Mandatory Sentencing Reform in the United States Following the *Booker* decision.

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Mandatory Sentencing Reform in the United States Following the *Booker* decision.

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Abstract

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Alan E Hillier

Under the Supervision of Dr. Michael Klemp-North

Statement of the Problem

Prior to 2005, there existed guidelines that Federal Courts were mandated to adhere to for cases or crimes that qualified under the provisions of the guidelines, usually for violent or heinous acts but including a laundry list of drug offenses. Regardless of judicial or prosecutorial discretion, these guidelines were the overarching determinant in sentencing. Often times, state-level legislation fell in line with the Federal Guidelines and/or adopted them as policy. This changed with a Supreme Court decision in 2005. *United States v. Booker* (2005) resulted in the decision to limit the authority of Federal Sentencing Guidelines to merely advisory. Immediately following this decision, a flurry of state and federal-level legislation propositions have arisen, leaving a chasm of uncertainty as to which method de jour, if any, is the most effective. From pardoning seemingly at will, as we saw with Louisiana Governor Barbour’s final Executive acts to the latest in sentencing reformation as seen in Senate Bill 123, out of Kansas, it should be clear that abandoning mandatory sentencing guidelines completely is a negligent approach and that the true solution is in compromise and finding the middle ground. For the purposes of this study, the crimes and offenses in question and that resulted in the Booker (2005) decision are those non-violent drug offenses for which many argue, prison is too severe. Under the Federal Guidelines, these crimes would have warranted a prison term, regardless of any extenuating circumstances surrounding the facts of the commission of the offense.
Methods and Procedures

The data and research analyzed for this study will have been provided by secondary sources as well as relative theoretical, empirical and practical findings. Said findings will be compared and contrasted for similarities and differences in relation to their overall contribution to the study of sentencing guidelines in America. This information will be gathered from relevant textbook resources, scholarly journal, state and federal level legislative doctrines. Much of the data pertaining to available statistics and data at the national level will be retrieved from the United States Sentencing Commission website as well as the National Institute of Justice.

Summary of Results

The statistical findings from this research have failed to determine which approach to sentence reform is most successful in reducing crime rates or the rates at which offender recidivate, or repeat offenses. The research has indicated, however, that many states have recognized the need for reform and are currently in the stage of implementing new programs or legislation of which, data collection will follow. There seems to be a consensus among multiple states that prior to any successful reform pertaining to sentencing and corrections, that a state-level sentencing commission should be enacted. Other states have had success with direct legislative acts that limit the use of prisons in lieu of diversion programs, offering offenders community-based sanctions if their offenses are deemed less dangerous and thus not warranting a prison term. No single approach will be recommended, rather the simple recognition that reform is happening and the next wave in sentencing will be occurring in the immediate months and years to come.
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I. INTRODUCTION: MANDATORY SENTENCING REFORM IN THE UNITED STATES FOLLOWING THE BOOKER DECISION

In the wake of the Booker (2005) decision, a state of limbo has befallen the criminal justice world. Prison populations in most states have reached well beyond maximum capacity and evidence suggests that this inevitable result of Mandatory Sentencing, often referred to as “mandatory minimums,” of the 1980’s and 1990’s, is not paralleled by its second intended purpose, crime deterrence. For the purposes of this study, areas of crime outlined under original Federal Mandatory Sentencing guidelines; specific, non-violent drug crime is the subject of debate on where sentencing at the Federal and State levels should be heading in the near future.

While many states have enacted Commissions to determine sentencing structure regarding these crimes, other states have stayed the course with sentencing guidelines acting as the overarching model by which judicial decisions are based. The current problems are that inconsistencies exist. Mandatory sentencing has proven ineffective in reducing crime rates and politics remain too heavily influential in decision-making while many feel that long prison sentencing for first time, non-violent offenders is neither in the best interest of the offender or the community.

