1995

Sentencing Drug Offenders: The Incarceration Addiction

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I. INTRODUCTION

In April of 1992, a Federal court in Boston convicted Paulita Cadiz, a nineteen-year old pregnant woman with no prior criminal record, of aiding drug dealers.1 According to the government, Lazaro Delgado was driving through Boston when he saw Cadiz, then eighteen years old, accompanied by a fourteen-year old child.2 Delgado asked them if they wanted a ride. They got in Delgado's car and he drove off. He eventually stopped the car and told Cadiz to go around a corner, meet a woman, Mersky, and bring her back.

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* Judge, General District Court, City of Richmond, Virginia; former Associate Professor of Law, Marshall-Wythe School of Law, College of William & Mary, B.A., 1969, Howard University; J.D. 1972, University of Virginia. The author would like to thank Paul Marcus and Richard Williamson for their helpful comments on earlier drafts of this article.


2. Brelis, supra note 1, at 2.
to the car. Cadiz walked Mersky to Delgado's car. Mersky then went to another nearby car and purchased crack cocaine. Unknown to Delgado and Cadiz, Mersky was an undercover Drug Enforcement Agency (DEA) agent. She had recorded her conversation with Cadiz while walking to Delgado's car, in which Cadiz had stated, "[j]ust go to the car, it will go quickly." Although Cadiz claimed she was an innocent participant, she was found guilty of engaging in a drug conspiracy. Ironically, Delgado was acquitted. Cadiz, because of inferences the jury made from her ten-minute car ride with Delgado and her one-minute, twenty-second conversation with the undercover agent, faced a grim future: a mandatory ten-year prison sentence.

In December of 1992, a Los Angeles federal judge sentenced another first-time offender, Johnny F. Patillo, to a ten-year mandatory prison term. Judge J. Spencer Letts sentenced Patillo, a twenty-seven-year old black male, for his role in attempting to ship a package that contained 681 grams of crack cocaine. He had been a "mule," a minor player in the drug trafficking trade. The federal judge, known as a strong advocate of stiff criminal sanctions for drug offenders, lamented imposing the ten-year mandatory minimum in Patillo's case, stating that "my conscience ... requires

3. Id.
4. Id. at 3.
5. Id. at 1.
6. Id. at 2-3.
7. Cadiz claimed that Delgado told her to bring the woman to the car because he did not speak English well and the woman owed him money. Brelis, supra note 1, at 2-3. Cadiz's lawyers had tried, without success, to arrange a plea agreement before trial in which she would have plead guilty to a lesser offense and thus avoided the mandatory sentence. Id.
8. Id. at 1, 3.
9. Id.
11. Patillo, 817 F. Supp. at 839. Federal sentencing laws mandate stiff penalties for crack offenders. For sentencing purposes, one gram of crack is equivalent to 100 grams of powder cocaine. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2D1.1(c) (Drug Quantity Table) (1994) [hereinafter U.S.S.G]. Therefore, if this defendant had possessed the same amount of powder cocaine, he would have faced a minimum sentence of five years. See 21 U.S.C. § 841(b)(1)(B)(ii) (1988) (imposing mandatory minimum five year penalty for selling 500 grams of cocaine); 21 U.S.C. § 841(b)(1)(A)(ii) (1988) (mandating minimum ten-year penalty for selling five kilograms of cocaine); U.S.S.G., supra, § 2D1.1(c)(11) (outlining drug quantity table and giving same offense level to selling 100 grams of cocaine and one gram of cocaine base (crack)).
that I avoid intentional injustice."12 Although the Federal Sentenc-
ing Guidelines (Guidelines) required imprisonment of twelve to fif-
teen years, the judge departed from the Guidelines as far as he
legally could, noting that a twelve-year sentence for a first-time of-
fender with a spotless prior record "is worse than uncivilized, it is
barbaric."13

