enacted in states with large minority and underclass, or immigrant, populations.

According to this argument the growth in prison populations is not based on rising crime rates or the government responding to public opinion, but the legacy of racial cleavages that has characterized the American political environment.⁷⁰ This legacy can be counteracted, however, if minorities are able to consolidate sufficient political power to influence politics, which could result in policies favorable to the minority population.⁷¹ This race and underclass based theory could explain why states with large minority populations initially passed strict drug sentencing policies during the war on drugs. It does not explain, however, why many of these states have since retreated from those strict laws. There is no indication that there has been a reduction in the perceived threat posed by these populations or that they have consolidated enough political power to achieve the reforms themselves.

Similarly, Rodney Hero argues that state policy making is influenced by the level of racial and ethnic diversity in each state. Hero categorizes the states by the racial and ethnic composition of their respective populations.⁷² Hero created these categories as a way to study social diversity in the states and whether levels of diversity impact public policy. The first category, homogenous, includes those states having a primarily white population, with small minority and small white ethnic populations. The second category, bifurcated, includes those

⁷⁰ Smith, Kevin. *The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates*. *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)

⁷¹ Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol and Public Policy*. M.E. Sharpe, Inc. 1994

⁷² Hero, Rodney E. *Faces of Inequality: Social Diversity in American Politics*. Oxford University Press, 1998

states having a relatively large minority population, a large white population, and a small white ethnic population. The third category, heterogeneous, includes states that have large minority populations, large populations of white ethnics, and moderately large white populations. These are the states with the most diverse populations. Hero argues that states falling into the categories of heterogeneous and bifurcated, or the most diverse states, will pass legislation that is more restrictive, or adverse to, the minority populations. According to this theory we would expect that states falling into those two categories, and primarily those categorized as heterogeneous, would enact more strict drug sentencing policies.

Even when race is a factor in policymaking politicians may not mention racial minorities explicitly. Mendelberg argues that explicit racial messages appear to violation the norms of racial equality and thus lose their ability to mobilize the racial resentment of white voters.⁷³ Under these circumstances politicians use implicit racial messages to appeal to white voters. This occurs when politicians want to avoid violating the norm of racial equality and they have incentives to mobilize the racial resentment of white voters. It is a successful tactic when white voters want to adhere to the norm of racial equality and they hold resentment against blacks and negative stereotypes about blacks.⁷⁴ Thus, politicians use implicit racial messages when they want to gain support from white voters for policies that will be disadvantageous to minorities.

Others argue that strict drug sentencing policies were enacted in an attempt to reduce disparities in sentences for similarly situated offenders. Under this theory the focus of sentencing reform was on 'just deserts' for the offender.⁷⁵ This occurred in the context of a

⁷³ Mendelberg, Tali. 2001. *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality*. Princeton: Princeton University Press.

⁷⁴ Mendelberg, Tali. 2001. *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality*. Princeton: Princeton University Press.

⁷⁵ Daly, Kathleen and Michael Tonry. 1997 "Gender, race, and sentencing." *Crime and Justice* 22:201-252

society full of inequality and injustice. In an effort to reduce race and class disparities in sentencing, policy shifted toward proportionality. Judges were to use the nature of the current offense and the defendant's criminal history as sentencing criteria, rather than personal characteristics of the defendant. This greatly reduced the judges' discretion. There was also a reduction, or complete elimination, of indeterminate sentencing, in which judges could use discretion to impose a sentence consistent with the offender's unique circumstances. The reason for this reduction in discretion was the belief that discretion and indeterminate sentencing were used by judges to impose harsher sentences for poor and minority defendants, while white and middle class defendants received an advantage.⁷⁶

According to this theory states that reformed their sentencing policies to establish sentencing guidelines held that race and gender were illegitimate considerations in sentencing offenders. Similarly, they believed that factors such as education and employment should not be considered because they had historically been used to disadvantage poor defendants. Further, proportionately more blacks than whites were poor, so these considerations indirectly worked to disadvantage black defendants. Finally, because most judges were white men, it was believed that if they had discretion they would be influenced by their own conscious or unconscious biases toward minorities.⁷⁷

Some scholars argue, however, that the policy goals of these highly structured sentencing guidelines are frustrated when they allow for judicial and prosecutorial discretion.⁷⁸ These

⁷⁶ Daly, Kathleen and Michael Tonry. 1997 "Gender, race, and sentencing." *Crime and Justice* 22:201-252

⁷⁷ Daly, Kathleen and Michael Tonry. 1997 "Gender, race, and sentencing." *Crime and Justice* 22:201-252

⁷⁸ Steffensmeier, Darrell and Stephen Demuth. "Ethnicity and Sentencing Outcomes in United States Federal Courts: Who is Punished More Harshly?" *American Sociological Review*, Vol. 65, No. 5 (Oct., 2000)

scholars argue that there is often judicial consistency in the use of sentencing criteria for most defendants, but that there are still disparities in sentencing outcomes for racial and ethnic minorities. In these instances sentencing outcomes favor whites and disadvantage Hispanics, while black defendants are in an intermediate position.⁷⁹ These theories help to explain why states passed strict drug sentencing laws by positing that they were passed in an attempt to reduce disparities in sentencing outcomes. They could also help to explain why many states amended those laws after it became clear that the punitive policies continued to have disparate impacts on minority offenders.

The criminal justice system in the United States historically has produced disparate outcomes for different groups in society. This is often studied by analyzing disparate sentences for racial minorities in relation to the sentences received by white offenders in similar circumstances.⁸⁰ This disparity, however, extends not only to racial minorities, but also to members of the lower financial classes in America.⁸¹ In particular, there are often different outcomes for members of varying classes who are otherwise similarly situated. This nuance of the criminal justice system and its sentencing outcomes is rarely addressed, but is highly important, particularly given the fact that many people in the lower class who find themselves involved in the criminal justice system are immigrants. Thus, immigrants often are caught up in a system they do not understand, based primarily on their status as lower class citizens, rather than as a result of any increased criminal activity among immigrants. Further, the outcome of

⁷⁹ Steffensmeier, Darrell and Stephen Demuth. "Ethnicity and Sentencing Outcomes in United States Federal Courts: Who is Punished More Harshly?" *American Sociological Review*, Vol. 65, No. 5 (Oct., 2000)

⁸⁰ Hero, Rodney E. *Faces of Inequality: Social Diversity in American Politics*. Oxford University Press, 1998

⁸¹ Reiman, Jeffrey. *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*. Pearson A and B, 1979; Smith, Kevin B. "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates" *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)

their involvement in the criminal justice system is often a product of their membership in the lower class and can serve to perpetuate this status. This is particularly unfortunate in light of the fact that immigrants are often misperceived by the public as individuals who are more likely to commit crimes, despite the reality that Latino immigrants are less likely to be involved in crime than all United States citizens.⁸²

There is, however, another possibility that must be tested, specifically the possibility that increased diversity in a state will lead to descriptive representation and less strict drug sentencing laws. It is well known that minority populations have borne the brunt of the consequences of strict drug sentencing laws.⁸³ Minorities, primarily blacks, have received disparately harsh sentences as a result of the war on drugs. While sentences for all drug offenders have increased, the increases have been particularly large for minority offenders. It has also been argued in the political science literature that descriptive representation can correspond with the enactment of policies that are favorable to the group that is represented, in this case blacks and Latinos.⁸⁴ Hero and Tolbert find that Latino legislators were more likely to enact legislation on issues salient to Latinos, thus providing substantive representation for this constituency. In

⁸²Hagan, John and Alberto Palloni. "Sociological Criminology and the Mythology of Hispanic Immigration and Crime" *Social Problems*, Vol. 46, No. 4 (Nov., 1999)

⁸³ www.ajp.usdoj.gov/bjs/

⁸⁴ Hero, Rodney E. and Caroline J. Tolbert. "Latinos and Substantive Representation in the U.S. House of Representatives: Direct, Indirect, or Nonexistent?" *American Journal of Political Science*, Vol. 40, No. 3 (Aug., 1995); Cameron, Charles, David Epstein, and Sharyn O'Halloran. "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" *The American Political Science Review*, Vol. 90, No. 4 (Dec., 1996); Lublin, David. "Racial Redistricting and African American Representation: A Critique of 'Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?'" *The American Political Science Review*, Vol. 93, No. 1 (Mar., 1999)

circumstances where minorities are able to consolidate political power, their presence in large numbers may result in policies that are favorable to minorities or immigrants.⁸⁵

It is likely that an increase in minority populations, and immigrant populations, will lead to greater numbers of minorities in the state legislatures. The possibility follows, that minorities in state legislatures will be sensitive to the impacts of the war on drugs on minority communities, and will seek to enact legislation favorable to those communities. In the case of drug sentencing laws, this means that minority legislators should push for amendment of strict drug sentencing laws in favor of less strict policies.

There are also theories that focus on crime rates and drug use as a catalyst for the passage of strict drug sentencing laws. For example, some argue that states that experience an increase in visible drug use will be more likely to pass strict drug sentencing laws and to implement the policies aggressively.⁸⁶ Many argue that states with large minority populations are particularly strict in focusing on crime rates, and visible drug use, which are often mistakenly associated with minority populations. This theory again fails to explain the retreat from punitive sentencing laws, particularly given the fact that rates of drug use and crime have remained mostly stable.⁸⁷

There is also a strand of theory that focuses on more traditional policy change and policy formation theories in the literature. For instance, some scholars argue that policy issues in the war on drugs can become more or less complex based on their being situated at the local level or

⁸⁵ Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol, and Public Policy*. M.E. Sharpe, Inc., 1994

⁸⁶ Meier, Kenneth J. *The Politics of Drug Abuse: Laws, Implementation, and Consequences*. *Western Political Quarterly*, 45, no. 1 (1992)

⁸⁷ Executive Office of the President, *Office of National Drug Control Policy*, 2002

the national level.⁸⁸ At the local level policy conflicts are sometimes more representative and pluralistic than those at higher levels of government. At the national level interest groups with broader concerns often enter the policy conflict and have the potential to alter the power dynamic, and influence the way that the issue is framed. This may help explain the policy changes in Michigan where this seems to have happened on a smaller scale. The War on Drugs was initially raised by the federal government, and Michigan took up the cause by passing strict drug sentencing policies. Later, however, the movement for sentencing reform was begun in Michigan primarily by public interest groups like FAMM, which pushed for reform based on the harsh consequences to drug offenders and their families, and particularly to minority offenders. When the scope of the conflict was expanded to the state level, the issue was simplified and dominated primarily by the state legislature and the governor, where the groups that may have been more representative of the people who were directly impacted by the policies had less influence.

When the issue shifts location in this way a ‘substitution effect’ often operates to limit the ability of broad citizen groups to expand a conflict’s scope and draw in sympathetic audiences, so while citizen groups see the problem as disparate sentences for minority offenders, politicians substitute the harm to whites: financial cost of incarcerating huge numbers of drug offenders.⁸⁹ In Michigan FAMM attempted to focus the issue on offenders, particularly minority offenders, and the consequences of the strict sentencing laws. The state government, however, ‘substituted’ the law abiding public as the ‘victims’ of the extreme costs of incarceration that impacted other

⁸⁸ Miller, Lisa. The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited. June, 2007, Perspectives on Politics, Vol. 5, No. 2

⁸⁹ Miller, Lisa. The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited. June, 2007, Perspectives on Politics, Vol. 5, No. 2

parts of the state budget. This did lead to reform, but under terms different from those proposed by the citizen groups. While the strict sentencing policies in Michigan impacted the state's budget, they also had huge impacts on offenders, particularly minorities, and their families. However, by moving this complex problem into the state government, the complexity was overlooked, and the policy problem was framed in terms that the public could understand – specifically, financial terms. As the theory predicts, the loss of complexity in Michigan most likely coincided with negative attitudes the public usually has toward drug offenders. This created a climate in which a simplification of the problem to one that impacts the general public allowed for reform to occur.

Other scholars take the importance of political maneuvering and apply it to the link between public opinion and policy. There are four traditional models for linking public opinion with government policies, including simple majority rule, the reverse linkage model, the incrementalism model, and the institutional lag model.⁹⁰ Norrander, in a study of the effect of public opinion on state death penalty policies, identifies a fifth model that encompasses the traditional four. Norrander argues that the four models can be combined into a historical model or causal chain model, which says that past opinion and past policy are both factors that shape current opinion and current policy. This produces one continuous chain of linkages between public opinion and policy.⁹¹

⁹⁰ Norrander, Barbara. 2000 "The multi-layered impact of public opinion on capital punishment implementation in the American states." *Political Research Quarterly*, 53

⁹¹ Norrander, Barbara. 2000 "The multi-layered impact of public opinion on capital punishment implementation in the American states." *Political Research Quarterly*, 53

Given Norrander's argument, we might expect to see drug sentencing policy and public opinion linked over time in a causal chain. We know that the initial drug sentencing policies of the War on Drugs were particularly harsh. After years of experience with these policies the public began to protest, citing the impact on the lives of offenders in relation to their crimes, and the economic costs incurred by the policy of incarcerating large numbers of offenders. In a development consistent with Norrander's causal chain model, many states have amended their policies to fall into line with public opinion. Thus, we may now expect to see public opinion adjust to this development, with the public in states which retain the strict drug sentencing policies exhibiting lower levels of support for the policies and the public in states with less strict policies showing higher levels of support.

Another way to look at the link between public opinion and policy is to study the elements necessary for a shift in public opinion. There are two instructive models which take this approach, the objectivist model and the constructionist model.⁹² Under the objectivist model the public must have knowledge of objective conditions to identify a social problem. In the case of drug policy, public opinion would form on the basis of public knowledge of street crime and drug use. Increased reported incidence of crime and drug abuse would lead to increased public concern about those issues, which would lead to state action. According to the constructionist model, public opinion does not form on the basis of a directly known reality, but through frames which interpret reality. Public opinion under this model depends on the subjective, social and

⁹² Beckett, Katherine. 1994 "Setting the public agenda: 'Street crime' and drug use in American politics." *Social Problems* 41:425-447

political dimensions of social problems.⁹³ Public opinion regarding drug policy under the constructionist model will be shaped by the issue's popular representation.

Beckett argues that the formation of public opinion regarding drug policy conforms to the constructionist model.⁹⁴ Public concern about crime and drugs shifts depending on claims made by the state and attention given to the issue by the media. Political actors and the media are able to shape public opinion on drug policy by introducing the issue to the public agenda and providing a definitional frame for the issue. According to Beckett's argument, we would expect public opinion regarding drug sentencing policy to follow the cues of political elites and the media. Specifically, in states with strict drug policies where the state and the media have begun to voice criticisms of strict policies and their outcomes, public opinion will be expected to shift against the policies.

The impact of the political parties and party competition on drug sentencing laws has been addressed by a number of other scholars. Some argue that Democratic policymakers are less likely to enact strict drug sentencing laws, particularly when the parties are competitive,⁹⁵ while Republican policymakers have more to gain by enacting strict drug sentencing laws because this provides an opportunity to connect with constituents who do not normally benefit

⁹³ Beckett, Katherine. 1994 "Setting the public agenda: 'Street crime' and drug use in American politics." *Social Problems* 41:425-447

⁹⁴ Beckett, Katherine. 1994 "Setting the public agenda: 'Street crime' and drug use in American politics." *Social Problems* 41:425-447

⁹⁵ Meier, Kenneth J. *The Politics of Drug Abuse: Laws, Implementation, and Consequences*. *Western Political Quarterly*, 45, no. 1 (1992)

from Republican economic policies.⁹⁶ The parties, however, may respond to public opinion and increase the strictness of drug sentencing laws if the public wants crime to be dealt with harshly.

The general argument is that Republicans have historically had more to gain from enacting tough-on-crime policies. However, it has become clear that both parties have benefited from a tough-on-crime stance during election cycles.⁹⁷ Democrats have taken up the issue at times when they have a real chance of becoming the majority party or when they stand to lose majority party status.⁹⁸ Thus, as party competition increases, the parties converge on crime policy and support tough drug sentencing policies. As the parties converge in being tough on crime, the parties will reposition themselves, with Democrats becoming less liberal and Republicans becoming more moderate, creating a political imprisonment cycle that will be associated with elections.⁹⁹

It is the theories about partisan politics and political maneuvering that this paper will focus upon. It seems clear that the theories elucidated above go far in explaining the initial politics surrounding the passage of the punitive policies of the war on drugs. They do not, however, go far in explaining how politicians were able to retreat from their tough-on-crime stance, and advocate for a retreat from the strict policies without risking their political lives.

⁹⁶ Smith, Kevin. The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates. *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)

⁹⁷ Smith, Kevin. The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates. *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)

⁹⁸ Meier, Kenneth J. The Politics of Drug Abuse: Laws, Implementation, and Consequences. *Western Political Quarterly*, 45, no. 1 (1992)

⁹⁹ Meier, Kenneth J. The Politics of Drug Abuse: Laws, Implementation, and Consequences. *Western Political Quarterly*, 45, no. 1 (1992)

This dissertation attempts to flesh out the complexities of the circumstances that allowed politicians who had staked their political reputations on punitive drug policies to essentially reverse that position without appearing to be weak or soft on crime.

Chapter 4

Drug Sentencing Policy in the 50 States

The de-escalation of the War on Drugs has seen many states reforming their drug sentencing policies. Although not all states have done so, some states have taken a variety of routes in amending their drug war laws. This chapter addresses the methods different states have used to reform their drug sentencing laws.

Over the years the United States Supreme Court has weighed in on the issue of the constitutionality of the policies of the War on Drugs. The Court has primarily addressed the mandatory minimum sentences that most states enacted during the escalation of the War on Drugs. While the Court has not required drastic alterations to any of the policies, it has placed some legal constraints on the states' ability to impose particular sentences under the policies of the War on Drugs and has informed the method the states have used to reform those policies. This chapter provides a summary of the Supreme Court rulings impacting the state drug war policies to demonstrate how the states have responded to Supreme Court case law to guide their own policy shifts.

Considering the methods of reform that states have undertaken as well as the Supreme Court rulings that have impacted those reforms provides a backdrop for the case studies presented in this dissertation. Both Michigan and New York passed some of the most harsh sentencing laws of the War on Drugs. During the de-escalation of the War on Drugs both states amended their laws, resulting in a near complete reversal of the policies. Putting these cases into the context of the overall landscape of reforms, or the lack of reform, in other states lends clarity and perspective to the analysis.

During the escalation of the War on Drugs the federal government set the tone and passed laws that would set the example for lawmakers on the state level. After the federal government passed their drug crime and sentencing legislation and drew the public's attention to the issues of drugs and crime, the states followed suit by passing their own laws, which were largely consistent with the federal legislation. During the de-escalation, however, it has been the states that have led the way in passing reform legislation. It has only been very recently that the federal government has indicated any intention to significantly change its policy in regards to drug sentencing and the War on Drugs in general.

While the states have been amending their drug sentencing laws for many years, the federal government's discussion of reform began in earnest in August of 2013. At that time United States Attorney General Eric Holder gave a speech to the American Bar Association. In that speech and on several occasions since then, he indicated that the United States Department of Justice plans to reduce many of the harsh penalties for drug offenses. Similarly, in a speech before the United States Sentencing Commission he argued for the reduction of sentences for most federal drug offenses.¹⁰⁰ It remains to be seen whether legislators on the federal level will heed this call for reform and pass the necessary legislation.

On the state level this type of reform has been under way for a number of years. While not all states have reformed their drug war legislation, many have, although at varying paces. Primarily in response to the untenable cost of incarcerating huge numbers of drug offenders, and also in the face of statistics that state that drug treatment is more effective than incarceration at treating addiction, many states have passed legislation eliminating mandatory minimum

¹⁰⁰ Ram Subramanian, Rebecca Moreno, "Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013." VERA Institute of Justice, Center on Sentencing and Corrections (April, 2014)

sentences for some offenders, reducing the length of prison sentences for others, and providing for alternatives to prison for some. The chart on page 83 illustrates the increase in both state and federal prisons in number of people incarcerated for drug offenses from 1980 to 2011.¹⁰¹ The dramatic increase in the numbers of people incarcerated for drug offenses, and the massive cost associated with this increase, on both the state and federal level has been a huge catalyst in the move for reform.

Methods of Reform

In order to combat the rising rates of incarceration and the rising costs associated with them, the States have taken a number of routes in reforming their drug sentencing laws. One method of reform is to repeal or limit mandatory minimum sentences. Mandatory minimum sentences were the hallmark of the War on Drugs. They were intended to equalize sentences for all similarly situated offenders. Additionally, making sentences mandatory took discretion from judges and eliminated the possibility that they could impose lenient sentences for deserving offenders. Mandatory minimum sentences heavily contributed to the mass incarceration of drug offenders and its attendant costs.

As a result, many states that amended their sentencing laws repealed mandatory minimum sentences as a way to ease the rising rate of incarceration and the costs associated with it. While some states merely limited mandatory minimum sentences to particular offenses, or to repeat offenders, others eliminated mandatory minimum sentences entirely. Some states also increased judicial discretion to deviate from the mandatory minimum sentence and impose a sentence below the minimum. Thus, even though these states left at least some mandatory

¹⁰¹ The Sentencing Project, *Statistics/Graphs*, 2012

minimum sentences in place, judges are now able to avoid requiring incarceration for offenders they deem deserving of some alternative sentence.

Another method of reform is modifying drug sentencing schemes. According to this method some states have changed the number of penalty levels or the quantity of drugs required to meet each level, and some have decriminalized or lowered penalties for possession of marijuana. This is another method of making sentences more lenient and easing the strain of mass incarceration and its costs. It allows, however, for the possibility of maintaining mandatory minimum sentences for some drug offenses and some drug offenders. Therefore while some offenses require more lenient sentences or no penalty at all, harsh penalties can be maintained for others.

Some states have reformed their sentencing laws by creating opportunities for early release from prison, and others have provided for alternatives to incarceration, such as drug treatment, drug court, and deferred prosecution. In these states the legislatures can choose to maintain their mandatory minimum sentencing laws, but provide for the possible early release of those offenders who maintain good behavior while in prison. Similarly, these states can continue to require mandatory minimum sentences for some offenses, while identifying circumstances in which certain offenders may benefit from rehabilitation rather than incarceration. These reforms also help to alleviate the impacts of the rising rates of incarceration.

Finally, some states have enacted legislation to help alleviate the collateral consequences of conviction for drug offenses, such as restrictions on housing and employment and restrictions on benefits and occupational licenses, while providing for the possibility of expunging criminal

records.¹⁰² Although these reforms do not reduce the number of offenders incarcerated for drug offenses, they do recognize the fact that there are consequences that persist long after the period of incarceration. These very consequences often lead to a cycle in which offenders are unable to move past conviction and incarceration for a drug offense, which often results in future criminal involvement in the criminal justice system.

Mandatory Minimum Sentencing Laws in the Courts

Of all of the harsh sentencing policies of the War on Drugs, mandatory minimum sentencing laws are the most notorious. They were touted as a way to equalize sentences for all offenders, while being tough on offenders as well. Mandatory minimum sentencing policies took discretion away from judges in determining what sentences was appropriate for each individual offender. It was widely believed that disparities in sentences were a result of judicial discretion in sentencing decisions. These disparities occurred along differing lines. One was along race lines, as minority offenders received longer sentences than white offenders. Another was gender, with women receiving lighter sentences than men. Generally, there was concern that offenders who were otherwise similarly situated were receiving vastly different sentences.

Mandatory minimum sentences would eliminate these disparities, and prevent judges from imposing sentences that were more or less lenient on the basis individual characteristics of the offender. However, in reducing judicial discretion and treating all offenders the same, a number of legal issues were raised, including the right to due process and the right to a trial by jury. Because these issues are implicated in the imposition of mandatory sentencing schemes, the Supreme Court has addressed this aspect of the policies of the War on Drugs far more

¹⁰² Ram Subramanian, Rebecca Moreno, "Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013." VERA Institute of Justice, Center on Sentencing and Corrections (April, 2014)

frequently than any other. The Court's rulings on these issues have informed the methods of reform the states have undertaken in their efforts to amend their laws.

The United States Supreme Court and the federal circuit courts of appeals have ruled on state mandatory minimum legislation in a number of cases. While the Supreme Court has upheld the constitutionality of mandatory minimum sentences and ruled that they comply with due process and the right to a jury trial, it has engaged in extensive analysis of the application of mandatory minimum sentences, statutory interpretation, and the relationship between state mandatory minimum laws and the federal sentencing guidelines, which have been deemed advisory. The following is an overview of federal case law on mandatory minimum sentencing statutes. In some cases the Court addresses mandatory minimum sentences in relation to crimes other than drug offenses, which remains relevant for the analysis of mandatory minimum drug crime sentences, and in others the Court rules on mandatory minimum sentences in drug cases.

The Sixth Amendment and Due Process Clause

In any criminal prosecution the Constitution requires that the prosecutor prove every element of the crime beyond a reasonable doubt. It also provides that the defendant has a right to have a jury determine whether the defendant is guilty or not guilty on each of the elements. Defendants who have challenged the constitutionality of mandatory minimum sentences have often invoked these rights by challenging the laws under the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. The basis of this challenge is that in imposing mandatory minimum sentences, judges are employing sentencing factors that have not been proven beyond a reasonable doubt as determined by a jury.

In *In re Winship* the Supreme Court held that the Due Process Clause requires that a defendant be convicted only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.¹⁰³ This precedent was applied in *Mullaney v. Wilbur*, where the Court held that a state law violated the Due Process Clause by requiring a defendant charged with murder to prove that he killed with adequate justification in order to be convicted only of manslaughter.¹⁰⁴ The Court in this case recognized that the difference between the mandatory life sentence for murder and the lighter sentence for manslaughter was highly relevant. Accordingly, the Court held that *Winship* applies not only to those facts that are essential to establishing guilt or innocence, but also to those facts that establish degrees of criminal culpability. Subsequently, in *Patterson v. New York*, however, the Court held that it was not a violation of due process to require a defendant to prove an affirmative defense.¹⁰⁵

The Supreme Court later applied these rulings to a state mandatory minimum sentencing statute in *McMillan v. Pennsylvania*.¹⁰⁶ In that case the statute included a mandatory minimum sentence of five years in prison for certain crimes if the judge found by a preponderance of the evidence that the defendant was in possession of a firearm at the time of the offense. The Court applied *Patterson* in holding that the Pennsylvania legislature defined possession of a firearm as a sentencing factor, rather than an element of the crime that must be proved beyond a reasonable doubt. The Court reasoned that the statute did not establish impermissible presumptions which would circumvent the requirement of proof beyond a reasonable doubt, the statute simply limited the court's discretion in sentencing within the range available, and the statute was not enacted in

¹⁰³ *In re Winship*, 397 U.S. 358 (1970)

¹⁰⁴ *Mullaney v. Wilbur*, 421 U.S. 684 (1975)

¹⁰⁵ *Patterson v. New York*, 432 U.S. 197 (1977)

¹⁰⁶ *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)

order to avoid the requirements set for the by the Court in *Winship*. As such, the statute legislating a mandatory minimum sentence did not violate due process.

The Supreme Court again addressed the constitutionality of a state mandatory minimum statute in *Castillo v. United States*.¹⁰⁷ In this case the statute prohibited the use of a firearm in relation to a crime of violence, and applied a mandatory minimum sentence if the weapon used was a machine gun. The Court held that whether the weapon was a machine gun was an element of the offense which had to be proved beyond a reasonable doubt, rather than a sentencing factor which could be found by the judge.

The Court subsequently addressed this issue again in *Harris v. United States*, in which the defendant was convicted of using a firearm in relation to a crime of violence, triggering a mandatory minimum sentence.¹⁰⁸ In this case the Court had to decide whether the intervening decision in *Apprendi v. New Jersey* affected its line of precedent regarding mandatory minimum sentences. In *Apprendi*, the Court had ruled that facts that increase the sentence beyond the maximum authorized by the jury's verdict must be proved beyond a reasonable doubt, whereas *McMillan* had involved facts that increased the mandatory minimum sentence but not beyond the authorized statutory maximum and therefore could be found by a judge without being proved beyond a reasonable doubt.¹⁰⁹ In *Harris*, the defendant was convicted of using a firearm in relation to a crime of violence. The Court held that the fact of the firearm did not have to be proved beyond a reasonable doubt because it was not an element of the offense, but merely a sentencing factor because the finding lead to the application of a mandatory minimum sentence which limited, rather than extended, the judge's discretion in imposing a sentence.

¹⁰⁷ *Castillo v. United States*, 530 U.S. 120 (2000)

¹⁰⁸ *Harris v. United States*, 536 U.S. 545 (2002)

¹⁰⁹ *Apprendi v. New York*, 530 U.S. 466 (2000)

In *Blakely v. Washington* the Supreme Court applied this reasoning to a state mandatory minimum sentencing statute that allowed judges to find certain facts and to impose a sentence within a mandatory range based on those facts.¹¹⁰ The Court found that the statutory maximum is the maximum sentence a judge may impose based on the facts proved beyond a reasonable doubt and reflected in the jury's verdict. The statutory maximum is not the maximum sentence a judge may impose after finding additional facts. Therefore, the state mandatory minimum sentencing procedure violated the Sixth Amendment by requiring the judge to impose a sentence that was not allowable based in the jury's verdict alone.

Mandatory Minimum Statutes and the Federal Sentencing Guidelines

The Supreme Court has also addressed mandatory minimum sentences for drug offenses under the federal statutes and federal sentencing guidelines. Under federal law a judge may impose a sentence that departs from the guidelines range or the mandatory minimum sentence if the defendant has rendered substantial assistance to the government in resolving the case or based on the calculation of the drug quantity.¹¹¹ This departure from the mandatory minimum sentence may only occur when the government moves for such a reduction. The Supreme Court has held that this gives the government a power, but not a duty, to move for a reduction when a defendant has substantially assisted the government.¹¹²

In *Chapman v. United States* the Court addressed the calculation of drug quantities as a method of determining the appropriate sentences under mandatory minimum statutes.¹¹³ In this case the Court addressed a statute that required a mandatory minimum sentence of ten years in

¹¹⁰ *Blakely v. Washington*, 542 U.S. 296 (2004)

¹¹¹ Section 3553(e), Title 18, United States Code; USSG, Section 5K1.1

¹¹² *Wade v. United States*, 504 U.S. 181 (1991)

¹¹³ *Chapman v. United States*, 500 U.S. 453 (1991)

prison for at least one gram of a mixture or substance containing LSD. The Court found that the inclusion of a carrier device used for distributing the drug, such as blotter paper or sugar cubes, in the weight was appropriate because a single dose of LSD is very potent and weighs very little. Following this ruling the United States Sentencing Commission amended its sentencing guidelines to advise that quantities of LSD should be calculated by presuming a weight of 0.4 milligrams per dose, rather than by including any carrier device.¹¹⁴

In response to this amendment to the guidelines the Supreme Court ruled in *Neal v. United States* that the revised guideline for calculating LSD quantities did not apply to the mandatory minimum statute. The Court held that the change applied for purposes of calculating the constructive weight of the drug under the guidelines, but not for calculating the actual weight of the drug under the mandatory minimum statute passed by Congress. The Commission had the power to change its methods within its ability to make policy judgments, but could not interpret a congressional statute in a way that was contrary to the Supreme Court's interpretation.

The Supreme Court has also addressed the issue arising from the difficulty in defining "cocaine base" for purposes of calculating a mandatory minimum sentence. The congressional statutes provide for different sentences depending on whether the offense involved cocaine or cocaine base, but do not define "cocaine base." As such some courts have interpreted the term as including more than crack cocaine, while others have determined that it only applies to crack cocaine. In the wake of this confusion the Sentencing Commission defined cocaine base as crack cocaine. The Supreme Court then ruled in *DiPierre v. United States* that the term cocaine base applies to all forms of cocaine base and not just crack cocaine.¹¹⁵ The court reasoned that

¹¹⁴ USSG App. C amend. 502

¹¹⁵ *DiPierre v. United States*, 131 S.Ct. 2225 (2011)

Congress intended to distinguish between powder cocaine and cocaine base products because of the significant difference in penalties provided in the statute.

The Supreme Court again addressed the issue of mandatory minimum sentences and the federal sentencing guidelines in *United States v. Booker*.¹¹⁶ The sentencing guidelines' procedure for triggering a mandatory minimum sentence relied on judge found facts, rather than facts proved beyond a reasonable doubt and found by a jury. The Court ruled that if the guidelines were mandatory this procedure would violate the Sixth Amendment. However, if the guidelines were merely advisory, they would not be unconstitutional. Rather than strike down the entire Sentencing Reform Act, the Court struck down the provision that made the guidelines mandatory. This ruling effectively restored discretion to district court judges in imposing a sentence where they previously were required to impose sentences within a mandatory range.

Mandatory Minimum Sentences and Cruel and Unusual Punishment

Mandatory minimum sentencing statutes have also been challenged as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The Supreme Court originally addressed this argument in relation to a three strikes case. In *Solem v. Helm* the Court held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.¹¹⁷ In that case the defendant was sentenced to life in prison for writing a bad check after having been convicted of the prior non-violent offenses. The life sentence was permitted, but was not mandatory, under a North Dakota sentencing statute. The Court held that the sentence was disproportionate to the offense. In this case the Court set forth a three part test in

¹¹⁶ *United States v. Booker*, 543 U.S. 220 (2005)

¹¹⁷ *Solem v. Helm*, 463 U.S. 277 (1983)

determining whether a sentence is cruel and unusual. In making this determination a court must (1) consider the gravity of the offense and the relative harshness of the sentence; (2) compare the sentence imposed to sentences imposed in other criminal cases in the same jurisdiction; and (3) compare the sentences imposed for the same crime in other jurisdictions.

Subsequently, the Court addressed the question of whether a mandatory sentence of life in prison for a first offense of possessing crack cocaine was cruel and unusual. In *Harmelin v. Michigan*, the Court held that the fact that the sentence was mandatory did not render it unconstitutional and that the sentence was not unconstitutionally disproportionate.¹¹⁸ The Court was divided in the way it applied *Solem* in this case. Justices Scalia and Rehnquist argued that the Eighth Amendment's prohibition against cruel and unusual punishment applied only to the form of the punishment, but not the severity. Justices Kennedy, O'Connor, and Souter argued that the inter- and intra-jurisdictional analyses should be undertaken only in rare cases where a sentence leads to an inference of gross disproportionality. As such, the Eighth Amendment doesn't require strict proportionality, but rather forbids extreme sentences that are grossly disproportionate to the crime. The remaining Justices argued that the life sentence was unconstitutional under any interpretation of *Solem*.

The Supreme Court again applied *Solem* in *Ewing v. California*. In that case the Court upheld California's three strikes law in ruling that the mandatory sentence of 25 years to life in prison after a conviction of grand theft did not violate the Eighth Amendment because the sentence was not grossly disproportionate to the crime the defendant committed, and because he had a long felony conviction record. Again, the Court was divided, with Justices Scalia and

¹¹⁸ *Harmelin v. Michigan*, 501 U.S. 957 (1991)

Thomas arguing that the Eighth Amendment does not guarantee proportionality, and Justices Stevens, Souter, Ginsburg, and Breyer arguing that the sentence violated the Eighth Amendment.

