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## Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences

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MANDATORY MINIMUM SENTENCES:  
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# MANDATORY MINIMUM SENTENCES: EXEMPLIFYING THE LAW OF UNINTENDED CONSEQUENCES

CHRISTOPHER MASCHARKA\*

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## I. INTRODUCTION

Mandatory minimum sentences, once rare in the criminal law system, have experienced a dramatic increase in popularity. This political phenomenon has enjoyed wide bipartisan support: since the mid-1980s, Congress has routinely passed new crime measures containing mandatory minimum sentences.<sup>1</sup> In spite of the political popularity of this sentencing tool, many commentators are concerned about the social and economic effects resulting from the proliferation of mandatory minimum sentencing statutes. Chief Justice Rehnquist has commented that these measures are “perhaps a good example of the law of unintended consequences.”<sup>2</sup>

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1. See, e.g., Alcohol and Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 31 U.S.C.); Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (codified as amended at 21 U.S.C. §§ 846, 963 (2000)). More than one scholar has noted that between 1986 and the mid-1990s, Congress passed these measures about every two years, or every election year. See, e.g., Carl M. Cannon, *America: All Locked Up*, NAT'L J., Aug. 15, 1998, at 1906.

2. William H. Rehnquist, Luncheon Address (June 18, 1993), in U.S. SENTENCING COMM'N, DRUGS & VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES: JUNE 16-18, 1993, WASHINGTON D.C. 286

The brunt of federal mandatory minimum sentences is aimed at drug crimes.<sup>3</sup> This trend is mirrored in the states, as many states now have mandatory provisions for drug possession.<sup>4</sup> The “war on drugs” juggernaut has been responsible for incarcerating hundreds of thousands of nonviolent, low-level drug offenders.<sup>5</sup> Defendants who would have received probation twenty years ago now routinely serve lengthy prison sentences with no possibility of parole.<sup>6</sup>

The result has been a dramatic increase in the U.S. prison population.<sup>7</sup> Recent estimates expect the combined federal, state, and local incarcerated population to top two million inmates in the year 2001.<sup>8</sup> This is a five-fold increase over the 1972 prison population and a rate of incarceration six to ten times higher than in other industrial

(1993), *quoted in* BARBARA S. VINCENT & PAUL J. HOFER, FEDERAL JUDICIARY CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* 1 (1994).

3. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 10 (1991) [hereinafter MANDATORY MINIMUM PENALTIES]; see also Families Against Mandatory Minimums (2001), at <http://www.famm.org/about2.htm>. The study described in the Commission’s report found that drug offenses comprised 91% of all federal mandatory minimum sentences from October 1, 1984 to September 30, 1990. See *id.* According to the study, see *id.* tbl. 1, at 11-12, of the federal statutes imposing mandatory minimum sentences, the three most commonly used are all aimed at drug offenses. See 21 U.S.C.A § 841 (West Supp. 2001) (manufacture and distribution of controlled substances); 21 U.S.C. § 844 (1994 & Supp. II) (possession of controlled substances); 21 U.S.C.A § 960 (West Supp. 2001) (importation/exportation of controlled substances).

4. See, e.g., N.Y. PENAL LAW § 60.01 (McKinney 2000); MICH. COMP. LAWS ANN. § 333.7403 (2000 & West Supp. 2001); GA. CODE ANN. § 16-13-31 (2000); see also Ellen Perlman, *Terms of Imprisonment*, GOVERNING, Apr. 2000, at 23, 24, LEXIS, News Library, Govern File (listing the following states as having similar provisions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin).

5. See Families Against Mandatory Minimums, *History of Mandatory Sentences* (2001), at <http://www.famm.org/about2.htm>. Thirty-six and one-tenth percent of inmates meet the Department of Justice’s criteria for low level offenders. Twenty-one and one-half percent had no previous incarcerations, no record of violence, and no involvement in sophisticated criminal activity. See *id.*

6. See, e.g., Cannon, *supra* note 1, at 1906 (quoting one federal judge as having remarked, “This [five year] sentence seems unduly harsh” before sentencing a 23-year old “small time marijuana grower—the kind [of defendant] who once would have qualified for an alternative sentencing program”).

7. See TARA-JEN AMBROSIO & VINCENT SCHIRALDI, JUSTICE POLICY INSTITUTE, FROM CLASSROOMS TO CELL BLOCKS: A NATIONAL PERSPECTIVE (1997), <http://www.cjcr.org/jpi/highernational.html> (reporting that while mandatory minimums for nonviolent drug crimes are usually pointed to as the root cause of the increase in prison population, other “tough on crime” measures such as “three-strikes,” truth-in-sentencing laws, and parole abolition have also been responsible).

8. See JUSTICE POLICY INSTITUTE, THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM (draft of May 1999), at <http://www.jji.org/pdf/punishing.pdf> (stating that the prison population in 1990 was approximately 1,148,702).

nations.<sup>9</sup> The United States has now surpassed Russia to become the world's leader in incarceration rate.<sup>10</sup> In comparison, the European Union, with a combined population of 370 million people, had a prison population in 1998 of approximately 300,000.<sup>11</sup> The total bill for incarcerating these prisoners at the state and federal level was estimated to be \$41 billion for the year 2000, and approximately \$26 billion was spent incarcerating the nation's 1.3 million nonviolent offenders.<sup>12</sup> The increase in incarceration has been labeled "a societal commitment to imprisonment on a scale that would have been unthinkable a quarter of a century ago."<sup>13</sup>

Not all jurisdictions have embraced mandatory minimum sentences to the same degree. The federal government and certain states, including Michigan, New York, and California, have historically been cited as examples of criminal justice systems with overly harsh mandatory sentencing structures.<sup>14</sup> Florida is also included in the list of states whose legislators currently embrace mandatory sentencing for nonviolent drug offenders.<sup>15</sup> Just this past year, Florida passed another mandatory sentencing bill, this one aimed primarily at ecstasy and other designer drugs.<sup>16</sup>

One particularly ill-conceived Florida mandatory sentencing scheme has generated a disproportionate amount of debate. The statutes pertaining to the pharmacological painkiller hydrocodone<sup>17</sup> have created considerable confusion, inconsistent opinions, and

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9. See Neal Pierce, *The Prison Boom: 2 Million and Growing*, PLAIN DEALER, Feb. 6, 2000, at 3H, 2000 WL 5132250.

10. See *id.* The incarceration rate is the percentage of a country's population currently behind bars. Until recently, nearly every article on prison population had included the statement that the United States' incarceration rate was second only to Russia. See, e.g., Harry W. Fenton, *Drug War Battle Fatigue*, A.B.A. J., Dec. 1999, at 112. But see Dita Smith, *What on Earth?: Behind Bars*, WASH. POST June 3, 2000, at A9, 2000 WL 19612398 (stating that Russia and the United States are now in a virtual tie).

11. See VINCENT SCHIRALDI ET AL., JUSTICE POLICY INSTITUTE, AMERICA'S ONE MILLION NONVIOLENT PRISONERS (Mar. 1999), <http://www.cjci.org/jpi/onemillion.html>. For further incarceration rate comparison data, see Smith, *supra* note 10. The United States imprisons 682 individuals per 100,000 of the population. See *id.* Canada's incarceration rate is 115, Turkey's is 95, France's is 90, and Japan's incarceration rate is just 39. See *id.*

12. See JUSTICE POLICY INSTITUTE, *supra* note 8, at 5 (citing estimate compiled using figures from the Criminal Justice Institute).

13. Cannon, *supra* note 1, at 1907 (quoting Marc Mauer of the Sentencing Project, a group that advocates prison alternatives). Mr. Mauer has also labeled the current system "an orgy of incarceration." *Id.*

14. See MICH. COMP. LAWS ANN. § 333.7403 (2000 & West Supp. 2001); N.Y. PENAL LAW § 220.00-.65 (West 2000).

15. See FLA. STAT. § 893.135 (2000) (imposing mandatory minimum sentences for violations covering a wide array of illegal substances).

16. See Act effective Oct. 1, 2000, ch. 2000-320, sec. 4, § 893.135, 2000 Fla. Laws 3478, 3490-99 (a recently enacted mandatory provision aimed at various designer drugs).

17. See FLA. STAT. § 893.03(2)(a)(1)(j), (3)(c)(4).

seemingly excessive sentences for minor drug offenses.<sup>18</sup> Illegal possession of a relatively small, personal consumption amount of hydrocodone subjects violators in Florida to twenty-five year mandatory minimum sentences and a \$500,000 fine.<sup>19</sup> By way of comparison, possession of *300 pounds* of cocaine results in a mandatory minimum sentence of only fifteen years—ten years less than illegal possession of an as-prescribed, one-week supply of hydrocodone.<sup>20</sup>

This Comment explores such anomalies as well as other (presumably) unintended results of mandatory sentencing. Factors in the political and social climate that have facilitated their passage will also be discussed. Part II provides a brief synopsis of the history of mandatory sentencing and recent changes in the sentencing system. Part III describes the failure of mandatory minimums to meet the intended goals of providing just and certain sentences to similarly situated defendants. Part IV outlines the economic inefficiencies of mandatory minimum sentences in attaining many of their drug- and crime-prevention objectives, investigating both the economics of crime rationales and the societal factors that diminish the effectiveness of imposing mandatory sentences for drug offenses. Part V demonstrates how the calculation of drug weights triggering mandatory minimums often leads to inequities in sentencing; examples involving cocaine, LSD and, in Florida, the pharmacological painkiller hydrocodone illustrate this point. Part VI examines the political and social climate that has provided such fertile ground for the passage of mandatory sentencing statutes, especially the role of the “war on drugs” and public perceptions in motivating legislatures to pass these measures. Finally, Part VII concludes with observations on this recent sentencing trend.

## II. THE RISE OF MANDATORY MINIMUM PROVISIONS

Mandatory minimum sentences are not a modern development. As early as 1790, mandatory minimum sentences existed for piracy and murder.<sup>21</sup> Other early-American mandatory penalties were imposed for refusing to testify before Congress,<sup>22</sup> failing to report seaboard

18. See *Hayes v. State*, 750 So. 2d 1, 1 (Fla. 1999) (listing previous disparate Florida hydrocodone decisions).

19. See, e.g., *State v. Hayes*, 720 So. 2d 1095, 1097 (Fla. 4th DCA 1998), *quashed*, *Hayes v. State*, 750 So. 2d 1 (Fla. 1999).

20. See § 893.135(1)(b)(1)(c).

21. See Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 186 (1993).

22. See MANDATORY MINIMUM PENALTIES, *supra* note 3, at 5. The historical overview section of the report notes that there are about a dozen mandatory provisions from the 1800s still on the books. See *id.*

saloon purchases,<sup>23</sup> and causing a ship to run aground by use of false light.<sup>24</sup> Then, as now, these sentences were enacted in response to public concern and outrage over well-publicized crimes.<sup>25</sup> However, until recently mandatory minimums were an uncommon exception to the sentencing system, and they did not target entire classes of offenses.<sup>26</sup>

In the middle of the twentieth century Congress instituted a series of mandatory minimum sentences for drug offenses.<sup>27</sup> In 1951, Congress passed a comprehensive narcotics control measure known as the Boggs Act.<sup>28</sup> The Boggs Act contained mandatory minimum sentences for narcotic offenses with no chance for parole or probation after the first offense: two years for the first offense, five years for the second, and ten years for the third.<sup>29</sup> These sentences became even harsher through amendments contained in the Narcotics Control Act of 1956.<sup>30</sup> High levels of drug use and experimentation in the 1960s resulted in numerous long prison sentences under the Boggs Act.<sup>31</sup> In 1970, Congress responded to the concerns of prosecutors, wardens, and families of those convicted, repealing virtually all provisions imposing mandatory minimum sentences for drug violations.<sup>32</sup> Congress commented that lengthening prison sentences “had not shown the expected overall reduction in drug law violations.”<sup>33</sup> Among those rallying against these mandatory minimums was a freshman Congressman from Texas—who would later become a “tough on crime” President—one George Bush, who spoke out for “better justice, and more appropriate sentences.”<sup>34</sup>

The movement towards the current state of sentencing for federal drug crimes began with the passage of the Sentencing Reform Act of 1984 (SRA).<sup>35</sup> In passing the SRA, a bipartisan Congress

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23. *See id.*

24. *See id.* at 5-10; *see also* Families Against Mandatory Minimums, *supra* note 5.

25. *See* MANDATORY MINIMUM PENALTIES, *supra* note 3, at 5.

26. *See id.*

27. *See id.*

28. Boggs Act of 1951, Pub. L. No. 82-235, 65 Stat. 767 (repealed 1970).

29. *See id.* at 767-768.

30. Pub. L. No. 84-728, 70 Stat. 567, 568-69 (1956) (repealed 1970) (increasing minimum sentences for first and second offenses to five years and 10 years, respectively).

31. *See* Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37, 39 (1999).

32. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 801 (1994 & Supp. IV 1999), *as amended* by Pub. L. No. 106-172, 114 Stat. 7 (2000)); *see also* Stewart, *supra* note 31, at 39.

33. S. REP. No. 91-613, at 2 (1969).

34. 116 CONG. REC. H33,314 (1970).

35. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.).

fundamentally changed sentencing by rejecting the rehabilitation model of punishment.<sup>36</sup> The Act announced new objectives:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>37</sup>

A revolutionary feature of the SRA was its creation of the United States Sentencing Commission, an independent expert panel within the judicial branch charged with refining sentencing.<sup>38</sup> Prior to 1984, the federal government employed an indeterminate system, which entailed a “three-way sharing” of sentencing responsibilities among the branches of government: “Congress defined the maximum, the judge imposed a sentence within the statutory range, . . . and the Executive Branch’s parole official eventually determined the actual duration of imprisonment.”<sup>39</sup> The SRA altered the indeterminate system by delegating authority to the Sentencing Commission to produce guidelines that would promote the SRA’s objectives (ensuring certainty in sentencing, eliminating disparity, and providing just punishment).<sup>40</sup>

A primary motive for this change was to confirm waning public confidence in the criminal justice system by thwarting “soft” judges who sentenced culpable criminals too lightly; proponents believed they could accomplish this through a compulsory system where “similar offenders, committing similar offenses, would be sentenced in a similar fashion.”<sup>41</sup> It was understood that the guidelines would be an evolving, rather than an immediate, fix to the sentencing system.<sup>42</sup> To help achieve the SRA’s goals, Congress abolished the

36. See Hatch, *supra* note 21, at 188.

37. Pub. L. No. 98-473, 98 Stat. 1837, 1989 (1984) (codified at 18 U.S.C. § 3553(a)(2) (1994 & Supp. V 1999)); see also Hatch, *supra* note 21, at 188 (citing the objectives and noting that rehabilitation is explicitly left off the list).