On May 12, 1986, Michigan police detained Ronald Harmelin
for failing to stop his car at a red light.14 After finding marijuana in
Harmelin's jacket pocket, the police arrested Harmelin and im-
pounded his car. A later search of the car revealed a gym bag in the
trunk which contained cocaine and $2,900.15 Harmelin was con-
icted of possessing 672.5 grams of cocaine.16 A Michigan statute
authorized a mandatory sentence of life in prison for possession of
650 grams or more of cocaine. Harmelin, a first offender, was sen-
tenced to mandatory life imprisonment without parole.17

First time offenders Cadiz, Patillo and Harmelin received
lengthy mandatory prison sentences because they committed drug
Crimes. Drug crimes, drug-related crimes and drug use have in-
creased dramatically within the last fifteen years, and the recogni-
tion that something must be done to combat the problem of drugs
and crime is commendable. However, the response has focused on
only one remedy: incarceration.

The American public is increasingly frustrated with high crime
rates fueled by drugs. In a recent poll, the public ranked crime as
the most important problem facing the country, leading both the
economy and health care,18 and no single element has had more
impact on crime in recent years than the influx of drugs.19 Not

13. Id. at B3; see also Patillo, 817 F. Supp. at 841 ("I... will no longer apply this
law without protest ... Statutory mandatory minimum sentences create injustice
because the sentence is determined without looking at the particular defendant.").
15. Id. at 78.
16. Id. at 76.
Supreme Court affirmed the Michigan Court of Appeals decision that the defend-
ant's sentence was not cruel and unusual and therefore did not violate the Eighth
Amendment to the United States Constitution. Id. at 996.
18. Crime Replaces Economy as Top Concern in Poll, GAINESVILLE SUN, Jan. 23,
1994, at 2A. Nineteen percent of those surveyed in a January, 1994, poll said crime
or violence was the nation's most important problem, whereas one year earlier,
only one percent ranked crime as the most important problem. Id.
19. At least 60% of violent crime is associated with drug use. Michael Kramer,
Clinton's Drug Policy Is a Bust, TIME, Dec. 20, 1993, at 35. For additional statistics on
the correlation between drug use and crime, see infra notes 31-33, 36-40. This
surprisingly, much of the concern about crime is related to the escalating "drug crisis" and to the proliferation of drug-trafficking violence.

The response to both the "drug crisis" and the crime rate has been identical — aggressive enforcement of existing criminal statutes and proposals for new legislation with tougher criminal sanctions. For politicians and legislators, being tough on crime is indispensable to survival. Toughness generally means putting more people in prison, detaining them there longer and carrying out more executions.

However, by comparing our current incarceration rates with either those of earlier times or with the current systems in other countries, the evidence strongly indicates that we are already extremely "tough on crime." In fact, we have the world's highest rate of incarceration. The actual number of persons in prisons and jails in the United States soared from about 250,000 to almost 1.25 million in the last twenty years. Our current use of incarceration is based on the perception that because incarceration has been an effective crime control method in the past, if we provide enough law enforcement and corrections resources to make the punitive sanction of incarceration more certain and severe, it should work in the future as well. This focus on incarceration increases public expectations about the response to crime and places even greater political pressure on legislators to become "tougher" on crime by enacting legislation with even harsher penalties.

We are obsessed with incarceration. Moreover, our obsession is now an addiction, for we are unduly and perhaps irrationally dependent on incarceration. This Article analyzes this addiction, ex-

correlation has been noted by many politicians. For example, during the 1992 Presidential campaign, Bill Clinton argued that it is impossible to get serious about crime without getting serious about drugs. Kramer, supra, at 35.

20. *Lock'em-up Leader of the World*, BOSTON GLOBE, Feb. 22, 1992, (Editorial), at 10. Our rate of incarceration in 1990 rose to 455 inmates per 100,000 population. *Id.* This statistic exceeded that of the former Soviet Union and South Africa, a comparison not wholly appropriate because many prisoners are political, rather than "street" criminals. *Id.* See generally MARC MAUER, AMERICANS BEHIND BARS: ONE YEAR LATER 1 (The Sentencing Project 1992).


plores whether incarceration is an effective response and considers available alternatives to incarceration.