The States That Have Amended Their Laws

Although many states have amended their drug sentencing laws, not all have done so. The following table illustrates the states that have passed legislation amending their drug sentencing legislation, and which method of reform the legislature pursued. Note that some states have passed legislation falling within more than one category of reform. This does not necessarily mean that those states have passed individual pieces of legislation for each indicated category, as some pieces of legislation fall within more than one category.

Table 1.

States That Have Amended Their Drug Sentencing Policies And The Method of Reform							
State	Repeals or Repeals or Shortens Mandatory Minimums	Enhances Judicial Discretion	Modifies Drug Sentencing Schemes	Reforms Marijuana Laws	Expands Access to Early Release	Expands Alternatives to Incarceration	Ameliorates Collateral Consequences
AL						X	
AZ						X	
AR	X		X			X	
CA				X			
CO	X		X	X		X	

CT				X			
DE	X		X				X
FL						X	
GA	X	X	X			X	X
HA		X	X				
ID						X	
IN	X	X	X			X	
KS						X	
KY	X		X		X	X	
LA						X	
MA	X				X		
MI					X		
MN		X					
MO	X						
NH						X	
NJ		X				X	
NY	X	X				X	
NC						X	
ND			X				
OH	X		X			X	
OK	X					X	
OR		X	X				

PN		X				X	
RI	X						
SC	X	X				X	
SD			X			X	
UT						X	
VT				X			
WA				X			
WV						X	

Source: VERA Institute of Justice. “Drug War Détente? A Review of State-level Drug Law Reform, 2009-2013.” Ram Subramanian, Rebecka Moreno. April 2014

As shown in the table, the method of reform used by most states is to provide alternatives to incarceration. This is probably a popular route because it allows for the possibility of imposing a sentence, but not requiring that sentence to be incarceration. This addresses the problem of increased rates of incarceration, but allows politicians to maintain the appearance of requiring some punishment for drug offenses. This alternative is also popular because drug offenses are often associated with drug abuse and addiction. Many of the alternatives to incarceration include drug treatment, drug court, or other rehabilitation programs.

The least used method of reform is laws that would ameliorate the collateral consequences of a drug conviction. As mentioned above these include restrictions on housing, employment, and access to benefits among other things. This method of reform is probably less popular because it does not address rates of incarceration or judicial discretion. Rather it deals

with consequences for offenders after they have been released from prison, which is often considered to be outside the realm of the sentencing decision.

Another method of reform not often employed is the expansion of access to early release from prison. While this would help to relieve the strain of high rates of incarceration, it is not politically popular to release from prison an offender who has been convicted and sentenced before the imposed sentence has been completed. The public has an expectation that a sentence, once imposed, is justified and should be carried out. Therefore, states are probably reluctant to authorize the early release of large numbers of offenders who otherwise would remain in prison on lawfully imposed sentences.

Reform and the De-escalation of the War on Drugs

It is clear that many states have recognized the need to reform the sentencing policies of the War on Drugs. For most states the move toward reform has been based primarily on the budget strain caused by the cost of incarcerating huge numbers of drug offenders. The process of reform and the methods states have employed to amend their sentencing laws have been informed by the rulings of the Supreme Court and the issues that have been raised in that venue.

The patterns that can be seen in the way states have chosen to go about reforming their drug sentencing laws can be further investigated by looking more closely at individual states. The use of in depth case studies allows for analysis of why states choose their particular methods of reform and the extent to which these reforms are required, or constrained, by the rulings of the Supreme Court.

Chapter 5

The Role of Race in the Fifty States: Race in the Population and the Legislature

With this chapter I conduct a statistical analysis of the minority and gender composition of state legislatures and its impact on state drug sentencing laws. The existing literature regarding the impact of descriptive representation on legislation that is important to minorities would indicate that greater levels of descriptive representation should lead to legislation that is favorable to minorities. My analysis in this chapter, however, suggests that there may be a more complex explanation for the relationship between descriptive representation and legislation that is important to minorities.

A number of scholars have entered the debate on why states enact criminal justice policies, and in particular, why they enacted the strict drug sentencing policies during the War on Drugs. A major strand of theory addresses the presence of minority populations and the general underclass in state populations, based on the proposition that race and racial politics remain significant factors in crime legislation.¹¹⁹ Some scholars argue that states with larger minority populations will pass more strict drug sentencing laws and will implement them aggressively.¹²⁰ A large minority population as well as a sizeable underclass is related to greater perceived threat

¹¹⁹ Miller, Lisa. "The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited" *Perspectives on Politics*, Vol. 5, No. 2, June 2007; Smith, Kevin B. "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates" *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)

¹²⁰ Meier, Kenneth J. "The Politics of Drug Abuse: Laws, Implementation, and Consequences" *The Western Political Quarterly*, Vol. 45, No. 1 (Mar., 1992); Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol, and Public Policy*. M.E. Sharpe, Inc., 1994

to the dominant group, usually whites.¹²¹ As these populations grow, the use of incarceration to control them also increases. Accordingly, under this theory we would expect to see strict drug sentencing laws enacted in states with large minority and underclass, or immigrant, populations.

Similarly, Rodney Hero argues that state policy making is influenced by the level of racial and ethnic diversity in each state. Hero categorizes the states by the racial and ethnic composition of their respective populations.¹²² Hero created these categories as a way to study social diversity in the states and whether levels of diversity impact public policy. The first category, homogenous, includes those states having a primarily white population, with small minority and small white ethnic populations. The second category, bifurcated, includes those states having a relatively large minority population, a large white population, and a small white ethnic population. The third category, heterogeneous, includes states that have large minority populations, large populations of white ethnics, and moderately large white populations. These are the states with the most diverse populations. Hero argues that states falling into the categories of heterogeneous and bifurcated, or the most diverse states, will pass legislation that is

¹²¹ Smith, Kevin B. "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates" *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004); Meier, Kenneth J. and Kevin B. Smith. "Say It Ain't So, Moe: Institutional Design, Policy Effectiveness, and Drug Policy" *Journal of Public Administration Research and Theory* 4, no. 4 (1994); Bobo, Lawrence D. and Mia Tuan. *Prejudice in Politics: Group Position, Public Opinion, and the Wisconsin Treaty Rights Dispute*. Harvard University Press, 2006; Marcus, George E., John L. Sullivan, Elizabeth Theiss-Morse, and Sandra L. Wood. *With Malice Toward Some: How People Make Civil Liberties Judgments*. Cambridge University Press, 1995; Davis, Darren W. *Negative Liberty: Public Opinion and the Terrorist Attacks on America*. Russell Sage Foundation, 2007

¹²² Hero, Rodney E. *Faces of Inequality: Social Diversity in American Politics*. Oxford University Press, 1998

more restrictive, or adverse to, the minority populations. According to this theory we would expect that states falling into those two categories, and primarily those categorized as heterogeneous, would enact more strict drug sentencing policies.

There are also theories that focus on crime rates and drug use as a catalyst for the passage of strict drug sentencing laws. For example, some argue that states that experience an increase in visible drug use will be more likely to pass strict drug sentencing laws and to implement the policies aggressively.¹²³ Many argue that states with large minority populations are particularly strict in focusing on crime rates, and visible drug use, which are often mistakenly associated with minority populations. Again, this would mean that states with large minority and immigrant populations will be attentive to visible drug use, and will enact correspondingly harsh drug sentencing policies.

There is, however, another possibility that must be tested, specifically the possibility that increased diversity in a state will lead to descriptive representation and less strict drug sentencing laws. It is well known that minority populations have borne the brunt of the consequences of strict drug sentencing laws.¹²⁴ Minorities, primarily blacks, have received disparately harsh sentences as a result of the war on drugs. While sentences for all drug offenders have increased, the increases have been particularly large for minority offenders. It has also been argued that descriptive representation can correspond with the enactment of policies that are favorable to the group that is represented, in this case blacks and Latinos.¹²⁵ Hero and Tolbert find that Latino

¹²³ Meier, Kenneth J. "The Politics of Drug Abuse: Laws, Implementation, and Consequences" *The Western Political Quarterly*, Vol. 45, No. 1 (Mar., 1992)

¹²⁴ www.ajp.usdoj.gov/bjs/

¹²⁵ Hero, Rodney E. and Caroline J. Tolbert. "Latinos and Substantive Representation in the U.S. House of Representatives: Direct, Indirect, or Nonexistent?" *American Journal of Political Science*, Vol. 40, No. 3 (Aug., 1995); Cameron, Charles, David Epstein, and Sharyn O'Halloran. "Do Majority-Minority Districts Maximize

legislators were more likely to enact legislation on issues salient to Latinos, thus providing substantive representation for this constituency. In circumstances where minorities are able to consolidate political power, their presence in large numbers may result in policies that are favorable to minorities or immigrants.¹²⁶

It is likely that an increase in minority populations, and immigrant populations, will lead to greater numbers of minorities in the state legislatures. The possibility follows, that minorities in state legislatures will be sensitive to the impacts of the war on drugs on minority communities, and will seek to enact legislation favorable to those communities. In the case of drug sentencing laws, this means that minority legislators should push for amendment of strict drug sentencing laws in favor of less strict policies.

This chapter addresses the following question: do states with large minority and immigrant populations enact more harsh sentencing policies? I hypothesize that states with large minority and immigrant populations enact sentencing policies that are more strict than states with smaller minority and immigrant populations. I also present the competing hypothesis, that states with large minority and immigrant populations will have more descriptive representation and less strict drug sentencing laws.

Substantive Black Representation in Congress?" *The American Political Science Review*, Vol. 90, No. 4 (Dec., 1996); Lublin, David. "Racial Redistricting and African American Representation: A Critique of 'Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?'" *The American Political Science Review*, Vol. 93, No. 1 (Mar., 1999)

¹²⁶ Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol, and Public Policy*. M.E. Sharpe, Inc., 1994

- H1: States with large minority populations as a percentage of state population will enact more strict drug sentencing laws.
- H2: States with large immigrant populations as a percentage of state population will enact more strict drug sentencing laws.
- ■ H3: States with large minority/immigrant population will have more descriptive representation in state legislatures, and less strict drug sentencing laws.

State Drug Sentencing Policy: The Effects of White Views of Minority Populations Versus Influence From Within the Minority Groups

Much of the literature predicts that the majority population will see a minority population as a threat, and will pass legislation that is adverse to the minority population in an attempt to control it. This type of legislation is seen as a way to vitiate the “threat” posed by the minority population to the majority population. Legislation enacted by the majority in an effort to control the minority could come in the form of criminal laws, and sentencing laws in particular. According to these theories the majority population should pass drug sentencing laws that are intended to control or incapacitate the threat posed by the minority population.

It is possible that this desire to control minority populations played a part in the War on Drugs and its initial efforts to legislate strict sentences for many drug offenses. The legislation passed in response to the War on Drugs imposed mandatory prison sentences for many offenses and lifetime probation for others. It quickly became clear that minority populations bore the brunt of these policies in the form of long prison sentences. This was particularly true for black offenders, as sentences for offenses involving drugs most commonly associated with this group were the most severe. Thus, if the majority population enacted the policies of the war on drugs in an effort to control the minority population, it effectively achieved this goal. This result

should bear out most clearly in states with large minority populations, as these states should enact the most strict sentencing policies.

But there is an additional element that bears scrutiny in the analysis of state policymaking in the war on drugs. That element is the possibility that increased numbers of minorities in any state will likely result in increased numbers of those minorities being elected to public office. This in turn, should lead to descriptive representation for the minority groups, which should result in legislation that is favorable to those groups.¹²⁷ Therefore, if the white majority has legislated strict sentencing laws that disparately punish minority drug offenders, subsequently elected minority legislators will push for legislation that counters that disparate impact in favor of the represented minority groups. In effect, while initial increases in minority populations lead to legislation that is unfavorable to those groups, further increases in those populations should lead to increased descriptive representation and legislation that is favorable to the minority groups. As will be demonstrated in Chapters 6 and 7, this appears to have been the case in both Michigan and New York. During the escalation of the War on Drugs both states had diverse populations and both passed some of the most harsh drug sentencing laws in the nation. Later, during the de-escalation, both states continued to have diverse populations and although legislators and others calling for reform did not explicitly do so based on racial disparities, this concern was clearly present when the laws were amended.

Accordingly, state legislatures that are predominantly white in states with large minority populations should enact strict drug sentencing laws. But legislatures in states with increasingly large minority populations will have a greater chance of having minority representatives, and

¹²⁷ *Representation and Backlash: The Positive and Negative Influence of Descriptive Representation*. Donald P. Haider-Markel, *Legislative Studies Quarterly*, Vol. 32, No. 1 (Feb., 2007), pp. 107-133

therefore should pass legislation that is less strict. However, this may not be true in regards to all minority groups, depending on public opinion among those groups in relation to the War on Drugs. In particular, opinion regarding the War on Drugs among the black population is perhaps more complex than among other racial and ethnic groups. At the beginning of the War on Drugs prominent members of the black community supported the harsh policies as a way to deal with the problem of drug use and related crime within their communities. However, as the years passed under the harsh policies it became clear that black offenders had borne the brunt of the policies, in the form of disparately long prison sentences. As a result, most in the black community, while desiring a solution to the rampant drug use and selling that often plagued their neighborhoods, also wanted to reform the policies that had effectively created a greater problem – the mass incarceration of black offenders.

When the War on Drugs was in its infancy organizations catering to black people, as well as some prominent black figures, came out in support of the War on Drugs. For example, in the late 1980s, the NAACP (National Association for the Advancement of Colored Persons) placed fighting drug problems and supporting punishment for drug offenders high on its policy agenda.¹²⁸ Similarly, the Congressional Black Caucus gave its support to the War on Drugs and candidates who supported it. While the Caucus argued for a focus on the causes of drug use and abuse as well as strict punishment for drug offenders, it did ultimately lend its support to the general principles of the War on Drugs.¹²⁹ The Congressional Black Caucus even agreed to

¹²⁸ The New York Times, September 11, 1988, The Nation: Civil Rights Groups Are Redefining Their Job, by Isabel Wilkerson.

¹²⁹ The Associated Press, September 14, 1989, Jackson Calls for War on Poverty with War on Drugs, by William M. Welch.

campaign on behalf of presidential candidate Dukakis based on his promises to aggressively prosecute the War on Drugs.¹³⁰

Jesse Jackson, a prominent black public figure, also came out strongly in support of the War on Drugs in the late 1980s. He campaigned aggressively for anti-drug programs and took credit for raising the issue of drug abuse to the top of both parties' agendas.¹³¹ He also played a part in encouraging the Congressional Black Caucus to support the War on Drugs by speaking at one of their meetings.¹³² Jackson also praised President George H. W. Bush because he would engage in a comprehensive War on Drugs, and Jackson offered his help in this endeavor.¹³³

The advocacy of these powerful organizations and public figures in favor of the War on Drugs most certainly had an impact on public opinion among black Americans. Therefore, we would expect that public opinion among blacks near the beginning of the War on Drugs, during this public advocacy, would be generally high. This would likely lead black legislators to support the enactment of strict drug sentencing policies in their states at the beginning of the War on Drugs. However, several years into the War on Drugs and the policies that resulted from it, it became clear that racial minorities, in particular blacks, were disparately impacted by the policies. As these disparate impacts became clear, these organizations and public figures began to remove their support for the War on Drugs and call for amended policies that would not have racist outcomes.¹³⁴ We would expect that this would cause a shift in public opinion among

¹³⁰ The Associated Press, September 17, 1988, Dukakis Says Stepped Up Drug Enforcement Would Pay for Itself, by William Welch.

¹³¹ United Press International, June 15, 1988, Buch, Dukakis Fight Political War on Drugs, by E. Michael Myers.

¹³² The Associated Press, September 14, 1989, Jackson Calls for War on Poverty with War on Drugs, by William M. Welch.

¹³³ The Associated Press, December 1, 1988, Jackson Sees 'Qualitative Change' Between Bush and Reagan, Washington Dateline.

¹³⁴ The Houston Chronicle, October 19, 1995, House Backs Stiff Drug Penalties: Sentencing Panel's Recommendation on Crack Laws Rejected, by Francis X. Clines.

blacks in the direction of a decreasing level of support for the War on Drugs and its harsh policies, which in turn would cause black legislators to support the enactment of less strict drug sentencing policies.

Another group that may exhibit unusual complexities is Latinos. In recent years the nation has been preoccupied with immigrants to the United States, and particular attention has been paid to Latino immigrants. As the largest minority groups and approximately 44% percent of the immigrant population,¹³⁵ Latinos have been associated with general lawlessness and criminal behavior.¹³⁶ As a result, a large presence of Latinos and Latino immigrants in any state, and particularly those with few or no Latinos in the state legislature, should be expected to lead to the enactment of strict drug sentencing laws. But as the Latino population has grown in many states, it has likely gained representatives in the state legislatures. This should lead to increased descriptive representation, and correspondingly to less strict drug laws in states with Latino legislators. Therefore, despite the tendency for white legislatures to pass strict drug sentencing laws in an effort to control the Latino and immigrant population, Latino legislators can counteract this tendency by advocating for legislation favorable to their group and developing a majority coalition in support of the legislation.

It thus becomes clear that variations in state drug sentencing policy-making and its interaction with minority groups is more complex than predicted by the existing literature. While it may be true that predominantly white legislatures in states with large minority populations pass strict drug sentencing laws, it should not necessarily hold true that as those minority populations increase as a percentage of the states' populations the drug sentencing laws

¹³⁵ United States Census Bureau, American Community Survey, 2011.

¹³⁶ *Overrepresentation and underrepresentation of African Americans and Latinos as lawbreakers on television news*. TL Dixon and D Linz, *Journal of Communication*, Volume 50, Issue 2, pp. 131-154, June 2000

will get more strict. Rather, as the minority populations increase, descriptive representation in the state legislatures should increase, and drug sentencing laws should become less strict.

The Complexities of Race in the Legislature and the Population: a Statistical Analysis of the Impact of Race on the Strictness of State Drug Sentencing Policies

This chapter studies the nuances of how punishment in the United States criminal justice system varies according to minority and immigrant status. For purposes of this chapter I focus on state sentencing laws for drug offenses. This chapter analyzes state drug sentencing policies, and how the ethnic and racial composition of the states and regions of the United States impact the criminal justice policies to which lower class citizens, in particular minorities, are subject. The time period studied begins and ends at two points that are relevant to the War on Drugs. The first point is near the beginning of the War on Drugs, 1985. The second point is 2002, as that is the most recent year for which I have comprehensive data on state drug sentencing policies.¹³⁷ The chapter also looks at how state drug sentencing policies are impacted by racial diversity in state populations as well as state legislatures. Specifically, I analyze whether more diverse state populations lead to more or less harsh sentencing policies, and whether more diverse state legislatures lead to more or less harsh sentencing policies.

Specifically, I look at state drug sentencing policies and their impacts on class and minority groups in the context of Rodney Hero's theory about social diversity in American politics. In this chapter I test Hero's theory by applying it to state drug sentencing policy, which I analyze by looking at the states as they fall into Hero's categories. In addition to categorizing

¹³⁷ When new data become available I plan to update this chapter to include more recent years which will allow for analysis of more recent changes to drug sentencing laws. The time frame analyzed here does include the years of the reforms to Michigan's drug sentencing laws, but does not include the final years of the reforms to New York's drug sentencing laws (2007).

states according to Hero's theory, I control for a number of other state level variables. These variables include income levels in the states, education levels, and immigrant population. As the study focuses on minority and immigrant populations, I define the minority and immigrant variables as the total number of blacks, Latinos, and immigrants in each state as a percentage of the state's population.

The data used to test the hypotheses were gathered from a variety of sources and compiled into one data set. The data are primarily composed of population and demographic information for each state from 1979 through 2002, as well as information regarding state immigrant populations. The demographic information includes median household income, education, and minority population.¹³⁸ Additionally, data was collected regarding the composition, in terms of race and gender, of each state's legislature during the time period in question.¹³⁹ Finally, a measure of the strictness of each state's drug sentencing laws and the change in those laws over the time period studied was included. Each type of data and the corresponding variables will be discussed in detail below.

Three dependent variables were created using the data regarding state drug sentencing laws. The first, *strictness of drug sentencing policy 2002*, captures the level of strictness of each state's drug sentencing laws in 2002, the second, *strictness of drug sentencing policy in 1985*, captures the level of strictness of each state's drug sentencing laws in 1985, and the third, *change in strictness of drug sentencing policy*, reflects the change in each states level of strictness in drug sentencing laws, if any, from 1985 to 2002. A brief explanation of the coding for the level

¹³⁸ The source of the data regarding median household income, education, and minority populations is the United States Census Bureau website.

¹³⁹ The data for the racial and gender composition of each state's legislature was provided by Rene Rocha, University of Iowa.

of strictness of drug sentencing laws for each year will be provided before each individual variable is explained.

The source of the drug policy levels for each state for the year 2002 is Impacteen, an organization that studies the effects of the criminal justice system on American youth.

Impacteen conducted a study on state drug sentencing laws in 2002 and produced a report entitled *Illicit Drug Policies: Selected Laws from the 50 States*.¹⁴⁰ The report provides drug laws for each of the 50 states and the District of Columbia (D.C.), regarding both sales and possession of cocaine, marijuana, methamphetamine, and ecstasy. For each crime, the report provided information on whether the state has a mandatory minimum sentence, the maximum sentence, and financial punishment. Also provided for each state is whether or not the state has laws for legalized medical marijuana.

The information provided in Impacteen's report was used to create a dependent variable which measures the drug policy level of each state, or where the state's drug policy falls on a range of strictness. The drug policy level variable for 2002 (*strictness of drug sentencing policy in 2002*) was created based on the selected drug laws of each state. The variable ranges from 1-5 with 1 representing the states with the least strict drug policy and 5 representing the states with the most strict drug policy. Each state was assigned a number, from 1-5, according to how strict the state's drug policy is. This was determined by assessing whether the state has mandatory minimum sentences for the selected drug offenses, and if so for how many of the drug offenses. Also taken into account was whether or not the state has a law for legal medical marijuana.

¹⁴⁰ This study was published in 2002 based on data collected during the preceding year, while the survey used in conjunction with the state data was conducted in 1999. To be sure that the state laws reflecting drug policy levels for the states coincides with the laws in effect at the time the survey was conducted, I verified that in most states, the laws had not changed between 1999 and 2002, and adjusted the drug policy level accordingly for those states which did see changes during that time period.

A similar process was undertaken to create the drug policy level variable for 1985. The source of the drug policy level variable for 1985 is a data set that includes drug laws for the 50 states, regarding both sales and possession of marijuana, narcotics, and enhanced penalties for cocaine and heroin.¹⁴¹ The data set includes information on whether each state has a mandatory minimum sentence for each offense, the maximum sentence, and financial punishment. The data set also contains information on whether or not the state has laws for legalized marijuana.

The information provided in this data set was used to create the second dependent variable (*strictness of drug sentencing policy in 1985*) which measures the drug policy level of each state in 1985, and where the state's drug policy falls on a range of strictness. The drug policy level variable for 1985 (*strictness of drug sentencing policy in 1985*) was created based on the selected drug laws of each state and is coded exactly like the drug policy level variable for 2002 (*strictness of drug sentencing policy in 2002*). The variable ranges from 1-5 with 1 representing the states with the least strict drug policy and 5 representing the states with the most strict drug policy. Each state was assigned a number, from 1-5, according to how strict the state's drug policy is. This was determined by assessing whether the state has mandatory minimum sentences for the selected drug offenses, and if so for how many of the drug offenses. Also taken into account is whether or not the state has a law for legal medical marijuana and whether the state has enhanced penalties for cocaine or heroin.

Although the data relied on for the 2002 drug policy level variable, and the data relied on for the 1985 drug policy level variable do not contain information on identical offenses, it was

¹⁴¹ This data set was provided by Kenneth J. Meier, and was the basis of his book, *The Politics of Sin: Drugs, Alcohol, and Public Policy*, M.E. Sharpe, Inc., 1994. Meier's source for the state drug sentencing laws included in the data set was *A Guide to State Controlled Substance Acts*, Washington, D.C., National Criminal Justice Association, February, 1988 by Gwen A. Holden et al. Meier's source for marijuana laws was the National Organization for the Reform of Marijuana Laws, published in *The Office of Justice Programs* (1988: 112-115).

possible to create two variables for the two different years that are directly comparable. This is possible because the range of drug policy strictness is based on numbers of mandatory minimum sentences, and whether there are increased penalties for heroin and cocaine for the 1985 variable, as well as the presence or absence of legalized marijuana in each state.

The third dependent variable, *change in strictness of drug sentencing policy*, was created by measuring the change, if any, in drug policy levels for each state between 1985 and 2002. For example, if a state scored a 2 on the drug policy range for 1985, and then scored a 5 for 2002, the state would be assigned a value of +3 for the variable *change in strictness of drug sentencing policy*. If, however, a state scored a 4 on the drug policy range for 1985 and then scored a 3 for 2002, the state would be assigned a value of -2 for the variable *change in strictness of drug sentencing policy*. Finally, if a state received the same score on the drug policy range for 1985 and 2002, the state would be assigned a value of 0 for the variable *change in strictness of drug sentencing policy*. The largest change possible for any state in this variable is plus or minus 4, as a change from 1 to 5 or 5 to 1 is the largest possible jump in score.

To analyze the data at each point in time, 1985 and 2002, as well as the change over time, twenty five independent variables were created. The independent variables can be discussed in groups, as each type of independent variable contains three variables: one for 1985, one for 2002, and one to capture the change from 1985 to 2002.

The first set of independent variables is based on selected minority populations. Minority populations measured in this data set are black and Latino populations in each state. The analysis of minority populations is limited to these two groups because they are the two minority groups that have experienced the most disparate impact as a result of harsh drug sentencing

policies of the war on drugs. For each of the minority variables, the minority population is measured as a percentage of the entire state population. There is a variable reflecting the black population of each state for 1985 and 2002, *black population*, and one measuring the change in each state's black population from 1985 to 2002, *change in black population*.¹⁴² Similarly, there are three variables capturing the Latino population for each state, including *Latino population*, which reflects the Latino population in each state for 1985 and 2002, and *change in Latino population*, which reflects the change in the Latino population in each state from 1985 to 2002.¹⁴³

The next set of independent variables reflects the size of the immigrant population in each state. The size of the immigrant population in each state is measured as a percentage of the state's entire population. The first and second of these variables, *immigrant population*, reflect the immigrant population in each state for 1980 and 2002.¹⁴⁴ The third, *change in immigrant population*, reflects the change in immigrant population in each state from 1985 to 2002.¹⁴⁵

The next two sets of independent variables capture some basic demographic information about the state populations, specifically median household income and education level. The first set is related to the median household income for each state. The first and second of these variables, *average income*, reflects the median household income for each state in 1979¹⁴⁶ and

¹⁴² The change in black population is the difference between the percentage of each state's population that was black in 1985 and the percentage that was black in 2002.

¹⁴³ The change in Latino population is the difference between the percentage of each state's population that was Latino in 1985 and the percentage that was black in 2002.

¹⁴⁴ Data for immigrant population as a percentage of each state's population for 1985 were not available, so the closest year possible, 1980, was used.

¹⁴⁵ The change in immigrant population is the difference between the percentage of each state's population that was immigrant in 1980 and the percentage that was immigrant in 2002.

¹⁴⁶ Data for median household income for each state for 1985 were not available, so the closest year possible, 1979, was used.

1999.¹⁴⁷ The third, *change in average income*, reflects the change in median household income for each state from 1979 to 1999. The variables measuring education level is the percentage of each state's population that has earned a college degree or higher. The first and second of these variables, *percent population with BA*, reflects the percentage of each state's population that had a college degree or higher in 1980¹⁴⁸ and 2000.¹⁴⁹ The third, *change in percent population with BA*, reflects the change in the percentage of each state's population that had a college degree or higher from 1980 to 2000.

The next three sets of variables measure the presence of women, blacks, and Latinos in each state's legislature in 1985, 2002, and the change in each from 1985 to 2002. The first set captures the percentage of each state's legislature composed of women. The first and second variable in this set, *women in legislature*, reflects the percentage of each state's legislature composed of women in 1985 and 2002. The third, *change in women in legislature*, reflects the change in percentage of each state's legislature composed of women from 1985 to 2002. The next set of variables captures the percentage of each state's legislature composed of blacks. The first and second variable, *blacks in legislature*, reflect the percentage of each state's legislature composed of blacks in 1985 and 2002. The third, *change in blacks in legislature*, reflects the change in the percentage of each state's legislature composed of blacks from 1985 to 2002. The final set of variables in this category capture the percentage of each state's legislature composed of Latinos. The first and second variable, *Latinos in legislature*, reflect the percentage of each state's legislature composed of Latinos in 1985 and 2002. The third, *change in Latinos in*

¹⁴⁷ Data for median household income for each state for 2002 were not available, so the closest year possible, 1999, was used.

¹⁴⁸ Data for the percentage of each state's population that earned a college degree or higher for 1985 were not available, so the closest year possible, 1980, was used.

¹⁴⁹ Data for the percentage of each state's population that earned a college degree or higher for 2002 were not available, so the closest year possible, 2000, was used.

legislature, reflects the change in the percentage of each state's legislature composed of Latinos from 1985 to 2002.

The final independent variable, *hero/state diversity level*, is based on Rodney Hero's categorization of the states by the racial and ethnic composition of their respective populations.¹⁵⁰ Hero created these categories as a way to study social diversity in the states and whether levels of diversity impact public policy. The variable includes three categories, one for each of Hero's categories. States falling into the first category, homogenous, are coded as 1. States coded for this category are those having a primarily white population, with small minority and small white ethnic populations. States falling into the second category, bifurcated, are coded as 2. States coded for this category are those having a relatively large minority population, a large white population, and a small white ethnic population. States falling into the third category, heterogeneous, are coded as 3. This category includes states that have large minority populations, large populations of white ethnics, and moderately large white populations. These are the states with the most diverse populations.

The Impact of Race in the Population and Race in the Legislature are More Complex Than the Literature Predicts

The first model is a regression on the dependent variable for the change in strictness level of drug sentencing laws from 1985 to 2002. Included in this model are all of the corresponding independent variables accounting for change in each variable over time. These include *change in black population*, *change in Latino population*, *change in immigrant population*, *change in average income*, *change in percent population with BA*, *change in blacks in legislature*, *change*

¹⁵⁰ Hero, Rodney E. *Faces of Inequality: Social Diversity in American Politics*. Oxford University Press, 1998

in Latinos in legislature, and change in women in legislature. Also included is the independent variable *hero/state diversity level*, which controls for the level of diversity of each state's population, or whether the state's population is homogenous, bifurcated, or heterogeneous. The results of this model are reported in TABLE 2.

TABLE 2. Effects for the Determinants of Change in Drug Strict Level*

Variable	Coefficients and Standard Errors	Betas
change in black population	-.254 (.312)	-.169
change in Latino population	.240 (.227)	.327
change in immigrant population	-.123 (.180)	-.220
change in average income	.000 (.000)	.032
change percent population with BA	-.014 (.182)	-.018
Hero/state diversity level	-.374 (.367)	-.177
change blacks in legislature	.147 (.099)	.277
change Latinos in legislature	-.051 (.117)	-.084
change women in legislature	.063 (.054)	.200

N: 50

Data Source: Frost Drug Data

Note: this data represents the universe on sentencing laws for all fifty states, therefore coefficient estimates are believed to be the real effects, not based on sample.

* Dependent variable = change in degree of strictness of drug sentencing laws 1 – 5 (1 = lax; 5=severe)

Because this chapter analyzes state level data, all regression models conducted here utilize the entire universe of cases (N = 50), rather than a sample of cases. As a result, significance levels are not important, and are not reported here.

The results of the first regression model largely support the hypothesis that as minority populations increase, levels of strictness of drug sentencing laws decrease. The independent variable for change in black population (*change in black population*) has a sizeable negative coefficient, indicating that as black populations have increased, drug sentencing laws have become less strict. Similarly, the variable for change in immigrant population (*change in immigrant population*) has a sizeable and negative coefficient, indicating that as immigrant populations increase, drug sentencing laws become less strict. Even more important is the variable signifying the diversity of a state's population (*hero/state diversity level*). Recall that this variable is coded 1 for states that are mostly white, up to 3 for those states that are most racially and ethnically diverse. The coefficient for this variable is large and negative, indicating that as state populations become more diverse, state drug sentencing laws become less strict. The only variable that refutes this hypothesis is the variable for the Latino population (*change in Latino population*). This variable has a large positive coefficient, indicating that as the Latino population grows, state drug sentencing laws become more strict.

The results on the part of the hypothesis related to descriptive representation are mixed. This part of the hypothesis predicted that as minority and immigrant populations increase, descriptive representation will also increase, resulting in policies favorable to those populations, specifically less strict drug sentencing policies. The variable accounting for blacks in the

legislatures (*change blacks in legislature*) has a coefficient that is positive, indicating that increased numbers of black legislators corresponds with more strict drug sentencing laws. This could be a result of the fact that black public figures and organizations supported the war on drugs and the strict policies associated with it. The variable accounting for Latinos in the legislatures (*change Latinos in legislature*), however, is negative, although not very sizeable. This indicates that as the number of Latino legislators increased, drug sentencing laws became less strict. This could be a result of the descriptive representation leading to laws that are favorable to the represented groups, in this case Latinos. The variable for women in state legislatures (*change women in legislature*) indicates that an increase in women legislators corresponds with more strict drug sentencing laws. The variables for income and education show little to no predictive impact.

The second model is a regression on the dependent variable for the strictness level of drug sentencing laws in 1985 (*strictness of drug sentencing policy in 1985*). Included in this model are all of the corresponding independent variables for 1985, or the closest year for which data were available. These variables include *black population, Latino population, immigrant population, average income, percent population with BAO, blacks in legislature, Latinos in legislature, women in legislature, and hero/state diversity level*. The third model is a regression on the dependent variable for the strictness level of drug sentencing laws in 2002 (*strictness of drug sentencing policy in 2002*). Included in this final model are all of the corresponding independent variables for 2002, including *black population, Latino population, immigrant population, average income, percent population with BA, blacks in legislature, Latinos in legislature, women in legislature, and hero/state diversity level*. The results of the second and third models are reported in TABLE 3.

TABLE 3. Effects for the Determinants of Strictness of Drug Sentencing Policy in 1985 and Strictness of Drug Sentencing Policy in 2002.*

Variable	1985		2002	
	Coeff. & Std Errors	Betas	Coeff. & Std Errors	Betas
black population	-.016 (.035)	-.141	.006 (.072)	.043
Latino population	.105 (.085)	.688	.252 (.092)	1.496
immigrant population	-.151 (.092)	-.467	-.096 (.078)	-.366
average income	-.000 (.000)	-.111	-.000 (.000)	-.075
percent population with BA	.059 (.092)	.151	.053 (.092)	.146
Hero/state diversity level	.118 (.275)	.086	-.272 (.347)	-.145
women in legislature	.039 (.034)	.222	-.073 (.039)	-.346
blacks in legislature	.136 (.071)	.567	.040 (.104)	.183
Latinos in legislature	-.119 (.110)	-.533	-.256 (.094)	-1.186

N: 50

Data Source: Frost Drug Data

Note: this data represents the universe on sentencing laws for all fifty states, therefore coefficient estimates are believed to be the real effects, not based on sample.