38. See Pub. L. No. 98-473, 98 Stat. at 2017 (codified at 28 U.S.C. § 991(a) (1994)) (providing that the commission is composed of members appointed by the President with the Senate’s “advice and consent”); see also Hatch, *supra* note 21, at 188-89.

39. *United States v. Mistretta*, 488 U.S. 361, 364-65 (1989).

40. See MANDATORY MINIMUM PENALTIES, *supra* note 3, at 13-15; see also Hatch, *supra* note 21, at 188-89. It was understood that, realistically, the goals of Congress and the Commission were “*greater* fairness and *greater* honesty, not *perfect* fairness or *perfect* transparency” in sentencing. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, An Address Before the University of Nebraska College of Law (Nov. 18, 1998), in 11 FED. SENTENCING REP. 180, 180 (1999).

41. Hatch, *supra* note 21, at 189.

42. See Breyer, *supra* note 40, at 180. Justice Breyer noted that while the members of Congress realized perfection was unascertainable, they “hoped to set in motion a system that, through trial and error, could gradually work toward these goals.” *Id.*



federal parole system and made the guidelines compulsory.<sup>43</sup> The Supreme Court deemed Congress' delegation of authority to the Sentencing Commission constitutional in *United States v. Mistretta*.<sup>44</sup>

Sentencing guidelines systems have been initiated in the states as well. As of 1999, about twenty states have existing or pending guideline systems.<sup>45</sup> The level of judicial discretion remaining within these systems differs by jurisdiction, as state guideline schemes vary greatly in their rigidity and complexity.<sup>46</sup> Despite the variability, no state scheme approaches the intricacy of the highly detailed and mechanical federal system.<sup>47</sup>

Two years after enacting the SRA, Congress passed the Anti-Drug Abuse Act of 1986 (ADAA),<sup>48</sup> which incorporated a tiered system of minimum sentences for crack, powder cocaine, and other commonly abused substances based on the quantity of the drugs involved.<sup>49</sup> The ADAA was passed in the midst of public paranoia and outcry over the crack epidemic and the fear of AIDS being spread through drug use.<sup>50</sup> This political climate led to broad bipartisan support for the ADAA, with the bill passing the House by a 392-16 vote and the Senate on a voice vote.<sup>51</sup>

Then, in 1988 Congress created an even more comprehensive set of quantity-based mandatory minimums for drug offenses by passing the Omnibus Anti-Drug Abuse Act of 1988 (OADAA).<sup>52</sup> A significant aspect of the OADAA was the application of mandatory penalties to "conspiracies" to distribute or import drugs, regardless of the defendant's level of culpable involvement.<sup>53</sup> This measure—designed to catch drug kingpins, who rarely have large quantities of drugs in

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43. See 28 U.S.C. § 3553(b) (1994 & Supp. V 1999); see also Hatch, *supra* note 21, at 189; Breyer, *supra* note 40, at 180; *Mistretta*, 488 U.S. at 367 (noting the congressional Judiciary Committee considered and rejected a system of guidelines that were merely advisory).

44. 488 U.S. at 374.

45. See, e.g., FLA. STAT. § 921.001 (2000); MICH. COMP. LAWS § 769.34 (2000); N.C. GEN. STAT. § 15A-1340.10 (2000); see also Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENTENCING REP. 69, 70 (1999). Numerous state guidelines systems preceded the federal guidelines. See *id.* Additional information about state sentencing guidelines may be accessed through the National Association of Sentencing Commission's web page at <http://www.ussc.gov/states/>.

46. See Frase, *supra* note 45, at 69.

47. See *id.*

48. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 18, 21, & 31 of the U.S. Code).

49. *Id.* at 3207-2 to 3207-4.

50. See DAVID F. MUSTO, M.D., *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 274 (Oxford Univ. Press 3d ed. 1999).

51. See Cannon, *supra* note 1, at 1913.

52. Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (codified as amended at 21 U.S.C. §§ 846, 963 (1994)).

53. See *id.*; see also MANDATORY MINIMUM PENALTIES, *supra* note 3, at 9 (noting that the penalties could now apply equally to a major distributor and a low-level participant).

their possession—has been criticized for being more routinely used against low-level drug dealers, look-outs, and peripheral conspirators such as the girlfriends of drug dealers.<sup>54</sup>

The ADAA was passed before the Sentencing Commission's first set of guidelines were implemented—and the statutorily mandated sentences were then incorporated into the guideline terms.<sup>55</sup> This slate of legislatively mandated drug sentences has been likened to an early “no confidence vote” in the Sentencing Commission and its forthcoming sentencing guidelines.<sup>56</sup> Justice Breyer, who was a member of the original Sentencing Commission, has also commented that “statutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.”<sup>57</sup> In spite of these observations, both federal and state legislatures have continued to use this sentencing method. They have routinely added new mandatory provisions and enhanced old ones throughout the past decade.

### III. CREATING UNIFORMITY IN SENTENCING?

There is little doubt that some of the concerns motivating the creation of mandatory minimum sentencing structures are legitimate. Before the widespread use of these structures, federal studies showed that the sentences of drug defendants could vary greatly depending on the geographical location and the sentencing judge.<sup>58</sup> Congress wished to remove these disparities, preclude what they perceived as soft sentences, and alleviate concerns that some

54. See, e.g., Stuart Taylor, Jr., *In the Drug Wars, Small Minds Go After Small Fry*, CONN. L. TRIB., Aug. 23, 1993, at 14. Taylor discusses the story of Nicole Richardson, a 20-year college student from Alabama who was found guilty of conspiracy after giving her LSD dealer boyfriend's phone number to an informant. Nicole cooperated with the DEA but had no real information to give due to her peripheral involvement. She received the mandatory minimum sentence of 10 years, while her boyfriend, clearly more culpable, received only a 5-year sentence since he had information of value to the prosecutors. See also Families Against Mandatory Minimums, *Victims of MMS* (2000), at <http://www.famm.org/victims.htm> (discussing numerous similar stories).

55. See VINCENT & HOFER, *supra* note 2, at 3.

56. Francesca D. Bowman, *Taking the Lead*, 8 FED. SENTENCING REP. 32, 32 (1995). The federal sentencing guidelines are fettered by the requirement of incorporating the mandatory minimum sentencing terms into the terms of the guideline, and the result is a guideline system that is significantly harsher than the one originally advocated. See *id.* This prompted Ms. Bowman to insist that Congress should allow the experts at the Commission to guide policy or admit that the Commission is nothing more than “expensive window dressing.” *Id.* at 33.

57. Breyer, *supra* note 40, at 184. From 1985 to 1989, Justice Breyer was a member of the original Sentencing Commission under Judge Billy Wilkins. See *id.* at 180.

58. See *id.*

differences in sentences might be racially motivated.<sup>59</sup> Creating a system under which the appropriate sentence was predetermined would ensure the certainty and just punishment that Congress was seeking.<sup>60</sup> Nevertheless, numerous studies and commentators have concluded that mandatory sentencing has failed to alleviate sentencing disparities; in certain areas, mandatory sentencing has even exacerbated the problem.<sup>61</sup>

One main criticism of mandatory minimum sentencing is that such provisions remove discretion traditionally held by “neutral” judges and transfers it to “adversarial” prosecutors.<sup>62</sup> Judges are handcuffed by the mandatory provisions and must impose the statutorily authorized sentence regardless of the culpable level of conduct involved.<sup>63</sup> What discretion is left in the system is in the hands of prosecutors.<sup>64</sup> Prosecutors can use their discretion in fashioning what they determine to be the appropriate charge, and they alone may initiate a motion for reduction of sentence based on the defendant’s “substantial assistance.”<sup>65</sup> While a judge’s sentencing actions are in the public view, the charging discretion of prosecutors is a behind-the-scenes, secretive process.

Sentence reduction for cooperation subsequent to arrest may result in a seemingly inequitable condition, which confutes the just sentencing goals of mandatory minimums. Those who are most able to offer the requisite “substantial assistance” to prosecutors—and receive substantial sentence reductions in return—are high-level, culpable operatives in the drug business.<sup>66</sup> Lookouts, messengers, and other underlings in the enterprise, who have little valuable information to offer, end up receiving the full mandatory minimum sentence.<sup>67</sup> This phenomenon—highly culpable individuals receiving

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59. *See id.* Concerns about the statistically disproportionate sentences African-American defendants received in many instances led to initial support of mandatory minimums by the Congressional Black Caucus.

60. *See Hatch, supra* note 21, at 188-89.

61. *See* VINCENT & HOFER, *supra* note 2, at 23-24.

62. *See id.* at 21.

63. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202-03 (1993).

64. *See id.*

65. 18 U.S.C. § 3553(e) (1994 & Supp. V 1999); *see also* VINCENT & HOFER, *supra* note 2, at 21.

66. *See* *United States v. Musser*, 856 F.2d 1484, 1486-87 (11th Cir. 1988); *see also* VINCENT & HOFER, *supra* note 2, at 21; Schulhofer, *supra* note 63, at 211-12.

67. *See Musser*, 856 F.2d at 1486-87; *see also* VINCENT & HOFER, *supra* note 2, at 21; Schulhofer, *supra* note 63, at 211-12. “This result makes nonsense of the intuitively plausible scale of punishments that Congress and the ordinary person envisage when they think of sentences linked to drug quantity or other hallmarks of the most serious criminal responsibility.” *Id.* at 213.

shorter sentences than their peripheral co-conspirators—has been aptly labeled the “cooperation paradox”<sup>68</sup> and “inverted sentencing.”<sup>69</sup>

The goal of ensuring uniformity in sentencing along racial lines has produced disconcerting results; studies show that mandatory minimum sentences “have had a disparate impact on nonwhite offenders.”<sup>70</sup> In fact, the disparity in sentence lengths between blacks and other offenders has increased since the enactment of mandatory drug penalties.<sup>71</sup> Studies offer two main explanations for the disparity: Whites are more likely to plead guilty earlier in the process for a lesser charge, and they are more likely to provide “substantial assistance.”<sup>72</sup>

However, the drafting of certain statutes has directly led to this racially unbalanced result as well. For example, the disparate treatment of crack and powder cocaine offenders in the federal system and its disproportionate impact on African-American defendants has been the source of much critical analysis and debate.<sup>73</sup> Crack is typically found in minority communities, while powder cocaine is perceived as a “suburban” drug.<sup>74</sup> Possession of only five grams of crack cocaine triggers a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine to trigger the same five-year sentence.<sup>75</sup> Five grams of crack cocaine could be “a weekend supply to a serious abuser.”<sup>76</sup> Most experts agree that there is no sound basis for the 100 to 1 ratio between crack and cocaine, yet the difference and its lopsided effect remain; over 88% of those arrested for possession of crack are African-American.<sup>77</sup> Additionally, while 76% of drug users are white, African-Americans comprise 35% of all drug arrests, 55% of all drug convictions, and 74% of all drug sentences.<sup>78</sup>

68. Schulhofer, *supra* note 63, at 211.

69. *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992) (“[W]hat makes the post-discount sentencing structure topsy-turvy is the mandatory minimum, binding only for the hangers on. What is to be said for such terms, which can visit draconian penalties on the small fry without increasing prosecutors’ ability to wring information from their bosses?”).

70. VINCENT & HOFER, *supra* note 2, at 23.

71. *See id.* at 23-24.

72. *See id.*

73. *See, e.g.*, Carol A. Bergman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENTENCING REP. 196 (1998).

74. *See, e.g.*, George Cornell, Editorial, *Don’t Neglect Treatment*, PATRIOT-NEWS, Apr. 4, 1999, 1999 WL 5134078.

75. *See* 21 U.S.C.S. § 841(b)(1)(B) (1994 & Supp. V 1999).

76. VINCENT & HOFER, *supra* note 2, at 23.

77. *See* Bergman, *supra* note 73, at 196; *see also* Sara Sun Beale, *What’s Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 28 (1997) (stating that the crack/cocaine sentencing distinction “fl[ies] in the face of expert opinion”).

78. *See* MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 12 (1995).

#### IV. MANDATORY PROVISIONS: INEFFICIENT AT ATTAINING DRUG AND CRIME PREVENTION GOALS

##### A. *Economics and Sentencing*

Another leading critique of aiming mandatory minimum sentences at nonviolent drug offenders is that the results do not justify the huge economic expenditures and social costs. Economists view criminal behavior as an attempt by individuals to maximize their utility (that is, satisfaction, well-being, or expected benefit) given their options, both legal and illegal.<sup>79</sup> Before engaging in criminal activity, an actor will (consciously or subconsciously) balance his expected benefits, which include monetary gains and psychological satisfaction, against the potential negatives, which include legal sanctions, lost legal income, and the personal embarrassment of being apprehended.<sup>80</sup> Therefore, according to economists, individuals engage in criminal behavior only when the expected benefits outweigh the potential costs.<sup>81</sup>

Policymakers employ this economic theory of crime to formulate enforcement policy, altering certain variables to raise the costs to the criminal.<sup>82</sup> Three important variables of this type are the probability of being apprehended, the probability of conviction if apprehended, and the severity of punishment.<sup>83</sup> Mandatory minimum sentences obviously achieve the goal of severity of punishment; they also raise the likelihood of conviction, since defendants are now more likely to plead to a charge rather than face prosecution and risk the

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79. See DAVID W. RASSMUSSEN & BRUCE L. BENSON, *THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS* 41 (1994); cf. MAUER & HULING, *supra* note 78 (noting that while economic analysis helps to understand criminal behavior and to formulate crime prevention policies, economic analysis should not be considered an exclusive factor, as psychological and sociological factors also play a vital role in the research of criminal behavior).