Part II of this Article describes the problem: the "drug crisis," the crime rate and the relationship between drugs and crime.23 Part III examines the federal legislative response to the problem: two federal anti-drug statutes, the Federal Sentencing Guidelines and the anti-crime legislation recently passed by Congress.24 This part also discusses the judicial response to the incarceration mindset. Part IV addresses the issues of why lengthy or mandatory imprisonment is supposed to be effective and whether imprisonment is an appropriate response to the problem.25 This part argues that imprisonment neither enhances public safety nor decreases the "drug crisis." Part V suggests alternative punitive responses that lead to a positive theory of punishing drug offenders and to a more efficient crime control methodology.26 Altogether, these alternatives seek justice for society as a whole, and for the future Harmelins, Patillos and Cadizes.

II. DRUGS & CRIME: THE PROBLEM

Although the United States has spent more than $100 billion on the drug war since 1981, the public still has ready access to drugs.27 A 1991 survey revealed that 74.4 million (36.2%) of Americans aged twelve and older reported using an illegal drug at least once during their lifetime.28 Cocaine, both powdered and base (crack), remains the primary drug for many abusers. For those adults under the age of twenty-five, an estimated 15.8% have used cocaine at least once, and for those between the ages of twenty-six and thirty-four, an estimated 25.2% have used cocaine.29 However,

23. For a background discussion of the drug crisis, see infra notes 27-45 and accompanying text.

24. For an examination of the federal government's response to the drug crisis in both the Congress and the courts, see infra notes 46-169 and accompanying text.

25. For an analysis of whether incarceration adequately responds to the drug problem, see infra notes 170-205 and accompanying text.

26. For a discussion of alternative methods of crime control, see infra notes 206-32 and accompanying text.

27. Kramer, supra note 19, at 35. Federal spending on drug control increased from less than $2 billion in 1981 to $13.1 billion in 1993. Id.


29. Id. at 59.
while cocaine use appears to have stabilized, heroin and marijuana use is rising.  

According to the Federal Bureau of Investigation (FBI), in 1992, one violent crime occurred every twenty-two seconds and one crime index offense occurred every two seconds. There is extensive evidence of the relationship between drug use and this crime rate. Drug users report greater involvement in crime and are more likely than non-users to have criminal records. Additionally,

30. See Use of Heroin, Marijuana Up, Report Shows, RICHMOND TIMES DISPATCH, May 12, 1994, at A7 (noting statement of Director of Office of National Drug Control Policy, Lee Brown, that heroin "has the potential of making a deadly comeback... I think it's endemic").

31. The crime index is used to measure fluctuations in the volume and rate of crime. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 5 (1993) [hereinafter CRIME REPORTS, 1993]. The crime index is composed of violent crimes (murder, nonnegligent manslaughter, forcible rape, robbery and aggravated assault) and property crimes (burglary, larceny-theft, motor vehicle theft and arson). Id. Between 1991 and 1992, there was a 1.1% increase in the violent crime rate. Id. at 10. Between 1984 and 1992, the murder and nonnegligent manslaughter rate (number of offenses per 100,000 inhabitants of the United States) increased from 7.9% to 9.3%. Id. at 13; FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 6 (1985) [hereinafter CRIME REPORTS, 1985]. The statistics for forcible rape, robbery and aggravated assault also showed increases between 1984 and 1992: rape increased from 35.7% to 42.8%; robbery increased from 205.4% to 263.6%; and aggravated assault increased from 290.2% to 441.8%. CRIME REPORTS, 1993, supra, at 23, 26, 31; CRIME REPORTS, 1985, supra, at 13, 16, 21.

32. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS 6, 14 (1994) [hereinafter CRIME REPORTS, 1994]. Although serious crimes reported to the police declined three percent from 1992 to 1993, murders rose three percent. Id. From 1992 to 1993, rapes declined four percent and robberies declined two percent. Id. at 24, 27. However, given prior increases in the crime rate, one can take little comfort in the small overall decrease in the 1993 crime index. The crime index total had also dropped 2.9% from 1991 to 1992, the first decline recorded since 1984. CRIME REPORTS, 1993, supra note 31, at 5. The 1992 level showed virtually no change from the 1988 level and was nine percent above the 1983 total. Id. at 6.

33. A 1989 Bureau of Justice Statistics survey of inmates in local jails reported that 77.7% of jail inmates, 79.6% of state prisoners and 82.7% of youth in long-term public juvenile facilities had used a drug at some point in their lives. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DRUG AND CRIME FACTS, 1992, at 7 (1999) [hereinafter DRUG AND CRIME FACTS, 1992]. One-fourth of convicted jail inmates, one-third of state prisoners and two-fifths of youths in long-term facilities reported being under the influence of drugs or alcohol at the time of the offense resulting in their incarceration. Id. at 4. In 1991, the National Institute of Justice's Drug Use Forecasting Program found that the percentage of male arrestees testing positive for an illicit drug at the time of arrest ranged from 36% in Omaha to 75% in San Diego. Id. at 6. Female arrestees testing positive ranged from 45% in San Antonio to 79% in Cleveland. Id. "About 2 out of 3 State prison inmates reported they had used drugs as frequently as once a week or more for a period of at least a month at some time." BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DRUGS, CRIME AND THE JUSTICE SYSTEM 3 (1992) [hereinafter DRUGS, CRIME AND THE JUSTICE SYSTEM].
approximately seventy percent of the nation's 1.4 million prisoners have drug problems.\textsuperscript{34}

In addition to drug-defined offenses,\textsuperscript{35} numerous drug-related offenses are committed by drug users. Some offenses are caused, in part, by a drug's pharmacologic effect. Drugs such as cocaine, amphetamines and PCP, for example, affect physiological function, cognitive ability and mood. These effects increase the likelihood that users will act violently; at least sixty percent of violent crime is associated with drug use.\textsuperscript{36} Moreover, in a 1990 study, researchers determined that victims perceived that their offenders were under the influence of drugs in more than 336,000 crimes of violence.\textsuperscript{37}

Other drug-related offenses may be motivated by the user's need for money to support continued use. Overall, 13.3\% of convicted jail inmates in 1989 said that they committed their offense to obtain money for drugs.\textsuperscript{38} Some users commit property crimes to support their habits.\textsuperscript{39} Other users resort to prostitution, or increase their prostitution activity to finance their drug habits when drug prices rise.\textsuperscript{40}

Many other drug-related offenses, and particularly violent offenses such as assaults and murders, are connected with drug traf-
ficking itself. To avoid arrest, drug dealers commit violent crimes against police, informants or witnesses.\(^{41}\) Furthermore, other violent crimes are common among participants in drug trafficking, and because they want to avoid the police, much of this violence is not reported.\(^ {42}\) In many cases, interactional circumstances create a drug-crime relationship. Being involved in drug use and crime are sometimes common features of a deviant lifestyle. A wide range of psychological, social and economic incentives can combine to produce drug use and crime patterns that become firmly established in some persons. The likelihood and frequency of involvement in illegal activity is increased because drug users are exposed to situations that encourage crime, and the "crime" may be neither a drug-defined crime nor a drug-related crime.\(^ {43}\)

As a result, crimes rise in number as offender drug use increases, because active drug users commit offenses at high rates.\(^ {44}\) Moreover, frequent use of multiple drugs generally follows involvement in property crime, and its onset may accelerate the development of a criminal career.\(^ {45}\) In sum, drug use and crime are not only related, but highly correlated.

### III. The Legislative and Judicial Response

The addictive response to the "drugs and crime" relationship has been incarceration. The textual support for this addiction is found in the Anti-Drug Abuse Acts of 1986 and 1988, the Guidelines, the Violent Crime Control and Law Enforcement Act of 1994 and the most recent United States Supreme Court decision addressing the imprisonment of drug offenders.