* Dependent variable = degree of strictness of drug sentencing laws 1 – 5 (1 = lax; 5=severe)

The results of the second and third models also support H3, and are particularly interesting. Recall that the model uses the entire universe of cases, all fifty states, and so significance levels are not important and not reported here. Viewing the results of the models side by side allows for comparison. In 1985, an increase in the black population corresponded with less strict drug sentencing laws. In 2002, however, an increase in the black population corresponded, although not by a large number, with more strict drug sentencing laws. Again, this could be a result of the support for the War on Drugs by black leaders and organizations. In both years, as the Latino population increased, drug sentencing laws became more strict. This is likely a result of the “threat” posed by Latinos and Latino immigrants to the majority white population.

The particularly interesting results, however, are found in the variables accounting for immigrant populations, the diversity of the state populations, and the composition of the state legislatures. For both 1985 and 2002 an increase in minority populations corresponded with less strict drug sentencing laws. This could be because increased minority populations lead to increased descriptive representation in the legislatures. For 1985 the variable accounting for the diversity of state populations, *hero/state diversity level*, indicates that an increase in the diversity of a state’s population corresponded with more strict drug sentencing laws. This would not be surprising if the existing literature on the presence of minority populations leading to more strict drug sentencing laws holds true. However, this variable in 2002 has a large negative coefficient. This means that by 2002, in states with more diverse populations, drug sentencing laws became less strict.

Among the variables capturing the composition of state legislatures are some interesting results. For the variable accounting for the percentage of women in state legislatures in 1985 (*women in legislature*), an increase of women legislators corresponded to a small increase in the level of strictness of state drug sentencing laws. In 2002, however, the coefficient for that variable is negative, indicating an increase in women legislators corresponding with less strict drug sentencing laws. The variable accounting for blacks in the legislatures (*blacks in legislature*), however has a positive, although small in 2002, coefficient in both 1985 and 2002, indicating an increase in black legislators corresponding with more strict drug sentencing laws.

Particularly interesting, however, is the variable accounting for Latinos in state legislatures (*Latinos in legislature*). For both 1985 and 2002 this variable has a large negative coefficient, particularly in 2002. These results indicate that as the percentage of Latinos in the state legislatures increased, drug sentencing laws became less strict. This finding is particularly interesting in light of the findings on Latino populations. For both years, as the Latino population increased, drug sentencing laws became more strict. However, also for both years, as immigrant populations increased, as state populations became more diverse, and as the numbers of Latino legislators increased, drug sentencing laws became less strict. This could have something to do with increasing attention to immigrant populations in the United States, and the tendency to associate the concept of ‘immigrants’ with Latinos.

In recent years immigration has been portrayed as a problem that must be addressed. The portrayal of immigration as a problem has been accompanied by images of Mexicans and other Latinos entering the United States in large numbers, and accounting for increasingly large percentages of the populations of many states. Therefore, it is not surprising that the increased presence of Latinos in state populations corresponds with more strict sentencing laws, as Latinos

and their growing numbers are seen by many as a threat. The perceived threat posed by an increasing Latino population is addressed by an attempt to control the population through drug sentencing laws.

This attempt at control, however, appears to be counteracted by the descriptive representation of Latinos in the state legislatures. Increased immigration creates growing Latino populations, which in turn creates a larger pool of Latino political candidates, and ultimately representatives. Once Latinos gain an increased presence in state legislatures, they use their position and power to help enact legislation that is favorable to their Latino constituents, in this case in the form of less strict drug sentencing laws. This hypothesis, and developing theory, is born out by the data and the models tested above.

Complex Causes of Drug Sentencing Policy Shifts

The findings in this chapter are interesting and important, as they contradict much of the existing literature. Rather than replicating existing theory, this chapter is more consistent with the overall findings of this dissertation. It is clear that there is more complexity to the causes of changes in state drug sentencing policy. The changes cannot be attributed solely to attempts of the majority to control the black and Latino minorities. Instead, it appears that there are other factors at play, including increased descriptive representation in state legislatures, which likely interact with the budget woes encountered by the states as a result of the increased rates of incarceration caused by the harsh sentencing policies.

According to the literature reviewed above, the findings should have revealed harsher drug sentencing laws in states with large minority and immigrant populations. This, however, was not the case. Although large Latino populations corresponded with strict drug sentencing

laws, more important was the fact that increased Latino presence in the state legislatures and increased immigrant populations corresponded with less strict drug sentencing laws. This supports the literature on descriptive representation, which argues that legislators from a particular demographic group are likely to enact legislation favorable to that group.

Further, the findings regarding Latino populations, immigrant populations, and Latinos in the legislatures appear to reflect current attitudes regarding the debate on immigration in the United States. An association of immigrants with Latinos corresponds with strict drug sentencing laws in states with large Latino populations. However, as immigrant populations increase, states become more diverse, and minorities are represented in the state legislatures, the tendency to enact harsh legislation is counteracted and instead we find less strict drug sentencing laws. This is a new finding and suggests that minority and immigrant populations are experiencing a previously unknown and unstudied relationship with state legislatures. The existing literature should be updated with further studies.

New York and Michigan, which will be addressed in detail in the following chapters, also exhibit the trends found here. Both states passed extremely harsh drug sentencing laws in the beginning of the War on Drugs. Both states had large minority populations, some of which supported the policies of the War on Drugs. Later, however, both states amended their drug sentencing policies to be much less strict, and it is clear that concern for minority offenders, as well as budget concerns, in large part lead to the changes. This is likely due to increased involvement and possibly increased descriptive representation for minorities in those states.

These novel findings are an important contribution to the literature on crime and racial minorities. They suggest that the findings in the existing literature should be reassessed and a

more complete an accurate picture of the politics surrounding crime and racial minorities should be revealed. Although it is clear that the current theories regarding attempts to control a perceived threat posed by racial minorities through strict crime legislation may be accurate to a point, they do not provide a complete explanation for what is likely a much more complex political process. This chapter takes great strides in providing a theory that accounts for these complexities.

This chapter further constitutes an important contribution to the existing literature on immigration, as well as general policy making literature. The findings revealed here suggest that these otherwise disparate areas of the political science literature should be utilized in conjunction to facilitate a more thorough and complete theory in a very complex policy area.

The context of the War on Drugs and state drug sentencing laws provides a rich field for studying state policy-making. This chapter illustrates the relationship between crime policy, race in the population, and race in the state legislature. Considered alongside the chapters on New York and Michigan, we see a clearer picture of how these factors interact with the budget crisis experienced by states that enacted the harsh sentencing policies of the War on Drugs. While the budget is the most cited reason for the need for change in state drug sentencing policies, it is clear that race is a factor as well. It is likely that the reason for the lack of explicit reference to race as a reason for change is the controversial nature of mentioning race as a factor in policy-making. This is particularly true in a policy area like the War on Drugs, where minorities have so clearly been discriminated against by past policies.

APPENDIX A

TABLE 4. Effects for the Determinants of Drug Strict Level in 1985 and Drug Strict Level in 2002 (Excluding Hero/State Diversity Variable).*

Variable	1985		2002	
	Coeff. & Std Errors	Betas	Coeff. & Std Errors	Betas
black population	-.015 (.035)	-.130	.012 (.071)	.077
Latino population	.094 (.081)	.616	.259 (.092)	1.536
immigrant population	-.132 (.080)	-.409	-.109 (.076)	-.416
average income	-.000 (.000)	-.098	-.000 (.000)	-.112
percent population with BA	.060 (.091)	.155	.043 (.090)	.118
women in legislature	.041 (.034)	.233	-.070 (.039)	-.336
blacks in legislature	.144 (.067)	.603	.020 (.101)	.090
Latinos in legislature	-.104 (.103)	-.467	-.265 (.093)	-1.227

N: 50

Data Source: Frost Drug Data

Note: this data represents the universe on sentencing laws for all fifty states, therefore coefficient estimates are believed to be the real effects, not based on sample.

* Dependent variable = degree of strictness of drug sentencing laws 1 – 5 (1 = lax; 5=severe)

TABLE 5. Effects for the Determinants of Drug Strict Level in 1985 and Drug Strict Level in 2002 (Excluding *black population, Latino population* variables).*

Variable	1985		2002	
	Coeff. & Std Errors	Betas	Coeff. & Std Errors	Betas
immigrant population	-.061 (.059)	-.188	.057 (.058)	.220
average income	-.000 (.000)	-.027	-.000 (.000)	-.093
percent population with BA	.045 (.089)	.116	.007 (.093)	.019
Hero/state diversity level	-.009 (.259)	-.006	-.367 (.366)	-.196
women in legislature	.042 (.032)	.239	-.050 (.039)	-.237
blacks in legislature	.126 (.045)	.527	.049 (.039)	.225
Latinos in legislature	.014 (.034)	.062	-.020 (.038)	-.094

N: 50

Data Source: Frost Drug Data

Note: this data represents the universe on sentencing laws for all fifty states, therefore coefficient estimates are believed to be the real effects, not based on sample.

* Dependent variable = degree of strictness of drug sentencing laws 1 – 5 (1 = lax; 5=severe)

Chapter 6

New York

Introduction

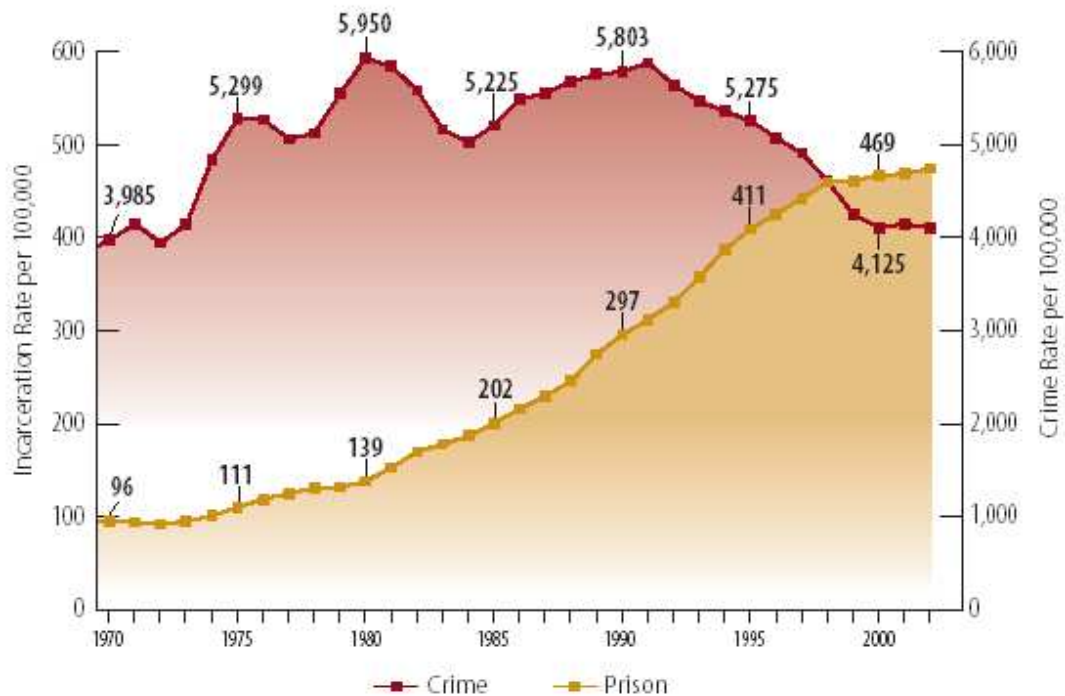
At the forefront of the War on Drugs and the push to enact mandatory minimum sentences for drug offenses was the state of New York. The trajectory of the politics surrounding New York's policies under the War on Drugs illustrates the interplay of factors that lead to the escalation and subsequent de-escalation of the War on Drugs in general. Perhaps most importantly, in New York we see the way that race played a role as a motivating factor in policy changes. During the escalation of New York's drug war policies, there was a clear effort to inflame the public's fear of crime, and an attempt to link drug use to crime in general. During this time, race was a factor in several ways. Racial minorities were linked to crime and drug use, and thus a perceived need to control this portion of the population was cultivated. On the other hand, prominent members of the black community expressed support of strict sentencing policies as a method for curbing crime and drug use in that community. At the same time, other members of the black community attempted to limit the severity of the policies. During the de-escalation, however, there was very little explicit mention of race as a catalyst for reform, despite the fact that racial minorities had suffered severely disproportionate impacts of the policies. It seems clear, however, that although race was rarely explicitly mentioned as an issue in the reform movement that led to de-escalation, it was an important underlying issue that intensified the need for change. While most agreed that the policies should be amended due to their failure to reduce drug crimes and the cost created by increased rates of incarceration, the racial disparities created by the laws were so severe that they could not be sustained.

New York began to respond to what officials claimed to be a rising drug problem in the 1960s and 1970s. The history of drug control in the United States, even before the advent of the official War on Drugs which began in the 1970s, reflects a series of policies enacted largely to vitiate a perceived threat from minority communities, including Chinese, Blacks, and Latinos.¹⁵¹ New York's drive toward determinate sentencing and mandatory minimum sentences, however, did not exhibit an explicit racial motivation. Rather, the apparent reasons for the push toward the strict policies were varied and upon first glance seemingly unrelated to race. Upon further examination, however, race was an underlying motivation behind the policies, although not always explicitly employed. Officials in New York were able to create a fear of this drug problem and an associated fear of minority offenders, despite the fact that throughout the nation crime rates have fallen while incarceration rates continue to grow. The following chart from The Sentencing Project illustrates the rising rates of incarceration nationally from 1970 to 2002 and the corresponding rise and then fall in crime rates over the same period.

Figure 1

¹⁵¹ Provine, 2009; Bertram et.al., 1996

**FIGURE 5
INCARCERATION AND CRIME RATES**



Source: The Sentencing Project; “Incarceration and Crime: A Complex Relationship.” 2005

New York experienced a 31 percent increase in drug arrests in 1972, creating a perceived need for swift action on the part of the government.¹⁵² The state government, lead by Governor Nelson Rockefeller, first created the Narcotics Addiction and Control Commission in 1967. This commission was intended to help drug addicts overcome their addiction, but the program was eventually deemed too costly and ineffective. The New York government then created the Methadone Maintenance program, which also proved to be ineffective and was abandoned in favor of creating alternative reforms. After these policy failures the New York legislature responded to calls for stricter sentencing laws for drug offenders. In 1973 the legislature enacted

¹⁵² Gray, Madison. “New York’s Rockefeller Drug Laws.” Time. Thursday, Apr. 02, 2009

what have become known as the Rockefeller Drug Laws, which mandated sentences of 15 years to life for possession of four ounces of narcotics and for the sale of two ounces of narcotics. An immediate result of the laws was an increase in drug convictions, and a huge increase in the state's prison population with racial minorities seeing the biggest increase, but no corresponding decrease in crime rates.

The period of years leading up to New York's unprecedented new drug sentencing policies saw a range of support for the laws. Many in New York, including the governor, the legislature, lawyers, judges, and the public, in particular prominent members of the African American community who were concerned about the negative impacts of drugs and crime among blacks, saw a need for reform in the state's drug sentencing laws. Although there was a consensus in the need for change, there was no explicit reference to race or particular minority groups in the calls for stricter drug laws in New York. This is interesting in light of the findings from the statistical analysis in Chapter 5. The empirical test for 1985 found that an increase in the black population corresponded with less strict drug sentencing laws. However, just before this the nation's most strict drug sentencing laws were passed in New York. This is likely because of the wide-ranging support for the laws, and the fact that among the supporters were leaders in the African American community. Although there were some members of the Black Caucus who cautioned against the laws and recommended changes before their enactment as discussed below, this coalition of support for the laws was strong enough to overcome any positive effects of descriptive representation for minorities.

The perceived need for change was reinforced by the national government, which was also calling for the adoption of strict new drug sentencing laws, which were expected to stem the rising tide of drug abuse in the nation. The media, both national and in the state of New York,

devoted increased coverage to the nation's drug problem and drew attention to its attendant consequences, including a rise in crime in general. Such media reports created and perpetuated a fear in the American public, which made it possible for politicians to promote and pass tough legislation for sentencing drug offenders.

Passage of the Rockefeller Drug Laws was not, however, a smooth process that was agreed upon by all involved. Despite the general agreement that there was a rising drug problem in New York and in the nation, and despite the proclaimed link between drug use and other more serious crimes, many argued that Governor Rockefeller's proposed legislation was flawed. Many interested parties, including members of the legislature, prosecuting attorneys, judges, and the Mayor of New York City, publicly expressed criticism of the proposed legislation and some put forth alternative proposals of their own. While the alternative proposals included tough penalties similar to those proposed by Rockefeller, they offered some amendments to the toughest of Rockefeller's proposals, which were deemed by many to be irrational and unjust. But at the end of the day, the Rockefeller Drug Laws were passed, largely just as they were proposed by Governor Rockefeller, with a few small amendments.

This raises questions about how Governor Rockefeller successfully pushed his legislation in the face of such opposition, particularly in light of the fact that since their passage they have been deemed a failure, and have been completely gutted. Why was Rockefeller able to pass his legislation in the face of criticism and resistance from so many fronts? The question of how Rockefeller was able to pass some of the most harsh drug sentencing legislation in the nation despite such opposition is complex, and requires examination of the circumstances surrounding the passage of the Rockefeller Drug Laws. An additional question, and perhaps the more interesting one, is how those who advocated for the harsh policies did so without referencing

racial minorities other than in very vague terms. In this way the state of New York differs from some other states that enacted harsh sentencing policies during the war on drugs. Many states, including Michigan which is analyzed in Chapter 6, used race as a catalyst for enacting their new laws by invoking fears of racial minorities or by claiming a desire to reduce racial disparities in sentencing, but abandoned these arguments when advocating for reform decades later despite the fact that the policies resulted in further racial disparities. New York, on the other hand, avoided references to race when pushing for the strict policies, but cited racial disparities in sentencing years later when emphasizing the need for reform. The usually implicit references to race during the escalation of New York's drug laws were overshadowed by the concern for drug use among the state's youth. Rising rates of drug use among youths was analyzed in terms of the role of the education system as well as family relationships. A reference to the fact that drug use was no longer confined to the poor classes but that it had spread to the middle and upper classes appears to be an implied reference to the spread of the perceived threat from minority communities.¹⁵³ Because drug use was historically believed to be confined, for the most part, to the lower class, it was associated with minorities, whose numbers were included in the lower class. However, the fact that drug use had spread to the upper, predominantly white, class, a vice that was considered to afflict minorities had spread to the greater population and therefore necessitated immediate strong action. Thus, although politicians did not explicitly refer to race, the emphasis on drug use spreading to white communities constituted an implicit reference to the fact that drug use and crime were associated with racial minorities and the poor. While avoiding explicit appeals to fear of racial minorities, they were able to perpetuate this fear and create a perceived need to control the minority population and prevent the further spread of drug use and crime.

¹⁵³ Drug Abuse Prevention Report of the Temporary State Commission to Evaluate the Drug Laws, 1974

New York During the Escalation of the War on Drugs: Federal Action Fuels Public Fear and Catalyzes Change

The years leading up to the passage of the Rockefeller Drug Laws saw increased public attention to what was deemed to be a rising drug problem in the nation. The federal government, the national media, and the New York media, drew attention to drug use and crime rates that became associated with the rise in drug use. As the public became alarmed by descriptions of a drug epidemic, the government in New York, and other states, responded with tough on crime rhetoric and calls for strict laws to stem the tide of drug abuse and crime. The general public's alarm was fueled by the media, which focused the public's attention on drug use by associating it with sensational crime stories, often involving minority offenders. Minority communities also became alarmed because the media portrayed minority neighborhoods as breeding grounds for drug use and crime. Law enforcement responded to these rising fears by joining in with lawmakers' calls for tough legislation. In calling for the legislation legislators played on the public's fear, saying that the public was "mortally afraid" due to the rise in drug use in the nation.¹⁵⁴ New York's governor and legislators capitalized on this fear of crime and minority drug offenders, creating the belief that tough drug sentencing policies were necessary and that they would solve the drug problem, and in doing that would solve the greater issue of crime rates in general.

Action in creating strict drug sentencing policies on the part of the national government spurred New York state to action as well. In 1971, just before the Rockefeller Drug Laws were passed President Nixon proposed legislation that would impose mandatory minimum sentences for heroin sellers and mandatory sentences of life in prison with no parole for second time drug

¹⁵⁴ "Tough Drug Stand Urged By Both Parties at Albany." New York Times. Special to the New York Times. Jan. 5, 1973.

offenders.¹⁵⁵ Governor Rockefeller praised the president's proposals. Advocating for policies similar to those being adopted by the federal government gave Rockefeller leverage in claiming that his plan was reasonable and necessary to address the state's drug problem.

Accordingly, state governments as well as the public viewed legislative action on the federal level as an indication that the drug problem was real and had to be dealt with swiftly. As Congress passed legislation increasing penalties for drug sellers, the New York media claimed that this was a response to the national realization that the drug problem required an answer.¹⁵⁶ Subsequently there was a move to align state policies with those being passed by the federal government, which was intended to better use resources and to integrate state and federal sentencing policy.¹⁵⁷ The alignment of state policies with those of the federal government was a logical way for New York to capitalize on the public's fear of crime and drug abuse, and to rationalize the adoption of the strict legislation as a response to the national government's lead in this policy area.

Accompanying federal attention to the drug use issue was an apparent increase in drug use in New York State. In 1972 a report to the Mayor's Narcotics Control Council reported an estimate of more than 300,000 habitual drug users in New York, which constituted a 42 percent increase from the previous year.¹⁵⁸ The report further claimed that blacks and women were being identified as drug abusers at a faster rate than other groups. This report caused alarm among prosecuting attorneys, as well as state legislators who claimed that the numbers indicated

¹⁵⁵ Weaver Jr., Warren. "President Gives Drug Plan: He Urges Mandatory Jail Sentences for Heroin Pushers." *New York Times*. Special to the *New York Times*. Mar. 11, 1973.

¹⁵⁶ "The Good-Bad Drug Bill." *New York Times*, Sep. 26, 1970.

¹⁵⁷ "A Joint Task Force Is Proposed to Coordinate Federal and State Systems of Criminal Justice." *New York Times*. Nov. 30, 1972.

¹⁵⁸ Burnham, David. "City's Drug Users Placed at 300,000." *New York Times*, May 1, 1972.

a crisis of drug abuse.¹⁵⁹ The statistics publicized in this report created further confirmation for the public, exacerbating the fear of drug abuse and crime and the association of these with racial minorities, that drug abuse and related crime were indeed on the rise and had to be dealt with swiftly.

Although this 1972 report mentioned that blacks were identified as a group that was increasingly identified as drug users, references to racial minorities were often vague and the message implicit. In 1971 the Marijuana Interim Report of the Temporary State Commission to Evaluate the Drug Laws referred to the origins of drug use in the United States as linked to certain ethnic minorities, including 'Indian hemp,' an estimate that 85% of marijuana comes from Mexico over its border with the United States, and that hash comes from the Near and Middle East. Another 1971 report from the State of New York Commission of Investigations Recommendation for Law Enforcement, referred briefly to people receiving public assistance, living in public housing, or in public employment. Although the report did not refer explicitly to racial minorities, they are overrepresented among those referred to. The report recommended that when people who fall into these categories are arrested for drug offenses, they be reported to the appropriate agency so that a determination could be made on whether they should remain eligible for public assistance. This appears to be another implicit reference to racial minorities and a method for exercising control over them by essentially increasing any punishment they might experience as a result of a drug arrest through discontinuing their eligibility for public services. While the reference to race and differential treatment of offenders on that basis is implicit, it constitutes strong evidence that race was indeed a strong factor in the justification for the harsh sentencing policies. All of this negative attention on minorities and the attempt to link

¹⁵⁹ Burnham, David. "City's Drug Users Placed at 300,000." New York Times, May 1, 1972.

minorities with drugs and crime help to explain why the findings in this case study are inconsistent with the findings of the empirical analysis in chapter 5. While the findings show less strict drug sentencing laws with an increasingly diverse population, in New York the link between that diverse population and drugs and crime led to the opposite result – more strict drug sentencing laws.

Another major concern giving rise to the apparent need for comprehensive drug legislation was the disparity in sentences for people sentenced to similar drug offenses. Some of the concern raised regarding disparities in sentences was not necessarily related to racial disparities. The McKay Commission, which was formed to reconstruct the events surrounding the Attica prison riot, recommended a shift to determinate sentencing to end disparities in sentences for identical offenses because they left offenders with a sense of “disgust and betrayal”.¹⁶⁰ The commission did not elaborate on the disparities or identify them specifically as racial disparities. At a time when New York was beginning to relax sentences for marijuana possession, concern was raised that sentences for similar offenses around the nation were widely disparate, ranging from seven days in jail in Nebraska to life in prison in Texas.¹⁶¹ It was found that disparities in sentencing often reflected factors such as the defendant’s finances, the defendant’s race, geography, and judges’ personalities.¹⁶² Longer sentences were typically given to defendants with assigned counsel as opposed to private counsel, nonwhites, defendants convicted after a trial rather than a guilty plea, and defendants convicted in New York City as opposed to other parts of the state. This type of disparity was seen as unjust and an impermissible consequence of judicial discretion, which was supposed to result in sentences

¹⁶⁰ The Future of Sentencing in New York State: Recommendations for Reform, 2009, p. 13

¹⁶¹ Charlton, Linda. “Marijuana Terms Range From Seven Days to Life.” *New York Times*, Mar. 22, 1971.

¹⁶² Oelsner, Leslie. “Wide Disparities Mark Sentences Here.” *New York Times*. Sep. 27, 1972.

suited to the offender, rather than just the crime. While some differences in sentences based on individual offender differences were seen as acceptable, the disparities reported were much greater than previously appreciated.

Many argued that sentencing disparities were largely a result of sentencing policies that allowed judges discretion in sentencing offenders. While these policies were initially seen as promoting punishment appropriate for each offender, the huge disparities called this practice into question. This gave rise to the call for sentencing guidelines.¹⁶³ Guidelines, it was claimed, were needed to assist judges in achieving the goals of rehabilitating criminals while protecting society, deterring crime, and fostering a respect for the law. Sentencing guidelines were also intended to eliminate the impact of philosophical differences among judges regarding society's right to punish offenders.

The federal court system also became involved in the move for reform by expressing concern over disparities in sentencing. The federal courts pinpointed disparate sentencing of defendants in the federal courts of New York, Connecticut and Vermont in calling for reform of sentencing practices.¹⁶⁴ The courts suggested using three judge sentencing panels to sentence offenders rather than single judges, thereby reducing the impact of individual judges' sentencing philosophies. The courts found that guidelines were needed because pursuit of the goal of imposing punishment to suit the individual rather than the crime was resulting in sentencing differences that were no longer justified.

It seems, however, that the concern was not necessarily for those who received unfair sentences, usually blacks and Latinos, but for the fact that many of the sentences were perceived

¹⁶³ Oelsner, Leslie. "Wide Disparities Mark Sentences Here." *New York Times*. Sep. 27, 1972.

¹⁶⁴ Oelsner, Lesley. "U.S. Courts Acting to End Disparity in Prison Terms." *New York Times*. Jul. 5, 1973.

as too lenient. One study reported that judges in New York's state and city courts imposed increasingly lenient sentences in the years from 1966 to 1972.¹⁶⁵ The reported reasons for the increase in lenient sentences include unmanageable caseloads, a loss of faith by judges in the prison system, judges' beliefs that harsh sentences do not lead to a reduction in crime, and the fact that sentences imposed by judges are often reduced by factors such as probation policies. The media decried this increase in lenient sentences, but failed to highlight the unjust and disparate sentences imposed on minorities and the poor.

Thus, New York followed the federal government's lead in moving toward drug sentencing policies that would be consistent with the larger War on Drugs. The fear of drugs and crime that was cultivated at the national level was instilled in the public in New York. This fear was implicitly associated with the poor and racial minorities, who comprised a large percentage of the population of drug offenders. While the appeal to such fears was not explicitly invoked, the message of the urgent need to curb drug use and associated crime carried an implicit racial undertone. This implicit racial message was the product of news stories focusing on crime in poor and minority neighborhoods, as well as legislators' call for tough on crime measures in these neighborhoods.

Governor Rockefeller's Proposed Legislation

In response to calls for drug sentencing reform from all corners, Governor Nelson Rockefeller proposed what would become the most harsh drug sentencing policies in the nation. The Rockefeller Drug Laws, once passed, became a model for other states moving in the direction of adopting strict drug sentencing policies. Governor Rockefeller's proposed

¹⁶⁵ Oelsner, Leslie. "A Study Shows Leniency is the Rule in City Courts." New York Times. Sep. 26, 1972.

legislation called for punishments such as mandatory life sentences with no possibility of parole, no suspended sentences, and no plea bargaining for offenders convicted of selling hard narcotics and for addicts who committed crimes of violence while under the influence of drugs. His proposal also called for a bounty of \$1,000 for informants in drug selling convictions, a 100 per cent tax on drug dealers so the state could seize their money and property, and for ending youthful-offender treatment of drug sellers in favor of life imprisonment with the possibility of parole after 15 years.

The new laws imposed mandatory sentences for drug offenses, including unlawful possession and sale of controlled substances, depending on the weight of the drug. Under the Rockefeller Drug Laws the penalty for selling two ounces or more of heroin, morphine, opium, cocaine, or marijuana, or possessing four ounces or more of the same substances was a minimum of 15 years to life in prison and a maximum of 25 years to life in prison.¹⁶⁶ The same penalty was proposed for committing a violent crime while under the influence of those same drugs, but this provision of the legislation was omitted from the bill and was not part of the legislation that finally passed the legislature.

The Rockefeller Drug Laws stripped judges of discretion and required them to impose the mandatory sentences based on weight of the drugs involved, rather than on the individual circumstances of each case or defendant. They also prevented judges from diverting offenders into treatment. These provisions were aimed at reducing the exercise of the discretion which was believed to be a cause of the widely disparate sentences seen in New York and the nation.

¹⁶⁶ Rockefeller Drug Laws Information Sheet. Prepared by Aaron D. Wilson, Associate Director, PRDI

The Rockefeller Drug Laws were passed by the New York State legislature on September 1, 1973. The following table outlines the basic structure of the Rockefeller Drug Laws.

Table 6

The Rockefeller Drug Laws			
Class	Definition	Minimum	Maximum
A I	Sale of one ounce or possession two ounces.	15 years to life	25 years to life
A II	Sale of 1/8 of an ounce or possession of one to two ounces.	6 years to 8 1/3 years	Life imprisonment
A II	Sale of less than 1/8 of an ounce or possession of up to one ounce.	1 year to 8 1/3 years	Life imprisonment

Source: Walker, S. (2006). *Sense and Non-Sense about Crime, Drugs and Communities*. 6th Edition. Belmont, CA: Thomson-Wadsworth.

Coalitions of Support and Opposition to the Rockefeller Drug Laws

Support for the Legislation

During the time leading up to the enactment of the Rockefeller Drug Laws a number of organizations took formal positions either in support or opposition of the laws. Very active in the years preceding 1973 was District Attorney Leo F. Hayes, who repeatedly pushed for tough

sentences for drug sellers and pushers.¹⁶⁷ Hayes, however, argued for mandatory minimum jail sentences for drug sellers, rather than the mandatory life sentences supported by Governor Rockefeller. Spurred to action by convictions that lead to probation rather than prison sentences, Hayes presided over a crackdown on such offenders, which included police raids and the formation of a cooperative team in which the prosecutor's office worked with law enforcement in drug investigations. In October of 1972 Hayes testified before the State of New York Temporary State Commission to Evaluate Drug Laws. Hayes believed that the imposition of tough sentences for sellers and pushers would act as a deterrent to would be drug traffickers. He also argued that conviction of drug sellers would serve as encouragement to law enforcement responsible for policing drug crimes. Hayes dismissed concerns about hindered plea negotiations by claiming that his office would not plea bargain with any offender arrested for the sale of heroin. He further argued that heroin dealers should be sentenced to prison and not put on probation.

Another supporter of the Rockefeller Drug Laws before their enactment was the Greater Syracuse Chamber of Commerce.¹⁶⁸ The chamber had previously made its own efforts to combat drug offenders with the institution of a program called TIP (Turn in a Pusher), which rewarded anonymous tippers for providing information leading to the arrest and conviction of drug sellers. The chamber expressed support of Rockefeller's drug law proposals without calling for any alternative or amendment.

¹⁶⁷ Rockefeller Drug Laws Legislative History. New York State Defenders Association. www.nysda.org

¹⁶⁸ Rockefeller Drug Laws Legislative History. New York State Defenders Association. www.nysda.org

The CCNY Anti-Drug League also came out in support of the Rockefeller Drug Laws shortly before their enactment.¹⁶⁹ The league worked with youths, primarily minorities, in Harlem and other poverty areas. It argued that the law would not be a scheme to persecute the poor, but a way to decrease the influence of drugs among youths. The league believed, however, that the laws should not distinguish between hard and soft drugs, but should punish both equally. Although the league worked with minorities and youths, it expressed no opposition to the tough youthful offender provisions of Rockefeller's proposal and brought no attention to the disparate sentences imposed on minority offenders.

Not surprisingly, polls showed that the public was also in favor of Rockefeller's proposed legislation. According to a nationwide Gallup poll 67% of Americans supported Rockefeller's proposal that all hard drug pushers receive a mandatory life sentence.¹⁷⁰ The numbers were similar for all categories of respondents, including among all racial groups, with 68% of whites approving and 28% of whites disapproving, and 59% of nonwhites approving and 36% of nonwhites disapproving. The poll-takers attributed the results to the widespread fear of crime and a desire for solutions among the American public.

Opposition to the Legislation

Clearly there was a basic consensus on the need for reforms in drug sentencing policy in the state of New York. There was quite a lot of disagreement, however, on what form the changes should take. One striking fact is the broad range of criticism toward Rockefeller's proposed legislation. Opposition to the strict laws came not only from defense attorneys and offender rights groups, but from prosecuting attorneys, judges, corrections officials, and others.

¹⁶⁹ Rockefeller Drug Laws Legislative History. New York State Defenders Association. www.nysda.org

¹⁷⁰ "Public Supports Drug-Pusher Law." New York Times. Feb. 11, 1973.

Still, however, those opposed to the proposed laws did not raise concern for the impact they could have on racial minorities.

While recognizing the problem of disparities in sentencing and the need for reform, many officials of the New York's criminal justice system called for legislation that would be markedly different from that proposed by Rockefeller. In calling for reform, officials cited problems and proposed solutions. In identifying problems within the sentencing system New York's Chief Judge suggested taking the job of sentencing away from judges entirely in favor of sentencing by jury. Many advocated a system in which defendants be sentenced only after a hearing at which the prosecuting attorney would be required to prove the benefit of sending the offender to prison.¹⁷¹ The United States Attorney in New York questioned why longer prison sentences were being proposed and suggested that there should be valid reasons for sending people to prison, which the current system did not encompass. The chief of the Legal Aid Society's criminal division warned that reducing judicial discretion would amount to a vote of no confidence in the state's judges.¹⁷²

Many officials in the criminal justice system, including New York State District Attorneys, the American Bar Association, and state prison officials, cited the failure of prisons to rehabilitate offenders and called for treatment rather than prison.¹⁷³ They argued that given the financial and social costs of the existing prison system, new policies were needed. The American Bar Association advocated for rehabilitation rather than prison, arguing that all but those convicted of the most violent crimes should be sentenced to no more than five years in

¹⁷¹ Kaufman, Michael T. "Experts Urge Hearings on Sentences Following Trials." *New York Times*. Oct. 6, 1972.