80. See RASSMUSSEN & BENSON, *supra* note 79; see also Isaac Ehrlich, *Crime Punishment and the Market for Offenses*, 10 J. ECON. PERSPECTIVES 43, 46 (1996), for an elaboration on a individual's decision to participate in an illegal activity: the net return for the offense ( $n$ ), equals the gross return of the offense ( $g$ ) minus the direct costs of the offense (including the cost of self-protection) ( $c$ ), minus forgone wages from a legal activity ( $l$ ), minus [the probability of apprehension and conviction ( $a$ ) multiplied by the prospective penalty if convicted ( $p$ )]; or:  $n = g - c - l - (ap)$ .

Additionally, this theoretical model assumes the individual is crime neutral; however, an individual's preferences pertaining to crime, moral values, and risk weighs on the decision to engage in a criminal activity. See *id.* at 46; see also Samuel Kramer, Comment, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 405 n.31 (1990) (noting that "[p]sychic benefits are notoriously difficult to quantify, but play an indispensable role in our criminal justice system").

81. See RASSMUSSEN & BENSON, *supra* note 79, at 41.

82. See *id.*

83. See *id.*

mandatory sentence.<sup>84</sup> This economic rationale, coupled with a desire for vigilant law enforcement and apprehension of drug traffickers, sellers, and users, is embedded in our current drug enforcement agenda.<sup>85</sup>

However, the effectiveness of such drug enforcement policies is countered by several factors. First, more severe sentences do not proportionately add deterrence benefits. Second, potential deterrence and crime reduction benefits are further limited by sociological factors inherent in the drug culture, including the greatly diminished capacity of addicts to react to negative stimuli. Finally, money spent trying to incarcerate our way to a drug war victory is redirecting dollars from other areas, including policing, drug prevention and treatment, and social programs.

### *B. Certainty v. Severity in Sentencing*

The severe penalties in mandatory minimum provisions are designed both to incapacitate the violator and to serve as a general deterrent against future violations.<sup>86</sup> After it was well established that raising the costs to the offender reduces crime, it was still an open question as to how great a factor increasing the severity of punishment actually was in deterring crime.<sup>87</sup> In the past decade, several studies have established that certainty of punishment (likelihood of apprehension and conviction) is a far more significant factor.<sup>88</sup> Professor Grogger's comments in his statistical analysis of California criminal offenders sums up the stance of most experts: "The results point to large deterrent effects emanating from increased certainty of punishment, and much smaller, and generally insignificant effects, stemming from increased severity of sanction."<sup>89</sup>

Additionally, the RAND Drug Policy Research Center analysis—perhaps the most exhaustive study done on mandatory minimums

84. See Hatch, *supra* note 21, at 191 ("Discretionary decisions by prosecutors, regarding both charges and factual allegations, can powerfully expand or limit a judge's sentencing boundaries. This increased leverage, in turn, promotes 'hidden bargaining,' wherein prosecutors and defense attorneys manipulate the guidelines in order to induce pleas necessary to keep the system working."). *But see* Breyer, *supra* note 40, at 183 (noting, however, that the certainty of the guidelines and mandatory minimum sentences might have induced "prosecutors to want to bargain less while defendants want to bargain more").

85. See JONATHAN P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CENTER, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 75 (1997).

86. See Breyer, *supra* note 40, at 181.

87. See WILLIAM A. LUKSETICH & MICHAEL D. WHITE, CRIME AND PUBLIC POLICY: AN ECONOMIC APPROACH 85-86 (1982).

88. See CAULKINS ET AL., *supra* note 85, at 75; Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 297, 308 (1991) (including a citation to a 1980 study conducted by Ann Witte).

89. Grogger, *supra* note 88, at 308.

for drug crimes—found such minimums to be less cost-efficient than either conventional enforcement or treatment at reducing both drug-related crime and drug consumption.<sup>90</sup> RAND confirmed that shorter sentences combined with vigilant policing is dollar for dollar a wiser policy than long sentences:

[E]xtending sentences for all drug dealers is less cost-effective than expanding the scope of conventional enforcement by arresting and prosecuting more dealers under traditional sentencing laws. Thus, if the objective is to increase the stringency of drug enforcement in a manner that maximizes the benefits obtained per dollar spent, expanding conventional-enforcement budgets is preferable to passing laws increasing sentence length.<sup>91</sup>

Other studies have reached a similar conclusion. For example, the Federal Judicial Center's evaluation of the general deterrence effect of mandatory minimum drug laws concluded that "the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable . . . effects or short-term effects that rapidly waste away."<sup>92</sup> A National Academy of Sciences Panel (NASP) determined that tripling the average length of incarceration between 1975 and 1989 barely impacted the crime rate.<sup>93</sup> NASP also determined further increases would result in even smaller effects.<sup>94</sup> A comment of Professor Grogger bears reiterating: "These findings . . . call into question the economic rationality of a sanctioning strategy based on increasingly lengthy prison terms as a means of reducing crime."<sup>95</sup>

### *C. Factors Undermining the Legislative Intent of Mandatory Minimums*

State and federal legislatures intend for mandatory minimum sentences to be an important weapon in the war on drugs: "The theory behind these laws was that if potential felons knew in advance that the penalty for certain crimes was a long prison

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90. See CAULKINS ET AL., *supra* note 85, at 68-69 (discussing the ability of treatment and other methods to curtail various types of crimes); see *id.* at 44 (discussing the ability of mandatory minimums to limit drug consumption, using cocaine as an example). "Conventional Enforcement" is defined as sentences served by prisoners exiting in 1990. *Id.* at 28.

91. *Id.* at 75.

92. VINCENT & HOFER, *supra* note 2, at 11 (quoting Professor Michael Tonry).

93. See Beale, *supra* note 77, at 26.

94. See *id.*

95. Grogger, *supra* note 88, at 308; see also Laura Mansnerus, *As Crime Rate Drops, the Prison Rate Rises and the Debate Rages*, N.Y. TIMES, Dec. 26, 1999, at 14NJ, LEXIS, News Library, NYT File (indicating "criminologists say the question of whether tough sentencing depresses the crime rate is unanswerable, although the consensus is that it does not").

sentence or death, they would think carefully and refrain from violating the law.”<sup>96</sup> Yet, many variables—including the target population of these measures—were likely not fully considered.

One factor that diminishes the deterrent effect of mandatory sentencing becomes apparent once it is realized that economic crime deterrent theories are modeled on persons who act “rationally.”<sup>97</sup> Many crimes, “crimes of passion” being a leading example, are simply not rational—they are therefore not subject to the deterrence effect of harsh punishments.<sup>98</sup> Many drug crimes also experience limited deterrent effect from mandatory minimum provisions. Drug addiction diminishes the user’s response to negative stimuli; addicts, in order to supply their addiction, are often willing to risk victimization, predatory crimes, overdose, toxicity and impurities in the drug, and the transmission of diseases.<sup>99</sup> It follows that it is nonsensical to attempt to deter this group through severe mandatory sentences.

Yet the overwhelming majority of mandatory minimum sentences are levied against drug defendants. Many of those charged as drug dealers are, in fact, drug users. For example, three-fourths of those individuals arrested for selling cocaine use the drug themselves.<sup>100</sup> The RAND study confirmed the general ineffectiveness of mandatory minimum sentences against drug users and drug-related crime; when dealing with such a target population, there is “very little difference between conventional enforcement and mandatory minimums in their effects on . . . economically motivated [drug] crime[s].”<sup>101</sup>

Other characteristics of the drug culture in addition to addiction work to limit the deterrent effect of long drug sentences. Drug dealers, who are typically young males, tend to think of potential outcomes in the near term; they are more apt than other members of society to prefer short-term rewards and downplay future consequences.<sup>102</sup> Those most likely to be apprehended are young, street-level operatives who do not engage in a concerned analysis of the potential lengthy sanctions as envisioned by Congress.<sup>103</sup> Instead, this group tends to “act impulsively, without forethought. . . . They

96. LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* 62 (1994).

97. LUKSETICH & WHITE, *supra* note 87, at 57. The word “rational” is defined as behaving in a manner to maximize personal satisfaction, not acting within community norms or psychological definitions of rational. *Id.*

98. See Kramer, *supra* note 80, at 405 n.32.

99. See RASSMUSSEN & BENSON, *supra* note 79, at 53-54; cf. CAULKINS ET AL., *supra* note 85, at 65 (discussing the irrationality of psycho-pharmacological crime).

100. See CAULKINS ET AL., *supra* note 85, at 86.

101. *Id.* at 68.

102. See *id.* at 98.

103. See FORER, *supra* note 96, at 62.



think they can beat the law.”<sup>104</sup> As the Federal Judiciary Center (FJC) noted in its report on mandatory minimums: “To be deterred, offenders must stop to weigh the costs and benefits, be aware of the penalties, find those penalties intolerable, and have other more attractive options.”<sup>105</sup> Therefore, young, impoverished, inner-city drug dealers, who perceive few legitimate alternatives as compared to the large, immediate returns from dealing, are not as likely to be discouraged by mandatory minimum sentences.

The FJC report found that in addition to addicts and low-level dealers, drug traffickers may also not be susceptible to the deterrence theory.<sup>106</sup> The report also noted that even if some drug dealers and traffickers are deterred, as well as others being sentenced to long mandatory minimum sentences, the overall curtailment effect is virtually negated when there are countless others ready to take their place, as is the case in the lucrative illegal drug business.<sup>107</sup>

#### *D. Allocating Resources to the Big Business of Corrections*

Another subsidiary economic effect of the war on drugs has been the expansion of the prison industry, which has been dubbed the past decade’s “major public works project and social program.”<sup>108</sup> To accommodate the drastic increase in prison population, 168 state and forty-five federal prisons were constructed between 1990 and 1995.<sup>109</sup> Total costs for constructing state prisons in 1997 were \$3.4 billion, most of which was financed through long-term bonds whose total debt payments will eventually raise that figure considerably.<sup>110</sup> New prisons can be an economic boon to an area, and many locations—typically rural counties—covet correctional institutions for the jobs and dollars they bring to the community.<sup>111</sup> The big business of operating prisons has also attracted the private sector: the nation’s largest private prison firm, Corrections Corporation of America, operates seventy-eight prisons located in twenty-five states.<sup>112</sup>

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104. *Id.* at 62; see also CAULKINS ET AL., *supra* note 85, at 98.

105. VINCENT & HOFER, *supra* note 2, at 11; see also FORER, *supra* note 96, at 62. As an ex-judge, Forer notes the realities of the application of these sentences: “The [deterrent] theory behind these laws was . . . patently fallacious.” *Id.*

106. See VINCENT & HOFER, *supra* note 2, at 11.

107. See *id.*

108. Press Release, Justice Policy Institute, Two Million Americans Will Be Behind Bars on February 15 (Jan. 24, 1999) (on file with author).

109. See Cannon, *supra* note 1, at 1907.

110. See SCHIRALDI ET AL., *supra* note 11.

111. See Cannon, *supra* note 1, at 1907-08 (“Rural counties covet them the way they once did Japanese auto plants.”); see also Bill Sizemore, *New Prisons Bring Much Needed Jobs*, VIRGINIAN-PILOT & LEDGER-STAR, Mar. 7, 2000, at A6, 2000 WL 5114929.

112. See Cannon, *supra* note 1, at 1908.

Considerably greater than the construction costs are the annual incarceration costs. On average, it costs approximately \$20,000 a year to confine a state inmate and \$24,000 to confine a federal inmate.<sup>113</sup> According to the Justice Policy Institute, the total bill for incarcerating the nation's two million inmates—which includes the 1.2 million nonviolent inmates—was expected to reach \$40 billion in 2000.<sup>114</sup>

Hidden costs, such as health care and contracted services, may raise these figures as well. For example, Florida spent \$230 million on prisoner health care last year, amounting to roughly one-fifth of the state's prison budget.<sup>115</sup> Additionally, the overabundance of mandatory minimum sentences carrying long-term penalties will eventually create an older prison population, resulting in an increase in the cost of health care in the prison system.<sup>116</sup> In Florida, for example, health care costs for prisoners over fifty are estimated to be three times that of a younger inmate.<sup>117</sup> The state legislature recently responded to the growing elderly prison population by passing a law creating a "geriatric prison" in Chattahoochee, Florida.<sup>118</sup> One Florida newspaper editorial commented on the new prison:

With ever-tougher mandatory sentencing laws, more and more inmates are going to be growing old and spending their "golden" years behind bars. . . . Conventional wisdom has held that once offenders reached a certain age, they become significantly less likely to commit new crimes or pose a danger to society and, thus, are better candidates for release. But the lock-em-up-and-throw-away-the-key mentality has overtaken that rationale.<sup>119</sup>

The money financing the construction and operation of these prisons comes at the expense of other programs. Prison funding limits spending for treatment and other policing strategies with proven track records.<sup>120</sup> The trend in state and federal criminal justice system budgets has been the allocation of larger portions of

113. See SCHIRALDI ET AL., *supra* note 11.

114. See JUSTICE POLICY INSTITUTE, *supra* note 8.

115. See *id.*

116. See AMBROSIO & SCHIRALDI, *supra* note 7 (estimating that the "[a]verage cost of incarcerating an elderly (55+) state inmate" costs \$69,000 annually).

117. See Mark Hollis, *Lawmakers Revive Talk of Prison for Elderly: As the Number of Inmates Older than 50 Grows, So Do Concerns About the Cost of Incarcerating Them*, ORLANDO SENT., Jan. 4, 2000, at D1, 2000 WL 3569755.