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41. Id. at 5.
42. Id.
43. In addition, persons with criminal records are much more likely than ones without criminal records to report being drug users. According to two national studies, the majority of persons "in drug treatment had been arrested or incarcerated, or had admitted committing crimes for economic gain before entering treatment." Drugs, Crime and the Justice System, supra note 33, at 4. "The Drug Abuse Reporting Program (DARP) found that 87% had been arrested and 71% had been in jail or prison before entering treatment." Id. "The Treatment Outcome Prospective Study (TOPS) found that about 60% of those entering publicly-funded residential treatment programs . . . said they had committed one or more crimes for economic gain in the year before treatment." Id.
44. Drugs, Crime and the Justice System, supra note 33, at 4.
45. See Jan M. Chaiken & Marcia R. Chaiken, Drugs and Predatory Crime, in 13 Crime and Justice 203, 235 (Michael Tonry & James Q. Wilson eds., 1990) (stating that "there is strong evidence that predatory offenders who persistently and frequently use large amounts of multiple types of drugs commit crimes at significantly higher rates over longer periods than do less drug-involved offenders").
A. Legislative Response


Prior to the Anti-Drug Abuse Act of 1986 (1986 Act), federal judges had maximum flexibility to tailor sentences to the particular circumstances of each case, in accordance with the prevailing emphasis on offender rehabilitation. Judges could sentence drug offenders to long or short incarceration periods or probation, and offenders could be paroled. The 1986 Act, however, radically transformed this aspect of judicial sentencing. It imposed mandatory minimum sentences, deleted the sentence of probation or parole for most drug offenses, lengthened terms of incarceration and significantly increased monetary penalties.

The 1986 Anti-Drug Abuse Act mandated a five to forty year sentence, without probation or parole, for first offenders convicted of possession with intent to distribute small quantities of designated drugs. In response to the escalating trafficking of larger quantities...

47. See Williams v. New York, 337 U.S. 241, 248 (1949) (noting that judges were capable of individualizing sentences according to recidivist behavior and goals of reformation and rehabilitation).
50. 21 U.S.C. § 844(a), (b) (1988). The designated quantities were at least 100 grams of heroin, 500 grams of cocaine mixture, 5 grams of crack, 10 grams of PCP, 1 gram of LSD, or 100 kilograms of marijuana mixture. Id. No mandatory minimums were prescribed for first time offenders convicted of possession of smaller quantities of drugs, and while repeat offenders faced mandatory minimums ranging from 15 to 90 days, federal judges could authorize probation, depending on the number of prior convictions. 21 U.S.C. § 844(a), (b) (1) (1988). This footnote and those below omit references to the prescribed fines for drug offenses.
ties of drugs, the 1986 Act mandated a sentence of ten years to life, without probation or parole, for first offenders convicted of possession with intent to distribute larger quantities of drugs. More-#over, if the offender caused death or bodily injury, these mandatory minimums were doubled to twenty years.

The 1988 Amendments to the Act increased the mandatory minimum sentences, increased the other maximum sentences and increased the monetary penalties previously prescribed in the 1986 Act. In addition, the 1988 Amendments significantly increased the penalties for possession offenses, provided for the eviction of public housing residents if any member or guest of the household was involved in certain drug offenses, and established the death penalty for offenders engaging in “continuing criminal enterprises” who commit or order murder to further the criminal enterprise.

These provisions were intended to control and to prevent the rising “drug epidemic” by incapacitating drug offenders, and indicated a further shift from any rehabilitative themes in pre-1986 statutes.

More importantly, Congress increased the penalties for low level drug offenses. The 1988 Amendments increased the mandatory minimums mentioned above, imposed mandatory minimums for the simple possession of smaller quantities of drugs, deleted provisions authorizing probation, parole or suspended sentences, and prescribed stiffer penalties for first time offenders possessing crack or any other cocaine-based substance. Penalties for crimes involving crack were harsher than those prescribed for first time offenders possessing other drugs.