PURPOSE OF THIS STUDY

In this study, various programs that have proven successful at the state level will be examined to determine whether their approaches to sentencing can be applied successfully to other states or at the federal level. The discussion will include remaining mandatory sentencing provisions, presumptive sentencing and combinations of the two approaches. State Sentencing Commissions that have improved crime rates while also reducing incarceration rates and prison
populations will be emulated and scrutinized against other studies from secondary literature and research. For example, though results seem mixed in terms of recidivism and revocations, Senate Bill 123 (Rengifo, 2009) in the State of Kansas has shown to divert significant numbers of drug offenders away from prison and into intermediate or community sanctions. The question would therefore be, is this program sustainable and can other states enact similar legislative acts and expect the same results?

SIGNIFICANCE AND IMPLICATIONS

The significance of a study such as this is to uncover what the next step in sentencing is. If current state level practices can be replicated nationally to show reduced prison populations, reduced crime rates, reduced recidivism rates and overall reduced costs to the state, then a true leap in the criminal justice system will have been made. A great deal of research is indicating a flawed system from statistical analysis to the opinions of the district judges asked to adjudicate according to the guidelines in place in their respective jurisdictions (Rengifo, 2009).

From a purely monetary perspective, in the years immediately following a recession, greater scrutiny is applied to every dollar spent at the state and federal levels of government. State and Federal Corrections do not get a free pass from this. It is expected that the data and research uncovered within this study will indicate that there is a methodology that is working. Garland (2001) will contend that most economic-centered models will battle against political-centric models of crime control and punishment. His implied shift away from rehabilitation will bring to the forefront, many historical perspectives on corrections, including the earliest model of penology under Beccaria (Clear, 2009).
Seven separate studies have been analyzed to gain a clearer picture of the current state of mandatory sentence laws and their overall impact on each branch of the criminal justice system, including judges, attorneys, victims, offenders and communities.
II. LITERATURE REVIEW: SENATE BILLS, LEGISLATIVE ACTS AND SURVEY RESULTS

A. SENATE BILLS AND LEGISLATIVE ACTS

In a study conducted by Lauren E. Geissler (2006), seven various Senate Bills in the State of California were examined in terms of their effectiveness in creating a successful sentencing commission for the state. The necessity for this commission is well-rooted in overall dissatisfaction with the current condition of mandatory minimums at the state level. The author noted multiple instances of “confusion, inequity and inconsistency in the current sentencing structure” (2006). California suffers from the same maladies experienced at the Federal level under the current Mandatory Sentencing era; overbuilding, overspending while still seeing overcrowding are all driving the state to seek out reform. Geissler (2006) cites two successful reformed commissions in both Washington and Minnesota. In both cases, the states saw incarceration rates skyrocket in the mid 1980’s through their respective implementations. Both states’ commissions are still based on a mandatory minimum structure, where specific violent crimes are met with a mandatory minimum sentence; however, they have greater built-in flexibility. All sides in the judicial process are able to contribute their point of view. In Minnesota, the commission was able to improve judicial compliance to over 75% while in Washington, violent offender incarceration rates have increased by over 16% while rates for non-violent offenders have decreased and have instead been substituted with greater reliance on community-based corrections and treatment programs (2006). The study provides a framework that would essentially tie all of the previous attempts at establishing a commission in the seven failed Senate Bills into a more concise body, similar to what she had found in both Washington and Minnesota. Though final data is not yet available, the memorandum proposed to the
California Bureau of Prisons cites improved information collection, sentencing structure, reduced long-term costs and alignment with rehabilitation efforts as the key benefits of a reformed commission following the current mandatory minimum legislation that the state has been operating under for over 20 years (2006).