118. See Act effective July 1, 2000, ch. 2000-214, 2000 Fla. Laws 2148 (amending FLA. STAT. §§ 120.81, 413.051, 414.40, 944.02 (2000); creating FLA. STAT. §§ 944.804, 944.8041 (2000)); see also Editorial, *Lock-Up Condos*, LEDGER, June 16, 2000, at A12, LEXIS, News Library, LAKELD File (calling Governor Bush's signing of the bill creating Florida's geriatric prison "a sign of the times," as prisoners over 50 are the fastest growing inmate population).

119. Editorial, *supra* note 118.

120. See AMBROSIO & SCHIRALDI, *supra* note 7.

funding for prisons and smaller portions of funding for policing.<sup>121</sup> This trend is directly contrary to the data suggesting conventional police enforcement is considerably more efficient at curtailing drug proliferation than lengthy incarceration.<sup>122</sup> Many involved in the corrections field also contend that legislatures are allotting money to prisons that should be used on more cost-effective crime solutions and social programs.<sup>123</sup>

In 1994, Senator Paul Simon's Subcommittee on the Constitution conducted a national survey of prison wardens, finding that the wardens were in opposition to the current "tough on crime" policies.<sup>124</sup> The wardens favored smarter use of resources, an end to mandatory minimum sentences, and a greater use of alternatives to prison.<sup>125</sup> Astonishingly, the wardens stated that half the inmates under their supervision pose no serious physical threat to society.<sup>126</sup> The wardens were also opposed to longer sentences for minor drug offenses and the continued construction of new prisons.<sup>127</sup>

Programs unrelated to the criminal justice system have had their budgets slashed as prison budgets grow.<sup>128</sup> Between 1987 and 1998, while corrections spending increased 30%, there was an 18.2% decrease in higher education budgets.<sup>129</sup> In 1995, for the first time ever, the states spent more on building prisons than colleges.<sup>130</sup> While President Clinton touted that spending large sums of money "[would] ensure that all Americans have the best education in the world," the states funded prisons to the detriment of education.<sup>131</sup>

Florida has been cited as "another example of a state whose policies have taken a turn for the worst."<sup>132</sup> In 1994 the Florida

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121. See John J. DiIulio, Jr., *Two Million Prisoners Are Enough*, WALL ST. J., March 12, 1999, at A14, 1999 WL 5444197 (citing a 1999 Rockefeller Institute of Government study that showed 52% of the total 1983 U.S. criminal justice budget was allocated to police, while 28% was allocated to corrections; by 1995 the numbers were 43% to police and 37% to corrections, respectively).

122. See generally CAULKINS ET AL., *supra* note 85, at 75.

123. See AMBROSIO & SCHIRALDI, *supra* note 7.

124. See *id.* Eighty-five percent of the wardens surveyed felt that elected officials are not offering effective solutions to the country's crime problems, and 92% said that there should be greater use of alternatives to incarceration. See *id.*

125. See *id.*

126. See *id.* As the overwhelming majority of wardens agreed that elected officials do not provide effective solutions to country's crime problem, Senator Simon stated "It's time for a reality check on what works and what doesn't in fighting crime. . . . Some of these tough-sounding answers are just making things worse." *Wardens Oppose More Prisons, Longer Sentences, Survey Shows; Results Prove 'Contract' Is Misguided Group Says*, ARIZ. REPUBLIC, Dec. 22, 1994, at A3, 1994 WL 6348534 [hereinafter *Wardens Oppose Prisons*].

127. See *Wardens Oppose Prisons*, *supra* note 126.

128. See Cannon, *supra* note 1, at 1915.

129. See AMBROSIO & SCHIRALDI, *supra* note 7 (focusing just on the 1980s, the numbers are more dramatic: a 95% increase in corrections and a 6% decrease in education).

130. See SCHIRALDI ET AL., *supra* note 11.

131. AMBROSIO & SCHIRALDI, *supra* note 7.

132. *Id.*

Council of 100 issued some sage, though unheeded advice, noting that appropriate public policy “will combine effective, cost-efficient reforms in criminal justice with investments in the state’s future. Only if criminal justice expenditures are made efficiently, will resources be available for critical investments in prevention, intervention and education.”<sup>133</sup> Nevertheless, in prioritizing its expenditures, Florida has joined the long list of states that spend more on corrections than higher education; meanwhile, its university system has experienced a perceptible decline in quality.<sup>134</sup> In this mad dash to increase prison capacity through new facilities, maintenance at existing facilities is often neglected.<sup>135</sup> A common complaint is that “Florida politicians give lip service to preventing children from becoming criminals, but not much money or effort.”<sup>136</sup> With a huge influx of “baby-boom echo” students arriving at the state’s universities in the near future, the legislature should heed the concerns of those who argue for the replacement of today’s spending trends with an investment in their future.<sup>137</sup>

Society has a finite amount of resources available to benefit its citizens. Within drug and crime fighting budgets, as well as in general government apportionments, wise—and admittedly often difficult—decisions must be made for the allotment of tax-dollars. Currently, however, there is strong evidence that a disproportionate amount of these resources is being spent on operating prisons and incarcerating nonviolent and low-level drug dealers.

## V. THE CALCULATION OF DRUG WEIGHTS

Mandatory minimum sentences often create seemingly unconscionable anomalies in prison sentences. Such anomalies are the result of either poorly drafted or poorly contemplated statutes that evidence a lack of comprehension of the realities of drug

133. *Id.*

134. *See id.* Many have lamented Florida’s choice of priorities:

[T]his state’s system of higher education also has dropped in prestige. By the late 1980s, Florida’s state universities had improved so much they attracted national attention, and were rated well above average. Since then, with state tax support plummeting and high-quality professors fleeing, the system at first stagnated and then drifted downward. . . . [T]his issue ought to receive the same high profile that criminal justice has had in recent years.

Editorial, *Forecast of Higher Education’s Woes Includes Good, Bad Plans of Attack*, FT. LAUD. SUN SENT., Jan. 21, 1996, at 4G, LEXIS, News Library, SUNSEN File.

135. *See Jay Croft, New Prisons Built, Older Ones Slighted*, PALM BCH. POST, Apr. 2, 1995, at 1A, LEXIS, News Library, PBPST File.

136. Editorial, *Prisons No Cure For Young Criminals*, FT. LAUD. SUN SENT., Jan. 16, 1995, at 6A, LEXIS, News Library, SUNSEN File. (“Mostly, [the politicians] anti-crime focus is to build prisons with tax funds because steel bars are immensely popular with voters.”).

137. *See* Editorial, *supra* note 134, at 4G.

smuggling, distribution, and use.<sup>138</sup> A prime example is offered by statutes imposing mandatory minimum sentences triggered by the total weight of the *entire* “mixture or substance containing a detectable amount” of the illegal drug, rather than simply the weight of the illegal drug contained in the mixture or substance.<sup>139</sup> Consequently, the courts have been left to address how this statutory language applies to a variety of controlled substances.

### A. Cocaine

The creative methods used by drug smugglers have led to peculiar cases involving mixtures containing cocaine; the cases are varied in their holdings. In *United States v. Restrepo-Contreras*,<sup>140</sup> the defendants were apprehended at San Juan Airport with eleven souvenir statues made out of cocaine mixed with beeswax.<sup>141</sup> The district court determined the cocaine and beeswax comprising the statues to be a “mixture,” and the defendants appealed the resulting sentence.<sup>142</sup> The First Circuit held that the district court properly determined that the entire weight of the souvenirs—the cocaine plus the beeswax—should be counted towards the weight that triggers the mandatory sentence.<sup>143</sup> The First Circuit also affirmed the sentence of a man traveling with two “suitcases,” which were made of a combination of acrylic suitcase material and cocaine bonded together.<sup>144</sup> The First Circuit held that in imposing a mandatory minimum sentence, the district court properly determined the calculable drug weight to include the entire weight of the suitcase, minus the metal parts.<sup>145</sup> Cases involving cocaine mixed with cornmeal<sup>146</sup> and cocaine mixed with boric acid<sup>147</sup> have also resulted in the weight of the noncontrolled substance being disallowed from the total weight calculated for sentencing.<sup>148</sup> Conversely, cocaine mixed in bottles of wine or liquor has not been calculated on a total-weight-of-the-mixture basis.<sup>149</sup>

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138. See FLA. STAT. § 893.135(1)(c)(1) (2000).

139. *E.g.*, 21 U.S.C. § 841(b)(1)(B)(v) (1994 & Supp. V 1999); see also FLA. STAT. § 893.135(1)(c)(1) (2000).

140. 942 F.2d 96 (1st Cir. 1991).

141. *Id.* at 97.

142. *Id.* at 98.

143. See *id.* at 99.

144. See *United States v. Mahecha-Onofre*, 936 F.2d 623, 626 (1st Cir. 1991).

145. See *id.* at 625-26.

146. See *United States v. Robins*, 967 F.2d 1387, 1387 (9th Cir. 1992).

147. See *United States v. Rodriguez*, 975 F.2d 999, 1000 (3d Cir. 1992).

148. See *id.*

149. See *United States v. Bristol*, 964 F.2d 1088, 1090 (11th Cir. 1992) (holding the weight of wine mixed with cocaine should not be included); see also *United States v. Acosta*, 963 F.2d 551, 557 (2d Cir. 1992) (holding the weight of creme liquor containing imported cocaine should not be included); *United States v. Rolande-Gabriel*, 938 F.2d 1231,

The rule of lenity has been applied to 21 U.S.C. § 841 to avoid the absurd and irrational result that occurs by including the weight of a mixture with a controlled substance.<sup>150</sup> The rationale is that the failure to do so would result in divergent and disproportionate sentences, which are contrary to the “uniformity in sentencing” and “just punishment” purposes of the sentencing guidelines and mandatory minimum sentences.<sup>151</sup> Nonetheless, as cases involving a variety of substances—including LSD—indicate, this logic has been far from universally embraced.<sup>152</sup>

### B. LSD

Lysergic acid diethylamide (LSD) is another controlled substance carrying a mandatory minimum sentencing provision that has engendered considerable debate and disparity in the courts.<sup>153</sup> Since a dose of LSD is so small, it must be sold in combination with a carrier.<sup>154</sup> Examples of common carriers include small pieces of blotter paper, gelatin capsules, or sugar cubes.<sup>155</sup> When combined with a carrier, the actual LSD comprises an extremely small part of the combined drug product’s weight.<sup>156</sup> The weight of the carrier medium and, therefore, the applicable penalty can vary considerably.<sup>157</sup>

In *Chapman v. United States*, the Supreme Court upheld the prosecution’s contention that the combined weight of the paper and LSD should be used to calculate the sentence.<sup>158</sup> The Court determined the paper was a “mixture or substance containing a detectable amount of [LSD].”<sup>159</sup> The weight of the pure LSD in Chapman’s possession was fifty milligrams, but the combined LSD and blotter paper weight was 5.7 grams, enough to trigger a

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1238 (11th Cir. 1991) (holding the weight of a liquid substance containing semi-dissolved cocaine should not be included).

150. See *Rolande-Gabriel*, 938 F.2d at 1237. *But see* *Chapman v. United States*, 500 U.S. 453, 463-64 (1991) (“The rule of leniency . . . is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act.’”).

151. See *Rolande-Gabriel*, 938 F.2d at 1235.

152. See *Chapman*, 500 U.S. at 463-64 (1991).

153. See *id.* at 458 n.2, 461-63.

154. See *id.* at 457.

155. See *id.*

156. See *id.*

157. See *id.* at 458. The weight of 100 doses of LSD on sugar cubes is 227 grams, and on blotter paper only 1.4 grams, while the weight of 100 doses of pure LSD is only 5 milligrams. See *id.* at 458 n.2. Even the weight of blotter paper can vary greatly. LSD weighing over one gram requires a five-year sentence, while 10 grams requires a 10-year sentence, irrespective of the total number of doses. See 21 U.S.C. § 841(b)(1)(A)(v), (b)(1)(B)(v) (1994 & Supp. V 1999), *as amended by* Pub. L. No. 106-172, 114 Stat. 9 (2000).

158. *Chapman*, 500 U.S. at 469.

159. *Id.* at 455, 461 (quoting 21 U.S.C. § 841(b)(1)(B)(v)).

mandatory five-year sentence.<sup>160</sup> Chapman argued that the weight of the carrier was an arbitrary factor that should be excluded from the sentence calculation, that “mixture or substance” is impermissibly vague, and that due process and constitutional considerations required the exclusion of the carrier-weight.<sup>161</sup>

The majority of the Court held that the blotter paper used to distribute LSD was a “mixture or substance containing a detectable amount” of the drug.<sup>162</sup> Since the statute and the guidelines failed to define “mixture,” it was sufficient to give the word its ordinary, dictionary meaning.<sup>163</sup> The Court also cast aside Chapman’s constitutional arguments, deeming the statute not arbitrary. The Court held it was rational for Congress to include the weight of the paper, given the congressional intent to punish large-volume drug operatives and the fact that blotter paper is the “chosen tool of the trade for those trafficking in LSD.”<sup>164</sup> In addition, the statute was neither a violation of due process nor unconstitutionally vague, since “plausible arguments against describing blotter paper impregnated with LSD as a ‘mixture or substance’” were not enough to render the statute vague.<sup>165</sup>

Many thought that including the carrier weight on a substance that is sold by dose, instead of by weight as heroin and cocaine are sold, produced a seemingly irrational and harsh result.<sup>166</sup> As Justice Stevens noted in his dissent, “[t]he consequences of the majority’s construction of 21 U.S.C. § 841 are so bizarre that I cannot believe they were intended by Congress.”<sup>167</sup> Stevens went so far as to reason that the most plausible explanation for this sentencing scheme is that Congress simply did not comprehend how LSD is sold.<sup>168</sup> He also argued that such an interpretation would create sentencing

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160. *See id.* at 455-56.

161. *Id.* at 456.

162. *Id.* at 454.