¹⁷² Oelsner, Leslie. "Sentencing Disarray: Officials Indict the System of Justice; Emphasize a Need for Basic Changes." *New York Times*. Oct. 2, 1972.

¹⁷³ Kaufman, Michael T. "Experts Urge Hearings on Sentences Following Trials." *New York Times*. Oct. 6, 1972.

prison.¹⁷⁴ City officials also criticized the proposed legislation, saying that it would be costly and that it was simplistic because it lumped teen-aged offenders with big time drug sellers.¹⁷⁵ Some charged that the legislation was an attempt to please the public with tough on crime legislation.

Some opposed the legislation because it would hamper the ability of lawyers to plea bargain and would increase case loads. Ninety percent of all convictions in the country are obtained by the defendant pleading guilty to receive a reduced sentence.¹⁷⁶ Many who opposed mandatory minimum sentencing guidelines argued that it would restrict plea bargaining and result in further strain on the caseloads of courts and prosecutors.¹⁷⁷ In particular, the New York State District Attorneys Association opposed the proposed legislation because eliminating plea bargaining in these cases would impede a prosecutor's effectiveness, causing many cases to proceed to trial where the likelihood of a conviction is less sure, whereas a plea bargain ensures a conviction.¹⁷⁸

Similarly, legislators, both Democrat and Republican, supported Rockefeller's proposed legislation, but many advocated for changes to the proposal. Legislators agreed that there should be increased penalties for drug sellers, but thought there should be different sentences for those who sold drugs for a profit and those who sold drugs to support a drug habit.¹⁷⁹ The state's

¹⁷⁴ Oelsner, Leslie. "Sentencing Disarray: Officials Indict the System of Justice; Emphasize a Need for Basic Changes." *New York Times*. Oct. 2, 1972.

¹⁷⁵ "Tough Drug Stand Urged by Both Parties at Albany." *New York Times*. Special to the *New York Times*. Jan 5, 1973.

¹⁷⁶ Zimroth, Peter L. "101,000 Defendants Were Convicted of Misdemeanors Last Year. 98,000 of Them Had Pled Guilty – To Get Reduced Sentences." *New York Times*. May 28, 1972.

¹⁷⁷ Oelsner, Leslie. "Sentencing Disarray: Officials Indict the System of Justice; Emphasize a Need for Basic Changes." *New York Times*. Oct. 2, 1972.

¹⁷⁸ Farrell, William E. "A Tough Program by Lindsay." *New York Times*. Feb. 18, 1973.

¹⁷⁹ "Tough Drug Stand Urged By Both Parties at Albany." *New York Times*. Special to the *New York Times*. Jan. 5, 1973.

Conservative Party argued against mandatory life sentences for all adult drug dealers, and instead proposed that life sentences be an available sentence rather than a mandatory one.¹⁸⁰ The Conservatives, however, recommended that the death penalty be an option for major importers and wholesalers of narcotics.

The Assembly Codes Committee, which was the committee of the New York State legislature charged with holding hearings on Rockefeller's proposed legislation, also criticized the Rockefeller Drug Laws and proposed its own alternative.¹⁸¹ The committee proposed changes that would include harsher penalties for traffickers in dangerous drugs, but would not eliminate plea bargaining as the Rockefeller Drug Laws would. The committee did propose restrictions on plea bargaining, which would prevent second offenders from pleading guilty to a misdemeanor. The committee's proposal also differed from Rockefeller's bill in that it would continue youthful offender treatment in which youths would be required to serve time in a reformatory.

The state's black caucus also advocated for a distinction between addict sellers and high volume drug dealers.¹⁸² Some members of the black caucus, however, supported the tough policies of Rockefeller's proposal. This presents an interesting dichotomy in the level of support versus the level of opposition to the harsh laws that existed in the black community. It appears that while some members of the black caucus supported the tough policies as a way to curb drug use and crime in the black community, others sought to vitiate the harsh sentences and thereby limit the effects that the policies might have in the black community. Distinguishing between addict sellers and high volume dealers would allow for lighter sentences for the vast majority of

¹⁸⁰ Cliness, Francis X. "Flexibility Urged in Narcotic Cases." *New York Times*. Feb. 6, 1973.

¹⁸¹ Farrell, William E. "Mandatory Sentence Proposed for 2d-Felony Drug Offenses." *New York Times*. Apr. 5, 1973.

¹⁸² Cliness, Francis X. "Flexibility Urged in Narcotic Cases." *New York Times*. Feb. 6, 1973.

drug offenders in the black community, while providing for harsh punishment for those who were responsible for higher level drug dealing. Thus, there existed a tension between those in the black community who came out in support of the policies and those who opposed the more harsh policies.

The chief counsel to the special state commission on drugs, whose members were appointed by Governor Rockefeller, also criticized Rockefeller's legislative proposal. The commission warned that that a distinction should be drawn between small time addict drug sellers and big time drug dealers.¹⁸³ It also criticized the broad range of drugs the legislation would cover, saying that it would not require tough penalties for certain drugs on Rockefeller's list. The commission also disapproved of Rockefeller's proposal for mandatory life sentences for offenders who commit violent crimes while under the influence of hard drugs, saying the provision might be unconstitutional if not applied to offenses involving alcohol as well.

The Committee on Youth and Correction submitted to the governor a legislative memorandum opposing the laws and recommending alternatives.¹⁸⁴ The committee's opposition was based on the fact that there lacked proof that severe penalties would deter crime or reduce criminal activity. The committee further criticized the legislation because the mandatory sentences failed to recognize the fact that many crimes vary in seriousness and likelihood of repetition, and thus the lack of judicial discretion could result in the frequent miscarriage of justice. The committee recommended that no amendments be made to the penal law until a full study could investigate why the current laws did not effectively reduce crime, suggesting that factors such as enforcement, lack of planning and resources, lack of appropriate treatment for

¹⁸³ Oelsner, Lesley. "State Drug Panel Scored Scope of Governor's Plan." New York Times. Jan. 11, 1973.

¹⁸⁴ Rockefeller Drug Laws Legislative History. New York State Defenders Association. www.nysda.org

incarcerated offenders, and a slow court process could be to blame. The committee also recommended that societal causes of crime should be taken into consideration.

Also notable was the fact that the Office of the Mayor of New York City, John Lindsay, in 1973 expressed opposition to the laws in a memorandum to Governor Rockefeller.¹⁸⁵ The mayor claimed that the new laws would hamper plea negotiations, harm the ability of law enforcement to apprehend drug sellers, discourage addicts from voluntarily entering treatment, and flood courts and prosecutors. Specifically, the fact that life sentences are mandated for many offenses meant that the incentive for informants to cooperate with law enforcement would be eliminated. Similarly, an addict facing life in prison would have no incentive to voluntarily enter treatment. The preferred course of action, according to the mayor, would be to implement a broad based strategy for dealing with drugs as a social problem. It was noted that New York had attempted a strategy of recruiting addicts into treatment and using law enforcement for arresting mid- and top-level dealers. In criticizing the laws the mayor pointed to the failure of federal mandatory minimum sentences in reducing drug crimes. In his memorandum the mayor suggested alternatives to the Rockefeller Drug Laws, including an expanded narcotics law enforcement unit, the installation of a narcotics prosecutor, procedural reform within the courts to speed up case adjudication, and lowering of the minimum narcotics weight requirements so that more cases would fall within already tough felony provisions.

Mayor Lindsay's criticism of the Rockefeller Drug Laws went beyond opposition to the basic policies contained therein. He also expressed doubt that the Rockefeller administration could handle the attendant impacts those policies would have. Specifically, Mayor Lindsay charged that the Rockefeller administration did not have a practical plan for implementation of

¹⁸⁵ Rockefeller Drug Laws Legislative History. New York State Defenders Association. www.nysda.org

the laws.¹⁸⁶ The mayor predicted chaos, as the governor would have to appoint 100 new judges to handle additional trials necessitated by the law. Although Governor Rockefeller promised to provide extra court facilities, judges, and staff, Mayor Lindsay, along with bar associations, prosecutors, and court officials, did not believe these practical measures would be in place in time for the first impacts of the legislation.

Some organizations opposed Rockefeller's legislation but did not put forth their own proposals. The Consumers Union criticized the legislation and its punitive approach, saying that punitive penalties do not work as a deterrent to crime. The Consumers Union suggested treatment for addicts rather than prison. The New York Civil Liberties Union also opposed the legislation, saying that it was inhumane and unconstitutional. The NYCLU suggested improvements to the whole criminal justice system as an alternative to the harsh legislation.¹⁸⁷ The Drug Abuse Council, a private nonprofit corporation in Washington, DC, also opposed the legislation, saying that punitive sentences would not solve the narcotics problem.¹⁸⁸ Many of these groups expressed particular concern regarding the fact that mandatory minimum sentences were also being passed for non-drug crimes along with the Rockefeller Drug Laws.¹⁸⁹ Mandatory minimum sentences for crimes including rape, armed robbery, and burglary were passed with little debate and little public knowledge as part of the Rockefeller Drug Laws.

Also opposing the general idea of mandatory sentences were President Johnson's Commission on Law Enforcement and Administration of Justice, the Advisory Council of Judges of the National Council on Crime and Delinquency, and the Federal Bureau of Prisons.

¹⁸⁶ Oelsner, Lesley. "Lindsay Scores Governor On Planning for Drug Law." *New York Times*. Jul. 18, 1973.

¹⁸⁷ Farrell, William E. "A Tough Program by Lindsay." *New York Times*. Feb. 18, 1973.

¹⁸⁸ Farrell, William E. "Legislators Seek a Compromise on Governor's Drug Penalties." *New York Times*. Feb 24, 1973.

¹⁸⁹ Farber, M.A. "Fixed-Term Laws Draw Opposition." *New York Times*. Sep. 24, 1973.

Mandatory minimum sentencing has also been opposed by The Model Penal Code promulgated by the American Law Institute and the Model Sentencing Act drafted by the Advisory Council on Crime and Delinquency, as well as the American Bar Association's Project on Standards for Criminal Justice.¹⁹⁰

The Aftermath: Consequences of the Rockefeller Drug Laws

The laws passed in 1973 would become some of the most punitive drug sentencing laws in the nation. The laws required a mandatory minimum sentence of fifteen years to life in prison for sale of one ounce or possession of two ounces of a controlled substance, six years to eight and one third years in prison for sale of one eighth of an ounce or possession of one to two ounces of a controlled substance, and one year to eight and one third years in prison for sale of less than one eighth of an ounce or possession of up to one ounce of a controlled substance. The Rockefeller drug laws were intended to deter drug use and sales and to punish those who violated drug laws. The belief was that rehabilitation of drug offenders had failed, and strict sentencing laws were the answer. The Rockefeller drug laws established mandatory minimum prison sentences for many offenses, including unlawful possession and sale of controlled substances. As a result, rates of drug arrest, indictment, and incarceration in New York skyrocketed over the life of the Rockefeller drug laws, particularly for racial minorities.

The impact of the Rockefeller Drug Laws drew scrutiny from many during the early years of its enactment. In an early test of the Rockefeller Drug Laws, a New York judge sentenced an offender to three to six years in prison after he plead guilty to charges of selling heroin to a police officer.¹⁹¹ Under the Rockefeller Drug Laws the offender should have been

¹⁹⁰ "Rockefeller Masquerade." New York Times. Apr. 17, 1973

¹⁹¹ "Drug Seller Gets Lighter Sentence." New York Times. Special to the New York Times. Sep. 21, 1974.

given life imprisonment. The judge imposing the sentence declared the drug law unconstitutional because it constituted cruel and unusual punishment. The District Attorney in the case considered the sentence illegal.

Criticism arose not only for the drug related penalties, but for other policies that were included in the drug law. New York's State Supreme Court found part of the law unconstitutional less than a year after it had been passed.¹⁹² The overruled provision of the law required a mandatory prison term for any second felony offender whose previous felony was committed in another state – even if the first offense was not a felony in New York. While the provision was aimed at punishing drug law violators, the Court found it was unconstitutional because it violated the Equal Protection clause of the 14th Amendment to the United States Constitution and its counterpart in the New York State Constitution, by treating offenders differently based on the state of origin of the prior conviction. In essence, the law treated offenders with a prior offense from another state, which was not a felony in New York, as a second time felony offender resulting in a harsher sentence, while an offender with the same prior conviction in New York would be treated as a first time felony offender, resulting in a lighter sentence.

Other New York courts, however, upheld the Rockefeller Drug Laws' constitutionality. A state appellate court held the law and its mandatory life sentences for the sale or possession of many drugs constitutional.¹⁹³ The court said the penalties were harsh in many cases and even unjust in some, but declared that any changes in the law should be made by the legislature, not

¹⁹² Chambers, Marcia. "Sentencing Law Ruled Improper." New York Times. Jul. 26, 1974.

¹⁹³ Breasted, Mary. "New State Drug Law Is Upheld by Court." New York Times. Nov. 19, 1974.

the courts. The state appeals court found that a mandatory life sentence for selling drugs was not cruel and unusual under the Constitution.¹⁹⁴

But as years passed under the Rockefeller Drug Laws courts and judges became critical of the laws. In 1977 a Federal judge declared unconstitutional sentences of up to life in prison for two women who were convicted under the laws.¹⁹⁵ Rather than ruling that life sentences could never be imposed under the state's drug sentencing laws, the Court held that the mandatory sentences imposed on the two women who were convicted of selling small amounts of cocaine and who had no prior drug convictions constituted cruel and unusual punishment. The New York Court of Appeals later reversed this ruling, and the United States Supreme Court declined to hear the women's appeal, both of which actions constituted a setback in the movement for reform. Notably, however, Justices Thurgood Marshall and Lewis Powell dissented, stating that the punishments imposed under the Rockefeller Laws were not proportionate to the crime.¹⁹⁶

Also expressing concern in the early years of the law's enactment were prosecuting attorneys in New York. New York City's special narcotics prosecutor indicated that impacts of enforcing the Rockefeller Drug Laws had strained the office's ability to handle its caseload.¹⁹⁷ The law's requirement that small time dealers be treated the same as big time dealers required prosecutors to spend a disproportionate amount of time on those less serious cases. Additionally, the mandatory sentences had hampered the prosecutor's ability to plea bargain, which lead to

¹⁹⁴ Goldstein, Tom. "Life Term Upheld in Narcotics Cases." *New York Times*. Jun. 19, 1975.

¹⁹⁵ Lubasch, Arnold H. "Court Voids 2 Life Terms Imposed Under New York State Drug Laws." *New York Times*. Aug. 6, 1977.

¹⁹⁶ Goldstein, Tom. "Drug 'Lifers' Dealt Blow by High Court, Pin Their Hopes on Albany." *New York Times*. Jan. 14, 1979.

¹⁹⁷ Goldstein, Tom. "Prosecutor Urges Lighter Sentences for Small-Scale Dealers of Narcotics." *New York Times*. Feb. 21, 1975.

more trials. The prosecuting attorneys therefore proposed changes to the law, which would include lighter sentences for less serious drug selling cases.

Similarly, the Manhattan District Attorney announced in 1974 that his office would give illegal sellers of methadone an opportunity to plead guilty to a much lower misdemeanor charge, rather than require them to face charges which would subject them to the mandatory life sentence required by the Rockefeller Drug Laws.¹⁹⁸ The District Attorney justified this policy by referring to a provision in the drug laws that gave prosecutors discretion to give humane and rational dispositions to reformed heroin addicts who had relapsed but should not be subject to the harsh sentencing requirements of the law. Although the Rockefeller laws restrict plea bargaining after indictment, there is leeway before a suspect is indicted.

Elected in 1974, Governor Hugh Carey, a Democrat, unseated Republican Malcolm Wilson who became governor for one year after Rockefeller resigned in a time of unpopularity for Republicans due to the resignation of President Richard Nixon. Rockefeller resigned in 1973, the year the Rockefeller Drug Laws were enacted, and in 1974, became Vice President under President Gerald Ford. Carey faced calls to amend the drug laws immediately upon taking office. Governor Carey's Law Enforcement Task Force advised him that there was an urgent need for amendment to the drug sentencing laws. The Task Force recommended that the law be amended so that life sentences would be imposed in only the most serious cases.¹⁹⁹ It also called for an increase in judicial discretion to allow judges to impose alternatives to the mandatory minimum sentences and for a change in the lifetime parole provisions. The Task Force also

¹⁹⁸ Farber, M.A. "Kuh Offers Lesser Charge In Small Methadone Sales." *New York Times*, Jun. 19, 1974.

¹⁹⁹ Goldstein, Tom. "Panel Told Carey in April Drug Law Urgently Needed Sentencing Changes." *New York Times*. Jun. 20, 1975.

recommended decriminalizing marijuana, a restoration of plea bargaining, and a change in the way that youthful offenders are treated under the law.

Governor Carey, in accordance with the Task Force's recommendation, issued a proposal to decriminalize the sale of small amounts of marijuana.²⁰⁰ This proposal however, was met with stringent opposition from Republican legislators, who claimed that the governor would give college campus drug dealers a license to sell marijuana and that the proposal would benefit dealers and organized crime. Governor Carey responded to Republicans by accusing them of politicizing the issue. His intent, he claimed, was simply to avoid imprisoning people who commit crimes without victims along with hardened criminals. Democrats, however continued to call for reduction of penalties for possession of small quantities of cocaine, to be applied retroactively to people sentenced under the Rockefeller Drug Laws.²⁰¹ Governor Carey also received many requests, some of which were granted, for clemency from convicted drug offenders, requests which historically had been granted only in cases of murder. This phenomenon would continue in 2000, when then Governor George Pataki granted clemency to four first-time nonviolent drug offenders who were serving mandatory sentences under the Rockefeller Drug Laws.²⁰²

The New York State Department of Corrections also expressed concerns about the impact of the Rockefeller Drug Laws. Just over a year after the law was passed, the Department of Corrections was just beginning to feel the impacts of the law, but feared that in the coming year the state's prison system would be strained beyond capacity by the record number of new

²⁰⁰ Peterson, Iver. "Anderson Scores Marijuana Plan: Opposes Carey's Proposal to Lift Criminal Penalties in Sale of Small Amounts." *New York Times*. Special to the *New York Times*. Feb. 10, 1976.

²⁰¹ Goldstein, Tom. "Drug 'Lifers' Dealt Blow by High Court, Pin Their Hopes on Albany." *New York Times*. Jan. 14, 1979.

²⁰² "Clemency and Unjust Drug Laws." *New York Times*. Jan. 31, 2000.

inmates.²⁰³ In the following years concern in the department of corrections grew. In 1976 the New York State Correction Commissioner argued that the mandatory minimum sentencing system was unfair and did not reduce crime.²⁰⁴ The Commissioner said that the laws had created overcrowded prisons, leaving his department with an inability to provide adequate programs and activities, which created tensions among the prisoners leading to riots and other confrontations.

The Impact on Minorities, The Incarceration Boom, and The Call For Reform

During these early years under the Rockefeller Drug Laws there were still only indirect references to the impact on racial minorities, and these references were rare. In 1975 a report titled *Anomalies in Drug Abuse Treatment, Interim Report of the Temporary State Commission to Evaluate the Drug Laws*, made a brief reference to racial minorities in treatment programs. In a case study involving an alcohol treatment halfway house, a reference was made to the fact that the center served “Blacks, whites, and Puerto Ricans, with a majority of Blacks” (p. 86). A doctor involved with the program noted that his patients were often discriminated against because they were poor and likely black. The report later returned to the familiar focus on youths and relayed in great detail the story of a twelve year old boy who died from a heroin overdose. This boy lived in Harlem, but there was no mention of his race. His father was from Surinam, but his mother’s race was not discussed. The failure to mention the boy’s race or ethnicity is remarkable, but the fact that he belonged to a racial minority group can be inferred from the fact that he lived in Harlem amidst poverty and drug addiction.

As the years under the Rockefeller Drug Laws went on, the prison population in New York continued to grow, creating an increasing need for reform. During these years, the concern

²⁰³ Goldstein, Tom. “Effect on Prisons.” *New York Times*. Special to the *New York Times*. Feb. 21, 1975.

²⁰⁴ Sheppard, Nathaniel Jr. “State Correction Chief Asks End To Indeterminate Terms in Prison.” *New York Times*. Dec. 14, 1976.

over the disparate impacts of the laws on racial minorities began to merit attention. By 1980 the Commissioner of Correctional Services reported that the state prison population would increase by 3,000 inmates between 1980 and 1987, and he argued for alternatives to prison for some offenders and education for prisoners.²⁰⁵ The increase in prison population was expected to increase prison costs by \$30 million in the following year, causing the department of corrections to ask for a \$340 million budget and \$262 million for construction. The Commissioner also reported that the percentage of black and Hispanic inmates rose to 72.5 percent from 66.5 percent from the time the Rockefeller Drug Laws were passed in 1973 to 1980.²⁰⁶

The growth in the state's prison population, which doubled in less than a decade, prompted officials to use unconventional spaces to house inmates. Spaces such as military bases, gymnasiums, mess halls, and psychiatric facilities were used to accommodate the inmates.²⁰⁷ Governor Carey proposed \$500 million in bonds to pay for new prisons and also offered to buy Rikers Island for use as a prison, but voters rejected the proposals. The state found itself in a quandary because voters did not want new prisons, but they also did not want the state to release offenders to make room for new inmates.²⁰⁸ Even while many advocated for alternatives to prison for nonviolent drug offenders, some such as the Manhattan District Attorney continued to claim that most inmates were violent or drug offenders and deserved to be incarcerated as a method for reducing crime.²⁰⁹ Similarly, Mayor Koch, in 1985, argued that New York should adopt tougher crime sentencing policies even if it meant taking money from the city's education

²⁰⁵ Kihss, Peter. "State Urges Alternatives as Prisons Fill." *New York Times*. Nov. 13, 1980.

²⁰⁶ Kihss, Peter. "State Urges Alternatives as Prisons Fill." *New York Times*. Nov. 13, 1980.

²⁰⁷ Oreskes, Michael. "Grim Outlook for Prisons, Experts Agree." *New York Times*. Jan. 16, 1983.

²⁰⁸ Oreskes, Michael. "Grim Outlook for Prisons, Experts Agree." *New York Times*. Jan. 16, 1983.

²⁰⁹ Oreskes, Michael. "Grim Outlook for Prisons, Experts Agree." *New York Times*. Jan. 16, 1983.

system to build more prisons.²¹⁰ Such divided opinions extended to a commission set up to draft a system of fixed sentences for New York's offenders. The commission was divided between judges who argued that they should have authority to set aside fixed sentences and the District Attorney who claimed that such authority would nullify mandatory minimum sentencing laws and would destroy public confidence in the system.²¹¹ The proposal for fixed sentences, which was under discussion by the state legislature and Governor Cuomo, a Democrat elected in 1982, would allow judges to select a sentence of fixed duration from a chart that provided for different sentences based on the nature of the offense and the offender's criminal history.²¹²

Complaints about overcrowded prisons continued over the years. In 1983 it was publicized that New York's prison population had increased by 130 percent over one year and that the cause was long sentences with no early release for black and Hispanic low income offenders.²¹³ Women, who are more likely to be involved in drug offenses and forgery or domestic violence, were also being incarcerated at a steadily growing rate. In 1986 New York's female prison population grew by 25.6 percent.²¹⁴ Concern about overcrowded prisons became so pronounced that courtroom decisions on who would and who would not be imprisoned were impacted.²¹⁵ In 1986 it was predicted that New York's prison population would reach 40,000, its largest ever, by the middle of 1987.²¹⁶ The cause for this increase was attributed to increased indictments and felony dispositions, as well as an increase in drug arrests. By the early 1990s, the new prisons New York had built to accommodate its growing prison population were filled

²¹⁰ Barbanel, Josh. "Koch Recommends Stiffer Penalties and More Prisons." *New York Times*. Feb. 15, 1985.

²¹¹ Barbanel, Josh. "Legislative Action on Fixed Sentences Threatened by Impasse in Study Panel." *New York Times*. Oct. 27, 1984.

²¹² Berger, Joseph. "New York Group Fights Mandated Prison Terms." *New York Times*. Jun. 16, 1985.

²¹³ Isaacs, Myron S. "One Way to End Prison Overcrowding." *New York Times*. Mar. 20, 1983.

²¹⁴ Applebome, Peter. "Women in U.S. Prisons: Fast-Rising Population." *New York Times*. Jun. 16, 1987.

²¹⁵ Johnson, Kirk. "Overcrowding of Jails in the City is Said to Affect Drug Sentencing." *New York Times*. Aug. 9, 1986.

²¹⁶ Johnson, Kirk. "Prison Report: State Takes a Look at Correction Policy." *New York Times*. Dec. 13, 1986.

beyond capacity.²¹⁷ At this point the state had plans to build more prisons, but had run out of funds to run the prisons. This increased the need to provide alternatives to prison. Despite the urgent need for reform, Governor Cuomo and the state legislature were able to agree only on budget cuts and sentencing changes, including new eligibility requirements for drug treatment and increasing judicial discretion, which would ease New York's financial strain, but would leave the prisons crowded beyond capacity.²¹⁸ Officials did, however, agree not to expand the prison system further, but to expand drug treatment programs and to place inmates in underused areas of existing prisons.²¹⁹

Many official organizations also criticized the laws and the lack of their intended impact. The Office of Drug Abuse Control found that the Rockefeller Drug Laws had little effect on marijuana offenses.²²⁰ The Drug Law Evaluation Project, which conducted a study under the Justice Department's Law Enforcement Assistance Administration, found that in the two years after the Rockefeller Drug Laws went into effect there were fewer dispositions, convictions, and prison sentences for drug offenses than there were in 1973 under the old drug laws.²²¹ The report concluded that none of the indicators of successful implementation of the law had been met, as there had been no increased risk of punishment, no increase in the number of drug offenders sentenced to prison, and cases were not processed at an increased speed. The New York Times further found that those offenders who were sentenced to the harshest sentences were more likely

²¹⁷ Lyall, Sarah. "Without the Money to Supply Prison Beds, Officials Consider Reducing Demand." New York Times. Special to the New York Times. Feb. 17, 1992.

²¹⁸ Lyall, Sarah. "Albany Plan Would Ease Prisoner Rise." New York Times. Special to the New York Times. Mar. 13, 1992.

²¹⁹ Lyall, Sarah. "Prison Burdens Go Unresolved in Budget Pact." New York Times. Special to the New York Times. Mar. 28, 1993.

²²⁰ Peterson, Iver. "Anderson Scores Marijuana Plan: Opposes Carey's Proposal to Lift Criminal Penalties in Sale of Small Amounts." New York Times. Special to the New York Times. Feb. 10, 1976.

²²¹ "U.S. Study Backs Critics of New York's Drug Law." New York Times. Special to the New York Times. Sep. 5, 1976.

to be low level dealers, rather than the major traffickers the law was intended to target. This was all despite the fact that approximately \$55 million had been spent on resources intended to help implement the laws.

By 2000 the calls for reform from various organizations were growing. Criminal justice experts, judges, and prisoners' rights groups were joined in these demands by General Barry McCaffrey, the head of the White House drug control policy office, New York's Roman Catholic bishops, and lawmakers such as former State Senator John Dunne who originally supported the laws but had changed their minds.²²² Even Douglas Barclay, who was the Senate sponsor of the Rockefeller Drug Laws, claimed that the laws were passed in response to pressure to do something about narcotics, but that he had come to support reform because the laws had not achieved their goals.²²³ Republicans in the state legislature, such as State Senate Majority Leader Joseph Bruno, had also begun to speak of the need to revise the drug sentencing laws and restore judicial discretion. Similarly, most candidates for the state legislature in 2000 indicated that they favored amendments to the Rockefeller Drug Laws.²²⁴ In an interesting twist, Clay Rockefeller wrote a letter to the editor of the New York Times on behalf of Governor Rockefeller's descendants urging the end of mandatory sentences, stating that Governor Rockefeller himself would support the reforms were he alive today.²²⁵

The New York State Senate Select Committee on Crime along with many district attorneys and law enforcement officials claimed that the mandatory minimum sentences created a demand for trials and made the courts more reluctant to convict offenders who would face

²²² "New York's Harmful Drug Laws." New York Times. May 12, 2000.

²²³ "Drug Laws That Misfired." New York Times. Jun. 5, 2000.

²²⁴ Mansnerus, Laura. "State Legislative Candidates Strongly Support Reform of Court System, Survey Finds." New York Times. Oct. 31, 2000.

²²⁵ Rockefeller, Clay. "Fix the Rockefeller Drug Laws, Rockefeller's Say." New York Times. Jun. 4, 2005.

these penalties.²²⁶ In 1993 the American Bar Association released a report finding that the criminal justice system was at risk of collapse due to its overemphasis on drug offenders at the expense of paying attention to violent crime.²²⁷

While most politicians avoided using race related rhetoric, many organizations emphasized the racist outcomes of the laws in calling for reform. In 2000, Human Rights Watch released a report stating that nearly twice as many black men and women are imprisoned for drug offenses than are whites, despite findings that there are five times as many white drug users as black users.²²⁸ Organizations also began to draw attention to the discriminatory sentencing impact of the distinction between powdered cocaine and crack cocaine, which resulted in racially disparate sentences. The United States Sentencing Commission on numerous occasions urged Congress to reduce the sentences for possession of crack cocaine to bring them closer to sentences for possession of powder cocaine.²²⁹ The United States Supreme Court also began to weigh in on how the judiciary should respond to the disparity in sentences for crack cocaine and powder cocaine.²³⁰ In 2007, new federal sentencing guidelines imposed shorter prison sentences for crack cocaine offenders.²³¹ Shortly after, Democratic Senator Joseph Biden proposed a bill that would eliminate the 100 to 1 disparity, which mandates a ten year sentence for offenders caught with 50 grams of crack or for an offender caught with 5,000 grams of powdered cocaine. The bill would eliminate mandatory minimum sentences for first time offenders and create new treatment programs.²³²

²²⁶ U.S. Study Backs Critics of New York's Drug Law." New York Times. Special to the New York Times. Sep. 5, 1976.

²²⁷ "Bar Group Sees Overemphasis on Drug Cases." New York Times. Feb. 14, 1993.

²²⁸ Holmes, Steven A. "Race Analysis Cites Disparity in Sentencing For Narcotics." New York Times. Jun. 8, 2000.

²²⁹ "Bringing Fairness to Drug Sentencing." New York Times. Jun. 2, 2005.

²³⁰ Green house, Linda. "Court to Weigh Disparities in Cocaine Laws." New York Times. Jun. 12, 2007.

²³¹ Moore, Solomon. "Rules Lower Prison Terms In Sentences for Crack." New York Times. Nov. 2, 2007.

²³² "100-to-1 Rule." New York Times. Nov. 15, 2007.

Changes in drug sentencing policy in the rest of the nation also impacted the move for reform in New York. In the decade and a half after 1970, America's prison population more than doubled, while the crime rate fell.²³³ By 1992 The Sentencing Project reported that the United States, which imprisons more of its population than any other nation, had widened the gap over the second ranking country, South Africa, and would increase its prison population by another 30 percent by 1995.²³⁴ Many states began to consider alternatives to prison sentences for some offenders.²³⁵ In the South prison officials recommended reform to relieve prison overcrowding.²³⁶ In Florida severe overcrowding in the state's prisons prompted officials to consider releasing offenders.²³⁷ In 1993 Florida became one of the first states to reverse their mandatory minimum sentencing policy when their prison overcrowding and prison costs became unbearable.²³⁸

The federal government, however, continued to legislate tougher penalties for drug offenders. In a reported attempt to reduce disparities in sentences for federal offenders, the United States Sentencing Commission, appointed by President Reagan, recommended tougher treatment for drug dealers.²³⁹ In 1988 United States Attorney General Edwin Meese proposed drug testing for every person who was arrested in the nation's cities.²⁴⁰ Democrats at the federal level also sought to remain tough on crime in an attempt to blunt Republicans' historical

²³³ Applebome, Peter. "With Inmates at Record High, Sentence Policy is Reassessed." *New York Times*. Apr. 25, 1988.

²³⁴ Butterfield, Fox. "U.S. Expands Its Lead in the Rate of Imprisonment." *New York Times*. Feb. 11, 1992.

²³⁵ Asimov, Eric. "Again, States Turning to Alternatives To Costly and Overcrowded Prisons." *New York Times*. May 23, 1988.

²³⁶ King, Wayne. "Prison Officials Call For Reform." *New York Times*. Jan. 25, 1976.

²³⁷ "Prisons Overcrowded, Florida May Have to Begin Freeing Convicts." *New York Times*. Special to the *New York Times*. Feb. 2, 1987.

²³⁸ "With Prison Costs Rising, Florida Ends Many Mandatory Sentences." *New York Times*. *New York Times Regional Newspapers*. May 29, 1993.

²³⁹ "Federal Panel Issues Plan for Revamping Sentencing Practices." *New York Times*. Sep. 30, 1986.

²⁴⁰ "Meese Is Seeking to Require Drug Testing in All Arrests." *New York Times*. Apr. 27, 1988

advantage in being the party to lead tough crime policy.²⁴¹ In 2005, although the United States Supreme Court had ruled that federal sentencing guidelines for imposing mandatory minimum sentences were merely advisory, Congress instituted a plan to enact new mandatory minimum sentencing laws which would, among other things, impose much harsher mandatory minimum sentences for federal drug offenses.²⁴²

Judges, both federal and state, began to express deep concern over the harsh drug sentencing policies and their impacts. Judges who imposed mandatory sentences under the Rockefeller Drug laws felt compelled to apologize to offenders for imposing unfair, but mandatory, sentences.²⁴³ In 1990 a federal district judge resigned because he could not in good conscience continue to impose sentences under the Federal sentencing guidelines which he believed to be too harsh.²⁴⁴ In Minnesota a judge ruled that an anti-crack law was unconstitutional because it discriminated against blacks.²⁴⁵ In New York, two prominent federal judges refused to hear drug cases as a form of protest against the sentencing guidelines.²⁴⁶ Such support for reform by federal judges led United States Attorney General Janet Reno to take steps toward reversing tough sentencing policies for minor drug offenses.²⁴⁷

All of these factors raised the need for officials to consider alternatives to incarceration for some offenders. Prison overcrowding caused in large part by drug cases gave rise to debate over what punishments are appropriate. Governor Cuomo's administration, which added space

²⁴¹ Dionne Jr., E.J. "Fearing Republic Edge, Democrats Set Initiative on Crime." *New York Times*. May 29, 1989.

²⁴² Kirkpatrick, David D. "Congress Rekindles Battle On Mandatory Sentences." *New York Times*. May 11, 2005.

²⁴³ Purdy, Matthew. "For Judges, Drug Laws Can Mean Having to Say You're Sorry." *New York Times*. May 21, 2000.