Fain, Merritt and Turner (2004) researched Oregon’s Measure 11 (herein referred to as M11) after it had been in place for 10 years to determine the bill’s effectiveness as an alternative to Mandatory Sentencing Provisions previously in place. The difference between M11 and those discussed previously, is that M11 enacted stricter and longer sentencing guidelines, furthering the limitation on judicial discretion and lengthening the terms they were required to hand out. The motivation behind this significant policy shift was the belief that going even further than the federal guidelines behind mandatory sentencing would even further the efforts at improving public safety and deterring crime. M11 was a heated topic for both sides, with opponents fearing that prosecutors would become more powerful than both judges and defense attorneys, thereby jeopardizing the offenders 6th Amendment Right to a fair and speedy trial and 8th Amendment right to protect against Cruel or Unusual Punishment. M11 also covered offenses by people as young as 15, again receiving a great deal of opposition. Prosecutors interviewed for this study admitted that they do not choose to implement the mandatory minimums available to them in every case, but also noted that it was within their discretion whether or not to impose them, independent of the defense or even the judge’s opinion. Statistical findings did suggest a positive relationship between the time period in which M11 was enacted and a reduction in crime rates, further evaluation has revealed the reduction to be secondary in terms of results and not directly correlated to M11 (Fain et al, 2004).
In a Panel Discussion centered on Senate Bill 123 in the State of Kansas, multiple scholars weigh-in on their professional and academic opinions regarding this and similar actions at the state level in response to opposition to current mandatory minimums with regard to drug offenses. Senate Bill 123 (herein referred to as SB 123), is a one of a kind legislative action in the U.S. At the state level, it calls for a movement toward treatment for those nonviolent drug possession offenders who would have otherwise been sentenced to prison under the prevailing mandatory minimum legislation in the state of Kansas. This bill was the first statewide initiative, legislatively adopted to “provide mandatory community-based drug treatment in lieu of incarceration” (Rengifo, 2009). California Proposition 36 and Arizona Proposition 200 are similar bodies of legislation, however they were voted in by the public. SB 123 is born completely out of the state’s legislature. SB 123 is a direct result of the requirement in the State of Kansas for the Sentencing Commission to evaluate all potential alternatives to imprisonment and or expanding the capacity of their prisons every time the state nears 95% occupancy in its current prison population. SB 123 represents the first “statewide initiative to provide mandatory community-based drug treatment in lieu of incarceration (Rengifo, 2009).” Following the implementation of SB 123, Kansas has reported that prior to the bill, community corrections supervised 30 percent of all convicted drug possessors and now they supervise 88 percent, essentially diverting 55 percent from prison, to community corrections. Although SB 123 is technically still under the umbrella of mandatory sentencing, because it is not an option for either prosecution or the offender, it does represent an alternative to mandatory prison sentencing. The statewide initiative does rely on a strong, state-level community corrections framework. This reliance has and will continue to strain the economic model in Kansas and other states enacting similar legislation. Diverting into community sanctions as a mandate will require an immediate
boost in financial support for those organizations. Rengifo (2009) was clear that in the early stage of SB 123, he could not show that the program was yet cost effective. The State of Kansas was able to close 6 jails since SB123 was enacted which allowed a great reduction in the corrections budget for the state, however, the boost in cost for community corrections had more than offset the savings. Garland (2001) might argue here that since the economics and cost of the Bill are increasing overall expenses, that the political rhetoric behind the bill may become less supportive, ultimately destroying the Bill. The statistical results in terms of recidivism and deterrence are too early to be analyzed, although early indicators suggest that SB 123 has resulted in fewer cases of recidivism, greater revocations and fewer technical violations of the terms of their sentence. Providing that legislators can work around the financial impact of SB 123, the bill offers a glimpse of what may be next in line in terms of sentencing at the federal level.

**B. SURVEYS CONDUCTED ON SATISFACTION AND EFFECTIVENESS OF MANDATORY GUIDELINES**

The Vera Institute of Justice (2005) conducted a “comprehensive survey of state-level sentencing and corrections policies implemented between 1975 and 2002 to assess the impacts of those policies on state incarceration rates”. The survey was implemented to identify how these policies specifically impacted prison populations. During the time period surveyed, mandatory sentencing was the predominant policy in terms of impact on incarceration rates at the state level. Prior studies, per Stemen (2005) focused too narrowly on the impact of Mandatory Minimums at the Federal level. They wanted to immediately address the impact of the policy on judicial decision-making; whether the policy altered the duration of the sentence for the underlying offense, the duration of the sentence imposed or the judge’s conformity to required incarceration.
Indicators suggest that states who have widened the number of provisions or offenses qualifying for mandatory minimums, have seen higher incarceration rates than states with fewer provisions falling under mandatory sentencing. In these states, judges are more “constrained in their abilities to set either the disposition or duration of many sentences (2005).” The statistical findings by Stemen (2005) and his team found a significant positive correlation between states with Mandatory Provisions and increased incarceration rates; however, they also saw significant decreases in incarceration rates in states with Mandatory Sentencing in conjunction with Presumptive Sentencing, or the idea that more serious crimes warrant more severe punishment. From a political influence factor, the study revealed higher incarceration rates during periods where political influence would have been more conservative than in years where determined to be more liberal. The political finding acted independently from sentencing policies (2005).