163. *See id.* at 461-62. The dissent quoted Learned Hand and considered this an instance where it was not proper to “make a fortress out of the dictionary.” *Id.* at 476.

164. *Id.* at 454. “Congress adopted a ‘market-oriented’ approach to punishing drug trafficking under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.” *Id.* at 461.

165. *Id.* at 467.

166. Dissenting, Justice Stevens quoted the following:

“This is a quilt the pattern whereof no one has been able to discern. The legislative history is silent, and since even the Justice Department cannot explain the why of the punishment scheme that it is defending, the most plausible inference is that Congress simply did not realize how LSD is sold.”

*Id.* at 475 (quoting *United States v. Marshall*, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting)); *see also* *Neal v. United States*, 516 U.S. 284, 295 (1996) (“True, there may be little in logic to defend the statute’s treatment of LSD; it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers.”).

167. *Chapman*, 500 U.S. at 468 (Stevens, J., dissenting).

168. *See id.* at 475.

anomalies and undermine the very uniformity that Congress had been striving to attain.<sup>169</sup>

After the Court's decision in *Chapman*, family members of convicted LSD offenders made impassioned pleas to the Sentencing Commission regarding the arbitrary nature of the LSD rule and its draconian results.<sup>170</sup> After determining that carrier weights vary widely and are a poor standard on which to base sentences, the Commission amended the guidelines for LSD.<sup>171</sup> The amendment standardized the per dose weight at 0.4 milligrams regardless of the carrier, and the new guideline retroactively applied to offenses committed before November 1, 1993.<sup>172</sup> This development seemed to signify that, to an extent, the system envisioned in the mid 1980s was operating as designed. While certainty in sentencing was ensured, the Commission was researching and developing a "rational, coherent set of punishments."<sup>173</sup>

But it was not to last. In *Neal v. United States*,<sup>174</sup> the Supreme Court resolved a conflict in the Court of Appeals over whether the amended Guidelines controlled the LSD weight calculations for the purposes of section 841(b)(1).<sup>175</sup> The Court determined that even though the Sentencing Guidelines state differently, the language of section 841(b)(1) requires the trial court to account for the actual carrier weight in calculating its sentence.<sup>176</sup> While acknowledging the Commission's expertise, the Court held the decision in *Chapman* was still the law, and that principles of *stare decisis* required adherence to their earlier statutory interpretation.<sup>177</sup> As Justice Breyer commented several years after *Neal*, "[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task. . . . They will sometimes make it impossible for the Commission to adjust sentences in light of factors

169. See *id.* at 468. The dissent was also willing to take a closer look at "mixture and substance" as they specifically relate to LSD, and after viewing the legislative history and other LSD cases, Stevens determined the majority's construction was improper, noting that "[t]here is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result." *Id.* at 476.

170. See *Bowman*, *supra* note 56, at 32.

171. See *id.*

172. See *id.* at 33 n.2.

173. Breyer, *supra* note 40, at 184.

174. 516 U.S. 284 (1996); See also, *e.g.*, *United States v. Pope*, 58 F.3d 1567, 1570 (11th Cir. 1995) (following *Chapman*, 500 U.S. 453); *United States v. Muschik*, 49 F.3d 512, 518 (9th Cir. 1995) (using the amended Guidelines), *vacated by* 516 U.S. 1105 (1996), *on remand to* 89 F.3d 641 (1996)).

175. *Neal*, 516 U.S. at 296. Through the Anti-Drug Abuse Act of 1986, Congress provided for mandatory minimum sentences based on the weight of the "mixture of substance" containing a controlled substance, including LSD. *Id.* at 289.

176. See *Neal*, 516 U.S. at 289.

177. See *id.* at 290.



that its research shows to be directly relevant.”<sup>178</sup> Thus, the Commission today lacks the authority to alter the substantive nature of Congress’ statutes, no matter how illogically written or irrational the results may be.

### C. Hydrocodone

In Florida, one poorly written sentencing statute—imposing a minimum for possession of hydrocodone—led to a particularly harsh result. The prescription drug hydrocodone is a semi-synthetic narcotic painkiller, similar to codeine, that is found in drugs such as Vicodin, Triaminic DH, and Lortab.<sup>179</sup> Hydrocodone is the most commonly prescribed painkiller in America, accounting for half the opiate-based painkillers prescribed annually.<sup>180</sup> People who illegally use hydrocodone often begin taking the drug for legitimate medical purposes, later finding themselves addicted when their prescriptions run out.<sup>181</sup> Until recently, illegal possession of a small amount of hydrocodone routinely resulted in a twenty-five year prison term and a \$500,000 fine without the chance of parole.<sup>182</sup>

In Florida, as in other jurisdictions, the severity of the penalty resulting from an illicit drug charge is largely contingent on the schedule or classification of the drug-type and the quantity involved.<sup>183</sup> Section 893.135, *Florida Statutes*, states that drug trafficking charges—and the resulting weight-triggered mandatory minimum sentences—are applicable only to schedule I and schedule II substances.<sup>184</sup> The illegal possession and distribution of substances listed in schedule III, IV, or V carries a lesser sanction and does not result in drug trafficking charges.<sup>185</sup>

With the war on drugs raging and prescription drug abuse on the rise, the Florida legislature reclassified hydrocodone. Traditionally, hydrocodone had been listed as a schedule III drug.<sup>186</sup> However, in 1995 the Florida legislature listed hydrocodone as a schedule II

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178. Breyer, *supra* note 40, at 184.

179. See PHYSICIANS’ DESK REFERENCE 121-22, 1831 (51st ed. 1997).

180. See Greg Critser, *Pill Shaves Off Life’s Edges—At a Price*, USA TODAY, Oct. 2, 2000, at 19A, LEXIS, News Library, USATDY File. According to a government survey, 1.6 million people used hydrocodone and related opiate painkillers recreationally for the first time in 1998. See *id.*

181. See Graham Brink, *Court Ruling May Ease Penalty for Narcotic*, ST. PETE. TIMES, Oct. 25, 1999, at 1B, LEXIS, News Library, STPETE File (noting the manner in which the Green Bay Packers’ quarterback, Brett Farve, became addicted).

182. See *id.*

183. See FLA. STAT. § 893.135 (2000).

184. *Id.*

185. See §§ 893.13, 893.135.

186. See § 893.03(3)(c)(4). A schedule III drug can be addictive but has currently accepted medical uses. See *id.* § 893.03(3).

drug as well.<sup>187</sup> A schedule II drug “has a high potential for abuse and has a currently accepted but severely restricted medical use.”<sup>188</sup> Hydrocodone is the only substance located in both schedule II and III.<sup>189</sup>

Hydrocodone is a schedule III substance if the amount is not more than “15 milligrams per dosage.”<sup>190</sup> In pill form, hydrocodone is usually manufactured and distributed in dosages of five to ten milligrams.<sup>191</sup> Thus, only illegally manufactured pills would likely be in excess of fifteen milligrams per dose. Schedule II hydrocodone is defined as “hydrocodone not listed in another schedule.”<sup>192</sup> Therefore, pills over fifteen milligrams fall under schedule II. Schedule II hydrocodone may lead to a trafficking charge, and a first-degree felony carrying mandatory minimum sentences and mandatory fines.<sup>193</sup> But no mandatory minimum sentences apply to Schedule III hydrocodone; instead, offenders are sentenced for unauthorized possession of a schedule III controlled substance, a third-degree felony.<sup>194</sup> Therefore, how the drug is classified can have severe sentencing ramifications.

While the Florida legislature defined Schedule III hydrocodone in section 893.03,<sup>195</sup> it also went on to describe the substances that are susceptible to trafficking charges through section 893.135.<sup>196</sup> Section 893.135(1)(c)(1), *Florida Statutes*, prohibits the sale, purchase, manufacture, delivery, or possession of four grams or more of *hydrocodone* or four grams or more of *any mixture containing hydrocodone*.<sup>197</sup> The statute continues by providing that a violator “commits a felony of the first degree, which felony shall be known as ‘trafficking in illegal drugs’” if the requisite four grams or more are involved.<sup>198</sup>

187. See *id.* § 893.03(2); see also Brink, *supra* note 181; Jamie Malernee, *Man Gets Reprieve on Drug Charge*, ST. PETE. TIMES, Oct. 12, 1999, at Hernando 1, LEXIS, News Library, STPETE File.

188. FLA. STAT. § 893.03(2) (2000). Florida divides controlled substances into five different schedules. Schedule I, which includes heroin and LSD, is the most restrictive schedule because the drugs therein have “a high potential for abuse and has no currently accepted medical use.” *Id.* § 893.03(1). Schedule V, the least restrictive schedule, includes drugs with “a low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States.” *Id.* § 893.03(5).

189. See § 893.03(2)-(3); see also Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999).

190. § 893.03(3)(c)(4).

191. See PHYSICIANS’ DESK REFERENCE 121-22 (51st ed. 1997).

192. Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999).

193. See FLA. STAT. § 893.135(1)(c)(1) (2000).

194. See *id.* § 893.13(1)(a)(2).

195. See *id.* § 893.03(3)(c)(4) (defining schedule III hydrocodone as not more than 300 milligrams per 100 milliliters or not more than 15 milligrams per dosage).

196. See § 893.135.

197. *Id.* § 893.135(1)(c)(1) (emphasis added).

198. *Id.*

Hydrocodone is ordinarily combined with a nonprescription pain reliever, such as acetaminophen or aspirin, when manufactured in pill form.<sup>199</sup> The nonprescription substance usually comprises around 98% of the pill, while the controlled substance constitutes a small fraction of the approximately 750 milligram total pill weight.<sup>200</sup> In Florida, some prosecutors have centered on the “four grams or more of any mixture containing any such substance,” language of section 893.135(1)(c)(1) and include the acetaminophen in the total drug weight when charging defendants with hydrocodone violations.<sup>201</sup> Under this scheme—at 750 milligrams a pill—six pills, or the maximum prescribed daily dosage, could net an offender a first-degree felony trafficking charge.<sup>202</sup> Twenty-eight grams, less than the weight of a one-week legal prescription, could trigger a felony trafficking charge carrying a mandatory minimum sentence of twenty-five years and a \$500,000 fine.<sup>203</sup>

One might have thought that prosecutors would exercise their charging discretion to reduce the inequitable severity of these trafficking sentences; it would not be illogical to conclude that the pills fall within the gambit of Schedule III, since the pills contain “15 milligrams or less per dosage unit.”<sup>204</sup> However, given two different charging options by the poorly contemplated and confusing statutory scheme, prosecutors have decided to levy the more severe charge despite the glaringly, disproportionate sentence it would trigger.<sup>205</sup> Violators who telephoned a fraudulent prescription to a pharmacy were prosecuted for trafficking and sentenced to twenty-five years, in spite of no evidence that they attempted to sell or distribute the pills.<sup>206</sup> The draconian absurdity in applying this sentence to the criminal behavior involved seems indisputably apparent, yet the

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199. See *State v. Dial*, 730 So. 2d 813, 813 (Fla. 4th DCA 1999) (Klein, J., concurring), *quashed*, 752 So. 2d 555, 555 (Fla. 1999).

200. See *id.*

201. See *Brink*, *supra* note 181.

202. Possession of over four grams results in a mandatory minimum sentence of three years and a \$50,000 fine. See FLA. STAT. § 893.135(1)(c)(1)(a) (2000). Between 14 and 28 grams results in a sentence of 15 years and a \$100,000 fine. See § 893.135(1)(c)(1)(b).

203. See § 893.135(1)(c)(1)(c). The mandatory scheme in section 893.135(1)(c) provides for the following sentences: 4 to 15 grams—mandatory imprisonment of three years and a \$50,000 fine; 14 to 28 grams—mandatory imprisonment of 15 years and a \$100,000 fine; 28 grams to 30 kilograms—mandatory imprisonment of 25 years and a \$500,000 fine.

204. *Hayes v. State*, 750 So. 2d 1, 2 (1999); see also § 893.03(3)(c)(4). Rather than employ this definition, prosecutors instead chose to center on the aggregate pill weight methodology of the trafficking statute.

205. This is a classic example of the common critique of mandatory minimum provisions discussed *infra*: they transfer discretion from neutral judges to adversarial prosecutors. See, e.g., VINCENT & HOFER, *supra* note 2, at 21.

206. See *Hayes*, 750 So. 2d at 2-3 (chronicling earlier hydrocodone decisions); see also *Brink*, *supra* note 181.

state Attorney General's Office fought for the validity of this interpretation all the way to the Florida Supreme Court.<sup>207</sup>

Florida defense attorneys protested the obvious unfair sentencing anomaly.<sup>208</sup> An individual caught with a one-week personal-use supply of hydrocodone was sentenced to the same twenty-five year term as someone caught with twenty-eight grams of pure heroin—even though 98% of their drug weight was acetaminophen!<sup>209</sup> The cost of this twenty-five year sentence to the taxpayers: about a half million dollars.<sup>210</sup> Moreover, in Florida, possession of 300 pounds of cocaine mandates a fifteen year sentence—ten years less than forty pills of hydrocodone.<sup>211</sup> A defendant would also have been better off with 10,000 pounds of marijuana<sup>212</sup>—also a fifteen year sentence.<sup>213</sup>

The confusion caused by Florida's hydrocodone scheme was manifest in the trial courts. One circuit court judge, Richard Tombrink, refused to impose the mandatory minimum sentence on a defendant, ruling the law unconstitutional—something he had never done in ten years on the bench.<sup>214</sup> He declared the hydrocodone rule unconstitutional because of its unclear wording and its “bizarre” sentencing ramifications.<sup>215</sup> The defendant standing in front of Tombrink was Ariel Hernandez, a thirty-seven-year-old man who became addicted to the pills after a car crash.<sup>216</sup> Hernandez had telephoned a pharmacy pretending to be a doctor and prescribed himself 100 Vicodin pills—an amount doctors had legally prescribed him in the past.<sup>217</sup> Hernandez previously had only minor run-ins with the law and there was no evidence he tried to sell the pills.<sup>218</sup> Judge Tombrink stated, “I could not in good conscience sentence him to 25 years,” and after researching alternatives, he declared the statute unconstitutional.<sup>219</sup> He added that in addition to being a gross miscarriage of justice, the rule was a “gigantic waste of taxpayers’ money.”<sup>220</sup>

207. See *Hayes*, 750 So. 2d at 1.

208. See Brink, *supra* note 181.

209. See *Hayes*, 750 So. 2d at 3.

210. The figure is based on a current estimate of \$20,000 a year. See Brink, *supra* note 181.

211. See FLA. STAT. § 893.135(1)(b)(1)(c) (2000).

212. Marijuana is even classified as a schedule I drug. See *id.* § 893.03(1)(c)(7).

213. See § 893.135(1)(a)(3).

214. See Jamie Malernee, *Judge: Sentence Is Unfair*, ST. PETE. TIMES, Sept. 22, 1999, at Hernando 1, LEXIS, News Library, STPETE File.