²⁴⁴ "Criticizing Sentencing Rules, U.S. Judge Resigns." *New York Times*. Special to the *New York Times*. Sep. 30, 1990.

²⁴⁵ London, Ross. "Judge's Overruling of Crack Law Brings Turmoil." *New York Times*. Jan. 11, 1991.

²⁴⁶ Treaster, Joseph B. "2 Judges Decline Drug Cases, Protesting Sentencing Rules." *New York Times*. Apr. 17, 1993.

²⁴⁷ Labaton, Stephen. "Reno to Reverse Stiff Sentencing Rule for Minor Drug Crimes." *New York Times*. Special to the *New York Times*. May 5, 1993.

to prisons in its early years, lead the drive to consider alternative solutions to prison, such as revamping the parole and probation systems.²⁴⁸ The director of the Correctional Association of New York, a nonprofit group, claimed that Governor Cuomo would face accusations of not being tough on crime because he tried increasing prison space, and was now looking for alternatives. New York's Criminal Justice coordinator argued that successfully implementing alternatives to prison would require appeasing a public that wanted punishment for criminals.²⁴⁹ He said that alternatives to prison would have to make legal and policy sense, but would also have to appear to constitute a punishment that the public would accept. Also advocating alternatives to prison was a Democratic state legislator, backed by the Democratic Assembly Speaker, and groups such as Citizens Crime Commission and the New York Correctional Association.²⁵⁰ In 1989 New York's mayoral candidates all focused on crime policy and drug sentencing policy in particular.²⁵¹ In 2007 Governor Eliot Spitzer continued the trend toward reform when he appointed a commission to study the state's sentencing practices.²⁵²

Finally, in 2009, just before the Rockefeller Drug Laws were repealed, a report highlighted the racial disparities in sentencing under the laws and drew attention to the need for reform on this basis. Although the discussion of racial disparities occupied just four pages of a 255 page report, it is notable that this issue was raised as a cause for reform. The mention in this report of race as a cause for reform is remarkable, because it is the only instance in which race, and the disparate impacts of the drug laws on racial minorities, was explicitly cited in the push for reform of the Rockefeller Drug Laws. This highlights the fact that although race was not

²⁴⁸ Johnson, Kirk. "Debate is Sharpening Over Alternatives to Prison." *New York Times*. Mar. 13, 1987.

²⁴⁹ Johnson, Kirk. "Debate is Sharpening Over Alternatives to Prison." *New York Times*. Mar. 13, 1987.

²⁵⁰ Bohlen, Celestine. "Early Parole Is Proposed in Drug Plan." *New York Times*. Dec. 30, 1988.

²⁵¹ Roberts, Sam. "Crime Is the Crucial Issue for New York's Mayoral Rivals." *New York Times*. Aug. 30, 1989.

²⁵² "Rational Sentencing." *New York Times*. Oct. 25, 2007.

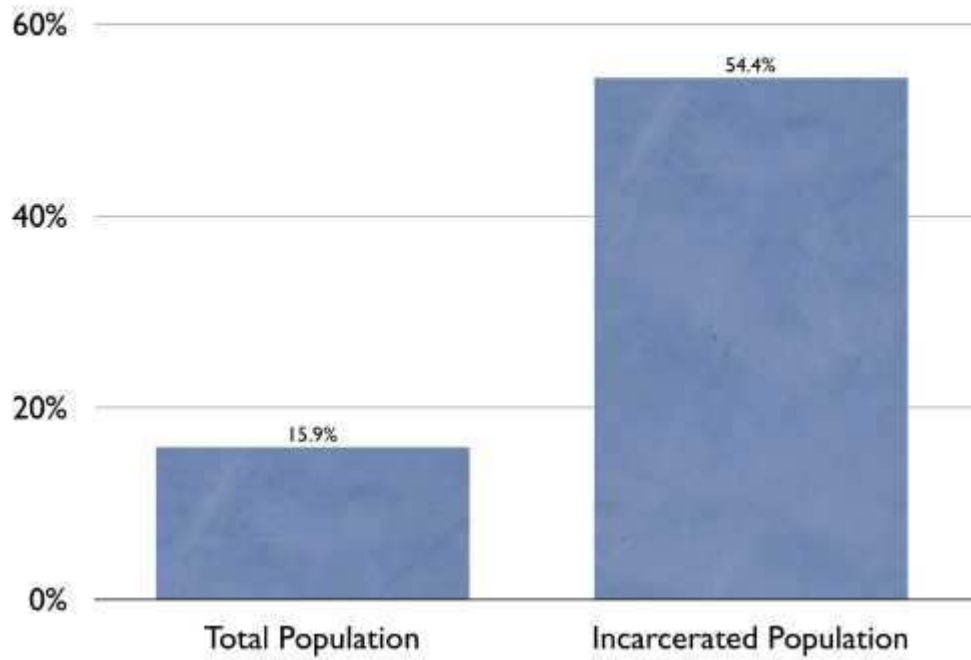
explicitly mentioned in the debates over the drug laws and their reform, it was an underlying and ever present issue that drove the need for reform.

In the report, titled *The Future of Sentencing in New York State: Recommendations for Reform*, the New York State Commission on Sentencing Reform cited incarceration statistics on racial disparities in New York's prisons. For example, in 2003 blacks constituted 13% of the total United States population, but made up 53% of drug offenders in state prisons. In New York, from 2003 to 2007, 10% of drug admissions to prison were white, 55% were black, and 34% were Latino. In 2008, blacks and Latinos made up 32% of New York's population aged 16 years or older, but comprised 90% of all drug offenders in New York prisons that year.

The following charts illustrate the disparities in incarceration rates for black and Latino offenders in relation to white offenders.

Figure 2

Blacks are overrepresented in New York's prisons and jails

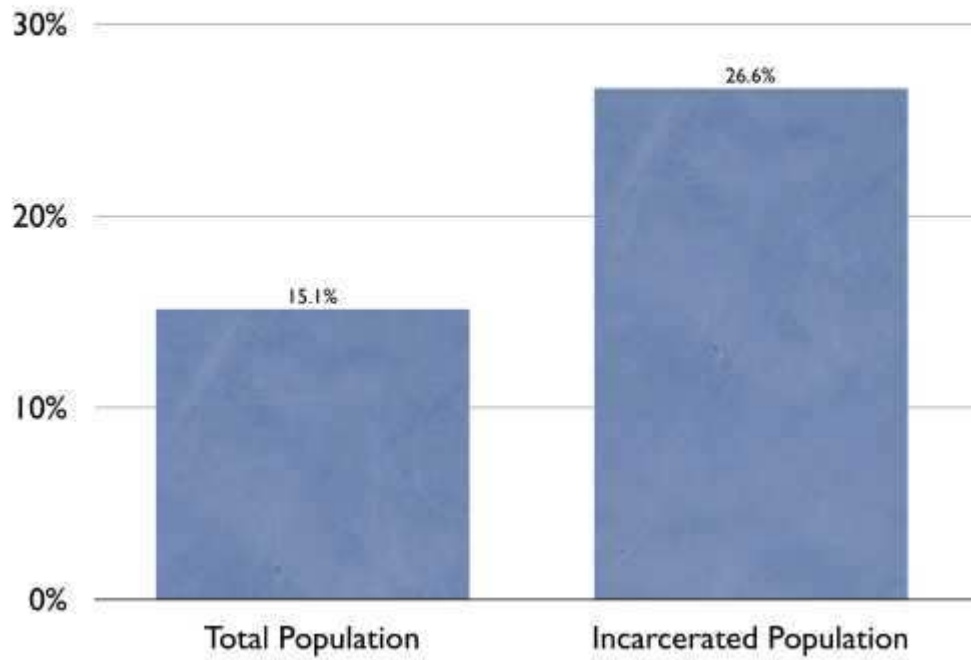


Source: U.S. Census 2000

Prison Policy Initiative

Figure 3

Latinos are overrepresented in New York's prisons and jails

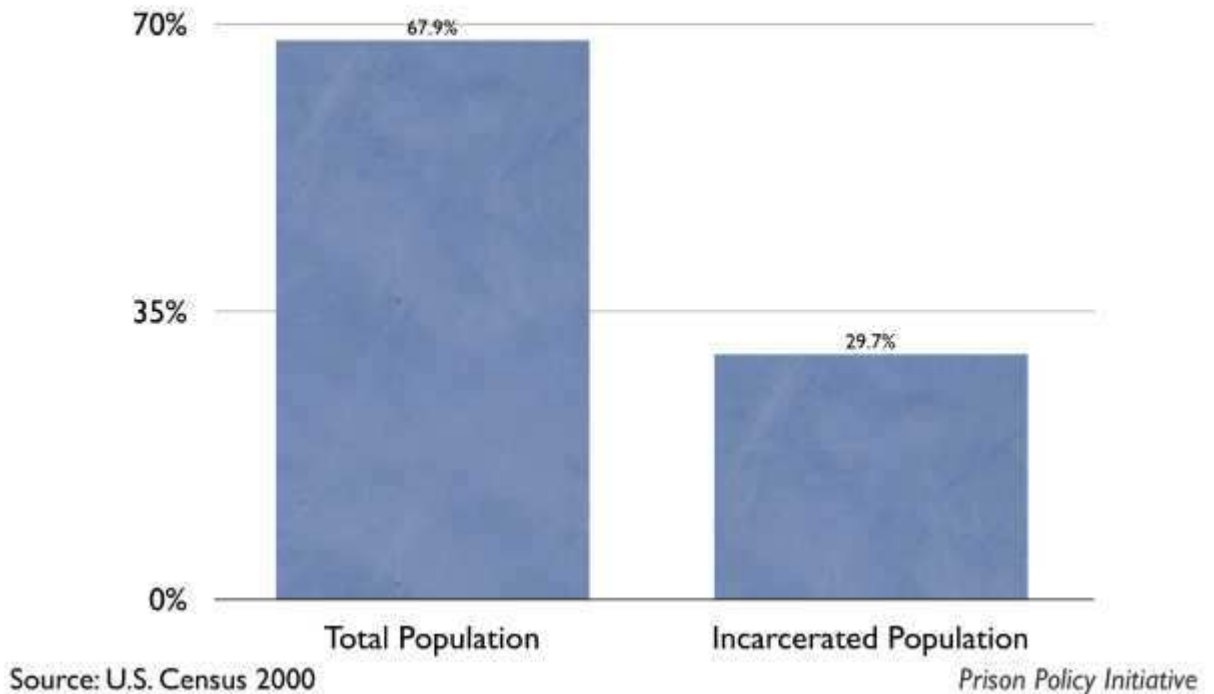


Source: U.S. Census 2000

Prison Policy Initiative

Figure 4

Whites are underrepresented in New York's prisons and jails



The report also indicates that the commission held hearings and meetings at which it took testimony from drug law reform advocates, criminal justice professionals, and sentencing experts, all of whom testified to the need to reduce racial disparities in the criminal justice system in general, and particularly in drug cases. Interestingly, however, the commission did not argue that these racial disparities were unjust or unfair to those groups. It argued instead that the disparities might lead to public mistrust of the criminal justice system and interfere with the state's ability to promote public safety. The goal of reducing disparity therefore, would be to restore credibility to the system. The commission emphasized that the disparities might not be

due solely to the impact of the Rockefeller Drug Laws, but that they may be attributable to other decisions made at the myriad opportunities for officials to exercise discretion throughout the criminal justice process. It is possible that these arguments which discuss racial disparities as a threat to the credibility of the criminal justice system, rather than an injustice to minorities, are implicit racial messages, intended to argue that racial minorities will continue to experience disparate impacts in sentencing outcomes regardless of any reforms to the Rockefeller Drug Laws.

Reform: Amendments to and Eventual Repeal of the Rockefeller Drug Laws

After only three years under the strict laws, in 1976 the state legislature relaxed some of the plea bargaining restrictions under the law²⁵³, and in 1977 the Committee on New York Drug Law Evaluations issued a report that criticized the laws after finding that drug use and related crime was as widespread as it was prior to the enactment of the laws. This was despite the fact that the state had spent nearly \$76 million and had appointed 49 additional judges to implement the laws. In 1979 the New York State legislature and Governor Carey agreed to eliminate some mandatory prison sentences for sale and possession of small amounts of narcotics.²⁵⁴ These changes, however, were not enough for Democrats in the state legislature. The Democratic Senate minority leader claimed that Democrats were not consulted in the negotiations leading up to this agreement and that Democrats would push for broader changes than the ones to which Republicans and the governor had agreed.²⁵⁵ Again in 1988 the laws were amended to increase the amount of drugs needed to reach the mandatory sentence of 15 years to life in prison and to

²⁵³ Goldstein, Tom. "Stiff New York Law On Drugs Is Termed Ineffective by Study." *New York Times*. Jun. 22, 1977.

²⁵⁴ Meislin, Richard J. "Albany Acts to Cut Mandatory Terms in Narcotics Cases." *New York Times*. Special to the *New York Times*. May 8, 1979.

²⁵⁵ Goldman, Ari L. "Albany Accord on Drug-Law Changes." *New York Times*. Special to the *New York Times*. May 23, 1979.

lower the threshold for cocaine possession to allow the arrest of people possessing small amounts of the drug, due to concern over crack cocaine.²⁵⁶ In 2000 Chief Judge Judith S. Kaye ordered courts to phase in a program which would require that nearly all nonviolent drug-addicted offenders be offered treatment instead of jail time, although this program would not apply to nonviolent offenders convicted under the Rockefeller Drug Laws.²⁵⁷

Despite these minor amendments to the laws, the consequences of their enforcement were severe. From 1980-1992 New York's prison population tripled from 20,000 to nearly 62,000. The percentage of offenders incarcerated for drug offenses increased from 9% in 1980 to 32.3% in 1997. The cost of the rising prison population has been approximately \$4 billion, and the prison system remains severely overcrowded.²⁵⁸ Racial minorities and women offenders have borne the brunt of the Rockefeller drug laws' consequences. While blacks and Latinos comprise about 23% of New York's population, they comprise 91% of those incarcerated for drug offenses.²⁵⁹ This is despite research that shows that drug selling and use are approximately equal between races proportionately to their percentage of the overall population. The following chart illustrates the rates of drug use by race compared to rates of incarceration by race. Although it represents national data as opposed to data specific to New York, it is representative of disparity between white and black drug offenders.

²⁵⁶ Wilson, Rockefeller Drug Laws Information Sheet

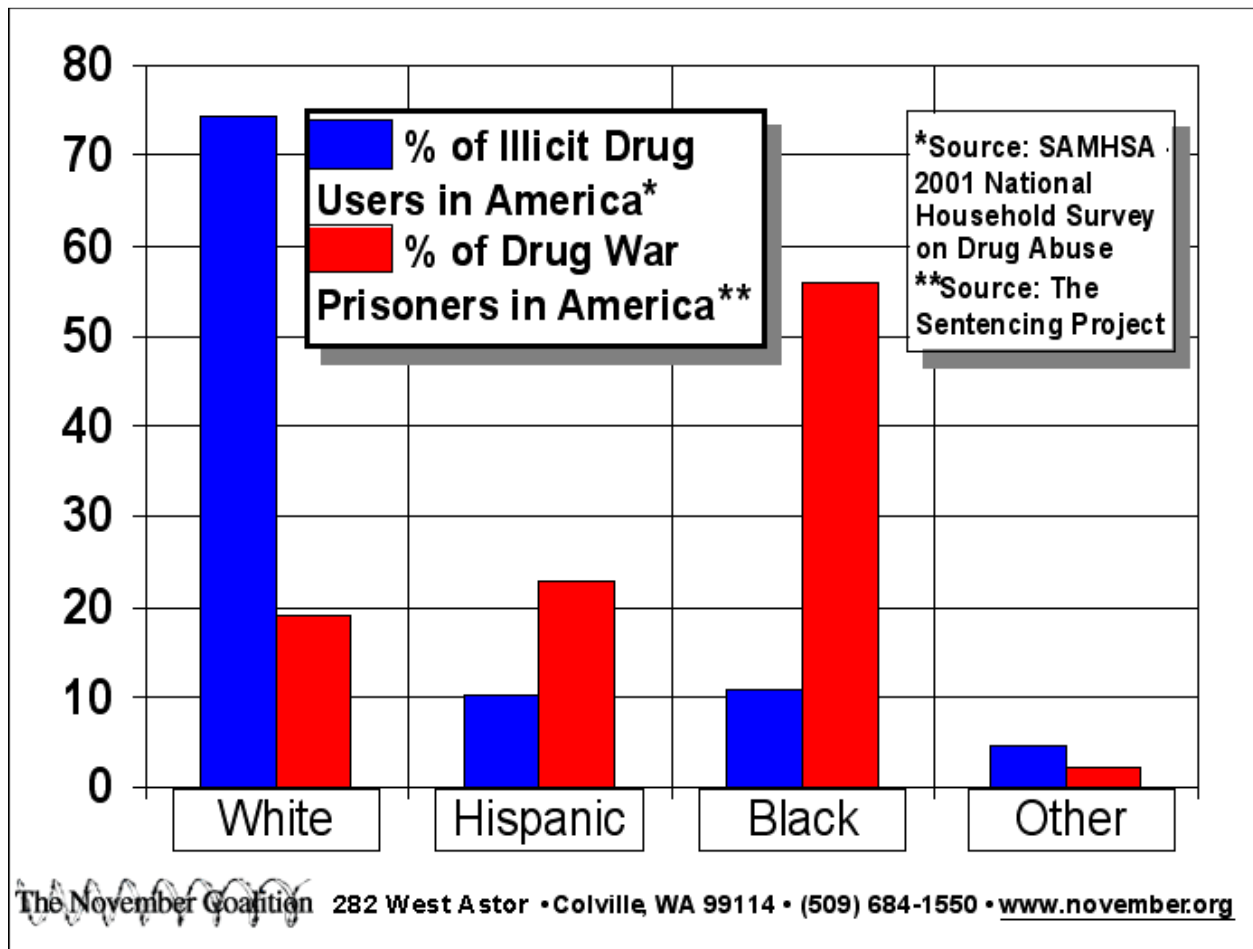
²⁵⁷ Finkelstein, Katherine E. "New York To Offer Most Addicts Treatment Instead of Jail Terms." New York Times. Jun. 23, 2000.

²⁵⁸ Wilson, Rockefeller Drug Laws Information Sheet

²⁵⁹ Drug Policy Alliance Network

Figure 5

Disparity Between Black and White Drug Offenders



Source: The November Coalition

The New York legislature, however, soon began to chip away at the mandatory minimum policies until it ultimately gutted the Rockefeller drug laws in 2009. In 2004 the New York state legislature passed limited amendments to the laws. These reforms were intended to amend the sentencing structure for drug offenses and reduce prison terms for nonviolent drug offenders. The legislation provided variation in sentencing structure according to the offender category.

Some significant reductions in sentences were included in the legislation. For example, first time Class A-I felony offenders saw a reduction in prison sentences from an indeterminate sentence of 15 years to life, to a determinate sentence of 8 years. Indeterminate sentences with life maximums for Class A-I and Class A-II offenders were replaced with determinate terms. Post release supervision periods became shorter for most offenders, although sentences for drug offenders with prior violent felonies increased modestly.

The 2004 legislation also expanded treatment options for many offenders. Offenders would be eligible for the Comprehensive Alcohol and Substance Abuse Treatment Program (CASAT) and early release six months earlier than under the previous legislation. Under the previous law only the Department of Correctional Services could decide whether to place inmates in CASAT. Under the new law judges were given discretion to order inmates into the treatment program. While the weight thresholds for some drugs would not change, for Class A-I and II heroin and cocaine the thresholds would double. The legislation also provided retroactive benefits to offenders already serving time for drug offenses. Offenders serving Class A-I sentences of 15 years to life were eligible to apply for conversion to determinate sentences and a denial of such application could be appealed. Additionally, merit time of one third, rather than the previous one sixth, could be earned, and parole would be terminated after two years.

The stated justifications for the reforms of 2004 were unduly harsh sentences for nonviolent offenders, warehousing of prisoners, and cost. No mention was made of the racial injustices in the disparities in numbers of incarcerated minorities. A letter signed by a number of individuals representing various organizations was sent to the legislature in support of the reforms. The letter generally applauds the reforms, and urges more reforms that focus on treatment and a medical emphasis on the problem of drug addiction. One sentence in the letter is

devoted to the fact that poor and minority communities are the largest population impacted by the Rockefeller Drug Laws. This one sentence speaks volumes in that it draws attention, however sparingly, to the fact that racial minorities have borne the brunt of the Rockefeller Drug Laws.

Finally, on April 2, 2009, the legislature passed comprehensive reforms, gutting the Rockefeller drug laws. These new laws eliminated mandatory minimum sentences and restored judicial discretion, giving judges authority to order treatment instead of jail.²⁶⁰ There is still controversy in the face of these reformed laws, and advocates for reform are calling for still further reforms. Opponents of reform, however, continue to warn of potential consequences of more lenient sentencing laws.²⁶¹ In particular, Republicans plan to make the amended laws an issue in future legislative elections, alleging that criminals who sold drugs to children or operated meth labs will be released and that programs under the new laws will cost the state \$50 million. It thus appears that this state, which has swung dramatically from having some of the strictest drug sentencing policies in the nation to a full repeal of those laws, may remain in flux due to continuing controversy over those laws.

The 2009 legislation amending the Rockefeller Drug Laws was passed as part of a budget bill, and was intended to amend state finance in relation to the use of funds in the criminal justice improvement account.²⁶² The bill overall enacts legislation that is necessary to implement the state fiscal plan for the 2009-2010 year.

²⁶⁰ www.nyclu.org/rockefellerreform

²⁶¹ www.qgazette.com

²⁶² Governor's Bill Jacket, 2009, Chapter 56

On December 8, 2009 a hearing was held to assess the impact of the 2009 reforms to the Rockefeller Drug Laws. Although it was too early at this time to accurately assess the complete scope of the impact of the reforms, the intent of the hearing was to evaluate the implementation of the reforms by the courts and community based programs. The hearing was attended by legislators and other government officials, and testimony was taken from judges, corrections officials, and representatives from community based programs, including those advocating for the defense bar, former inmates, alternatives to incarceration, and organizations that address women's issues. Notably absent was any organization or representative advocating for racial minorities. In fact, there was virtually no mention during this hearing of the impacts of the 2009 amendments on racial minorities, or whether there had been any effort to benefit these populations, as there had been for women.

Judge Kluger, Chief of Policy and Planning for New York State's Unified Court System testified to the use of federal stimulus funds from the American Recovery and Reinvestment Act to provide court resources for implementation of the reforms. She spoke of the new emphasis on drug addiction and the need to help offenders overcome it. She made no mention of racial disparities in sentencing outcomes or prison overcrowding.

Secretary O'Donnell emphasized the focus on treatment and rehabilitation rather than incarceration, but stressed that this must not compromise public safety. He recognized that fewer prison sentences have resulted in increased stress on local jails and probation departments. He provided some preliminary data on the impact of the reforms, which are based primarily on resentencing of some offenders and diversion to treatment of other offenders. None of the data include statistics on the impact of the reforms on the racial composition of New York's prison population.

The testimony of Commissioner Carpenter-Palumbo covers diversion programs and re-entry issues, in addition to a program in 23 prisons which trains inmates to become drug counselors and is available to women prisoners as well as men. His testimony also points out that the number of drug offenders in New York prisons has gone down 12% since the law was passed. He indicated that success of the reforms would be defined as offenders completing treatment programs and a reduction in recidivism rates of more than 30%.

Representatives of several organizations, such as defense advocates, the Legal Action Center, The Fortune Society (which works with former inmates), Serendipity 2 and Crossroads (both serving women drug and alcohol addicts), gave testimony regarding breaking down barriers to re-entry, the importance of the human story of each offender, and the impact on women of the reforms. The discussion of the impact of the reforms on women is fairly lengthy and serves to recognize that the paths into addiction are different for women than for men. Women face issues such as abuse and caring for children, which don't affect men in the same way. The testimony emphasizes that women are the smallest correctional population and that they do not want to increase their number. Testimony from representatives of Greenhope and the Women in Prison Project discussed additional and more specific women's issues, including the fact that there are not as many vocational training programs for women in prison as for men, and provided statistics on women and issues upon re-entry. The discussion of the impact of the reforms on women prisoners concludes with the information that the state legislature passed a bill requiring equal treatment of women in prison, but the governor vetoed it.

Throughout this entire hearing on the implementation of the reforms of 2009 there is only one reference to race or ethnicity in prison populations. In discussing the program which trains inmates to become drug counselors it is mentioned that the former inmates who do become drug

counselors represent the inmate population in terms of racial, ethnic, and cultural composition. It is further noted that “cultural competency” in prison is not part of the counselor training program, but that it should be. This is the sole mention of race in the hearing. There is no assessment of the impact of implementation of the 2009 reforms on the numbers of racial minorities in prison or in treatment. There is no discussion of specific issues faced by racial minorities in prison, in treatment, or upon re-entry after release from prison. There were no representatives or advocates to raise such issues on behalf of racial minorities in attendance at the hearing, and none of those who were in attendance raised such issues.

Conclusion

New York presents an important case study in the politics of sentencing in the course of the War on Drugs. The trajectory of its sentencing policies from the escalation of the War on Drugs through its de-escalation illustrates the complex interplay of factors that influence punishment policies at the state level. During the escalation of New York’s War on Drugs sentencing policies, the state followed the lead of the federal government. State politicians capitalized on and contributed to the public’s fear of drug use and crime. Implicit race-related messages were employed to fuel the fear of drugs and crime and to garner support for the harsh penalties of the War on Drugs.

Later, during the de-escalation of the War on Drugs in New York, there was a near abandonment of any mention of race in the move to amend the strict sentencing policies. However, although politicians almost never mentioned race as a motivation in amending the policies, it is clear that race was an underlying issue. The disparate impacts experienced by minorities, and blacks in particular, were so pronounced that it was impossible to ignore race in

the move toward de-escalation. It was virtually unnecessary to mention race as an issue because the racial injustices that resulted from the harsh sentencing policies were inescapable as a motivating factor in reform. It is remarkable, however, that this looming issue was so important, yet garnered so little explicit mention.

The case of New York is interesting and important because it does not fall into line with the literature on race and criminal justice policy. The literature theorizes that criminal law is used to control or vitiate a perceived threat posed by minority communities. While this does seem to play out at the beginning of the War on Drugs, the de-escalation tells a different story. In New York, at the beginning of the War on Drugs attention was drawn to drug use and crime in minority, particularly black, communities. The passage of the Rockefeller Drug Laws could certainly be seen as an attempt to incarcerate and thereby control these communities. This is true despite the fact that some prominent black figures supported the laws at their inception. After years under the Rockefeller Drug Laws it would appear that this attempt to control the minorities of New York had been successful. Minorities, blacks in particular, were incarcerated at higher rates than ever before. Contrary to theory in the literature, however, this is when calls for reform were made.

At this point, it is clear that the disparate impact of incarceration for blacks was one of the most striking consequences of the Rockefeller Drug Laws. The number of blacks that were incarcerated under the Rockefeller Drugs Laws makes it clear that race was an issue with these policies. The outcome for blacks under the laws did not have to be explicitly raised because it had become so inherent to the laws and their implementation. This unjust treatment of black offenders was only implicitly mentioned, while the primary discourse of reform focused on the state budget.

Ultimately what we see in New York is the use of implicit racial language as discussed by Mendelburg. People raised issues that can be seen as implicitly referring to blacks and other minorities, but they did not explicitly reference the disparate and unjust impacts these communities had experienced. A fear of crime and the racial undertone of that fear led to the passage of the Rockefeller Drug Laws. The consequences for racial minorities also led to the reforms. Why wasn't this explicit? It could be because politicians and the public care more about the budget than injustices for minorities. But the more likely reason is that it is simply too difficult to raise the issue, particularly for politicians. While the issue of race was underlying the effort for reform, it was too difficult to use racially transparent language. Doing so would draw attention to the racist impacts of laws passed by those calling for reform, and to the unfair treatment of minorities in the criminal justice system in general. As a result, the issue was raised only through implicit language, when raised at all, although everyone knew it was a catalyst for reform.

The lack of mention of race in the move toward the de-escalation of New York's War on Drugs is distinguishable from the events surrounding the de-escalation of drug sentencing policies in Michigan's War on Drugs, which is the subject of the following chapter. In Michigan race was also an important factor in both the escalation as well as the de-escalation of the War on Drugs and the state's drug sentencing policies. There, however, there was far more explicit mention of race and racial injustices that resulted from the harsh sentencing policies as a motivating factor in the move to reform those policies. Not only did public interest organizations make mention of race as an issue, but politicians invoked racial injustices as justification for reform as well.

Chapter 7

Michigan

The state of Michigan provides a case that can be analyzed by looking at two points in the history of its drug sentencing policy. At the beginning of the war on drugs, during the 1970s, Michigan enacted some of the most harsh drug sentencing policies in the nation. In the 1990s, however, after more than twenty years of experience with the harsh policies, the Michigan legislature began to reverse many of the policies by enacting new legislation that significantly altered drug sentencing in the state. Since then the legislature has continued to amend the policies and to entertain further amendments. These policies continue to undergo changes even today. The question I address with this chapter is: how did the circumstances surrounding the enactment of Michigan's harsh sentencing policies, where unlike in New York racial disparities were initially a catalyst for enactment of those policies, change in the intervening twenty years to allow politicians to reverse course and take the politically risky position of retreating from punitive drug sentencing policies?

The War on Drugs and Sentencing Reform in the State of Michigan

Michigan provides an example of a state that enacted harsh sentencing statutes in response to the War on Drugs, and then moved to reform those statutes after years of experience under those laws. It appears that the theories incorporating politics go the furthest in explaining the dynamics of the circumstances surrounding the original enactment of the punitive policies of

the War on Drugs as well as the subsequent amendments of those policies in Michigan. The partisanship theories of the existing literature argue that Republicans were most likely to enact strict drug sentencing policies during the war on drugs. However, in Michigan both parties advocated for punitive policies during the early years of the war on drugs.

Years later, however, individual legislators from both parties had to change their positions, and advocate for reform of the tough sentencing policies. They were eventually able to do this without appearing to be inconsistent in their policy positions, and without appearing to be weak on crime policy. The major factor that made it possible for politicians to make what would seem to be a politically risky move without jeopardizing their reelection prospects was the fact that they were able to build a strong coalition from both sides of the issue and from both ends of the political spectrum. A bipartisan coalition that included legislators, police officials, lawyers, and others worked together to bring about change to Michigan's drug sentencing laws, thus taking away the element of political risk, and introducing the idea that the coalition would now be smart on crime, rather than soft on crime.

The results of the statistical analysis presented in Chapter 5 would create an expectation that the enactment of the policies at both the beginning of the War on Drugs as well as during the period of reform would correspond to the presence of minority populations, the level of diversity in the state, and the presence of descriptive representation in the state legislature. However, it seems that the coalition that came together to enact the legislation acted without great regard to these factors.

The Initial Years of the War on Drugs

Michigan began to respond to the War on Drugs' call for tough sentencing laws for drug offenders in the late 1970s. In 1973, Michigan enacted mandatory minimum sentences for many drug offenses, which were the most harsh drug sentences in the nation.²⁶³ The most well known of those laws, the '650 Lifer Law,' mandated life in prison without parole for offenders convicted of delivery of over 650 grams of heroin or cocaine. This law was signed by Republican governor William Milliken.²⁶⁴ In 1987 Michigan enacted statutes requiring mandatory consecutive sentences for some drug offenses, which required that sentences for drug offenses be served consecutively to sentences for another felony.²⁶⁵ This course of events is consistent with the theory that Republicans are more likely to enact more punitive sentencing policies.

There were several apparent reasons for the enactment of the harsh sentencing laws in Michigan, including the general drive to be tough on drug offenders under the War on Drugs, and the desire by many in the government and the criminal justice system to see similar sentences for similarly situated offenders. At this time the federal government and the Michigan state government were headed by members of the Republican Party, which made a party issue of being tough on crime. It appears that the government campaign to gain support for the War on Drugs succeeded in swaying public opinion to support the new policies. At the time, many Americans cited drugs and drug crimes as one of their most pressing concerns about the nation.²⁶⁶ This increased concern on the part of the public as well as the Republican control of the Michigan government made passage of the strict sentencing laws feasible.

²⁶³ Families Against Mandatory Minimums (FAMM) www.famm.org

²⁶⁴ stopthedrugwar.org/chronicle-old/268/Michigan.shtml

²⁶⁵ FAMM, www.famm.org

²⁶⁶ Beckett, 1994

Another catalyst of the change to harsh drug sentencing policies was the concern that many drug offenders were receiving different sentences, despite having similar characteristics, such as criminal history and seriousness of the crime for which they were being sentenced. In 1979 the Michigan Felony Sentencing Project, “Sentencing in Michigan,” reported that there were disparities along racial lines in the state’s drug sentencing. In this study of 6000 felony cases the authors found that the sentencing system in Michigan of the 1970s produced marked disparities in sentencing outcomes. They found that the discrimination was not deliberate, but was so severe that it could not be accounted for solely by offense or offender characteristics.²⁶⁷ The issue, therefore, was initially framed in terms of race and disparities in sentences for similarly situated offenders.

The concern raised over the disparities along racial lines in sentencing outcomes is interesting in light of the findings in Chapter 5. The first statistical analysis found that as black populations increased, drug sentencing laws became less strict. I also found that as immigrant populations increased and as states became more diverse, drug sentencing laws became less strict. However, during the initial years of the War on Drugs in Michigan, the drug sentencing laws that were passed were some of the most strict in the nation. However, the statistical analysis shows that as the number of blacks in the legislature increased, drug sentencing policies became more strict. This is likely due to the fact that many black leaders initially supported the harsh policies of the War on Drugs. On the other hand, the statistical analysis found that as the number of Latinos in state legislatures increased, drug sentencing laws became less strict.

The findings of the second statistical analysis in Chapter 5 are also mixed in relation to what we see in Michigan. In both 1985 and 2002, an increase in minority populations

²⁶⁷ Zalman, et al., 1979

corresponded with less strict drug sentencing laws. However, in 1985 states that were more diverse according to the Hero diversity variable, drug sentencing laws were more strict, and in 2002 they were less strict. Again, in this analysis a greater number of blacks in the legislature lead to more strict drug sentencing laws, while more Latinos in the legislature lead to less strict drug sentencing laws. In Michigan it appears that during the buildup of the War on Drugs, the findings of the statistical analysis relating to increased diversity do not hold, while the findings for increased numbers of black representatives in the legislature do bear out.

Concern for the disparate sentencing outcomes for minorities were a factor in the enactment of Michigan's harsh sentencing policies at the beginning of the War on Drugs. However, this does not appear to play out as would be predicted by the findings of the statistical analysis. It does not necessarily appear that the strict laws were passed as a result of less descriptive representation in the legislature, or as a by-product of a less diverse population at that time. Rather, it seems more likely that the findings on blacks in the legislature corresponding with more strict policies bear out here, as the black community's support for the strict laws, as seen on the national stage, may have contributed to their enactment.