The National Institute of Justice conducted an analysis in 1997 to determine the effectiveness of Mandatory Sentence policy on crime deterrence for those specific crimes covered in their respective states. The uncovered that in many cases, states with mandatory provisions in place saw significant plea negotiations in an effort to avoid, what practitioners believed to be “unduly harsh (Dunworth, McDonald, Parent and Rhodes, 1997)”. They also identified racial disparity in the percentage of mandatory sentences handed down for similar offenses, with whites and Hispanics receiving mandatory minimum sentences at a lower rate than African Americans. These findings were disputed in a separate, independent research finding conducted by the United States Sentencing Commission (USSC, 2011). Those findings will also be presented later in this section. In states where strict adherence to mandatory sentencing was the primary policy driving sentencing guidelines, incarceration rates as much as tripled from their implementation to the time of this body of research. Due to these and other similar findings,
Dunworth et al. (1997) provide a list of alternative methods for determining statewide sentencing guidelines, including but not limited to, forming an effective commission, adopting a hybrid model of both mandatory and presumptive sentencing guidelines. The latter, in their opinion, would provide the judiciary with limitations and guidance rather than completely removing discretion as is seen in jurisdictions operating solely under Mandatory Sentencing provisions.

For the 25th Anniversary of the Sentencing Reform Act (SRA) of 1984, an act which established many of the Mandatory Sentencing Provisions at the Federal Level in the U.S., the United States Sentencing Commission (herein referred to as USSC) conducted a survey of all U.S. District Judges (2010). The survey was comprised of 20 questions regarding the judges’ opinion on the provisions as stated in the SRA. The USSC was able to collect completed surveys from nearly 70 percent of all US District Judges. With regard to Mandatory Minimums, 62 percent felt the minimums were overall, too high; noting specifically that the sentences for crack cocaine convictions was significantly too high, with 72 percent answering in the affirmative.

In perhaps the most thorough analysis to date, the United State Sentencing Commission released a report to Congress examining, in detail, mandatory minimum penalties at the federal incarceration level. The report was released one year after the above survey of U.S. District Judges was completed. Within the Congressional Report by the USSC is an extensive history of all Mandatory Sentence provisions since the birth of the United States of America. Following this historical analysis, the Commission examines Mandatory Sentencing in its current state, the interaction between minimums and sentencing guidelines, changes in the Federal Criminal Justice System, policy views, and its use across various districts, the statistical findings and finally the conclusions and recommendations for future policy. In conjunction with the USSC study above, the Commission reported out that “52 percent (of US District Judges) ranked
minimum penalties among the top three factors contributing to sentencing disparity”…while 78 percent believe that a shift toward sentencing guidelines have “reduced unwarranted sentencing disparities among similarly situated defendants (USSC, 2011).” There was cohesive belief by many that the sentences imposed were handed down regardless of the circumstances of the crime and that such sentences had the most extreme of violent offenders in mind rather than non-serious offenders committing equally serious offenses. The report suggests that the widening of provisions to include more crimes has resulted in “exponential growth in the federal prison population since the 1980s…reforms of existing mandatory minimum sentencing statutes are needed (2011).” The report also agrees with previous research noting that judges are blocked from considering individual circumstances with regard to sentencing and that a one-size fits all provision could in fact, and in agreement with Booker (2006), violate the offenders 6th Amendment rights. Another chief concern is that mandatory minimums could coerce a guilty plea to a lesser offense, thereby rendering the defense’s role, useless. The report continues by concluding that prior research has failed to provide for any statistical support that mandatory sentencing directly results in crime deterrence. It could instead be argued, that the “certainty of punishment through prosecution” that is the more effective deterrent instead of “the severity of punishment that mandatory minimum penalties…provide (2001).” The general recommendations of the report are as follows:

- A Strong and Effective Guideline System, with built in flexibility to help correct many of the sentencing inconsistencies seen since Booker (2006).
- If Mandatory minimums should continue, ensure they are fair, consistent and applicable only to those that should be receiving them, not first-time, non-violent offenders
- Install a “safety valve” for low-level offenders
- Require a prison impact analysis from the commission – similar to the analysis enacted by Kansas that resulted in SB123.
When viewed as a collective data set, there is agreement that mandatory sentencing in its post-1984 form reduces judicial discretion and authority while increasing the power of the prosecution, thereby creating an inherent disparity in the judicial process as noted in *Booker* (2006). Furthermore, mandatory sentencing is a financial burden to both states when the alternative of judicial prosecution based on the individual and that act combined, result in lower incarceration rates and decreased state spend on corrections. Finally, decreasing the rate of imprisonment for non-violent offenders in exchange for more community-based programs will lead those individuals away from the violent interactions they would have otherwise experienced in prison.

In an effort to determine how to apply the findings from above, it is necessary to begin with the foundation of sentencing itself and understand the theoretical purposes and perceived outcomes. If a program is statistically successful but serves to fulfill none of the requirements that the public anticipates, it is doomed to fail.
III. THEORETICAL FRAMEWORK: RETRIBUTION OR REHABILITATION

A. RETRIBUTION

To understand why a society explores reform is to first understand what the goals of that society might be. In the case of sentencing, it is therefore necessary to determine what the United States and its citizens hope to accomplish through sentencing reform in present day America. To look forward, we must first review the past to conclude if what is being sought has been tried before. The most recent era of sentencing has been one rooted in retribution. “Swift, sure and severe (Allen, Edward & Ponder, 2010).” These words underlie the basic principles of retributive sentencing established by Cesare Beccaria over 200 years ago. Beccaria believed punishment was a means of removing criminals from an otherwise, law-abiding populous, thus allowing people to freely and safely, live their daily lives. He believed that incarcerating offenders, with certainty, would deter future criminal activity by others who may be considering the commission of similar acts. “The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity” (Conklin, 2004). Fragments of Beccaria’s theory reappeared in the United States in the 1970’s and 1980’s with the shift in policy toward Retributive Justice; at times, referred to as the by-product of the Regan Administration’s War on Drugs. At that time, the United States was facing a surge in drug usage and subsequent violence that was growing out of hand. The Federal Government, acting on the voice of the people and in the spirit of the political environment, aimed to remove these criminals from the streets and confine them to prison. What had been an era, from 1920 to 1970, of a rehabilitative sentencing model, reliant on changing the behavior of offenders, was back to certain, swift and proportionate punishment. The idea of maintaining their presence in the community through intermediate sanctions or other rehabilitative means would
not have satisfied the socio-political goals of that time, however, it is unclear if the Classical School under Beccaria would have agreed that prison was appropriate for first-time, non-violent offenders.

The shift in theory to an era of Mandatory Sentencing was as reflective of politics as much as or even more so than a fundamental need to reform criminal justice sentencing procedures. Though historical analysis has had great difficulty in “reaching scholarly consensus regarding the crime-control effects of sentencing practices,” there does exist, fragmented support of sentencing severity and mandatory time served (Hofer, 2007). As could be expected, with a philosophy aimed at sending more people to prison, the prison populations ballooned while crime rates in some areas actually increased. In Wisconsin, one of the holdout states in converting to a complete mandatory structure, populations in prison skyrocketed from 1990 to 2008, increasing from 6,533 to 23,341 (Klingele, 2011). As the populations behind bars escalated, so did the economic impact of retributive justice on state and federal corrections.