215. *Id.*

216. See Graham Brink, *Strict Drug Trafficking Penalties Questioned*, ST. PETE. TIMES (PASCO TIMES), June 4, 1999, 1999 WL 332462.

217. See Malernee, *supra* note 214.

218. See Brink, *supra* note 216.

219. Brink, *supra* note 216.

220. *Id.*

Predictably, the confusion over hydrocodone surfaced at the appellate level as well.<sup>221</sup> The Florida district courts of appeal split on the issue.<sup>222</sup> The Fourth District and the Fifth District upheld the “any mixture containing such substance,” aggregate-pill-weight interpretation.<sup>223</sup> Offenders in these districts were subject to trafficking charges and the entire weight of the pill was used to determine the applicable mandatory minimum sentence.<sup>224</sup> Conversely, the First and Second District Courts of Appeal held that the drug trafficking statute was inapplicable, as it only applied to possession of hydrocodone in amounts of fifteen milligrams or more per dosage unit.<sup>225</sup> Since the pills were “not more than 15 milligrams,” they met the statutory definition of Schedule III hydrocodone; and trafficking charges only apply to schedule I and schedule II substance.<sup>226</sup> Therefore, in the First and Second Districts essentially all pharmacologically manufactured hydrocodone was considered a schedule III substance exempt from trafficking charges.<sup>227</sup>

The split among the district courts of appeal was settled in the fall of 1999 when the Florida Supreme Court decided the case of Kathryn Hayes,<sup>228</sup> a woman who telephoned a fraudulent prescription for forty Lorcet tablets to her local pharmacy. The trial court granted her motion to dismiss the trafficking count. On appeal, the Fourth District aligned with the Fifth District Court and reinstated the trafficking charges.<sup>229</sup> In reaching their decision, the Florida Supreme Court referenced the concurring opinion of Judge Klein of the Fourth District Court of Appeal, who noted the absurdity of the hydrocodone sentencing anomaly and emphasized that lenity rules require that if a statute “is susceptible to differing constructions, [the statute] shall be construed most favorably to the accused.”<sup>230</sup> The court’s analysis of these factors, coupled with their interpretation of the ambiguous statutory language, ended with their unanimously embracing the section 893.03 language: pills under fifteen milligrams per dosage unit are a schedule III substance and exempt from

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221. See *Hayes v. State*, 750 So. 2d 1, 1 (1999).

222. See *id.*

223. *State v. Hayes*, 720 So. 2d 1095, 1097 (Fla. 4th DCA 1998) (applying the Supreme Court’s definition of “mixture” from *United States v. Chapman*, 500 U.S. 453 (1991)), *quashed*, 750 So. 2d 1 (Fla. 1999); *State v. Baxley*, 684 So. 2d 831, 833 (Fla. 5th DCA 1996).

224. See *Hayes*, 720 So. 2d at 1095; *Baxley*, 684 So. 2d at 832.

225. See *State v. Perry*, 716 So. 2d 327, 327 (Fla. 2d DCA 1998); *State v. Holland*, 689 So. 2d 1268, 1270 (Fla. 1st DCA 1997).

226. *Holland*, 689 So. 2d at 1269.

227. See *id.*

228. See *Hayes v. State*, 750 So. 2d 1, 1 (Fla. 1999).

229. See *State v. Hayes*, 720 So. 2d 1095, at 1097 (Fla. 4th DCA 1998).

230. *Hayes*, 750 So. 2d at 3 (quoting FLA. STAT. § 775.021(1)).

trafficking charges.<sup>231</sup> After several confounding years, the penalties for possession of hydrocodone were reduced to a seemingly more rational level and in line with those of other jurisdictions.<sup>232</sup>

Prior to *Hayes*, one of the most prevalent arguments against the severe interpretation of the hydrocodone statutes was a common sense appeal.<sup>233</sup> Many thought that it was inconceivable that defendants like Ariel Hernandez and Kathryn Hayes were the type of individuals the state actually wished to send away for twenty-five years at the cost of \$500,000 each to the state's taxpayers.<sup>234</sup> The presumption was that the statute was merely poorly drafted and the consequences were unintended.<sup>235</sup> As one reluctantly concurring Florida District Court of Appeal Judge remarked, "I question whether, when the legislature enacted and amended our drug trafficking statute, it recognized how severe the penalties could be . . . for illegally possessing a quantity of pain killers which can be obtained in one prescription."<sup>236</sup>

While many heralded the *Hayes* decision as a triumph of common sense that returned a much-needed degree of proportionality to one area of Florida's criminal justice system,<sup>237</sup> the Florida legislature refuted such common sense contentions in the 2000 legislative session. In May 2000, the legislature passed another drug trafficking law,<sup>238</sup> primarily targeting "designer drugs" such as GHB and ecstasy.<sup>239</sup> Also included in this bill was the legislature's response to the Supreme Court's decision in *Hayes*: the bill listed hydrocodone solely in schedule II, deleting the schedule III designation from the Florida Statutes.<sup>240</sup> As a result, hydrocodone defendants in Florida are once again subject to twenty-five year sentences for possessing forty pills.<sup>241</sup>

231. *See id.* at 5.

232. *See, e.g.,* Sharp v. State, 710 So. 2d 1373, 1373-74 (Ala. Crim. App. 1997) (overturning 25-year sentence for conspiracy to traffic in Lortab since hydrocodone is not subject to trafficking charges under § 13A-12-231 of the Alabama Code).

233. *See, e.g.,* Brink, *supra* note 181.

234. *See id.*

235. This is not an uncommon occurrence. *See* Schulhofer, *supra* note 63, at 209-10 (discussing "mistakes" in mandatory minimum sentence structures). "Mistakes occur when mandatory provisions are badly drafted or poorly coordinated with other statutes." *Id.* at 209.

236. State v. Dial, 730 So. 2d 813, 813 (Fla. 4th DCA 1999) (Klein, J., concurring). Judge Klein was bound to concur by the fourth DCA's previously alignment with the "any mixture-aggregate pill weight" methodology. *Id.*

237. *See, e.g.,* Brink, *supra* note 181 (heralding the decision and describing the old rule as "draconian" and "insane" and leaving judges "scratching their heads").

238. *See* Act effective Oct. 1, 2000, ch. 2000-320, 2000 Fla. Laws 3478.

239. *See id.* § 4, 2000 Fla. Laws at 3495-96 (amending FLA. STAT. § 893.135 (2000)).

240. *See id.*

241. *See* § 893.135(1)(c)(1)(c). Attorney General Robert Butterworth subsequently issued an emergency rule placing the hydrocodone provisions of the Act on hold after the Florida Board of Medicine and the Florida Board of Pharmacy contacted him. *See* Fla. S.

The Committee Reports on House Bill 2085 did not reference the obvious and understandable confusion that existed prior to the Florida Supreme Court's decision in *Hayes*.<sup>242</sup> Instead, it exhibited indignation at the Court's overturning their statutory scheme and displayed approval of the harsh "any mixture containing such substance" methodology.<sup>243</sup> Florida courts had upheld other controlled substance statutes involving mixtures in the past.<sup>244</sup> Thus, the report cited *Stanfill v. State*<sup>245</sup> for the proposition that "the legislature is presumed to know existing law when enacting statutes."<sup>246</sup> Actually, it appears the change came at the behest of Broward County prosecutors, who complained to the legislature about the Court's removal of their heavy-handed leverage.<sup>247</sup> The Committee declined to comment on the draconian consequences of the hydrocodone law or engage in a comparative analysis of sentences for other controlled substances.<sup>248</sup> So, far from confirming the assumptions of many, that the harsh consequences of the scheme must have been unintended, the Committee's report *avored* the harsh interpretations and claimed the results were "presumably" just as the legislature had intended.<sup>249</sup>

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Comm. on Crim. Just., CS for SB 232 (2001) Staff Analysis 6-7 (Mar. 7, 2001) (on file with comm.). The medical community pointed out unforeseen ramifications of the law. *Id.* By listing hydrocodone solely as a schedule II drug it became subject to the stricter controls contained in the federal requirements concerning schedule II controlled substances. See 21 C.F.R. 1306. Schedule II substances require a doctor visit for a refill and may only be prescribed for one month at a time. The hardship this would create for patients led to the Attorney General retaining the schedule III designation pursuant to his emergency rulemaking authority under section 893.055, *Florida Statutes*.

In the 2001 legislative session another hydrocodone bill was passed. Fla. SB 232 (2001). This bill keeps the schedule II and III designations of hydrocodone, but amends section 893.135(1)(c)(1)(c), *Florida Statutes*, to allow for trafficking charges to be levied when schedule III hydrocodone is involved. See Fla. SB 232, § 2 (2001). Therefore, the 2001 bill uses a different approach to achieve the result intended by the 2000 legislation; the court's ruling in *Hayes*, is undone, and hydrocodone defendants are again subject to trafficking charges. Interestingly, the amended statute would expressly reference the previous disparate hydrocodone decisions in a new section (7), which would read:

(7) For the purpose of further clarifying legislative intent, the Legislature finds that the opinion in *Hayes v. State*, 760 So. 2d 1 (Fla. 1999) does not correctly construe legislative intent. The Legislature finds that the opinions in *State v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996) correctly construe legislative intent.

Fla. CS for SB 232, § 2 (2001).

242. See Fla. H.R. Comm. on Crime & Pun., CS for HB 2085 (2000) Staff Analysis 4-5 (rev. June 21, 2000), Online Sunshine, <http://www.leg.state.fl.us/Welcom/index.cfm> [hereinafter Staff Analysis].

243. *Id.* 4-5.

244. See, e.g., *State v. Yu*, 400 So. 2d 762, 765 (Fla. 1981) (involving cocaine mixture).

245. 384 So. 2d 141 (Fla. 1980).

246. Staff Analysis, *supra* note 242, at 4.

247. See Bob LaMendola, *Pain Pill Law Will Make Patients Pay*, FT. LAUD. SUN SENT., Aug. 6, 2000, at 1B, LEXIS, News Library, SUNSEN File.

248. See Staff Analysis, *supra* note 242, at 4.

249. *Id.*

In a 1999 *St. Petersburg Times* article on the plight of Ariel Hernandez, state Senator Ginny Brown-Waite, whose district includes Brooksville, Florida—scene of Hernandez’s trial—commented on the situation.<sup>250</sup> She stated she did not believe that the legislature intended the drug trafficking laws to have application against users who were not distributing drugs.<sup>251</sup> However, she noted, “My constituents have told me repeatedly that they want tougher charges and sentences for drug dealers,” though she admitted, “Obviously, we don’t want to go overboard.”<sup>252</sup>

Nonetheless, Senator Brown-Waite sponsored the Senate versions of the latest drug trafficking bills dealing with hydrocodone.<sup>253</sup> Co-sponsorship of a bill reaffirming twenty-five years for forty pills soon replaced tempered statements like those relating to the Hernandez case.<sup>254</sup> The senator was hardly alone; the provisions passed the senate and the House unanimously.<sup>255</sup> Mandatory minimum penalties relating to drugs are overwhelmingly supported by state and federal politicians, seemingly regardless of their costs or consequences.

## VI. A FERTILE MANDATORY MINIMUM SENTENCING CLIMATE

### A. Legislative Motives and Mindsets

In a recent *Nightline*, Ted Koppel remarked, “You’d think, since so many members of Congress are lawyers as well as politicians, that they might have had a hunch or two about the complications of mandatory sentencing.”<sup>256</sup> Whether involving hydrocodone in Florida, federal LSD penalties, or the harsh sentencing of highly attenuated “co-conspirators,” examples abound of mandatory minimums—either because they are poorly written or over-aggressively construed by prosecutors—having results that are seemingly way off target.<sup>257</sup>

Regardless of the mounting evidence indicating that long mandatory minimum sentences for nonviolent criminals are inefficient and often arbitrary, “in the current contentious political climate, the political system seems locked in place.”<sup>258</sup> Capitalizing on

250. See Brink, *supra* note 216. The Senator is the chairwoman of the Criminal Justice Committee. See *id.*

251. See *id.*

252. *Id.*

253. See Fla. SB 2414 (2000); Fla. SB 232 (2001).

254. See Fla. SB 2414 (2000); Fla. SB 232 (2001).

255. See Vote Report, at <http://www.leg.state.fl.us/cgi-bin.../votes/html/HHB20850501000365.html> (describing the vote report for HB 2085, which was 117:0:3); FLA. H.R. JOUR. 1857 (Reg. Sess. 2001) (describing the vote report for SB 232, which was 117:0:3).

256. *Nightline: Mandatory Sentences* (ABC television broadcast, Sept. 30, 1999), LEXIS, News Library, ABCNEW File.