Subsequently, the Sentencing Commission was created to address disparities where two offenders who had similar criminal histories were being sentenced to wildly differing minimum terms. The Michigan legislature responded by passing statutes that required mandatory minimum sentences for many drug offenses and lifetime probation for some drug offenses, among other things.²⁶⁸ The most infamous of these, referred to as the 650 Lifer Law, passed in 1973, and mandated a life sentence without parole for anyone convicted of possessing,

²⁶⁸ www.legislature.mi.gov

delivering, or intending to deliver over 650 grams of cocaine or heroin.²⁶⁹ These statutes were intended to reduce judicial discretion by requiring judges to take into account the nature of the offense and the criminal history of the offender, rather than characteristics of the offender, such as education, family, and potential for successful rehabilitation.²⁷⁰

There appears to have been little opposition to the passage of Michigan's tough drug sentencing laws. At the time of the enactment of the harsh policies, Michigan's legislature had no organized Black Caucus. Although the Michigan legislature elected a black legislator as early as 1892, the Michigan Legislative Black Caucus was not formed until 1976.²⁷¹ Further, years later Governor Milliken recalled that he, his staff, and the legislature had no reservations about passing and signing the laws.²⁷² Milliken did, however, receive a warning about the proposed legislation from the director of Michigan's Office of Drug Abuse and Alcoholism, Patrick Babcock. Babcock provided Milliken with a critique of New York's Rockefeller Drug Laws, which had been passed several years before Michigan considered passing its own drug war legislation. Babcock criticized the fact that the Rockefeller Drug Laws did not distinguish between addicts and drug traffickers. He also cited criminology studies which showed that traffickers would not be deterred by harsh sentences. Babcock favored maintaining the use of judicial discretion in sentencing drug offenders.²⁷³

²⁶⁹ FAMM, www.famm.org

²⁷⁰ House Legislative Analysis, Senate Bill 280 with House committee amendments, Senate Bill 281 with House committee amendments, 1997

²⁷¹ Michigan Legislative Black Caucus, www.michiganlbc.org

²⁷² The Drug Reform Coordination Network. "Michigan Legislature Repeals Mandatory Minimum Drug Laws." <http://stopthedrugwar/org/chronicle-old/268/Michigan.shtml>

(accessed November 7, 2007)

²⁷³ Pat Babcock. Memorandum to Governor Milliken, "Governor Rockefeller's message

There was also some debate as the Michigan legislature considered the laws. Various people, including doctors, judges, prosecutors, citizens, law enforcement officers, and treatment representatives testified at the hearings. Some echoed the argument that the law's failure to distinguish between low level dealers and drug traffickers would result in unfair sentences for some offenders.²⁷⁴

However, these minor attempts at opposition were overshadowed by the pressures to pass the harsh laws. According to a survey taken the year the laws passed, a majority of respondents in Michigan viewed the drug problem as an increasing threat. Milliken cited the threat of the state's growing drug problem as creating a great need for the legislation. Michigan was also receiving federal funding, along with federal directives, to help expand the punitive drug sentencing laws. In granting federal funds to fight the drug war in Michigan, Dr. Jerome H. Jaffe, the director of the White House Special Action Office for Drug Abuse Prevention stated that "President Nixon has directed us to expand drug abuse treatment and has given us the dollars to do the job."²⁷⁵ In the same press statement, Milliken said that his administration was "working closely with the Nixon administration to see to it that the entire range of drug prevention efforts," would be put forth to fight the war on drugs.²⁷⁶

on drug law violation." Lansing: January 8, 1973, folder: "Drugs 1971-1973 (2 of 3),"

Box 1222, William G. Milliken Papers, Bentley Historical Library.

²⁷⁴ Allen B. Rice. "Debate Begins On Bills Aimed At Heroin Dealers." Michigan Capitol

Report 14 (12). December 10, 1975.

²⁷⁵ Memorandum from the Executive Office, Governor William G. Milliken. November 1,

1972, folder: "Drugs 1974-1979 (3 of 3)," Box 1222, William G. Milliken Papers,

Bentley Historical Library.

²⁷⁶ Memorandum from the Executive Office, Governor William G. Milliken. November 1,

1972, folder: "Drugs 1974-1979 (3 of 3)," Box 1222, William G. Milliken Papers,

Thus, the lack of opposition minimized any risk of passing such punitive legislation, particularly when viewed in light of the fact that the federal government was leading the charge in passing similar legislation and in providing funding for Michigan's legislation. Even in the face of already overcrowded prisons, an economic recession, and crime rates that had been declining, the Michigan legislature and governor were able to pass the legislation with little apparent resistance. The findings of the statistical analysis in Chapter 5 predict that the relative strictness of the state's drug sentencing laws will be related to the level of diversity in the state as well as the extent to which descriptive representation exists in the state legislature, but the case of Michigan illustrates further complexities in the factors motivating the enactment of the initial harsh policies, as well as the subsequent reforms.

At the beginning of Michigan's war on drugs, it appears that the theories on partisan politics and the desire to address disparate sentencing outcomes for minority offenders were the main catalysts in the enactment of the original harsh policies. This raises the question of how the politics changed over the years to allow a retreat from these policies. As will be discussed below, the issue of disparate impacts for minority offenders was not resolved by the punitive policies, and in fact was exacerbated. Therefore, with similar issues facing the state after the harsh policies had failed to achieve their goals, the political climate had to shift to allow the legislature to reverse course on a policy position that had been popular, specifically they had to reform drug sentencing laws without appearing to be weak on crime.

Later Years in the War on Drugs and the Movement for Reform

After years under this sentencing system critics began to realize that the goals of the system were not being met, and indeed new problems had arisen. This sparked a movement for reform of the state's drug sentencing practices. This posed a potential problem for politicians who had supported and advocated for the initial punitive drug sentencing policies. It was now necessary to retreat from the harsh policies and adopt the previously politically untenable position of advocating for reform. It appears that legislators were able to accomplish this feat by relying on the support of public interest organizations, such as Families Against Mandatory Minimums (FAMM), which attempted to gain public support for reform, and by engaging a coalition for reform. FAMM is a nonprofit, nonpartisan group that advocates for state and federal sentencing reform. It is funded by taxpayers, families, inmates, law enforcement, lawyers, judges, criminal justice experts, and citizens. This organization played a major role in Michigan's efforts to reform the harsh policies of the War on Drugs.

The reform movement urged that rather than require jail or prison sentences, for some, particularly nonviolent, offenders the state should eliminate mandatory minimum sentences and life probation for some offenses, eliminate mandatory stacking for convictions involving multiple felony offenses, and eliminate a section of the state's constitution that guaranteed the rights of crime victims.²⁷⁷ The reform movement was led by FAMM, along with a coalition of citizens and organizations, and their initial goal was reform of the '650 Lifer Law.' FAMM and its supporters helped publicize the reform movement in a way that was palatable to the public and helped to sensitize the public to the need for reform. This created circumstances in which politicians could take advantage of the work done by the public interest organizations, and join the movement for reform without appearing to be weak on crime. It appears that regardless of

²⁷⁷ www.legislature.mi.gov

the factors of diversity and descriptive representation analyzed in Chapter 5, a confluence of other factors, lead by an alliance of citizens and public interest organizations, provided the catalyst for reform of Michigan's drug sentencing laws.

In 1998 Governor John Engler signed a bill amending the '650 Lifer Law,' thereby eliminating the mandatory sentence of life without parole and providing parole eligibility to those sentenced under the law.²⁷⁸ This bill reduced mandatory minimum sentences to 15 to 20 years for offenses which previously carried life sentences.²⁷⁹ Interestingly, therefore, the reforms to Michigan's drug sentencing laws began under the leadership of a Republican governor. By this time of course, the federal government was headed by Democratic President Bill Clinton, who also supported the War on Drugs and tough penalties for drug offenders.

More changes in sentencing policies came about in the early 2000s. In 2002 Representative Bill McConico, a Democrat, sponsored three bills that would reform drug sentencing in Michigan. A leader in the Michigan legislature's move to reform the drug sentencing laws, McConico represented two districts over the several years he was involved in the reforms. From 2000 to 2002 he represented Michigan's District 6, which was comprised of 86% White, 8.9% Black, and 3.6% Latino constituents, with the remainder comprised of a very small percentage of other races. From 2003 to 2006 he represented Michigan's District 5, which was comprised of 76.7% White, 18.6% Black, and 3.6% Latino constituents. The bills were co-sponsored by a bi-partisan coalition, including Representative Larry Julian (Republican), Representative Mike Kowall (Republican), and Representative Artina Tinsley Hardman

²⁷⁸ FAMM, www.famm.org

²⁷⁹ Grand Rapids Press, November 28, 2000

(Democrat).²⁸⁰ Also joining the coalition in support of the bills were numerous organizations, including FAMM, the Prosecuting Attorneys Association of Michigan, the Michigan Association of Drug Court Professionals, the Michigan Judiciary Association, the Michigan Catholic Conference, the Detroit Branch of the NAACP, the Citizens Alliance on Prisons and Public Safety, Michigan's Children, and the Michigan Association of Licensed Substance Abuse Professionals. The Prosecuting Attorneys Association of Michigan president at the time remarked that they had made the improbable move of joining the movement for reform because they recognized the fact that effective drug policy would have to combine criminal justice strategies with drug treatment, incarceration for appropriate cases, and prevention in schools, businesses, and homes.²⁸¹ This broad-based coalition proved to be crucial in politicians' gaining support for the reforms without jeopardizing their reelection.

Here we do see black legislators as well as the NAACP joining the coalition to enact less strict drug sentencing laws, which contradicts the findings in Chapter 5, which showed an increase in black legislators resulting in more strict drug sentencing laws. However, at this point in Michigan's War on Drugs there was no longer widespread support for the initial harsh policies. While many believed that the initial laws would lead to a decrease in disparities for minorities, and black public figures had expressed support for the War on Drugs on the national level, by these later years it was clear that the policies had led to even greater disparities, particularly for black offenders. As a result, the departure from the findings in Chapter 5 is not surprising, particularly given the growing coalition in the movement for reform.

²⁸⁰ stopthedrugwar.org/chronicle-old/268/Michigan.shtml

²⁸¹ stopthedrugwar.org/chronicle-old/268/Michigan.shtml

The proposed bills, HB 5394, HB 5395, and HB 6510, would make drastic changes to the existing drug sentencing laws. HB 5394 and HB 5395 addressed mandatory minimum sentencing laws. They proposed to eliminate mandatory minimum sentences and lifetime probation for most drug offenses. They would restore judicial discretion and allow judges to use the Michigan sentencing guidelines to impose sentences based on the facts of each case, rather than just on the drug weight. They would replace lifetime probation for the lowest level drug offenses with a five year probationary period that is standard for other crimes. The bills would allow consecutive sentences for delivery offenses, but eliminate mandatory consecutive sentences for simple possession. They would also increase the guideline penalties for the most serious drug offenses. Finally, these bills would create new sentencing ranges and drug amounts for each offense level over 50 grams, and would increase the penalties for delivery in a home where a minor child resides and for multiple offenses.²⁸²

The third proposed bill, HB 6510 addressed probation and parole. This bill would replace lifetime probation with five year probation periods and allow the court to discharge current offenders from lifetime probation after they had successfully completed five years of probation. It would also allow earlier parole eligibility for prisoner serving mandatory minimum and mandatory consecutive sentences under the ‘650 Lifer Law’.²⁸³

In 2002, Governor John Engler signed these reforms to the mandatory minimum sentencing policies, which would take effect on March 1, 2003, in the form of Public Acts 665,

²⁸² HB 5394, HB 5395

²⁸³ HB 6510

666, and 670.²⁸⁴ These policy reforms made sweeping changes to what were previously some of the most harsh drug war sentencing policies in the nation.²⁸⁵

The changes included new policies for those offenders who would be sentenced for drug offenses after March 1, 2003, including elimination of mandatory minimum sentences for controlled substance violations, establishment of a new schedule of sentencing guidelines based on revised amounts of drugs involved, the elimination of the sentence of lifetime probation, and changing the mandatory consecutive sentencing for drug offenses to permissive consecutive sentencing.²⁸⁶ The new acts also allowed judges discretion to depart below or above the sentencing guidelines for substantial and compelling reasons. For offenders sentenced before March 1, 2003, the reforms allowed eligibility for earlier parole consideration for offenders currently serving mandatory drug sentences, including mandatory consecutive sentences, and would replace lifetime probation with a maximum five-year probation. Probation officers would also have discretion to recommend discharge from probation for an offender who had served five years.²⁸⁷

Also in 2002, there was an attempt to get an initiative onto the ballot, which would have amended the state constitution to establish a commission to develop new sentencing guidelines for drug offenses and to appropriate funds for drug treatment programs.²⁸⁸ The amendment would have eliminated Michigan's mandatory minimum sentences for drug offenses, mandated treatment rather than incarceration for many drug offenders, and given judges broader discretion

²⁸⁴ FAMM's guide to the Michigan sentencing reforms, www.famm.org

²⁸⁵ The text of all three of these laws is reproduced in Appendix A

²⁸⁶ Public Acts 665, 666, 670

²⁸⁷ Public Act 670

²⁸⁸ www.drugreform.org/michigan

in sentencing drug offenders.²⁸⁹ This initiative failed to reach the ballot due to an inability to overcome technical problems. Specifically, the initiative sought to add a section to the constitution where one already existed.

There will likely be more changes to Michigan's laws as advocates for reform continue to fight for their cause. Most recently the state expanded access to drug court by enabling circuit and district courts to develop adult drug courts and allowing family courts to create juvenile drug courts. Senate Bill (SB) 998 establishes the state's drug court structure and numerous other bills set out criteria for eligibility for diversion to the drug court program.²⁹⁰ There are also indications that Democratic State Representative Paul Condino will soon introduce another reform bill that would reclassify some non-violent felonies into misdemeanors and reduce penalties for other felonies.²⁹¹

The Influences on Change: Theories of the Underclass Do Not Hold

Michigan State Legislature and Legislative Debates²⁹²: Little Concern for Minorities and Disparate Impacts

Although the arguments in favor of the harsh sentencing statutes passed in the beginning of the War on Drugs emphasized the disparities in sentences for minority and white offenders, the arguments in favor of reform essentially abandoned this language. This may be one reason we see departures in the Michigan case from the findings presented in the statistical analysis in Chapter 5. Advocates of reform invoked concerns over the financial consequences of housing

²⁸⁹ Grand Rapid Press, September 22, 2002

²⁹⁰ SB 999, SB 1000, HB 5647, HB 5674, HB 5716, HB 5928, HB 5932.

²⁹¹ Detroit Free Press, July 27, 2007

²⁹² The references to legislative debates made here are based on information gathered from the Michigan State website (www.michigan.gov), and for the most part consist of summaries of comments made during debates. Further efforts were made to secure the full text of debates and committee meetings surrounding the relevant bills, but this proved impossible in the absence of a trip to Michigan.

the offenders and the continued rates of recidivism. One of the main arguments was that the mandatory minimum sentences had resulted in a dramatic increase in prison populations and the number of people on probation, causing a strain on the resources of the courts and the state's Department of Corrections.²⁹³ One argument citing the fact that mandatory minimum sentences are not cost effective did devote one phrase to the fact that they also have a discriminate impact on minorities.²⁹⁴ Specifically, the House Fiscal Agency produced a report, titled "Eliminate Mandatory Minimums for Drug Sentences," which presented the problems associated with mandatory minimum sentences stating, "critics believe the current system is not cost effective and has had a disproportionate impact on minorities."²⁹⁵ This was not expanded upon and there was no mention of the fact that the statutes had also resulted in longer sentences for women offenders. Therefore, it does not seem that the theories arguing that racial disparities in sentencing will prompt reforms aimed at reducing those disparities hold in this case.

The failure to invoke racial disparities in sentencing outcomes in advocating for reform was not due to a lack of such disparities. As in New York, Michigan's drug sentencing policies exacerbated the problem of racial disparities, rather than eliminate or even reduce it. The following charts illustrate the disparities in the numbers of inmates incarcerated in Michigan based on race in 2000.

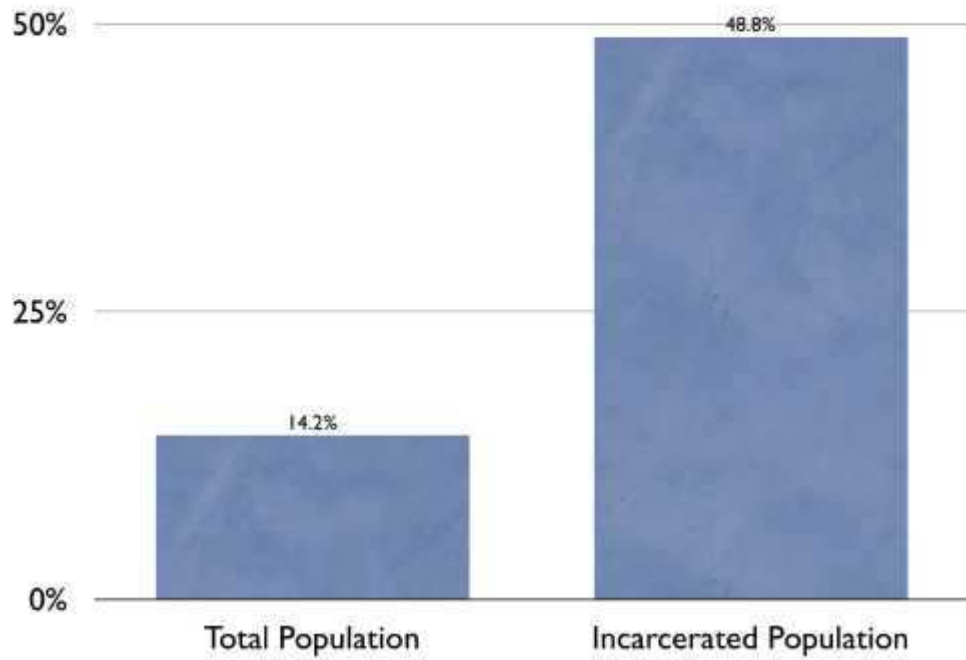
²⁹³ www.legislature.mi.gov

²⁹⁴ 12/3/02 argument in favor of HB5394, HB5395, HB6510

²⁹⁵ 12/3/02 argument in favor of HB5394, HB5395, HB6510

Figure 6

Blacks are overrepresented in Michigan's prisons and jails

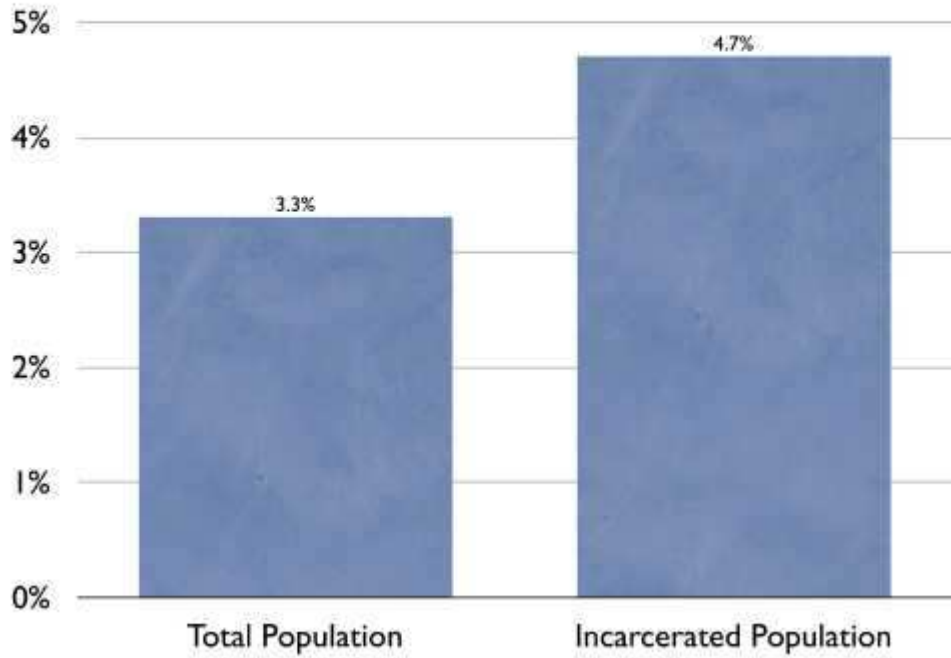


Source: U.S. Census 2000

Prison Policy Initiative

Figure 7

Latinos are overrepresented in Michigan's prisons and jails

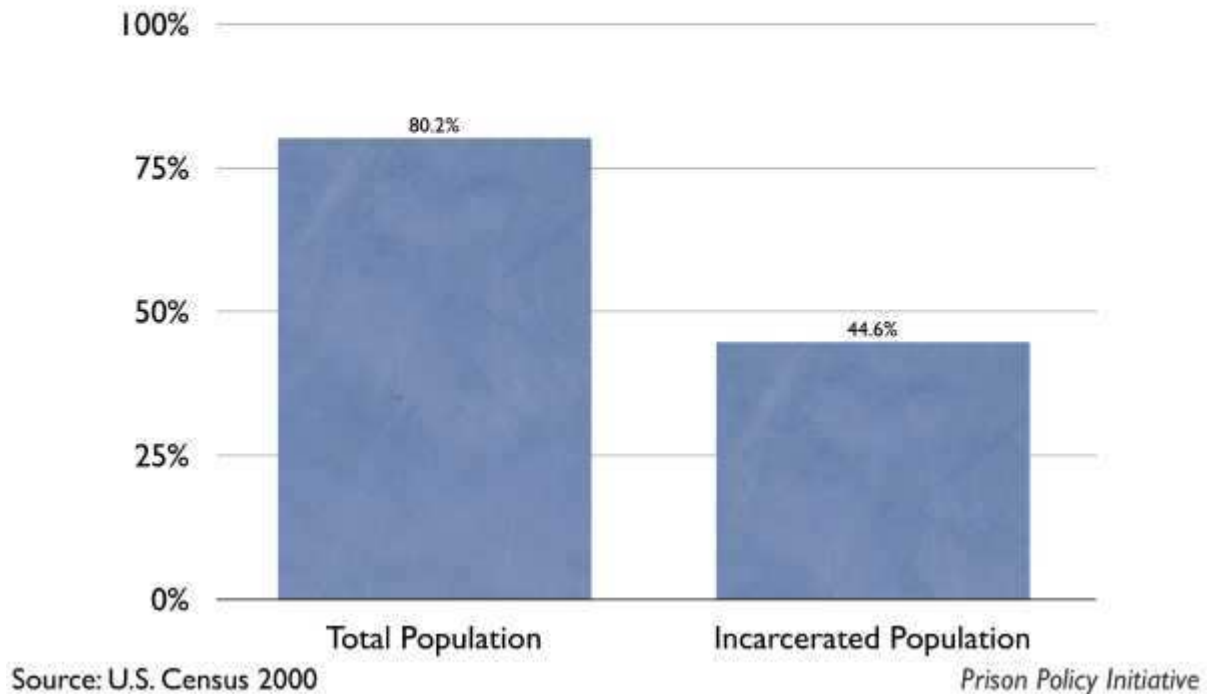


Source: U.S. Census 2000

Prison Policy Initiative

Figure 8

Whites are underrepresented in Michigan's prisons and jails



Although most did not mention racial disparities as an issue, in arguing for sentencing reform, some advocates did invoke language in favor of giving judges discretion to consider such factors as addiction, prior record, education, family support, and chances for successful rehabilitation (www.legislature.mi.gov).²⁹⁶ However, although the language regarding family and rehabilitation is often associated with the needs of women offenders, there was no specific mention of how women had been impacted by the sentencing statutes. These advocates also mention that there are still disparities under the mandatory minimum sentencing scheme due to

²⁹⁶ www.legislature.mi.gov

the ability of prosecutors to exercise discretion in their charging decisions. They do not, however, describe these disparities or mention whether they are based on race or gender. These references to disparities as well as to social and demographic factors could serve as a proxy for diversity levels discussed in Chapter 5. Minority populations are often associated with such social concerns, and the concern for these factors may be based on the level of diversity in the state, which according to the statistical analysis would indicate a move toward the less strict sentencing policies Michigan enacted at this time.

There is evidence of one argument which pointed out the fact that there had been a 22.7% increase in drug offense incarceration for white offenders and a 335.7% increase in drug offense incarceration for African American offenders, but this statistic was cited in support of the argument that mandatory minimum sentences were not working as a deterrent, and that treatment would be more appropriate.²⁹⁷ This was not cited in support of any argument regarding the discriminate impact of mandatory minimum sentences on African American or female offenders. The argument was presented in a legislative analysis of the proposed amendments to the harsh laws, which sets forth the existing legislation, the proposed amendments, and the arguments for and against the new laws.²⁹⁸ The comment does, however, reinforce the fact that although most advocates were not talking about disparate impacts for racial minorities, these disparities did exist and they were sizeable.

Those who opposed sentencing reform at this point argued that removing the requirements of mandatory minimum sentencing and allowing for more judicial discretion would result in sentencing disparities across the state. This concern, however, made no mention of

²⁹⁷ www.legislature.mi.gov

²⁹⁸ House Legislative Analysis Section, "Eliminate Mandatory Minimums for Drug Sentences." First Analysis (12-3-02)

disparities based on race and gender. Rather the opposition to reform wanted to avoid the possibility that sentences in one county may be systematically different from sentences in another county.²⁹⁹

Crime and Incarceration Rates: The Beginning of Budget Concern, and a Reduction in Concern for Safety

Rather than invoking concerns about the disparate impacts the sentencing policies had on certain offender populations, advocates for reform emphasized the huge costs incurred by the state as a result of the increased rates of incarceration produced by the policies. Rates of arrest and incarceration exploded around the nation during the war on drugs. The impact of harsh sentencing laws and the greater emphasis that has been placed on law enforcement has had a dramatic impact on the incarceration of Black offenders. This has been the result of several policies, including the concentration of drug law enforcement in inner city areas, harsher sentencing policies – especially for crack cocaine, and the emphasis on law enforcement at the expense of prevention and treatment.³⁰⁰ Incarceration rates in Michigan, when divided along racial lines, are similar to those of the rest of the nation. In 2001, the rate of incarceration per 100,000 residents was 369 Whites and 2,247 Blacks.³⁰¹ Nationally the rate of incarceration per 100,000 residents was 366 Whites and 2,209 Blacks. In 2006, Michigan had 67,132 inmates incarcerated in prisons and jails.³⁰² Of that total number, the rate of incarceration per 100,000 residents was 412 Whites, 2,262 Blacks, and 397 Hispanics.

The years of the War on Drugs have not seen significant change in crime rates in Michigan. In 1978, when the first of the harsh sentencing statutes were passed, the crime rate

²⁹⁹ www.legislature.mi.gov

³⁰⁰ Drug Policy and the Criminal Justice System, 2001, The Sentencing Project

³⁰¹ State Rates of Incarceration by Race, 2004, The Sentencing Project.

³⁰² Statistics by State, 2007, The Sentencing Project.

per 100,000 residents was 577.2 for violent crimes and 5,016.9 for property crimes.³⁰³ In 1990 the rate was 790.4 for violent crimes and 5,204.4 for property crimes. In 2000 the rate was 555.0 for violent crimes and 3,554.9 for property crimes. In 2004 the rate was 492.2 for violent crimes and 3,066.1 for property crimes. The following chart illustrates the overall crime rate in Michigan over this period of time relative to the overall crime rate in the New York. The subsequent chart illustrates the expanding rate of incarceration in Michigan over this period of time.

³⁰³ Reported Crime in Michigan, Bureau of Justice Statistics (BJS).

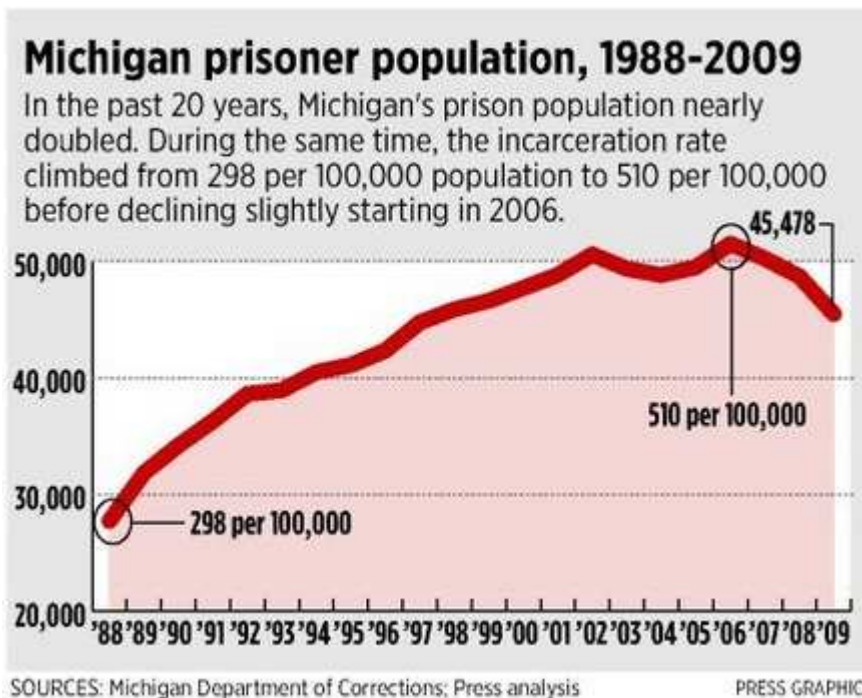
Figure 9

Crime Rate History in New York and Michigan



Source: United States Bureau of Justice Statistics

Figure 10



While rates for violent crimes have fluctuated over the years, rates for property crimes, including drug offenses, have steadily declined. Despite this general decline in crime, the prison populations continue to grow. This is probably a result of the fact that more people are incarcerated on drug offenses, and more of those incarcerated are serving longer sentences. The theories which argue that incarceration and crime rates will coincide with the punitiveness of crime policy also do not appear to hold true in Michigan. Throughout the war on drugs crime rates remained relatively stable, and so they cannot have been the catalyst for the initial punitive policies, or for their subsequent reform. The incarceration rate does seem to have had an impact on the reforms however, in that the cost of incarceration became impossible to maintain, and lead to the need for reform. The fact that the reform movement solidified around the needs of the state budget is not surprising, as most politicians and organizations are sensitive to issues of finance.

The Economic Costs of the War on Drugs

Because arrest and incarceration rates for drug offenders in Michigan continue to create problems for the state budget, advocates for reform have used the budget crisis as a way to push for change. According to one report, mandatory minimum sentencing policies caused corrections allocations in state budgets to increase faster than any other item during the 1990s.³⁰⁴ This was a clear concern for Michigan's legislature when it addressed the need for drug sentencing reform. Those who argued in favor of reform cited the huge costs of incarcerating large numbers of drug offenders, most of them non-violent, rather than the 'kingpins' and dealers who were the original targets of the laws.³⁰⁵

The huge cost of incarceration incurred by the states has caused budget shortfalls in recent years. States around the country have begun to respond to budget shortfalls by closing prisons and downsizing. This is politically feasible due to the fact that closing prisons is not likely to result in a risk to public safety because the previous expansion in prisons was largely due to the incarceration of nonviolent offenders.³⁰⁶ Studies have shown that the public in most states approve of diverting nonviolent offenders from prison in order to reign in corrections costs.³⁰⁷ Sixty two percent of respondents in one poll agreed that the laws should be changed so that fewer nonviolent crimes are punishable by prison sentences.³⁰⁸ Seventy seven percent of respondents agreed that many people in prison are nonviolent drug addicts who should be in treatment programs rather than in prison. Sixty one percent of respondents felt that mandatory

³⁰⁴ Greene and Schiraldi, 2002

³⁰⁵ House Legislative Analysis, Senate Bill 280 with House committee amendments, Senate Bill 281 with House committee amendments, 1997

³⁰⁶ Greene and Schiraldi, 2002

³⁰⁷ Greene and Schiraldi, 2002

³⁰⁸ Peter D. Hart Research Associates commissioned by the Open Society Institute, February 2002

sentences are unfair. In another poll, Californians were willing to cut spending on corrections to balance the state budget than any other state program.³⁰⁹

In Michigan the government made significant cuts to the state corrections budget, which most likely contributed to the success of efforts to reform sentencing policies. In 2002 Michigan faced a general budget shortfall of \$500 million dollars.³¹⁰ At that time the state laid off 240 prison employees as an effort to cut \$55 million from the corrections budget. Many of these employees were officers from the state's maximum security facility at Jackson, which was closed as part of the budget cuts. Throughout the entire corrections system Michigan eliminated 840 corrections positions, although many officers may have subsequently gotten new positions due to the continually growing prison population. As part of the budget cutting process the state closed numerous corrections facilities, reduced staff, and eliminated programs. The cuts in Michigan's corrections budget created a need to decrease the numbers of offenders entering the corrections system. This likely encouraged policy makers to make changes to the state's drug sentencing laws.

Politics and Coalition-building: The Creation of a Critical Condition for Politically Tenable Reform

Despite the increasing momentum that made sentencing reform possible, there were still political battles over the issue, largely divided along partisan lines. For example, Republican Senator William Van Regenmorter, who was the chairman of the Senate Judiciary Committee took a moderate stance on the issue. Van Regenmorter served as the representative of

³⁰⁹ Levey, Noam, *Prison Spending Cuts Endorsed, Poll Indicates Public Priorities During Shortfall*, San Jose Mercury News, December 28, 2001

³¹⁰ Wool and Stemen, 2003

Michigan's 55th legislative district in Ottawa County from 1982 to 1990, and the 74th legislative district from 2002 to 2006. From 1990 to 2002, he served a senator of the 22nd district. Ottawa County is located in the Grand Rapids-Wyoming, Michigan Metropolitan area, and at the time had a population of around 238,000, of which 91% were white, 1% were black, and 7% were Latino.³¹¹ The county is considered a stronghold for the Republican Party, and as such was a safe district for Van Regenmorter. While Van Regenmorter joined the coalition for reform and wrote the 1998 reform bill, he stated that judges had sufficient discretion to depart from the sentencing guidelines and that no further reforms to Michigan's drug sentencing policies were necessary.³¹² He further stated that although the legislature had reformed the sentencing laws, they were not getting soft on crime, but were getting smart on crime.³¹³ So, although Senator Van Regenmorter joined the reform coalition, he attempted to keep his involvement politically tenable by indicating that he would not support further reform, and by attempting to maintain a tough on crime stance.

Some opponents of reform have attempted to make advocacy for reform a political hazard by scaring the public. For instance, the head of the Michigan Sheriff's Association said that increased leniency for nonviolent offenders could cause death or injury to citizens.³¹⁴ An even more drastic attempt to create fear among the public was made by Michigan Attorney General Mike Cox, who said that such reforms to sentencing policy would make it easier for terrorists such as the 9/11 hijackers to commit crimes.³¹⁵ A similar comment made by a County Executive in Michigan urged citizens to buy an Uzi to protect themselves from felons who would

³¹¹ United States Census Bureau

³¹² Grand Rapids Press, November 28, 2000

³¹³ Grand Rapids Press, December 13, 2002

³¹⁴ Detroit Free Press, July 27, 2007

³¹⁵ Detroit Free Press, July 27, 2007

be wandering the streets as a result of the proposed sentencing reforms.³¹⁶ These comments were all made in opposition to reforms to Michigan's sentencing policies beyond those that have been enacted to date.