At a conference of State Legislators in Denver in 2003, the discussion of the day quickly moved into each legislator’s state budget crisis due to increasing prison populations. The conference, held three years prior to the *Booker* (2005) decision, which ruled the Federal Sentencing Guidelines established in 1984 as advisory only, rather than mandatory, was an early indicator that a shift in policy was on its way. Though few states mentioned holding out, as seen in Texas, where tradition was retribution at all costs, the majority of legislators were seeking out ideas on how to implement the practice of sentencing offenders away from prison and into community-based programs at a much lower cost. The key to this initiative was determining, who were the nonviolent drug offenders in those states’ prison systems that had been sent there following their first offense. One legislator noted that rather than pay $150,000 sentencing that
individual to prison, they would have opted for a 60-day treatment program at a fraction of that cost and a higher likelihood of success in rehabilitating that individual. It was then noted that 17 states had implemented some level of enhanced community corrections for drug offenders in lieu of prison following this conference. An additional 4 states had called for a sentencing commission to be enacted on a permanent basis to act as the voice of the criminal justice system as it related to sentencing. The greatest obstacle in moving forward for these legislators was calming the public’s existing fear of releasing drug offenders into society (Vera, 2003). Garland’s (2001) Culture of Control clearly states that the controls of mandatory sentencing were in place to protect the public from, what they perceived to be, a dangerous world in need of intervention by way of removal of offenders from society. Thus, allowing anything but incapacitation through a prison sentence would reflect a loss of control over crime and offenders, exposing the public to their fears of becoming victims.

While the catalyst for change was budget-driven, rather than by statistically supported data citing greater success by diverting these offenders away from prison, the actions were consistent with predictions made by multiple scholars. The idea that sentencing guidelines will exist within the scope of politics and economics rather than criminal justice research and statistics is indicative of our culture and in opposition, at times, to sentencing theory. If retributive justice is too expensive, what theoretical framework, then, will the next wave of sentencing fall under? One possibility is a hybrid of rehabilitative and retributive justice.

B. REHABILITATION

The greatest volume of debate surrounding Mandatory Sentencing revolves around sending first-time, non-violent, drug offenders to prison for lengthy sentences at a significant
cost to the average taxpayer when an alternative may be cheaper and more effective in
decreasing the likelihood of repeating the offence, or recidivism. Aside from the option for
intermediate sanctions, it is also argued that a sentence for such offenders is both inappropriate
and disproportionate to begin with. The idea that different sentences are needed for different
offenders was first established as a reform movement in France in 1819. At this time, the public
believed the age of retribution as designed under Beccaria was too rigid and focused entirely on
the crime rather than the criminal. This was the birth of Rehabilitative Justice. Because many at
this time believed that crime was a result of rational choice of the offender, it was also agreed
that the offender could be healed or fixed, so that when given the choice in the future to commit
a criminal act or not, they would choose to not commit the act (Conklin, 2004). The key
argument against Mandatory Sentencing and the provisions within the Federal Sentencing Act of
1984 echoed the same concerns that trouble criminologists in France nearly 200 years earlier.
The idea that non-violent drug offenders made an inappropriate or poor choice would support the
idea that they could just as easily have made the correct choice if given the proper social tools to
combat the temptation to commit the crime.

A final argument in support of legislation geared toward Rehabilitation is that it allows
the judiciary to sentence according to their set of beliefs in a given case. If the judge feels
rehabilitation is truly achievable for a specific offender, they have the power and authority to
hand down such a sentence. Prior to Booker (2005), this was not always the case. As mentioned
earlier, this limitation on judicial discretion was noted as the area of greatest dissatisfaction
among U.S. Circuit Court Judges under Mandatory Sentence legislation. They believed their
voices were muted when faced with crimes qualifying for Mandatory Sentences under the 1984
Act.
Taking Rehabilitative Justice one step further is a modern-era creation known as Restorative Justice. The basic concept is born of rehabilitation and requires a great deal of interaction between the community and the offender. Many programs under this umbrella require the criminal to personally discuss their crime and its effects with the victim of the crime they committed. Gaining buy-in from the criminal is a major theme in restoration. Statistics however, have shown limited support as to the effectiveness of this intensified version of Rehabilitation. None of the research mentioned above call for greater emphasis on offender and victim interaction as an alternative to incarceration. The emphasis however, does favor a link between Retribution and Rehabilitation.

Shifting public perception to one of acceptance, much like what was seen in early 1800’s France and in the U.S. from 1920-1970 when the focus was on rehabilitating the offender and “fixing” them, will be a task of tremendous political risk. While the general sentiment may publicly be one of approval, it is very likely that most Americans still favor a swift, certain and severe punishment for drug offenders. Current media trends of sensationalizing crime coupled with access to information at the blink of an eye across the globe have created a more knowledgeable, more scrutinizing populous.