51. 21 U.S.C. § 841(b)(1)(A)(1) (1988). Under the 1986 Act, the designated quantities were 1 kilogram of heroin, 5 kilograms of cocaine mixture, 100 grams of PCP, 50 grams of crack, 1000 grams of marijuana, or 10 grams of LSD. Id.

52. Id.


54. 21 U.S.C. § 848 (1988). This was the first federal capital sanction since the Supreme Court abolished all existing death penalties in 1972.

55. See 21 U.S.C. § 841(b)(1)(B) (1988) (doubling mandatory sentences and deleting discretionary probation provisions for persons with prior conviction for simple possession); see also 21 U.S.C. § 844 (1988) (prescribing two years imprisonment or $1,000 fine or both for simple possession, and either doubling (for one prior conviction) or tripling (for two prior convictions) mandatory sentence for repeat offenders).

56. The 1988 Amendments also prescribed a mandatory minimum of five years, with a maximum of 20 years, for first time offenders convicted of simple possession of more than five grams of crack. 21 U.S.C. § 844(a) (1988). The penalty for first time offenders convicted of simple possession of more than five grams of heroin is imprisonment of not more than one year, a $1,000 fine, or both. Id. The penalty for selling 500 grams of cocaine is at least five years, id. § 841(b)(1)(B), while the penalty for selling five kilograms of crack is at least 10 years. Id. § 841(b)(1)(A). These statutes have been widely criticized. See, e.g., Ger-
The 1988 Amendments also increased the penalties for higher level drug offenses. They doubled the mandatory minimum for first offenders convicted of possession with intent to distribute to ten years, without probation, parole or the possibility of suspended sentence, and increased the mandatory minimum to twenty years for first time offenders, if the offense resulted in death or bodily injury. Moreover, as noted above, the 1988 Amendments authorized the death penalty for drug offenders engaging in a "continuing criminal enterprise" who murder or authorize murder during the course of the drug offense.

The incarceration penalties in the 1986 and 1988 Acts were intended to promote the penological goals of specific and general deterrence, and incapacitation. Congress wanted to send "a message across the country that the war on drugs is on, and it will be won" because drug offenders will either be imprisoned or executed. For example, deterrence was the major issue for proponents and opponents of the death penalty. Proponents argued that drug dealers who murdered were "merchants of death" who would understand and be deterred by the death penalty. Opponents argued that drug dealers "have no fear of death" or that capital punishment simply does not deter crime.

60. 134 CONG. REC. H7280 (daily ed. Sept. 8, 1988) (statement of Rep. Manton). "The time is long overdue for us to deal with these sleazy drug czars in the harshest manner possible, and in the only manner these merchants of death understand." Id.
61. 134 CONG. REC. H7265 (daily ed. Sept. 8, 1988) (statement of Rep. Rangel) ("The bums that are out there every day dealing in drugs have no fear of death."); 134 CONG. REC. H7266 (daily ed. Sept. 8, 1988) (statement of Rep. Rodino) ("If there were any evidence to suggest that capital punishment deters, the issue before us might be closer, but there is no such evidence.").
As to lengthy imprisonment terms, however, the deterrent value of punishment was less clear. Congress assumed that drug dealers facing severe mandatory penalties would refrain from criminal activities, because they assumed that these offenders (1) understood basic utilitarian "cost-benefit" analysis,62 (2) would conclude the penological "costs" of their illegal activities outweighed the "benefits," and (3) would cease such activities. One member of the Senate argued that the "offsetting costs . . . [in prior laws were] relatively small. The chances of being intercepted [were] not great . . . [and, if caught and convicted] the penalties [were] nothing more than a small cost of doing business."63