The 2002 failed attempt to introduce a ballot initiative to amend Michigan's constitution in an effort to reform the state's drug policies was not only a victim of technical problems, but also of political ones. The amendment was proposed in an election year, and was seen by supporters as a way to reform drug sentencing policies without requiring the legislature to appear weak on crime during an election year.³¹⁷ Although the amendment was backed by a broad coalition, including prosecutors and opponents of the current policies, the House committee declined to vote on it before the election.

The ballot initiative may also have been a victim of the political maneuvering of Michigan's governor at the time, John Engler. In 2002 Governor Engler, a Republican, postponed a proposal for extending affordable health coverage to uninsured people in Michigan, and blamed this postponement on the proposed drug sentencing reform initiative.³¹⁸ According to Engler, the drug reform initiative, if passed, would threaten his health coverage initiative due to the fact that the two would have to compete for funds. Although neither initiative ended up on the ballot in 2002, the fact that Engler blamed the absence of the health coverage initiative on the potential presence of the drug reform initiative could have created public resistance to it.

Political issues have arisen not only around the necessity of reelection considerations, but also in the relationships between state and local officials. In 2007, Michigan's Democratic governor, Jennifer Granholm, proposed further reforms to state sentencing policies which would

³¹⁶ Detroit Free Press, August 10, 2007

³¹⁷ Grand Rapid Press, September 22, 2002

³¹⁸ Grand Rapids Business Journal, August 26, 2002

make some felonies misdemeanors and reduce sentences on some offenses. She faced opposition from a county sheriff who argued that her plan to reduce felonies, for which convicts serve time in state funded prisons, to misdemeanors, for which time is served in locally funded jails, was really an attempt to shift the cost of incarceration from the state to local county governments.³¹⁹ The governor did, however, have the support of the Department of Corrections, some judges, and a Democratic state legislature, which was controlled by the Republicans when she made a previous failed attempt to reform the policies.

The political difficulties surrounding efforts for reform have largely been overcome because of the growing number of organizations willing to join the reform coalition. The reforms to drug sentencing laws, and the changing rhetoric used to advocate for those changes, coincided with a change in public opinion regarding crime and drug sentencing. A Vera Institute report includes comments from legislators regarding the costs of incarceration and sentencing reform, which are illustrative of the role that changes in public opinion played in the advocacy for reform. According to the report, Representative McConico cited this factor as critical to his success in passing reform bills.³²⁰ McConico believes that the public in Michigan had a growing awareness of the costs associated with the high rates of incarceration and the fact that those costs came at the expense of other government spending and services. McConico argued that “every community, not just the inner cities, is realizing that everything is being cut and they’re seeing corrections increasing or staying constant.”³²¹ The shift in public opinion led to the election of a

³¹⁹ Bay City Times, July 18, 2007

³²⁰ Campbell, 2003

³²¹ Campbell, 2003

large number of new state legislators who were sympathetic to sentencing reform, which was essential to building a bi-partisan coalition.³²²

As public opinion began to shift, the momentum of change was compounded by organizations pushing for reform,³²³ and this encouraged further coalition building. There was increased activity by victims' rights groups, which contributed to continued change in public opinion. In an effort to further secure the support of public opinion McConico developed a coalition of reform advocates that the public would trust. A major part of this coalition was an effort, which proved successful, to gain bi-partisan support for the bills in the state legislature. Not only did McConico seek out Republican allies in the legislature, but he gained the support of legislators with law enforcement experience, such as former prosecuting attorneys and police officers. He also sought, and gained, the support of professional groups such as the prosecutor's association. With the support of prosecuting attorneys and judges McConico and his coalition were able to gain the trust and support of the general public. This allowed the bipartisan coalition in the legislature to pass sentencing reform legislation as part of an agreement on a package of bills without taking a huge political risk.³²⁴

A further impetus for change within this growing coalition was the political pressure placed on the state to reform sentencing policy in the face of similar reforms in other states. For example, in California 61% of the public voted in favor of treatment rather than incarceration for first time non-violent drug offenders.³²⁵ Those who backed the California initiative indicated

³²² Campbell, 2003

³²³ Campbell, 2003

³²⁴ State Net Capitol Journal, July 6, 1998

³²⁵ Grand Rapids Press, November 28, 2000

their intent to target drug sentencing policies in Michigan next, due to the fact that many people there are affected by the policy and the fact that Michigan has the initiative process.

Ultimately the changes that have occurred in Michigan's sentencing policies have been accomplished through the work of this bipartisan coalition of government officials, representatives of the criminal justice system, and the public, all of whom came to support sentencing reform after their experience with the harsh statutes, however direct or indirect. This unlikely coalition was able to accomplish reform despite initial differences of opinion, and will probably be instrumental in any future reforms to Michigan's drug sentencing policy.

Unlikely Members of the Reform Coalition

The pressure for reform intensified with the growth in the number of organizations that joined the coalition for reform. The diversity of those organizations exemplified the wide-ranging nature of the dissatisfaction with the harsh sentencing policies. The nature of the coalition encouraged the public to support reform as they saw individuals and organizations they trusted join the movement.

As previously mentioned, the prosecutor's association joined the coalition for reform. Additionally, individual prosecuting attorneys voiced their opposition to the harsh sentencing policies, lending support for the movement that would encourage more broad support among the public. One prosecuting attorney stated that he was against mandatory minimum sentences and the strict sentencing policies because they too severely restricted the discretion of judges.³²⁶ He further stated that mandatory sentences are not a deterrent to potential drug offenders, effectively dismantling one of the strongest arguments for maintaining the harsh policies.

³²⁶ Grand Rapids Press, November 28, 2000

Another surprising advocate for the reform movement is Michigan's former governor William G. Milliken, who signed the original 1978 bill that created Michigan's harsh policies. In 2002 Milliken wrote an editorial advocating reform of those policies.³²⁷ While justifying his 1978 support of the policies as something he believed was the correct response to the state's drug problem at the time, Milliken revealed that he had changed his stance due to the injustices that have occurred as a result of the policies, mostly in terms of disparate sentencing outcomes for minority offenders, and professed that he had come to believe that his initial signing of the bill had been a mistake. He urged further reform and encouraged increased attention to the bills being proposed by Representative McConico at the time. In advocating for reform he emphasized the broad coalition of supporters and the general public opinion. He also invoked the budget crisis as a reason to support drug sentencing policy reform. Although Milliken addressed his plea for support to the Michigan State legislature, the prominence of the editorial in a major Michigan newspaper surely caught the eye of large portions of the public.

Michigan's Department of Corrections also contributed its voice to the move for reform. The Department of Corrections has expressed the need for long term solutions to the problem of overcrowded prisons, urging legislators to consider reforming drug sentencing policy rather than simply allocate money to build more prisons.³²⁸ Recently the Department of Corrections has gone further by proposing its own sentencing plan which would reduce disparities in sentences and save hundreds of millions of dollars in incarceration costs by keeping non-violent offenders out of prison.³²⁹

³²⁷ Grand Rapid Press, September 16, 2002

³²⁸ Grand Rapids Press, August 28, 2003

³²⁹ Detroit Free Press, April 24, 2007

Advocacy for reform came from outside the state as well as within. On the East Coast, leaders of the National Conference of Catholic Bishops and the Coalition for Jubilee Clemency, two religious groups, called for reform of the harsh policies in favor of leniency and treatment.³³⁰ In Washington D.C. in 1998 a Republican Senator from Michigan, Spencer Abraham, proposed a bill that would amend the federal Controlled Substance Act to narrow the sentencing gap between White and minority offenders.³³¹ The proposed bill would decrease the amount of powder cocaine necessary to draw a mandatory minimum sentence to an amount closer to that necessary for crack cocaine to trigger a mandatory minimum sentence. Although the bill was criticized by Democrats because it would result in higher rates of incarceration, it was a rare attempt by a Republican to achieve parity in sentencing for White and minority offenders. The proposal, however, was viewed by many as an attempt to continue to appear tough on crime, rather than as a true attempt at reform. A similar proposal was made by the U.S. Sentencing Commission in 1995, but was rejected by Congress and the White House.

Another source of pressure from outside the state, as well as within, is the judicial rulings on cases in Michigan, in other states, and in the United States Supreme Court. In 1992 Michigan's Supreme Court ruled that a mandatory life sentence without parole for possession of more than a pound and a half of cocaine was unconstitutional because the sentence was extremely disproportionate to the crime and constituted cruel and unusual punishment.³³² In reaching this conclusion, the Court stated, "the only fair conclusion that can be reached regarding the penalty at issue is that it constitutes an unduly disproportionate response to the serious

³³⁰ Grand Rapid Press, November 28, 2000

³³¹ Detroit Free Press, May 5, 1998

³³² ABA Journal, September 1992

problems posed by drugs in our society.”³³³ This ruling came despite the fact that the previous year the United States Supreme Court ruled in a Michigan case that this law did not violate the United States Constitution’s ban on cruel and unusual punishment.³³⁴ The Court based this ruling in part on the fact that the Michigan constitution bans cruel *or* unusual punishment, while the United States Constitution bans cruel *and* unusual punishment, saying, “the Eighth Amendment contains no proportionality guarantee.”³³⁵

A case in Washington State cast doubt on the validity of Michigan’s sentencing policies when the state’s Supreme Court ruled that a jury, but not a judge may lengthen prison sentences beyond those set out in sentencing guidelines.³³⁶ Although a Michigan court ruled that the case did not apply to that state’s drug sentencing policies because the minimum sentence is based on sentencing guidelines while the maximum is set by law, the case did raise additional questions and place renewed focus on the policies.³³⁷ Michigan’s sentencing policies survived judicial scrutiny, but may face future challenges, particularly because Supreme Court Justices William Rehnquist and Stephen Breyer have public criticized state laws that take sentencing decisions out of the hands of judges.³³⁸

Efforts of Special Interest Groups to Influence Reform and Their Efforts to Frame the Issue

There are a number of organizations involved in advocating for change in drug sentencing policy. All of these advocated for a reduced reliance on incarceration and increased

³³³ ABA Journal, September 1992

³³⁴ Harmelin v. Michigan, 495 S.Ct. 956 (1990)

³³⁵ Id.

³³⁶ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

³³⁷ Grand Rapid Press, July 23, 2004

³³⁸ ABA Journal, April, 1999

judicial discretion and rehabilitation. The advocacy of these organizations for reform made the coalition stronger and gave it a base upon which to effectively communicate the need for reform to the public.

Organizations dedicated to changing drug sentencing or advocating for prisoners rights

There are a number of organizations that have been founded in response to the War on Drugs and as a backlash to the harsh sentencing statutes passed by most states. These organizations are diverse, and are often made up of prisoners and their families, friends, and other supporters. Many of these organizations also have formed in more recent years, as some changes have been made. They advocate for further, more complete change in states that have made initial policy reversals, and for change in those that have not.

One of the major organizations that has formed in response to the War on Drugs is FAMM. FAMM was instrumental in spearheading the effort to reform drug sentencing laws in Michigan. This organization maintains a website with extensive information on its advocacy activities, the history of the War on Drugs and sentencing laws, and links to other relevant websites.³³⁹ FAMM uses many strategies in advocating for sentencing reform. FAMM president, Julie Stewart, testified at a United States Sentencing Commission hearing on federal crack cocaine sentencing policy. FAMM also provides information and education in the form of defining what it believes are the important issues in drug sentencing, why mandatory minimums should be changed, how they should be changed, and who serves mandatory minimums. The site also provides background information for particular states and their responses to the War on

³³⁹ FAMM, www.famm.org

Drugs. FAMM also participates in litigation campaigns in an effort to influence sentencing policy change.

Another organization that has responded to the war on drugs is Citizens Alliance on Prisons & Public Spending (CAPPS). CAPPS was also part of the coalition that advocated for drug sentencing reform in Michigan. This organization attempts to put faces on the numbers that are endlessly discussed in relation to those incarcerated for drug offenses.³⁴⁰ CAPPS advocates by providing education and information on sentencing policy issues. In particular, it focuses on the rapid growth in prison populations since the war on drugs was initiated, the expansion in numbers of people employed by prisons, and the increases in spending on corrections.

In an interesting turn, the Michigan Crime Victims organization also maintains a website that includes information on the war on drugs and the effects on offenders.³⁴¹ The organization questions the efficacy of the War on Drugs and indicates general disapproval of the harsh sentencing statutes.

Politics and Coalition-Building as the Necessary Conditions for Reform

Throughout the years of the war on drugs Michigan undertook some of the most drastic enactment and subsequent reforms to drug sentencing policy in the nation. The state legislature initially passed extremely punitive policies that appeared to be consistent with theories posited in the political science literature discussed in Chapter 3. Debates in the legislature focused on disparate sentencing outcomes for minority offenders and the possibility of reducing or eliminating those disparities by curtailing the discretion of judges to fashion an appropriate sentence for individual offenders. Similarly, as the scope of the drug policy issue expanded from

³⁴⁰ <http://www.capps.mi.org/index.html>

³⁴¹ <http://www.mivictims.org>

the efforts of local public interest organizations to the floor of the state legislature, the complexities of the issue disappeared, and politicians were able to advocate for the policies and claim a tough-on-crime stance.

During these initial years, however, some of the conventional theories on the enactment of the policies of the War on Drugs seem to break down. For instance, there is little to no evidence that the harsh policies were enacted in an attempt to control the underclass in terms of minorities or the poor. Similarly, theories claiming that Republicans are more likely to support punitive sentencing policies do not hold. Members of both parties took a roll in advocating for the punitive policies, which allowed both parties to take credit for being tough on crime. This created a circumstance in which legislators from both parties lost the edge in claiming to be most devoted to crime control. As a result, it is likely that a tough-on-crime position became less necessary as a reelection tool. This probably created the conditions under which members of both party could retreat from the tough policies without jeopardizing their chances for reelection.

Thus, as hypothesized above, it is likely that the reforms were made possible by the fact that advocating a retreat from tough sentencing policies was no longer politically risky because it was the position of both parties. During the years of reform, the state was run by Republican Governor Engler, while the state legislature was divided, with a majority of the state Senate being controlled by Republicans and a majority of the state House being controlled by Democrats. Given this circumstance, politicians were open to the advocacy of a large number of other groups and organizations that had come to realize the failures of the punitive policies. Together, this coalition worked together to advocate for and accomplish reform without suffering electoral consequences.

Reform as the Inevitable Goal of the Coalition

The changes to drug sentencing policy in Michigan throughout the War on Drugs have been largely a result of the politics of coalition building. The political maneuvering, however, has been more complex than the political science literature on crime policy and race and policy theorizes it should be. While the literature would predict that such reform would come at the hands of the historically less punitive Democratic Party, the Michigan case demonstrates that reform was actually the result of a coalition of both political parties and many other political and social actors. At the beginning of the War on Drugs it seems true enough that Michigan's Republican government took the lead in enacting punitive sentencing policies. Soon, however, legislators from both parties joined the call for a tough-on-crime stance and increasingly punitive sentencing policies for drug offenses. This occurred at a time when the federal government was run by the Clinton administration, which had made clear its policy of support for the War on Drugs and its harsh sentencing laws. This was also a time when the extent of publicity for the War on Drugs and the nation's 'drug problem' had created great concern among the public, which in turn made them receptive to the punitive policies and to politicians who advocated for them.

After years of experience with these policies, however, it became increasingly clear to both the government and public interest organizations in Michigan that the punitive policies had not solved the problems they were intended to solve, and that they had created a new sort of problem for the state, primarily in terms of the state budget. The cost of incarcerating offenders increased throughout the United States, as well as in Michigan. The following charts illustrate

the increased costs of incarceration. The first is a summary of national corrections expenditures by state, local, and federal government. The second illustrates the corrections budget increases in Michigan as a percentage of the overall state budget, as well as illustrating the growth of Michigan's prison population.

Figure 11

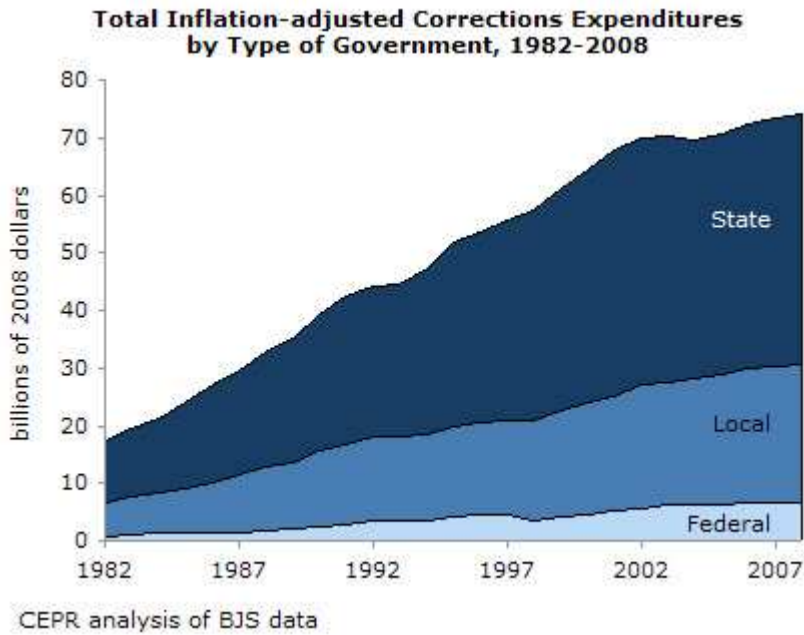
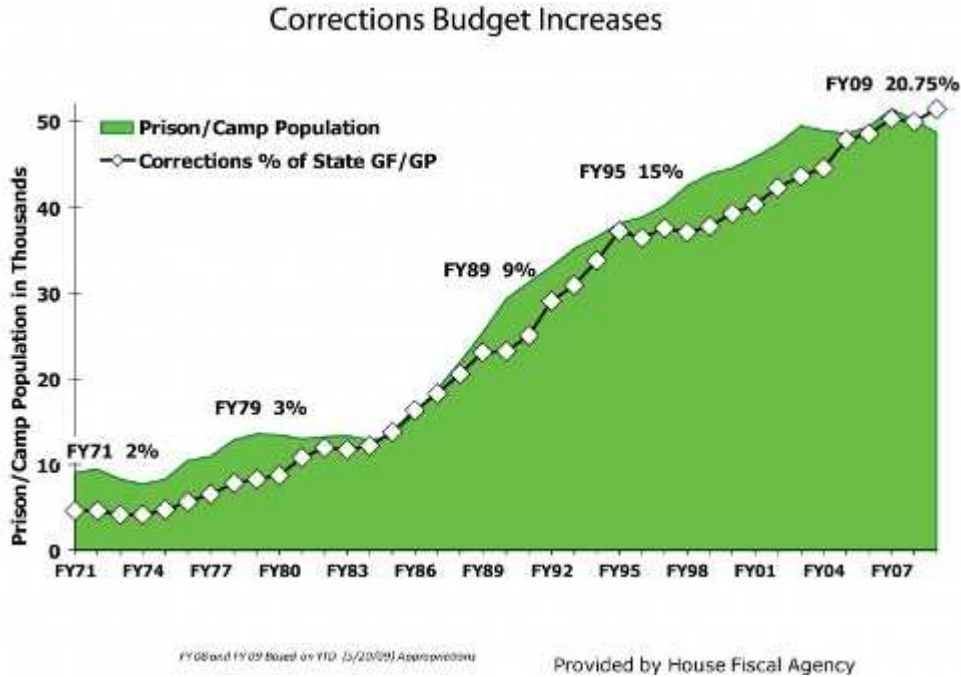


Figure 12



The need for reform posed the unique problem of politicians having to change their position on the drug sentencing policies without appearing to be weak on crime policy, and without jeopardizing their hopes of reelection. This was accomplished by the formation of a coalition that was made possible by a confluence of circumstances.

One of those circumstances was the budget crisis that was created in part by the huge costs of incarceration incurred during the War on Drugs. This caused all who depend on state funding to see the need for reform of some sort. This forced politicians and other members of the coalition to use rhetoric for reform that would be acceptable to the public, but that would publicize the need for reform. This rhetoric included the lack of funds for other important

programs, the need to provide treatment for offenders, and the low level of risk that release of non-violent offenders would pose.

Another important circumstance was the fact that the punitive policies of the War on Drugs did not solve the problems it set out to solve. It had little to no impact on crime and recidivism rates, and offenders were serving lengthy sentences rather than receiving treatment. In light of the fact that the goals of the war on drugs were frustrated, along with the costs it had imposed, those who previously supported the policies were at a loss for reasons to continue in that support.

A final circumstance that contributed the ability of these diverse groups to form a coalition for reform was the concern raised for the offenders themselves. The public interest organizations which contributed to the coalition did the most to publicize the harsh punishments that were doled out to many non-violent and low-level offenders. These organizations included advocates on behalf of the offenders, but also on behalf of victims' groups. These groups made clear the trade off in terms of consequences for these offenders that was made at such high cost to the state. They were able to personalize the offenders, which was essential to getting the public to accept the perceived risk of foregoing incarceration for such offenders.

In the end, it was a set of complementary circumstances that allowed for the formation of this diverse coalition for reform. In turn, it was the broad-based coalition that made it politically feasible for members of the state legislature to advocate for reform, and to pass the necessary amendments without risking their chances for reelection.

What did not play a large role in reform was the huge disparate impact for minority offenders that resulted from the harsh policies. At the beginning of Michigan's War on Drugs

some advocates for the harsh policies cited racial disparities in sentencing outcomes as a reason for enacting policies that would ostensibly equalize sentencing outcomes. Reducing judicial discretion and imposing mandatory minimum sentences was in part intended to result in consistent sentences for similarly situated offenders. The outcome, however, was increased disparities in sentencing based on race. Remarkably, just as occurred in New York, there was very little mention of these increased racial injustices in the advocacy for reform.

It is impossible to argue that those who advocated for reform were unaware of the increased racial disparities. It is possible that the incarceration of minority offenders at numbers hugely disproportionate to their share of the population was so obvious an injustice that it was unnecessary for politicians to venture into potentially controversial territory by raising this as an issue and a cause for reform. There were enough members of the coalition for reform and ample alternative issues to raise, in particular the state's budget, that allowed politicians to advocate for reform without having to appear soft on crime and without having to raise the issue of racial disparity.

Chapter 8

Race and Rhetoric in the De-Escalation of the War on Drugs

In examining what is causing the de-escalation of state drug sentencing policies it is important to note what is *not* causing de-escalation. It is likely that the causes of de-escalation are not the reverse of the causes of escalation. There is no decrease in drug arrest/conviction rates that has caused a concurrent decrease in the perceived need for strict punishment. Nor does there appear to be reduced concern among the public or legislative officials about drug crimes or drug use and their attendant consequences. Similarly, it does not appear that newly elected Democrats or changes in party control of state legislatures and governorships have led to de-escalation in punishment policies; nor does it appear that maintenance of the political status quo is a controlling factor in states that have not amended their strict policies.

There is no evidence that declining minority populations have led to de-escalation of punishment policies. There is also no evidence to suggest that states feel that incarcerating large portions of their minority populations has reduced the perceived threat posed by those populations, leading to a reduced need for punitive policies. However, it is possible that the activities of public interest organizations which have publicized the disparate and unjust impacts on minorities of the punitive policies have impacted the movement for reform and de-escalation of punishment – but there is a lack of evidence for this.

What, then, *is* causing de-escalation? The cause of de-escalation appears to be largely related to money. States with punitive drug sentencing policies have experienced huge increases in incarceration rates. The increased rates of incarceration have coincided with, and are in part the cause of, budget shortfalls. Budget concerns are cited as creating the need for amendment of the

policies, in the direction of de-escalation of punishment, thereby reducing levels of incarceration and the strain on state budgets.

The emphasis on state budgets as a catalyst for reform of drug sentencing laws raises the question of what will happen when state budgets recover. As the effects of the more lenient sentencing policies manifest themselves in reduced incarceration costs, it is likely that state budgets will recover. Additional economic factors outside of those discussed here may also lead to more stable state budgets. Will the revival of state budgets in turn lead to a return to the punitive sentencing policies of the War on Drugs?

I predict that this would not be the case for several reasons. First, although the budget crisis was a big catalyst for reform, and certainly the most visible or explicit reason, there were other factors in play, as discussed in this dissertation. The issue of racial disparities in rates of incarceration has not gone away as a result of the policy shifts. Although rates of incarceration will decrease overall, the issue of racial injustices has not been addressed, particularly due to the fact that the issue was raised only implicitly and never explicitly addressed or resolved during the move toward reform.

A return to the punitive policies of the War on Drugs would lead to a repeated exacerbation of racially disparate sentences. This, however, could lead to an interesting turn of events for politicians wishing to address the issue of racial disparities. While politicians were able to avoid the issue of race in favor of citing the budget as a reason for reform, if the budget crisis were resolved and the punitive policies were restored, circumstances could be created where politicians would be forced to explicitly raise the issue of racial disparities in drug sentencing and the criminal justice system in general. Although I don't predict a return to the punitive

policies, it would be interesting to observe the impact such a shift would have on the discussion of race in the criminal justice system.

Additionally, it is likely that a return to the punitive policies of the War on Drugs would lead to a return of the attendant budget woes. The policy shifts lead to decreased incarceration rates, which aided in the budget crisis as costs of incarceration subsided. If states decide to shift their policies to again be more punitive and to favor incarceration for drug offenders, the rates of incarceration will again increase, and the cost will increase. This would potentially put the states back where they began with huge incarceration costs devastating their budgets.

Finally, it appears that, at least in the states that have amended their drug war policies, there has been a larger philosophical trend against the punitive policies of the War on Drugs. There has been some recognition that the War on Drugs has not been successful. Although the federal government and many states continue to prosecute the War on Drugs, many have admitted that the punitive policies have not accomplished their intended goals. As a result, during the move to reform the punitive sentencing policies, many advocated for alternatives to incarceration, including drug treatment. Even if the state budgets recovered enough to allow for a return to the punitive policies, it is likely that those who advocated for alternatives to incarceration would continue to support such alternatives.

The budget crisis influenced not only legislators in their call for reform, but also an important lobby – the department of corrections and prison guard unions. The department of corrections ended up playing an interesting role in the movement for reform. Prison guards were on the front lines of the implementation of the strict policies of the War on Drugs. They experienced first hand the realities of the explosion of the prison populations.

On one hand, this potentially provided prison guards and officials with job security and even growth. On the other, the strain on state budgets made it impossible for states to fund enough new prisons and guards to meet the demand. In the end, the department of corrections and prison guard unions joined in the call for reform, advocating for alternatives to prison for drug offenders as a way to reduce the influx of inmates. Although this led to closures of some prisons that had been opened to accommodate drug offenders, this was preferable to the severe overcrowding prisons were dealing with under the policies of the War on Drugs.

Although the budget crisis experienced by the states and recognition of the injustices perpetrated on racial minorities were two main reasons for change, it is unlikely that these were the only factors. This raises some interesting questions. Given what we know about how politically safe it is to advocate a tough-on-crime position, why are some politicians advocating for amendment of the policies apparently without incurring political costs? Is it because running on budget/finances (saving the voter money) is just as strong? Given that it seems rational to amend punitive policies based on financial hard times, why aren't all states doing this? In light of the undeniable impacts that punitive policies have had on racial minorities, and the inherently racial nature of the issue, how do states use, or avoid using, racial language (either explicit or implicit) to address the options of maintaining punishment policies, or repealing them?

This study explores and attempts to provide answers about the institutional staying power of the politics surrounding mandatory minimums. It could have important implications for the study of the politics of criminal justice in general, and the politics of the War on Drugs and mandatory minimums in particular. It provides a rich analysis of state-level policy change by focusing on a policy area, drug sentencing policy, which has varied across the states over a significant period of time. While the existing political science literature theorizes about the

escalation of the War on Drugs and the imposition of mandatory minimums, these theories are limited to identifying individual causal factors that came into play when states passed mandatory minimum legislation. This dissertation investigates the more complex and nuanced interplay of factors that influenced the de-escalation of the War on Drugs.

The possible implications of the findings in this study could be groundbreaking and far-reaching. The analysis here is confined to the mandatory minimum policies of the War on Drugs, but they could have import for many policy areas in the American political arena. The findings shed light on the persistent nature of discrimination in our criminal justice system. It is well known that mandatory minimums and other criminal justice policies have had disproportionate impacts on racial minorities. I demonstrate that the move to amend mandatory minimum policies was not an attack on racism in the criminal justice system, but rather a product of necessity given the huge costs of incarceration states faced as a result of the policies. Although minorities may benefit from the move away from mandatory minimums, the politics of the amendments was consistent with the politics, including race-targeted politics, of the escalation of the War on Drugs.

The de-escalation of the War on Drugs has not been a change in our racial system, nor has it been an attack on discrimination in the criminal justice process. Instead, it has demonstrated the staying power of the racialized nature of the American carceral state. This institutional staying power is reinforced by politicians' willingness to use colorblind language, rather than raise the issue of the racial injustice inherent in the process they are legislating.

The fact that politicians and others advocating for various drug war policies rarely explicitly raise the issue of discriminate sentences for racial minorities might lead some to

conclude that race is actually not a motivating factor behind changes to those policies. However, this conclusion would be short sighted given the persistent nature of race based disparities in sentencing outcomes. Racial disparities in sentencing have plagued the American criminal justice system since its inception.

It is difficult to discern whether these disparities are an intended consequence of criminal justice policies, or whether they are an unfortunate byproduct of the decision making process that occurs in any given criminal case. Are sentencing policies enacted in order to cause racial disparities? Or are disparities an effect of the discretion our system invests in different actors, such as prosecuting attorneys and judges? Answering these questions would require imprecise speculation about the motives behind decisions made by politicians, attorneys, judges, and others. What is clear, however, is that racial disparities in sentencing exist at such overwhelming rates that they cannot be ignored, and simply cannot be discounted as a factor in the move to reform the sentencing policies of the War on Drugs.

It is also possible that the failure to explicitly raise the issue of racial disparity when advocating for reform of the policies was a strategy to allow benefits for minority offenders without having to discuss them in these terms. Race and discrimination are issues that many prefer not to discuss, and there is a definite reluctance on the part of politicians to accuse others of having taken actions, and enacted policies that have had a discriminatory effect. As such, politicians who advocated for reform of the sentencing policies did not wish to raise the discriminatory impact of those policies, and therefore only implicitly addressed the issue if they addressed it at all. Ultimately, because reform of the policies would benefit all drug offenders, including minorities, it was not necessary to raise the thorny issue of race. This strategic calculation allowed politicians concerned about racial discrimination to push for policies that

would benefit minorities without having to wade into the risky conversation about race and discrimination.

The shift in drug war policy toward more lenient alternatives to prison has not eradicated the problem of racial minorities serving longer sentences than white offenders. This is because, although racial disparities in sentencing increased dramatically under the policies of the War on Drugs, these disparities are not solely a characteristic of sentencing under those policies. These disparities have always existed in criminal sentencing outcomes, and are likely to continue unless there is an effort made to explicitly address and resolve the issue.

As discussed in this dissertation, some of the drug war policy shifts can be attributed to increasing descriptive representation for the minority offenders who suffer the disparate impacts of the strict sentencing policies. However, the inconsistent findings regarding descriptive representation raise further questions. Recall that an increase in blacks in state legislatures lead to more strict drug sentencing policies, while an increase in Latinos in state legislatures lead to less strict drug sentencing policies. It is possible that these inconsistent findings are a result of differing levels of support for drug war policies among blacks and Latinos, but they could be a result of the relatively low numbers of blacks and Latinos who have been elected to state legislatures. In order for black and Latino legislators to have a real impact on drug sentencing policies they may need to have larger numbers in the legislatures. At present blacks and Latinos do not constitute a large enough voting block to provide a form of descriptive representation that would allow for such major policy amendments. Instead they must rely on their ability to persuade other legislators to support their favored policies.

This issue is exacerbated by the time period studied in this dissertation, with the 50 state empirical chapter analyzing data only until 2002. Updated data may allow for a more accurate study of the effects of descriptive representation on policy shifts in the War on Drugs. If more recent data were available we might find more consistent effects of descriptive representation. The Latino population in particular has been growing rapidly and will continue to do so. As such, there are likely more Latino legislators in many states, which could lead to more pronounced evidence of descriptive representation.

Additionally, it is likely that black legislators have begun to withdraw their support for the strict sentencing policies of the War on Drugs. While many black leaders originally supported the policies of the War on Drugs as a way to eradicate drug use and related crime from their communities, this support is likely to have waned in light of the disparate impact blacks have experienced as a result of the policies. Therefore, increased descriptive representation for blacks in state legislatures may now be leading to less strict drug sentencing policies rather than the more strict policies discussed in this dissertation. As such, a future study with updated data will provide a more complete and accurate picture of the effects of descriptive representation in the policy shifts in the War on Drugs.

These findings are important contributions to the literature, but they are particularly relevant at this time in American history. Such findings about the persistent racialized nature of our institutions are astounding in a time when the racial composition of the nation is changing at a rapid rate. Current and projected rates of immigration will continue to change the population and will make racism and racial considerations in policymaking increasingly relevant. Further, it will be important to recognize the continued racial underpinnings of our policymaking processes,

in light of the fact that we have just elected the first black President of the United States, all while incarcerating millions of black citizens.

In this study I address the question of why some states have amended their harsh mandatory minimum sentencing laws of the War on Drugs. The existing literature addressing criminal justice policy, including sentencing policy, posits that a number of factors influence such policy, including political party competition, crime trends, and race. I find, however, that the literature paints a simplistic picture that does not address the nuances and complexities that influence the politics of crime, and particularly drug sentencing, policy. With this study I demonstrate that the dramatic financial costs, as well as latent race issues, play the largest role in determining whether a state maintains harsh sentencing policies or amends those policies to reduce prison sentences and introduce alternatives to prison.

Historically criminal drug laws have been related to a large extent to fear of and attempts to control particular portions of the population. In most instances, efforts to change criminal laws have resulted in policies that are more punitive rather than less. Long before criminal drug policies were referred to as the War on Drugs, drug use and related behaviors were criminalized primarily as a way to address new races or ethnic groups that were arriving in and growing in the United States. Criminalization of opium use was a response to the perceived threat posed by a growing Chinese population on the West coast. Criminalization of marijuana use began largely as an attempt to control the growing Latino population, initially in the southwest and more recently in other parts of the country.

In the late 1960s drug crime legislation experienced a period of rejuvenation, partly in response to the hippie culture and associated fears of drug use and belief in a corresponding loss

of morality. At this point legislators, initially at the federal level, fueled the growing fear among the population about drugs and their potential relationship to crime and general immorality. The hippie movement and its connection to college campuses sparked the fear that drugs and crime would spread to all parts of the country, including wealthy communities, rather than remain confined to urban, primarily poor and minority, communities.

Since that time criminal laws punishing drug offenses have multiplied and become increasingly harsh, culminating in policies such as mandatory minimum sentences for many offenses, three strikes laws, and truth in sentencing laws. Despite the fact that many states are facing huge budget strains as a result of the policies and associated costs of incarcerating increasingly large numbers of offenders, most states have maintained these policies. In the face of financial woes and mounting evidence of a large disparate impact of the policies on racial minorities, most legislators find it politically safe to continue to advocate for tough on crime policies. Those legislators who advocate for change suggest reform of drug sentencing policies as a way of reducing the budget shortfalls, but very few mention the gross injustices experienced by racial minorities as a justification for reform of the policies.