Though not impossible, the longevity of a hybrid theory would be at immediate jeopardy because of its very nature, lacking any sort of concrete theoretical framework for which to measure successes or failures. Though economics may have been the catalyst for change, failure to show success because the sentencing structure is not “justified by a normative theory” will ultimately prove the approach to be politically unsustainable (Klingele, 2011). Dollars and cents will sway bureaucrats in the short term, however, if the new shift in sentencing fails to show an equal or greater sense of safety and cannot present valid reductions in either crime rates or
recidivism rates, public sentiment will prevail and those legislators seeking re-election will also shift their position.
IV. RECOMMENDATIONS FOR SENTENCING REFORM FROM 2012 AND BEYOND

While the post-Booker era is still in its early stage, there are multiple examples of legislative doctrine in place or in the works, aiming to provide a “superstructure for decision making…which will produce greater utilitarian benefits overall and few injustices in individual cases (Love & Klingele, 2011).” SB 123 out of Kansas is one of these legislative doctrines. SB 123 allows for the judicial discretion in border-line cases surrounding non-violent or first-time drug offenses that many judges felt was lacking under that previous era of Sentencing Guidelines. These offenders now qualify for a rehabilitative approach due to the belief that they are more likely to respond positively to community-based sanctions. The bill upholds a significant level of retribution for violent and repeat offenders, satisfying the public need in our current environment to remove these threats from the population. Similarly, the South Carolina Panel’s submission for a permanent commission states that it recognizes the need to evaluate the current budget of the state to ensure adequate resources are available to community-based corrections once they install their version of SB 123, and begin diverting non-violent drug offenders away from prison (Grose, et al. 2009). These are two examples of states attempting to merge rehabilitation for those non-violent offenders while maintaining a level of certainty and retribution in terms of punishment for violent and/or repeat offenders. The lack of convincing empirical data surrounding these doctrines in terms of reductions in crime or recidivism appears to be the greatest obstacle or limitation to their fruition in the short term. In the long term, public sentiment and weakly grounded theoretical framework will also challenge the viability of similar legislative acts.
Ultimately, America will begin trending toward a solid school of thought on punishment. It could be Rehabilitative, a “feel good” version as seen in Restorative movements, or it could remain in an era of Retributive Justice, but from a discriminating viewpoint, it will have to be viable, measurable and well-received. As criminal justice policy is continuously merging and adapting fragments from various theoretical sources regarding why people commit crime, so too will sentencing policy. Election years in the coming future will likely spawn more ideas for reform than will the pleas from the criminal justice world. Legislation popularity among the voting masses will have a greater impact on the next phase than pure statistics or economics. Though the opinions will be based on both components, the facts will likely see a political spin to the point where to-good-to-be-true policy will be the next phase and will appear in the form of a hybrid of prior schools of thought on sentencing. It is therefore imperative for states to either enact a sentencing commission or provide a framework of checks and balances requiring reform. From South Carolina, to Kansas, to California, this is the current state of sentencing. In time, all states will follow. The impact on crime rates, judicial compliance and public opinion will remain interweaved as the backdrop for sentencing reform.
V. SUMMARY

While it was expected that an overarching body of work would establish a definitive path by which the future of sentencing reform would follow, it is concluded that the era of reformation is still in its infancy and will require significantly greater volumes of research to establish what will ultimately work. It is clear, however, from the research and review of literature that the period in history of Mandatory Sentence is ending in the United States in the form we had come to understand in the 1980’s through the early 2000’s under the Federal Sentencing Guidelines. States who have enacted sentencing commissions and have begun working through legislative acts to lay the groundwork for the next phase in sentencing, are leading the way for the rest of the nation. Kansas has leaped out of the pack with Senate Bill 123, combining elements of both Rehabilitative and Retributive Justice in an effort to satisfy the expectations of all stakeholders in the Criminal Justice System. It should be anticipated that other states will follow their lead in the very near future if they have not already begun adapting similar measures. Booker (2005) was a decision that should be applauded and studied to determine why legislation prior to the case was inappropriate in an attempt to ensure it is not replicated in the next cycle of sentencing reform. As with most public policy, cyclical patterns errant of historical analysis will refute any progress made by previous generations.
VI. REFERENCES


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