This assessment of the "rational drug offender" is somewhat inconsistent with another assessment prevalent in the Congressional debate on the Acts. Some members of Congress felt that drug offenders were inhuman or "non-citizens" and had lost all legal protections and civil rights guaranteed others. One Senator referred to all drug offenders as enemies and a "scourge" on society.64 Low level drug couriers were referred to as "animals"; other dealers were referred to as "bums," "thugs," "sleazy drug lords" or "merchants of death."65

Thus, while focusing on deterrence, Congress also indicated that drug offenders were non-human, and could not engage in the rational thinking that leads to specific deterrence or behavior modification. In addition, Congress never focused on the deterred, but rather on the non-rehabilitated offender. When Congress expressed apparent concern about rehabilitation, it was viewed only as

62. The underlying premise of utilitarianism is that a person predicts the benefits and burdens from a course of conduct and then engages in conduct that has the greatest benefits, or produces the greatest pleasure. Utilitarians assume human beings, because they can experience pleasure and pain, will seek to maximize pleasure and minimize pain. To determine which conduct causes the greatest pleasure, one considers the benefits and burdens of everyone who would be affected by the particular course of conduct. JOHN S. MILL, UTILITARIANISM 16 (1861).


a means of promoting specific deterrence.\textsuperscript{66}

Incapacitation was the other Congressional goal. Legislators wanted certain and severe minimum periods of imprisonment to “get the pushers out of our schoolyards and drugs off of our streets.”\textsuperscript{67} The public desperately wanted a “solution” to the drug crisis, and lengthy periods of incarceration, even if incarceration only incapacitated drug offenders, was the solution.\textsuperscript{68} One Senator noted that “dealers should know with certainty that if they are caught and convicted, they will be headed for the penitentiary and they will stay there for years. . . . In other words, for a number of years the key will be thrown away.”\textsuperscript{69} Congress thus prescribed lengthy mandatory penalties and hoped that current or potential offenders would either be deterred or physically restrained from committing drug offenses.

2. \textit{Federal Sentencing Guidelines}

In 1983, after studying rehabilitation theories of punishment and indeterminate sentencing,\textsuperscript{70} Congress decided to reform the federal sentencing system.\textsuperscript{71} A Congressional study disclosed disparate sentencing practices for similarly situated defendants among

\begin{itemize}
\item \textsuperscript{66} See 132 \textit{Cong. Rec.} S13,974 (daily ed. Sept. 27, 1986) (statement of Sen. Biden) (“One of the problems is we put these people in jail and we say we want to help them. Really we are helping ourselves. . . . [They must be] placed in treatment programs under close supervision to prevent their return to illicit drugs and crime.”).
\item \textsuperscript{70} In the early 1970s, the primary sentencing consideration was the provision of skills necessary to prevent recidivism. Individual offender characteristics were essential to the sentencing determination and judges had wide discretion in recommending incarceration or probation. If incarcerated, the U.S. Parole Commission could exercise further discretion in determining the time served by an offender. The Commission, however, was limited by two factors: the maximum sentence imposed and the statutory requirement that parole eligibility was considered only after an offender had served one-third of the imposed sentence. However, the recidivism rate did not decrease. Critics attacked the discretion given to judges and to the Parole Commission, and the resulting disparities in the sentencing imposed and served for similar offenses. \textsc{Andrew von Hirsch}, \textit{Doing Justice, The Choice of Punishments} 11-18 (1986).
\end{itemize}
federal judges. It also disclosed that judges considered the United States Parole Commission's probable release date for a defendant when imposing a sentence of imprisonment.\footnote{72} Congress concluded that (1) the discretion given judges and the Parole Commission undermined public confidence in the criminal justice system, and (2) the certainty of punishment no longer served effectively to deter crime.\footnote{73} Congress also decided that recidivism could not decrease if offenders and the public viewed the sentencing system as unwarranted, unfair and unjust.\footnote{74}

Congress' response — the Sentencing Reform Act of 1984 and the creation of the United States Sentencing Commission (Commission) — fundamentally altered the nation's sentencing goals and practices. The Sentencing Reform Act and the Commission rejected the sentencing flexibility inherent in the rehabilitative theory of punishment and embraced the shift toward deterrence and incapacitation as the primary purposes of punishment.\footnote{75} Deterrence (through certainty and severity) and incapacitation, rather than rehabilitation, were thus the goals of the new federal sentencing system.\footnote{76} These goals\footnote{77} would be accomplished through deter-
minate sentencing\textsuperscript{78} effected in compulsory sentencing guidelines established by the Commission,\textsuperscript{79} and the abolishment of parole.