Nevertheless, these two factors – money and race – appear to be the motivation behind reforms that have occurred in some states. While it remains politically expedient to be tough on crime, the financial strain and racial disparities resulting from the sentencing policies of the War on Drugs have forced many legislators to reconsider those policies and to vote for change. However, legislators are willing to raise finances in their advocacy for reform, but they are less willing to discuss racial disparities in sentencing outcomes as a result of the policies. Drawing attention to a financial crisis, and raising awareness of other policy areas that face shortfalls due to the costs of incarceration, is a surefire way to convince the public that change is necessary.

On the other hand, drawing attention to the fact that minorities have suffered disproportionately as a result of the policies is not as popular. Is this because legislators don't care that racial minorities are treated unfairly? Is it because the public doesn't care? The public is not receptive to the idea that some drug offenders, particularly minority offenders, are treated unfairly. The public is also unlikely to embrace policies that would be more lenient on drug offenders, even those who have been treated unfairly.

Throughout the history of the criminalization and punishment of drug use and sales, the public has been consistently supportive of the increasingly punitive policies. In general, Americans have favored punishment for criminals, rather than less restrictive alternatives, such as rehabilitation or community service. This punitive attitude has persisted throughout America's history, and has corresponded to a general dislike of programs like welfare. It is likely that this attitude stems from the basic values upon which this country was founded, such as individual independence, hard work, and accountability. Americans feel that they work hard for what they have, they pay their share of taxes, and they should not be required to supplement services for other Americans who have not fulfilled their personal responsibilities. Similarly, Americans feel that they are capable of abiding by the laws passed by the legislatures, and all other citizens should be able to do the same. If they can't, they should be punished. Legislators respond to our society's desire to punish. One result is the punitive sentencing policies of the War on Drugs.

References

- Beckett, Katherine. 1994 "Setting the public agenda: 'Street crime' and drug use in American politics." *Social Problems* 41:425-447
- Campbell, Robin. "Dollars & Sentences: Legislators' Views on Prisons, Punishment, and the Budget Crisis." A Round Table Discussion Sponsored by the Vera Institute of Justice State Sentencing & Corrections Program and the National Conference of State Legislatures. July, 2003
- Daly, Kathleen and Michael Tonry. 1997 "Gender, race, and sentencing." *Crime and Justice* 22:201-252
- Drug Policy Alliance Network ([www://drugpolicy.org/statebystate/newyork/rockefellerd/](http://www.drugpolicy.org/statebystate/newyork/rockefellerd/))
- Executive Office of the President, Office of National Drug Control Policy, ONDCP: Drug Policy Information Clearinghouse Fact Sheet, 2002. www.whitehousedrugpolicy.gov
- Greene, Judith and Vincent Schiraldi. 2002 "Cutting correctly: New prison policies for times of fiscal crisis." Justice Policy Institute, Center for Juvenile and Criminal Justice
- Gottschalk, Marie. *The Prison and the Gallows: The Politics of Mass Incarceration in America*. Cambridge University Press. 2006
- Meier, Kenneth J. *The Politics of Drug Abuse: Laws, Implementation, and Consequences*. *Western Political Quarterly*, 45, no. 1 (1992)
- Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol and Public Policy*. M.E. Sharpe, Inc. 1994
- Meier, Kenneth J., and Kevin B. Smith. *Say It Ain't So, Moe: Institutional Design, Policy Effectiveness, and Drug Policy*. *Journal of Public Administration Research and Theory* 4, no. 4 (1994)
- Miller, Lisa. *The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited*. June, 2007, *Perspectives on Politics*, Vol. 5, No. 2
- New York Civil Liberties Union (www.nyblu.org). "State Legislature Passes Historic Drug Law Reforms." April 2, 2009
- Schneider, Anne Larason. "Patterns of Change in the Use of Imprisonment in the American States: An Integration of Path Dependence, Punctuated Equilibrium and Policy Design Approaches." *Political Research Quarterly*, Vol. 59, No. 3 (Sep., 2006), pp. 457-470

Smith, Kevin. The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates. The Journal of Politics, Vol. 66, No. 3 (Aug., 2004)

Steffensmeier, Darrell and Stephen Demuth. "Ethnicity and Sentencing Outcomes in United States Federal Courts: Who is Punished More Harshly?" American Sociological Review, Vol. 65, No. 5 (Oct., 2000)

The Sentencing Project. "Drug Policy and the Criminal Justice System." 2001, www.thesentencingproject.org

The Sentencing Project. "State Rates of Incarceration by Race." 2004, www.thesentencingproject.org

The Sentencing Project. "Statistics by State." 2007, www.thesentencingproject.org

Seawright, Jason and John Gerring. "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options" Political Research Quarterly, Vol. 61, No. 2. June, 2008

Toscano, John. "New Drug Law Stirs 2010 Election Battles." The Queens Gazette, October 14, 2009

Warren, Jennifer. "One in 100: Behind Bars in America 2008." The Pew Center on the States. 2008

Wilson, Aaron D. "Rockefeller Drug Laws Information Sheet." Partnership for Responsible Drug Information. 2009

The Associated Press, December 1, 1988, Jackson Sees 'Qualitative Change' Between Bush and Reagan, Washington Dateline

Bobo, Lawrence D. and Mia Tuan. Prejudice in Politics: Group Position, Public Opinion, and the Wisconsin Treaty Rights Dispute. Harvard University Press, 2006

Cameron, Charles, David Epstein, and Sharyn O'Halloran. "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" The American Political Science Review, Vol. 90, No. 4 (Dec., 1996)

Clines, Francis X. The Houston Chronicle, October 19, 1995, House Backs Stiff Drug Penalties: Sentencing Panel's Recommendation on Crack Laws Rejected

Daly, Kathleen and Michael Tonry. 1997 "Gender, race, and sentencing." *Crime and Justice* 22:201-252

Davis, Darren W. *Negative Liberty: Public Opinion and the Terrorist Attacks on America*. Russell Sage Foundation, 2007

Hagan, John and Alberto Palloni. "Sociological Criminology and the Mythology of Hispanic Immigration and Crime" *Social Problems*, Vol. 46, No. 4 (Nov., 1999)

Hero, Rodney E. *Faces of Inequality: Social Diversity in American Politics*. Oxford University Press, 1998

Hero, Rodney E. and Caroline J. Tolbert. "Latinos and Substantive Representation in the U.S. House of Representatives: Direct, Indirect, or Nonexistent?" *American Journal of Political Science*, Vol. 40, No. 3 (Aug., 1995)

Lublin, David. "Racial Redistricting and African American Representation: A Critique of 'Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?'" *The American Political Science Review*, Vol. 93, No. 1 (Mar., 1999)

Marcus, George E., John L. Sullivan, Elizabeth Theiss-Morse, and Sandra L. Wood. *With Malice Toward Some: How People Make Civil Liberties Judgments*. Cambridge University Press, 1995

- Meier, Kenneth J. "The Politics of Drug Abuse: Laws, Implementation, and Consequences" *The Western Political Quarterly*, Vol. 45, No. 1 (Mar., 1992)
- Meier, Kenneth J. *The Politics of Sin: Drugs, Alcohol, and Public Policy*. M.E. Sharpe, Inc., 1994
- Meier, Kenneth J. and Kevin B. Smith. "Say It Ain't So, Moe: Institutional Design, Policy Effectiveness, and Drug Policy" *Journal of Public Administration Research and Theory* 4, no. 4 (1994)
- Miller, Lisa. "The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited" *Perspectives on Politics*, Vol. 5, No. 2, June 2007
- Myers, E. Michael. *United Press International*, June 15, 1988, Buch, Dukakis Fight Political War on Drugs.
- Reiman, Jeffrey. *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*. Pearson A and B, 1979
- Smith, Kevin B. "The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates" *The Journal of Politics*, Vol. 66, No. 3 (Aug., 2004)
- Steffensmeier, Darrell and Stephen Demuth. "Ethnicity and Sentencing Outcomes in United States Federal Courts: Who is Punished More Harshly?" *American Sociological Review*, Vol. 65, No. 5 (Oct., 2000)

Welch, William M. The Associated Press, September 14, 1989, Jackson Calls for War on Poverty with War on Drugs.

Welch, William M. The Associated Press, September 17, 1988, Dukakis Says Stepped Up Drug Enforcement Would Pay for Itself.

Wilkerson, Isabel. The New York Times, September 11, 1988, The Nation: Civil Rights Groups Are Redefining Their Job.

Appendix A

STATE OF MICHIGAN

91ST LEGISLATURE

REGULAR SESSION OF 2002

Introduced by Reps. McConico, Julian, Kowall and Hardman

Reps. Adamini, Bogardus, Bovin, Rich Brown, Clark, Clarke, DeRossett, DeWeese, Drolet, Durhal,

Garza, George, Hale, Howell, Jamnick, Kolb, Kooiman, Lemmons, Lipsey, Minore, Murphy, Palmer,

Phillips, Quarles, Reeves, Rison, Thomas, Whitmer, Williams and Zelenko named co-sponsors

ENROLLED HOUSE BILL No. 5394

AN ACT to amend 1978 PA 368, entitled "An act to protect and promote the public health; to codify, revise, consolidate, classify, and add to the laws relating to public health; to provide for the prevention and control of diseases

and disabilities; to provide for the classification, administration, regulation, financing, and maintenance of personal, environmental, and other health services and activities; to create or continue, and prescribe the powers and duties of, departments, boards, commissions, councils, committees, task forces, and other agencies; to prescribe the powers and duties of governmental entities and officials; to regulate occupations, facilities, and agencies affecting the public health; to regulate health maintenance organizations and certain third party administrators and insurers; to provide for the imposition of a regulatory fee; to promote the efficient and economical delivery of health care services, to provide for the appropriate utilization of health care facilities and services, and to provide for the closure of hospitals or consolidation of hospitals or services; to provide for the collection and use of data and information; to provide for the transfer of property; to provide certain immunity from liability; to regulate and prohibit the sale and offering for sale of drug paraphernalia under certain circumstances; to provide for the implementation of federal law; to provide for penalties and remedies; to provide for sanctions for violations of this act and local ordinances; to provide for an appropriation and supplements; to repeal certain acts and parts of acts; to repeal certain parts of this act; and to repeal certain parts of this act on specific dates," by amending sections 7401 and 7403 (MCL 333.7401 and 333.7403), as amended by 2001 PA 236.

The People of the State of Michigan enact:

Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

(i) Which is in an amount of 1,000 grams or more of any mixture containing that substance is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than \$1,000,000.00, or both.

(348)

Act No. 665

Public Acts of 2002

Approved by the Governor

December 25, 2002

Filed with the Secretary of State

December 26, 2002

EFFECTIVE DATE: March 1, 2003

(ii) Which is in an amount of 450 grams or more, but less than 1,000 grams, of any mixture containing that substance is guilty of a felony and punishable by imprisonment for not more than 30 years or a fine of not more than \$500,000.00, or both.

(iii) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$250,000.00, or both.

(iv) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$25,000.00, or both.

(b) Either of the following:

(i) A substance described in section 7214(c)(ii) is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$25,000.00, or both.

(ii) Any other controlled substance classified in schedule 1, 2, or 3, except marihuana is guilty of a felony punishable by imprisonment for not more than 7 years or a fine of not more than \$10,000.00, or both.

(c) A substance classified in schedule 4 is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

(d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:

(i) If the amount is 45 kilograms or more, or 200 plants or more, by imprisonment for not more than 15 years or a fine of not more than \$10,000,000.00, or both.

(ii) If the amount is 5 kilograms or more but less than 45 kilograms, or 20 plants or more but fewer than 200 plants, by imprisonment for not more than 7 years or a fine of not more than \$500,000.00, or both.

(iii) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than \$20,000.00, or both.

(e) A substance classified in schedule 5 is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

(f) A prescription form or a counterfeit prescription form is guilty of a felony punishable by imprisonment for not

more than 7 years or a fine of not more than \$5,000.00, or both.

(3) A term of imprisonment imposed under subsection (2)(a) may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

(4) If an individual was sentenced to lifetime probation under subsection (2)(a)(iv) before the effective date of the amendatory act that added this subsection and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual's probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection.

(5) As used in this section, "plant" means a marihuana plant that has produced cotyledons or a cutting of a marihuana plant that has produced cotyledons.

Sec. 7403. (1) A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv), and:

(i) Which is in an amount of 1,000 grams or more of any mixture containing that substance is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than \$1,000,000.00, or both.

(ii) Which is in an amount of 450 grams or more, but less than 1,000 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 30 years or a fine of not more than \$500,000.00, or both.

(iii) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$250,000.00, or both.

(iv) Which is in an amount of 25 grams or more, but less than 50 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$25,000.00, or both.

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(v) Which is in an amount less than 25 grams of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$25,000.00, or both.

(b) Either of the following:

(i) A substance described in section 7214(c)(ii) is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$15,000.00, or both.

(ii) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance for which a penalty is prescribed in subdivision (a), (b)(i), (c), or (d), or a controlled substance analogue is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

(c) Lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5 is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00, or both.

(d) Marihuana is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00, or both.

(e) A prescription form is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both.

(3) If an individual was sentenced to lifetime probation under subsection (2)(a)(iv) before the effective date of the amendatory act that added this subsection and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual's probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection.

Enacting section 1. This amendatory act takes effect March 1, 2003.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 91st Legislature are enacted into law:

(a) House Bill No. 5395.

(b) House Bill No. 6510.

This act is ordered to take immediate effect.

Clerk of the House of Representatives.

Secretary of the Senate.

Approved

Governor.

STATE OF MICHIGAN

91ST LEGISLATURE

REGULAR SESSION OF 2002

Introduced by Reps. McConico, Kowall, Julian and Hardman

Reps. Adamini, Bogardus, Bovin, Rich Brown, Clark, Clarke, Daniels, DeWeese, Drolet, Durhal, Garza,

George, Hale, Hansen, Howell, Jacobs, Kolb, Kooiman, Lemmons, Lipsey, Minore, Murphy, Palmer,

Phillips, Reeves, Rison, Thomas, Voorhees, Waters, Whitmer, Williams and Zelenko named co-sponsors

ENROLLED HOUSE BILL No. 5395

AN ACT to amend 1927 PA 175, entitled "An act to revise, consolidate, and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts, judges, and other officers of the court under the

provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses and ordinance violations; to provide for the arrest of persons charged with or suspected of criminal offenses and ordinance violations; to provide for bail of persons arrested for or accused of criminal offenses and ordinance violations; to provide for the examination of persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and ordinance violations and to provide for the procedure in those trials; to provide for judgments and sentences of persons convicted of criminal offenses and ordinance violations; to establish a sentencing commission and to prescribe its powers and duties; to provide for procedure relating to new trials and appeals in criminal and ordinance violation cases; to provide a uniform system of probation throughout this state and the appointment of probation officers; to prescribe the powers, duties, and compensation of probation officers; to provide penalties for the violation of the duties of probation officers; to provide for procedure governing proceedings to prevent crime and proceedings for the discovery of crime; to provide for fees of officers, witnesses, and others in criminal and ordinance violation cases; to set forth miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act," by amending section 34 of chapter IX, sections 1 and 2 of chapter XI, and sections 13m, 43, 45, and 57 of chapter XVII (MCL 769.34, 771.1, 771.2, 777.13m, 777.43, 777.45, and 777.57), section 34 of chapter IX and section 43 of chapter XVII as amended by 2000 PA 279, section 1 of chapter XI as amended by 2002 PA 483, section 2 of chapter XI as amended by 1998 PA 520, section 13m of chapter XVII as added by 2002 PA 30, section 45 of chapter XVII as added by 1998 PA 317, and section 57 of chapter XVII as amended by 1999 PA 227.

The People of the State of Michigan enact:

CHAPTER IX

Sec. 34. (1) The sentencing guidelines promulgated by order of the Michigan supreme court do not apply to felonies enumerated in part 2 of chapter XVII committed on or after January 1, 1999.

(350)

Act No. 666

Public Acts of 2002

Approved by the Governor

December 25, 2002

Filed with the Secretary of State

December 26, 2002

EFFECTIVE DATE: March 1, 2003

(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. Both of the following apply to minimum sentences under this subsection:

(a) If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

(b) The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.

(3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

(b) If an attempt to commit a felony designated in offense class H in part 2 of chapter XVII is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.

(c) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:

(i) To imprisonment with a minimum term within that range.

(ii) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

(5) If a crime has a mandatory determinative penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

(6) As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

(7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

(8) All of the following shall be part of the record filed for an appeal of a sentence under this section:

(a) An entire record of the sentencing proceedings.

(b) The presentence investigation report. Any portion of the presentence investigation report exempt from disclosure by law shall not be a public record.

(c) Any other reports or documents the sentencing court used in imposing sentence.

(9) An appeal of a sentence under this section does not stay execution of the sentence.

(10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

(11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

(12) Time served on the sentence appealed under this section is considered time served on any sentence imposed after remand.

CHAPTER XI

Sec. 1. (1) In all prosecutions for felonies or misdemeanors other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses not described in subsection (4), if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

(2) In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay.

(3) If a defendant is before the circuit court and the court delays imposing sentence under subsection (2), the court shall include in the delayed sentence order that the department of corrections shall collect a supervision fee of not more than \$135.00 multiplied by the number of months of delay ordered, but not more than 12 months. The fee is payable when the delayed sentence order is entered, but the fee may be paid in monthly installments if the court approves installment payments for that defendant. In determining the amount of the fee, the court shall consider the defendant's projected income and financial resources. The court shall use the following table of projected monthly income in

determining the amount of the fee to be ordered:

Projected Monthly Income Amount of Fee

\$ 0-249.99 \$ 0.00

\$ 250.00-499.99 \$ 10.00

\$ 500.00-749.99 \$ 25.00

\$ 750.00-999.99 \$ 40.00

\$1,000.00 or more 5% of projected monthly income,

but not more than \$135.00

The court may order a higher amount than indicated by the table, up to the maximum of \$135.00 multiplied by the number of months of delay ordered but not more than 12 months, if the court determines that the defendant has sufficient assets or other financial resources to warrant the higher amount. If the court orders a higher amount, the amount and the reasons for ordering that amount shall be stated in the court order. The fee shall be collected as provided in section 25a of the corrections code of 1953, 1953 PA 232, MCL 791.225a. A person shall not be subject to more than 1 supervision fee at the same time. If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration.

(4) This section does not apply to a juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309.

Sec. 2. (1) Except as provided in section 2a of this chapter, if the defendant is convicted for an offense that is not a felony, the probation period shall not exceed 2 years. Except as provided in section 2a of this chapter, if the defendant is convicted of a felony, the probation period shall not exceed 5 years.

(2) The court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case, fix and determine the period and conditions of probation. The order is part of the record in the cause. The court may amend the order in form or substance at any time.

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(3) A defendant who was placed on probation under section 1(4) of this chapter prior to the effective date of the act that amended this section is subject to the conditions of probation specified in section 3 of this chapter, including payment of a probation supervision fee as prescribed in section 3c of this chapter, and to revocation for violation of these

conditions, but the probation period shall not be reduced other than by a revocation that results in imprisonment or as otherwise provided by law.

(4) If an individual is placed on probation for a listed offense enumerated in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722, the individual's probation officer shall register the individual or accept the individual's registration as provided in that act.

(5) Subsection (1) does not apply to a juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309.

CHAPTER XVII

Sec. 13m. This chapter applies to the following felonies enumerated in chapter 333 of the Michigan Compiled Laws:

M.C.L. Category Class Description Stat Max

333.7341(8) CS G Delivery or manufacture of imitation controlled substance 2

333.7401(2)(a)(i) CS A Delivery or manufacture of 1,000 or more grams of certain schedule 1 or 2 controlled substances Life

333.7401(2)(a)(ii) CS A Delivery or manufacture of 450 or more but less than 1,000 grams of certain schedule 1 or 2 controlled substances 30

333.7401(2)(a)(iii) CS B Delivery or manufacture of 50 or more but less than 450 grams of certain schedule 1 or 2 controlled substances 20

333.7401(2)(a)(iv) CS D Delivery or manufacture of less than 50 grams of certain schedule 1 or 2 controlled substances 20

333.7401(2)(b)(i) CS B Delivery or manufacture of methamphetamine 20

333.7401(2)(b)(ii) CS E Delivery or manufacture of certain schedule 1, 2, or 3 controlled substances 7

333.7401(2)(c) CS F Delivery or manufacture of schedule 4 controlled substance 4

333.7401(2)(d)(i) CS C Delivery or manufacture of 45 or more kilograms

of marijuana 15

333.7401(2)(d)(ii) CS D Delivery or manufacture of 5 or more but less than 45 kilograms of marijuana 7

333.7401(2)(d)(iii) CS F Delivery or manufacture of less than 5 kilograms or 20 plants of marijuana 4

333.7401(2)(e) CS G Delivery or manufacture of schedule 5 controlled substance 2

333.7401(2)(f) CS D Delivery or manufacture of an official or counterfeit prescription form 20

333.7401(2)(g) CS D Delivery or manufacture of prescription or counterfeit form (other than official) 7

333.7401a Person B Delivering a controlled substance or GBL with intent to commit criminal sexual conduct 20

333.7401b(3)(a) CS E Delivery or manufacture of GBL 7

333.7401b(3)(b) CS G Possession of GBL 2

333.7401c(2)(a) CS D Operating or maintaining controlled substance laboratory 10

333.7401c(2)(b) CS B Operating or maintaining controlled substance laboratory in presence of minor 20

333.7401c(2)(c) CS B Operating or maintaining controlled substance laboratory involving hazardous waste 20

4

333.7401c(2)(d) CS B Operating or maintaining controlled substance laboratory near certain places 20

333.7401c(2)(e) CS A Operating or maintaining controlled substance laboratory involving firearm or other harmful device 25

333.7402(2)(a) CS D Delivery or manufacture of certain imitation controlled substances 10

333.7402(2)(b) CS E Delivery or manufacture of schedule 1, 2, or 3
imitation controlled substance 5

333.7402(2)(c) CS F Delivery or manufacture of imitation schedule 4
controlled substance 4

333.7402(2)(d) CS G Delivery or manufacture of imitation schedule 5
controlled substance 2

333.7402(2)(e) CS C Delivery or manufacture of controlled substance
analogue 15

333.7403(2)(a)(i) CS A Possession of 1,000 or more grams of certain schedule
1 or 2 controlled substances Life

333.7403(2)(a)(ii) CS A Possession of 450 or more but less than 1,000 grams
of certain schedule 1 or 2 controlled substances 30

333.7403(2)(a)(iii) CS B Possession of 50 or more but less than 450 grams
of certain schedule 1 or 2 controlled substances 20

333.7403(2)(a)(iv) CS G Possession of 25 or more but less than 50 grams
of certain schedule 1 or 2 controlled substances 4

333.7403(2)(a)(v) CS G Possession of less than 25 grams of certain schedule
1 or 2 controlled substances 4

333.7403(2)(b)(i) CS D Possession of methamphetamine 10

333.7403(2)(b)(ii) CS G Possession of certain schedule 1, 2, 3, or 4 controlled
substances or controlled substances analogue 2

333.7403(2)(e) CS H Possession of official prescription form 1

333.7405(a) CS G Controlled substance violations by licensee 2

333.7405(b) CS G Manufacturing or distribution violations by licensee 2

333.7405(c) CS G Refusing lawful inspection 2

333.7405(d) CS G Maintaining drug house 2

333.7407(1)(a) CS G Controlled substance violations by licensee 4

333.7407(1)(b) CS G Use of fictitious, revoked, or suspended license number 4

333.7407(1)(c) CS G Obtaining controlled substance by fraud 4

333.7407(1)(d) CS G False reports under controlled substance article 4

333.7407(1)(e) CS G Possession of counterfeiting implements 4

333.7407(1)(f) CS F Disclosing or obtaining prescription information 4

333.7407(1)(g) CS F Possession of counterfeit prescription form 4

333.7407(2) CS G Refusing to furnish records under controlled substance
article 4

333.7410a CS G Controlled substance offense or offense involving GBL

in or near a park 2

Sec. 43. (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age..... 50 points

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person 25 points

5

(c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii)..... 10 points

(d) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group..... 10 points

(e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) 10 points

(f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property 5 points

(g) No pattern of felonious criminal activity existed..... 0 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

(e) Do not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced.

(f) Do not count more than 1 crime involving the same controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances.

Sec. 45. (1) Offense variable 15 is aggravated controlled substance offenses. Score offense variable 15 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) 100 points

(b) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) 75 points

(c) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) 50 points

(d) The offense involved the sale or delivery of a controlled substance other than marihuana or a mixture containing a controlled substance other than marihuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender 25 points

(e) The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or

more of marihuana or 200 or more of marihuana plants 10 points

(f) The offense is a violation of section 7401(2)(a)(i) to (iii) pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present 10 points

(g) The offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking..... 5 points

(h) The offense was not an offense described in subdivisions (a) through (g) 0 points

(2) As used in this section:

(a) "Deliver" means the actual or constructive transfer of a controlled substance from 1 individual to another regardless of remuneration.

(b) "Minor" means an individual 17 years of age or less.

6

7

(c) "Trafficking" means the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution.

Sec. 57. (1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender has 2 or more subsequent or concurrent convictions 20 points

(b) The offender has 1 subsequent or concurrent conviction 10 points

(c) The offender has no subsequent or concurrent convictions..... 0 points

(2) All of the following apply to scoring record variable 7:

(a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

(b) Do not score a felony firearm conviction in this variable.

(c) Do not score a concurrent felony conviction if a mandatory consecutive sentence or a consecutive sentence imposed under section 7401(3) of the public health code, 1978 PA 368, MCL 333.7401, will result from that conviction.

Enacting section 1. This amendatory act takes effect March 1, 2003.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 91st Legislature are enacted into law:

(a) House Bill No. 5394.

(b) House Bill No. 6510.

This act is ordered to take immediate effect.

Clerk of the House of Representatives.

Secretary of the Senate.

Approved

Governor.

91ST LEGISLATURE

REGULAR SESSION OF 2002

Introduced by Reps. McConico and Thomas

Reps. Adamini, Bovin, Rich Brown, Clark, Clarke, Daniels, DeRossett, DeWeese, Drolet, Durhal, Garza, Hale, Hansen, Howell, Jacobs, Jamnick, Julian, Kolb, Kooiman, Lemmons, Lipsey, Minore, Murphy, Phillips, Reeves, Rison, Waters, Whitmer, Williams and Zelenko named co-sponsors

ENROLLED HOUSE BILL No. 6510

AN ACT to amend 1953 PA 232, entitled "An act to revise, consolidate, and codify the laws relating to probationers and probation officers, to pardons, reprieves, commutations, and paroles, to the administration of correctional institutions,

correctional farms, and probation recovery camps, to prisoner labor and correctional industries, and to the supervision and inspection of local jails and houses of correction; to provide for the siting of correctional facilities; to create a state department of corrections, and to prescribe its powers and duties; to provide for the transfer to and vesting in said department of powers and duties vested by law in certain other state boards, commissions, and officers, and to abolish certain boards, commissions, and offices the powers and duties of which are transferred by this act; to allow for the operation of certain facilities by private entities; to prescribe the powers and duties of certain other state departments and agencies; to provide for the creation of a local lockup advisory board; to prescribe penalties for the violation of the provisions of this act; to make certain appropriations; to repeal certain parts of this act on specific dates; and to repeal all acts and parts of acts inconsistent with the provisions of this act," by amending sections 20e and 34 (MCL 791.220e and 791.234), section 20e as amended by 1995 PA 20 and section 34 as amended by 1999 PA 191.

The People of the State of Michigan enact:

Sec. 20e. (1) Except as provided in subsection (2), not more than 880 prisoners shall be housed at the Scott correctional facility and not more than 925 prisoners shall be housed at the western Wayne correctional facility.

(2) If a new housing unit is constructed within the security perimeter of either facility listed in subsection (1), the capacity limits listed in subsection (1) for that facility are increased by the designated capacity of the new housing unit.

Sec. 34. (1) Except as provided in section 34a, a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years other than a prisoner subject to disciplinary time is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence

imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.

(2) Except as provided in section 34a, a prisoner subject to disciplinary time sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted.

(3) If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the

(349)

Act No. 670

Public Acts of 2002

Approved by the Governor

December 25, 2002

Filed with the Secretary of State

December 26, 2002

EFFECTIVE DATE: March 1, 2003

good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(4) If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

(5) If a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served.

(6) A prisoner under sentence for life, other than a prisoner sentenced for life for murder in the first degree or sentenced for life for a violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a, who has served 10 calendar years of the sentence in the case of a prisoner sentenced for a crime committed before October 1, 1992, or, except as provided in subsection (10), who has served 20 calendar years of the sentence in the case of a prisoner sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, who has another conviction for a serious crime, or, except as provided in subsection (10), who has served 17-1/2 calendar years of the sentence in the case of a prisoner sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, who does not have another conviction for a serious crime, or who has served 15 calendar years of the sentence in the case of a prisoner sentenced for a crime committed on or after October 1, 1992, is subject to the jurisdiction of the parole board and may be released on parole by the parole board, subject to the following conditions:

(a) At the conclusion of 10 calendar years of the prisoner's sentence and thereafter as determined by the parole board until the prisoner is paroled, discharged, or deceased, and in accordance with the procedures described in subsection (7), 1 member of the parole board shall interview the prisoner. The interview schedule prescribed in this subdivision applies to all prisoners to whom this subsection is applicable, regardless of the date on which they were sentenced.

(b) In addition to the interview schedule prescribed in subdivision (a), the parole board shall review the prisoner's file at the conclusion of 15 calendar years of the prisoner's sentence and every 5 years thereafter until the prisoner is paroled, discharged, or deceased. A prisoner whose file is to be reviewed under this subdivision shall be notified of the upcoming file review at least 30 days before the file review takes place and shall be allowed to submit written statements or documentary evidence for the parole board's consideration in conducting the file review.

(c) A decision to grant or deny parole to a prisoner so sentenced shall not be made until after a public hearing held in the manner prescribed for pardons and commutations in sections 44 and 45. Notice of the public hearing shall be given to the sentencing judge, or the judge's successor in office, and parole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole within 30 days of receipt of the notice of hearing. The written objections shall be made part of the prisoner's file.

(d) A parole granted under this subsection shall be for a period of not less than 4 years and subject to the usual rules pertaining to paroles granted by the parole board. A parole ordered under this subsection is not valid until the transcript of the record is filed with the attorney general whose certification of receipt of the transcript shall be

returnable to the office of the parole board within 5 days. Except for medical records protected under section 2157 of the revised judicature act of 1961, 1961 PA 236, MCL 600.2157, the file of a prisoner granted a parole under this subsection is a public record.

(e) A parole shall not be granted under this subsection in the case of a prisoner who is otherwise prohibited by law from parole consideration. In such cases the interview procedures in section 44 shall be followed.

(7) An interview conducted under subsection (6)(a) is subject to both of the following requirements:

(a) The prisoner shall be given written notice, not less than 30 days before the interview date, stating that the interview will be conducted.

(b) The prisoner may be represented at the interview by an individual of his or her choice. The representative shall not be another prisoner. A prisoner is not entitled to appointed counsel at public expense. The prisoner or representative may present relevant evidence in favor of holding a public hearing as described in subsection (6)(b).

(8) In determining whether a prisoner convicted of violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, and sentenced to imprisonment for life before October 1, 1998 is to be released on parole, the parole board shall consider all of the following:

(a) Whether the violation was part of a continuing series of violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, by that individual.

2

(b) Whether the violation was committed by the individual in concert with 5 or more other individuals.

(c) Any of the following:

(i) Whether the individual was a principal administrator, organizer, or leader of an entity that the individual knew or had reason to know was organized, in whole or in part, to commit violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and whether the violation for which the individual was convicted was committed to further the interests of that entity.

(ii) Whether the individual was a principal administrator, organizer, or leader of an entity that the individual knew or had reason to know committed violations of section 7401 or 7403 of the public health code, 1978 PA 368, MCL 333.7401

and 333.7403, and whether the violation for which the individual was convicted was committed to further the interests of that entity.

(iii) Whether the violation was committed in a drug-free school zone.

(iv) Whether the violation involved the delivery of a controlled substance to an individual less than 17 years of age

or possession with intent to deliver a controlled substance to an individual less than 17 years of age.

(9) Except as provided in section 34a, a prisoner's release on parole is discretionary with the parole board. The action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.

(10) If the sentencing judge, or his or her successor in office, determines on the record that a prisoner described in subsection (6) sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, has cooperated with law enforcement, the prisoner is subject to the jurisdiction of the parole board and may be released on parole as provided in subsection (6), 2-1/2 years earlier than the time otherwise indicated in subsection (6). The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide. The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury. If the court determines at sentencing that the defendant cooperated with law enforcement, the court shall include its determination in the judgment of sentence.

(11) An individual convicted of violating or conspiring to violate section 7401(2)(a)(ii) or 7403(2)(a)(ii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, before the effective date of the amendatory act that added this subsection is eligible for parole after serving the minimum of each sentence imposed for that violation or 10 years of each sentence imposed for that violation, whichever is less.

(12) An individual convicted of violating or conspiring to violate section 7401(2)(a)(iii) or 7403(2)(a)(iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, before the effective date of the amendatory act that added this subsection is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.

(13) An individual convicted of violating or conspiring to violate section 7401(2)(a)(iv) or 7403(2)(a)(iv) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, before the effective date of the amendatory act that added this subsection who is sentenced to a term of imprisonment that is consecutive to a term of imprisonment imposed for any other violation of section 7401(2)(a)(i) to (iv) or section 7403(2)(a)(i) to (iv) is eligible for parole after serving 1/2 of the minimum sentence imposed for each violation of section 7401(2)(a)(iv) or 7403(2)(a)(iv). This subsection does not apply if the sentence was imposed for a conviction for a new offense committed while the individual is on probation or parole.

(14) The parole board shall provide notice to the prosecuting attorney of the county in which the individual was

convicted before granting parole to the individual under subsection (11), (12), or (13).

(15) As used in this section:

(a) "Serious crime" means violating or conspiring to violate article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545, that is punishable by imprisonment for more than 4 years, or an offense against a person in violation of section 83, 84, 86, 87, 88, 89, 316, 317, 321, 349, 349a, 350, 397, 520b, 520c, 520d, 520g, 529, 529a, or 530 of the

Michigan penal code, 1931 PA 328, MCL 750.83, 750.84, 750.86, 750.87, 750.88, 750.89, 750.316, 750.317, 750.321, 750.349,

750.349a, 750.350, 750.397, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, and 750.530.

(b) "State correctional facility" means a facility that houses prisoners committed to the jurisdiction of the department, and includes a youth correctional facility operated under section 20g by the department or a private vendor.

Enacting section 1. This amendatory act takes effect March 1, 2003.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 91st Legislature are enacted into law:

(a) House Bill No. 5394.

(b) House Bill No. 5395.

3

4

This act is ordered to take immediate effect.

Clerk of the House of Representatives.

Secretary of the Senate.

Approved

Governor.