257. See *id.*

258. Cannon, *supra* note 1, at 1912.



the public's fear of crime has been an extremely successful political tool in the past two decades.<sup>259</sup> Politicians know that when running for election they cannot go wrong by portraying themselves as "tough on crime" and "hard on drugs."<sup>260</sup> Both major political parties currently embrace the tough-on-crime mantra.<sup>261</sup> This belief leads to a general tendency for legislatures not only to vote for mandatory minimums, but also to leave them in place—even if they are proven to have seemingly unintended results.<sup>262</sup>

This petrification is evidenced in Congress' failure to bring the crack cocaine provisions into line with the powder cocaine provisions,<sup>263</sup> in spite of the support of the attorney general, the drug czar, and numerous experts.<sup>264</sup> Politicians considering the ample advice may also be imagining a thirty-second campaign ad: "Congressman Smith voted to let hundreds of crack dealers out of federal prison. . . . That can be the end of a campaign."<sup>265</sup> In modern politics, it is considered imperative not to concede the "tough on crime" high ground to your opponents.<sup>266</sup> Such political realities have created the "paralysis" in current drug policy.<sup>267</sup>

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259. See, e.g., Jonathon Simon, *From a Tight Place: Crime, Punishment and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 854-55 (1999) (reviewing SUSAN ESTRICH, *GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM* (1995)) (discussing how Presidents Reagan and Bush both were able to successfully portray Democrats as soft on crime and woo Democratic voters on this issue—including Bush's devastating use of the Willie Horton issue against Michael Dukakis in the 1988 presidential election).

260. See Laura Mansnerus, *As Crime Rate Drops, The Prison Rate Rises and the Debate Rages*, N.Y. TIMES, Dec. 26, 1999, at 14NJ, LEXIS, News Library, NYT File (paraphrasing a quote by Ed Martone of the New Jersey Association on Corrections, who also added, "What we know works costs money and takes time and doesn't fit on a bumper sticker.").

261. See Simon, *supra* note 259, at 854-55.

262. See Cannon, *supra* note 1, at 1912 (citing the argument of Eric Sterling, president of the Criminal Justice Policy Foundation).

263. A five-year mandatory minimum sentence is triggered by five grams of crack cocaine, 21 U.S.C. § 844 (a), while it takes 500 grams of powder cocaine to trigger the same five-year sentence. See 21 U.S.C. § 841 (B)(ii)(II).

264. The disparity in mandatory minimum sentences for crack and powder cocaine in the federal system and its disproportionate impact on African-American defendants is itself the source of much critical analysis and debate. See, e.g., Bergman, *supra* note 73, at 196. For additional material on the disparate impact of mandatory drug sentences on the African-American community, see MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 12 (1995) (noting that while 76% of drug users are white, African-Americans comprise 35% of all drug arrests, 55% of all drug convictions, and 74% of all drug sentences).

265. Cannon, *supra* note 1, at 1912 (containing numerous examples of recent political "soft on crime" attack campaigns) (quoting Eric E. Sterling, president of the Criminal Justice Policy Foundation).

266. See Press Release, Federation of American Scientists, Drug Experts Call for "Third Way"—Neither Drug War Nor Legalization (Sept. 2, 1997), <http://www.fas.org/press/index.html>.

267. See *id.*

### B. *The Public's Concerns about Drugs and Crime*

This ossification within many legislatures is symptomatic of society's views of drugs and drug-related crimes. Americans consistently list drugs and crime as major concerns.<sup>268</sup> The public seems convinced that criminals regularly receive lenient treatment and that societal problems can be fixed by taking a tougher stance.<sup>269</sup> Increasing the severity of sentences routinely receives overwhelming support from the public—with such measures registering approximately 80% approval ratings throughout the 1990s.<sup>270</sup> Consequently, few social problems receive as much political attention as crime, and the “lock ‘em up” mentality “resonate[s] deeply with the electorate.”<sup>271</sup> The war on drugs is often cited as the leading example of the politicization of crime in America.<sup>272</sup> Therefore, politicians may compellingly argue that they are attending to the concerns of the citizens by enacting lengthy mandatory terms for various penalties. The protection of citizens is certainly established as an important governmental goal;<sup>273</sup> however, this goal does not necessarily support the American justice system's recent “monolithic answer” of lengthy incarceration.<sup>274</sup>

Are the public's concerns—and the resulting harsh penalties—warranted? Certainly, a considerable degree of concern for personal safety and the safety of loved ones is rational. But ample evidence suggests the public's apprehension about crime is exaggerated. Fear of crime is prevalent in areas with crime rates that are relatively low.<sup>275</sup> Rural citizens in areas with virtually no violent crime often list crime as a top concern.<sup>276</sup> The suburban, voting population that is so concerned about crime experiences comparatively low victimization rates.<sup>277</sup> Yet the perceived risk from crime and “the

268. See Beale, *supra* note 77, at 44-45.

269. See *id.*

270. See *id.* at 25.

271. *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1968 (1998).

272. See *id.* at 1985.

273. See *id.* at 1967 (citing John Locke's *Second Treatise of Government*).

274. See *id.* at 1866; see also Beale, *supra* note 77, at 38 (“By themselves, [the crime rate] data do not seem sufficient to explain the salience of the fear of crime, and the political support for punitive crime policies.”).

275. See Beale, *supra* note 77, at 44-45 (citing a Long Island, New York study, according to which 56% of residents said they were less likely to shop after dark now than they were 20 years before, even though major crime had fallen 21% during that time period and Long Island crime rates are well below the national level).

276. See *id.* at 44. There is a prodigious variation in victimization rates by demographic factors, including race, gender, and age. See *id.* at 37.

277. See *id.* at 39; see also Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM L. BULL. 305, 318-19 (1995) (“Suburbanites . . . fear crime more than urban dwellers who face much greater dangers from crime.”). Pillsbury claims that there may be racial undertones to this

deeply rooted pro-incarcerative sentiments of the American public” continue to flourish.<sup>278</sup>

There are various accepted explanations for the heightened fear of crime.<sup>279</sup> Psychological research and analysis on the topic is in abundance.<sup>280</sup> The public’s “[b]iased [p]rocessing of information” is likely partly responsible; once people have made up their minds about drugs, crime, and punishment, they are likely to process new information on the subject in line with their established beliefs.<sup>281</sup> Additionally, research shows that frequency of repetition is an important factor in how important a topic is considered, and the evening news consistently furnishes such frequent repetition through sensational stories of a crime-laden and drug-infested society.<sup>282</sup>

The effects of media reports on crime has been the focus of much research, criticism, and debate.<sup>283</sup> The slogan “If it bleeds, it leads” is now the theme of television news coverage, evidenced by a dramatic increase in violent news stories throughout the 1990s.<sup>284</sup> Likewise, in the 1980s, the public was bombarded with stories of the raging crack “epidemic.”<sup>285</sup> Some posit that this media attention has resulted in the disproportionately heightened concern over societal ills.<sup>286</sup> In addition to altering public perceptions, the media is also cited for its role in prioritizing crime in the political agenda.<sup>287</sup>

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phenomenon, as people often fear those different from them, including the urban poor and minorities. See Pillsbury, *supra*, at 319. “Law and order advocates rarely become exercised about the economic crimes of middle-class offenders . . . [p]erhaps because white, middle-class voters represent the most powerful group in U.S. politics.” *Id.* at 316.

278. *Developments in the Law—Alternatives to Incarceration*, *supra* note 271, at 1986. Now that drugs (and other categories of crimes) have been heavily covered by mandatory minimums, the brunt of the politicians’—and the public’s and media’s—concerns appear now to be directed at violent youth offenders. See *id.* at 1988-90.

279. See Beale, *supra* note 77, at 51-64 (summarizing various psychological models).

280. See *id.*

281. *Id.* at 59-60.

282. See *id.* at 46, 59-60.

283. See *id.* at 45-46 (citing both news and entertainment media); see also Pillsbury, *supra* note 277, at 317-18 (discussing the media’s role in the public’s perception of crime).

284. Beale, *supra* note 77, at 45.

285. See Stewart, *supra* note 31, at 39 (“[In the 1980s,] crack cocaine was a new drug on the scene. There was a lot in the media, every night almost, about crack babies and the crack scare. There were certainly a lot of unknowns about crack cocaine.”).

286. See Beale, *supra* note 77, at 47-49. Though some argue this research is incomplete, it is certainly safe to say that “violence is attractive to media consumers.” *Id.* at 48. And the public connects with stories about other people, not with statistics. See Pillsbury, *supra* note 277, at 321.

287. See Beale, *supra* note 77, at 49-51.

C. “*Entrenched Camps*” in the Drug War—*Little Room for a Middle Ground*

Mandatory minimum sentences were envisioned as a valuable drug control measure.<sup>288</sup> Drugs have long been a major societal concern and there is obviously no easy answer to the drug problem. An all out “war on drugs” has proven to be costly and inefficient.<sup>289</sup> Those in the opposite camp, who favor legalization of drugs, are likely just as mistaken. While drugs and nonviolent crime in general impose less costs on society than violent crime, drug use is not a “victimless” activity.<sup>290</sup> In addition to crime control and incarceration, drug use imposes enormous costs on society. Medical costs, lost productivity, accidents, and various insurance and social program costs constitute a significant toll.<sup>291</sup> And, the majority of these costs are not borne by the addict, but rather by the nonabusing population.<sup>292</sup> Removing the negative legal ramifications presently enforced against drugs would just increase overall drug consumption.<sup>293</sup>

Unfortunately, the current state of our drug policy remains entrenched between the two opposite camps of “drug warriors” and legalizers.<sup>294</sup> Consequently, many moderate policy proposals that fall between the two extremes are not intelligently discussed.<sup>295</sup> In addition, there is a tendency among many hard line anti-drug advocates to consider any proposal not in line with their ideology, as starting on the slippery-slope towards legalization.<sup>296</sup>

The current anti-drug camp’s upper hand in current policy is certainly evidenced in the harsh mandatory minimum sentences that have been politically vogue for the past two decades.<sup>297</sup> Nevertheless, in spite of a politically inhospitable climate, alternative views advocating moderate tenets or “harm reduction” drug policies have

288. See, e.g., CAULKINS ET AL., *supra* note 85, at 1.

289. See *id.*

290. See HENRICK HARWOOD, U.S. DEPT OF HEALTH AND HUMAN SERVS., THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE IN THE UNITED STATES, 1992, at 1.8, 7.1 (National Inst. of Health Pub. No. 98-4327, 1998), <http://www.nida.nih.gov/EconomicCosts/Intro.html>.

291. See *id.* at 1.8.

292. See *id.* at 1.8, 7.1.

293. See Mark A.R. Kleiman, *Drugs and Drug Policy: The Case for a Slow Fix*, ISSUES SCI. & TECHS. (1998), at <http://sun00781.dn.net/drugs/slowfix.htm>; see also Gary S. Becker, et al., *Economics of Drugs: Rational Addiction and the Effect of Price on Consumption*, 81 AM. ECON. REV. 237, 237 (1991) (stating that the legalization of drugs would increase consumption).

294. See Kleiman, *supra* note 293, at 155.

295. See *id.*

296. See Press Release, Federation of American Scientists, *supra* note 266.

297. See Kleiman, *supra* note 293, at 155.

slowly been gaining momentum in response to the perceived deficiencies of prevailing approaches.<sup>298</sup>

Inherent in moderate views is the realization that *both* drugs and anti-drug policies may impose costs and aggregate harm on society. Public health and harm reduction advocates criticize the current war on drugs in the United States on a variety of fronts, including:

[I]ts moral arbitrariness, its insensitivity to differential consequences of drug use, its stigmatization and thereby systematic marginalization of drug users, its manufacturing a drug-related ‘moral panic’ in society, its straining the criminal-justice system by turning drug users into criminals, its infringement on the civil rights of citizens, its indirect sustenance of a black market, and, most important of all, its inability to achieve what it promises to achieve—curbing illicit drug consumption and availability.<sup>299</sup>

Moderate policies and harm reduction encompass a realization that the use of mind-altering substances has been with us for thousands of years, and—regardless of the billions of dollars spent on the problem—such use will not be leaving us in the near future.<sup>300</sup> A truly “decisive” victory in the drug war is the language of politicians, not experts.

While harm reduction measures aimed for alcohol and tobacco meet with limited opposition,<sup>301</sup> opponents abound when the measures are applied to illegal drug use within the zero tolerance framework of our current system. The divide stems from an inability to agree on the degree of harm that is acceptable from illegal drugs and ideological differences on the appropriate methods to employ.<sup>302</sup> Needle exchange programs are a prime example of programs that are enormously cost-effective yet often vehemently opposed on ideological grounds.<sup>303</sup> Easy access to detoxification is another method of lowering society’s costs when confronted with addicts with a need for drugs but without the financial resources to purchase them.<sup>304</sup>

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298. See HARM REDUCTION: A NEW DIRECTION FOR DRUG POLICIES AND PROGRAMS 4 (Patricia G. Erickson et al. eds., 1997) [hereinafter HARM REDUCTION] (“To say that the search for a harm reduction perspective was a reaction to deficiencies of existing approaches is hardly an exaggeration.”); see also Kleiman, *supra* note 293.

299. HARM REDUCTION, *supra* note 298, at 4.

300. See BARRY STIMMEL, MD, THE WAR THAT MUST BE WON 172 (1996).

301. See *id.* at 172-73 (harm reduction techniques range from treatment and dependency programs to “designated driver” and “call-a-cab” programs, to designated smoking areas and nonsmoking rules).

302. See *id.* at 174.

303. See *id.* at 174-75 (comparing the estimated lifetime costs of treating an HIV patient to the cost of averting infection).

304. See *id.* at 174. Of course not all similarly situated addicts would chose this option, but the detoxification space should be increased to accommodate demand.

Currently, over half those seeking treatment are denied it due to financial inability or lack of facility space to accommodate them.<sup>305</sup>

Harm reduction advocates attack mandatory minimum sentences as inefficient. They argue mandatory minimums should be abandoned in favor of programs that offer greater returns such as providing greater access to treatment and shorter, more widespread jail sentences for dealers.<sup>306</sup> So why haven't we done this? The answer is, as one police chief stated, "Public officials are reluctant to consider a variety of potentially helpful steps, from abandoning ineffective programs to reforming the sentencing laws, for fear of being labeled as pro-legalization or soft on drugs."<sup>307</sup>

In addition to failing to receive much political support, moderate programs are often vehemently attacked. As with all programs advocated as an alternative to the current zero-tolerance mind-set, conservative policymakers assail the harm reduction movement.<sup>308</sup> They suspect that the hidden agenda of those advocating moderate drug policies is the legalization of drugs.<sup>309</sup> Barry McCaffrey, President Clinton's Drug Czar, sounded almost paranoid in discussing the harm reduction movement:

[The movement is] a carefully-camouflaged, well-funded, tightly-knit core of people whose goal is to legalize drug use in the United States. It is critical to understand that whatever they say to gain respectability in social circles, or to gain credibility in the media and academia, their common goal is to legalize drugs.<sup>310</sup>

The driving tenet of moderate drug policies is not legalization. Rather, it is the employment of more utilitarian and less damaging policy tools against the drug problem, such as prioritizing policy based or public health methods over punitive programs.<sup>311</sup> Mandatory minimum sentences for most drug offenders are far from utilitarian in principle. Rather than registering the greatest return for the crime control dollar, they often end up "inflicting a great deal of pain on many offenders who have committed relatively minor offenses."<sup>312</sup> They often force the allotment of the societal asset of long-term

305. See Marsha Rosenbaum, *Are We Really Winning the War on Drugs?*, S.F. CHRON., Mar. 24, 2000, at A23, LEXIS, News Library, SFCHRN File.

306. See CAULKINS ET AL., *supra* note 85, at 75-76.

307. Press Release, Federation of American Scientists, *supra* note 266.

308. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 175 (1999) ("In fact, the 'harm reduction' movement has cleverly turned the table on the conservative harm arguments, focusing instead on the harms caused by the policies prohibiting drug use.").

309. See Barry R. McCaffrey, *Legalization Would Be the Wrong Direction*, L.A. TIMES, July 27, 1998, at B5, LEXIS, News Library, LAT File.

310. Harcourt, *supra* note 308, at 176.

311. See *id.* at 174-75.

312. Pillsbury, *supra* note 277, at 312.

prison space to nonviolent offenders, while violent offenders who were sentenced without a mandatory provision are set free.<sup>313</sup> A rational justice system should gauge sentencing and allot prison space to those criminals who impose the highest costs on society—and utilize research and analysis in the employment of an efficient sentencing system that assures this result. Unfortunately, analysis of sentencing policy and the long-term ramifications of mandatory sentencing remain largely underutilized in our justice system.

#### D. *The Role of Expert Opinions in Sentencing Policy*

In his 1993 article on sentencing reform in the federal system, Senator Orrin Hatch summed up his position by concluding, “Over the last decade, Congress has assumed a more active role in the federal sentencing system and should continue to do so.”<sup>314</sup> But he added a word of caution:

As the ultimate architects of a sentencing policy that affects the liberty interests of defendants and the lives of all citizens, congressional policy makers must take advantage of the most current and complete information available when making legislative decisions. Whenever possible, Congress should encourage . . . those most knowledgeable of and most involved with the guidelines—judges, prosecutors, practitioners and the [Sentencing] Commission—to express their views . . . Congress should carefully study and monitor . . . [the] compulsory nature [of sentencing schemes].<sup>315</sup>

However, it is highly debatable how much credence politicians have given to this advice.

Analysis of this public policy and employment of criminal justice experts plays an extraordinarily limited role in the design of criminal sentencing policy.<sup>316</sup> Politicians commonly employ financial experts and economists in monetary policy decisions; and diplomats, intelligence, and military experts are essential to foreign policy.<sup>317</sup> Yet, politicians ignore and underutilize criminal justice experts in the development of sentencing and crime initiatives.<sup>318</sup> Instead, the

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313. The most notorious and publicized example of this was the Polly Klass murder in California. Her killer was released from prison early due to overcrowding caused in part by mandatory drug penalties. *See id.* at 311.

314. Hatch, *supra* note 21, at 198.

315. *Id.* at 197-98.

316. *See* Doris Marie Provine, *Reflections on the International Conference on Sentencing and Society*, 12 FED. SENTENCING REP. 178, 178 (1999) (“As our politicians concentrate on being popular by being tough, sentencing professionals of all persuasions are more and more marginalized. At this point the two groups are hardly on speaking terms.”); *see also* Pillsbury, *supra* note 277, at 313 (discussing reasons for this limited role and potential reactions by experts to help reverse this trend).

317. *See* Pillsbury, *supra* note 277, at 313.

318. *See id.*

widespread passage of mandatory minimums has turned sentencing into a political function, as legislators seek to shore up their public image by assuaging the public's fears through strong sentencing laws. The extent to which this occurs is uniquely American.<sup>319</sup>

The American system of formulating criminal justice policy differs greatly from that of many other countries.<sup>320</sup> Canada, England, and other European countries employ divergent policies to combat crime, while the United States favors a nearly "exclusively punitive model with increasingly harsher sanctions."<sup>321</sup> Many foreign systems exhibit a greater realization that criminal sanctions have only a modest deterrent effect.<sup>322</sup> They also rely on a "tradition of empirical research as a guide to criminal justice" instead of the political-moral condemnation inherent in American policy.<sup>323</sup>

Our system is replete with criminal justice policies that are "contrary to what almost everyone with close knowledge of the topic thinks makes sense."<sup>324</sup> This contradiction is evident in the expert opinions regarding long mandatory minimum sentences for drug offenses; such sentences are deemed fundamentally flawed and are almost unanimously considered contrary to expert opinion.<sup>325</sup> Interestingly, one of the most frequently cited experts among the harsh-sentencing advocates, Princeton Professor John J. DiIulio, recently changed his position with respect to nonviolent offenders.<sup>326</sup> Professor DiIulio, who wrote an article for the *Wall Street Journal* in 1994 with the catchy title "Let 'em Rot," now feels that "Two Million Prisoners Are Enough."<sup>327</sup>

The criticism of the current lengthy prison durations is primarily limited to nonviolent and drug offenses.<sup>328</sup> Importantly, for dangerous and violent offenders, the sentences emanating from an empirically based sentencing system would likely be similar to the current

319. See *Developments in the Law—Alternatives to Incarceration*, *supra* note 271, at 1866.

320. See *id.*; see also Provine, *supra* note 316, at 178-79.

321. Beale, *supra* note 77, at 29.

322. See *id.*

323. *Id.*; see also Provine, *supra* note 316, at 179 ("There appears to be a working relationship between researchers, court administrators, and legislators, in most of the [European] countries represented at this conference.").

324. Beale, *supra* note 77, at 23.

325. See *id.* at 25 ("There are a few criminal justice experts who support harsher sentences, but they are in the distinct minority.").

326. See John J. DiIulio, Jr., *Two Million Prisoners Are Enough*, *WALL ST. J.*, Mar. 12, 1999, at A14, LEXIS, News Library, WSJ File [hereinafter DiIulio, *Two Million Prisoners*]; John J. DiIulio, Jr., *Let 'Em Rot*, *WALL ST. J.*, Jan. 26, 1994, at A14, LEXIS, News Library, WSJ File.

327. DiIulio, *Two Million Prisoners*, *supra* note 326.

328. See, e.g., Provine, *supra* note 316, at 179.



scheme.<sup>329</sup> In contrast, with most drug offenses, the sanctions would likely be drastically different.<sup>330</sup>

There has long been a plethora of experts declaring opposition to mandatory minimums. The Sentencing Commission, the Judicial Conference of the United States, the Federal Courts Study Commission, the Federal Judicial Center, the ABA, and an overwhelming majority of judges oppose mandatory minimums.<sup>331</sup> Even three current Supreme Court Justices have publicly spoken out against these penalties.<sup>332</sup> Even among prosecutors, who are currently empowered with wide discretion under mandatory minimums, only half viewed these provisions in a favorable light.<sup>333</sup>

Additionally, some argue that certain areas of governmental policy should not be overly guided by public opinion.<sup>334</sup> Public attitudes on risk can be highly skewed from reality. Justice Breyer has compellingly contended that in certain fields, cognitive errors create a public perception on risk so fundamentally flawed it should not be the basis for public policy.<sup>335</sup> Crime, and the resulting criminal justice decisions, are an area fueling highly emotional, and arguably irrational, public reactions. Considering that policy determinations affect the liberty interests of defendants, basing criminal justice policy on empirical research seems favorable to public-driven and politically motivated measures.<sup>336</sup>

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329. *See id.*

330. *See id.*

331. *See* Beale, *supra* note 77, at 27; *cf.* Breyer *supra* note 40, at 184 (“The Commission, from the beginning, has strongly opposed mandatory minimums.”).

332. *See* Breyer, *supra* note 40, at 184. Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer have all publicly spoken out against mandatory minimums. *See Id.*

333. *See* Schulhofer, *supra* note 63, at 216-17 (noting that not all prosecutors disfavored them solely on the harshness of the sentence).

334. For a comprehensive accounting of the public’s opinions regarding crime and punishment, see Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1 (2000), which summarizes numerous public opinion studies on crime and punishment.

335. *See* STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59-81 (1993) (arguing primarily in the context of environmental risk); *see also* Beale, *supra* note 77, at 65 (paraphrasing Justice Breyer’s sentiments on the issue). *But see* Beale, *supra* note 77, at 65 n.157 (stating that some would consider Justice Breyer’s opinions “elitist”).

336. *See* Cullen et al., *supra* note 334, at 3. The authors expressed the following concern:

One immediate concern is whether public opinion should be the arbiter of sentencing and correctional policies. Public sentiments on policy issues must be accorded some weight in a democratic society, but justifying policies on the basis of what citizens want confronts a dismaying reality: much of the public—in the United States and elsewhere—is ignorant about many aspects of crime and its control.

*Id.* However, there are those who believe that the appropriate source of criminal justice policy lies with our elected politicians. Relegating criminal justice decisions to experts may raise complaints that it is undemocratic and elitist. *See* Beale, *supra* note 77, at 65 n.157. It may also be argued that in a democracy—given certain constitutional limitations—a

Scientific, policy-based methodology in criminal justice and drug control will likely continue to be underutilized, at least as long as the current conservative line on drugs is in vogue among politicians. Yet, as the evidence mounts, there are examples of political and public retreats from ultra-hard-line stances.<sup>337</sup> But the establishment of a climate reasonably hospitable to changes in sentencing is requisite for wholesale changes to occur.<sup>338</sup>

Politicians will likely begin modifying disproportionate drug laws only if they are afforded “adequate cover against the dreaded charge of being ‘soft on drugs.’”<sup>339</sup> When extensive social, medical, and scientific support is mustered, policymakers may be more willing to accept a slower, more realistic set of policies.<sup>340</sup> The compilation of such information continues, and if it adequately affects the public and political conscious, changes will occur.<sup>341</sup>

## VII. CONCLUSION

Sentencing policy has become much more of a function of politics instead of the discriminating and careful analysis envisioned by Senator Hatch.<sup>342</sup> Rather than resulting from meticulous empirical or legislative scrutiny, mandatory minimums often evolve without any legislative debate. As Chief Justice Rehnquist has noted, mandatory minimums “frequently . . . do not involve any careful consideration;” rather, they “are frequently the result of floor amendments to

society has a “moral right to punish” in accordance with the values and opinions of the law abiding majority. *E.g.*, Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 337-38 (1990).

337. *See Developments in the Law—Alternatives to Incarceration*, *supra* note 271, at 1900-19 (discussing various programs that are proposed, and to a degree being implemented, to sanction and rehabilitate nonviolent drug offenders); Families Against Mandatory Minimums, *supra* note 5 (discussing the “safety-valve” provisions of 1994—the true value of which is highly debated); *see also* Mark Hansen, *Mandatory Minimums Going, Going . . . Gong: Support for Minimum Drug Sentences Hits New Low*, A.B.A.J., Apr. 1999, at 14.

338. *See generally* Pillsbury, *supra* note 277, at 305 (commenting on the role of experts in furnishing that philosophical adjustment).

339. Kleiman, *supra* note 293.

340. *See id.*

341. For example, in the fall of 1997 a varied group of 34 scientists, treatment and medical experts, law enforcement officials, and drug policy experts offered a set of “Principles for Practical Drug Policies,” released by the Drug Policy Project of the Federation of American Scientists. Those principles advocate “that drug policies should be designed to minimize both the *damage* done by drugs and the *damage* created by drug control measures.” Press Release, Federation of American Scientists, *supra* note 266 (emphasis added). A stated goal of the Drug Policy Project was to help create an atmosphere where scientific research and expert opinions in the field of drug abuse can be considered by elected officials. *See* Kleiman, *supra* note 293 (discussing the Drug Policy Project and “Principles for Practical Drug Policies”).

342. *See* Hatch, *supra* note 21, at 197-98.

demonstrate emphatically that legislators want to ‘get tough on crime.’”<sup>343</sup>

The indeterminate sentencing system certainly may have been problematic and raised legitimate concerns that were confronted by state and federal legislatures seeking a practical solution.<sup>344</sup> Yet, the compiled evidence lends credence to Justices Breyer and Kennedy, judges across America, and the litany of experts who have noted that an exhaustive, objective analysis, if not an outright repeal, of mandatory minimum sentencing is in order.<sup>345</sup> When an addicted individual is sentenced to twenty-five years in prison for possession of forty pills, it demonstrates that “[s]ome things are worse than sentencing disparity, and we have found them.”<sup>346</sup> Such sentiments signal that it is time for legislators to step back from their recent power-grab for sentencing authority and “examine whether the most effective way of addressing these problems is to return a greater degree of flexibility to the judiciary.”<sup>347</sup> Or legislators could leave state and federal sentencing policy in the hands of sentencing commissions or a body of experts who are adequately insulated from the political pressures and campaign promise considerations affecting our legislators.

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343. Breyer, *supra* note 40, at 184.

344. *See id.* at 180.

345. *See id.* at 184-85.

346. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991).

347. Hatch, *supra* note 21, at 198.