The Guidelines\textsuperscript{80} were specifically intended to limit judicial discretion so that defendants convicted of similar crimes under similar circumstances would receive similar sentences.\textsuperscript{81} They established the acceptable range of appropriate punishment for any given crime, but leave the actual sentence to the discretion of the trial judge.\textsuperscript{82}

The Guidelines have been subjected to intense analysis and debate.\textsuperscript{83} Proponents contend that the Guidelines have been effective in accomplishing their major goals — uniformity and certainty in sentencing and reducing sentencing disparity.\textsuperscript{84} Critics claim that the Guidelines have adversely affected the criminal justice system, have not effectively reduced sentencing disparity, have not met

\begin{itemize}
\item \textsuperscript{80} U.S.S.G., supra note 11, at 1. The Sentencing Guidelines were established to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” Id.
\item \textsuperscript{82} The Guidelines must “provide certainty and fairness on meeting the purposes of sentencing, avoiding unwarranted sentencing disparities . . . while maintaining sufficient flexibility to permit individualized sentences.” Id. Arguably, the Guidelines do not realistically preserve the judge’s discretionary function because the maximum allowable range (assuming the judge may not deviate) is six months.
\item \textsuperscript{83} Analyses of the effectiveness of the Guidelines have been conducted by the Sentencing Commission and other federal agencies. See, e.g., GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAINED UNANSWERED (1992) [hereinafter G.A.O. REPORT]; UNITED STATES SENTENCING COMMISSION REPORT: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (1991) [hereinafter U.S.S.C. REPORT].
\end{itemize}
their stated goal of certainty, have granted unfettered discretion to the executive branch and have mandated disproportionately severe sentences. Federal judges, probation officers, the American Bar Association, the General Accounting Office, defense attorneys and the Federal Courts Study Committee have criticized the Guidelines. They argue that the Guidelines create more problems than they resolve.86

The provisions subjected to the most intense criticism are the substantial assistance, the obstruction of justice, and the acceptance of responsibility prerequisites. Opponents claim that these provisions have detrimental effects on sentences for minor offenders, on the right to testify on one’s own behalf and on a defendant’s right against self-incrimination. Criticism generally applicable to drug offenses has been directed at the mandatory minimums, the substantial assistance provision and the determination of the weight of a drug which includes “mixture or substance” or the carrier agent.

The most frequent criticism, however, involves the mandatory minimum sentences for drug offenders. When the Anti-Drug Abuse Act of 1986 was enacted, Congress was surely aware that federal sentencing guidelines were being developed. Congress may have also been aware that the Senate Report accompanying the bill


87. See U.S.S.G., supra note 11, § 5K1.1 (Substantial Assistance to Authorities); id. § 3C1.1 (Obstructing or Impeding the Administration of Justice); id. § 3E1.1 (Acceptance of Responsibility).

88. For an analysis of mandatory minimum sentences, see United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Criminal Justice System (1991) [hereinafter Mandatory Minimum Penalties in the Criminal Justice System].
that became the Sentencing Reform Act of 1984, and that established the Sentencing Commission, stated: "[T]he [Congressional] Committee generally looks with disfavor on statutory minimum sentences of imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws." Congress nevertheless enacted mandatory minimum sentencing provisions in the 1986 Act and restricted the Commission's discretion in establishing sentencing guidelines for drug offenses.

The Commission calculated the guideline ranges for narcotics violations using the statutory minimum penalties in section 841 of the 1986 Act. However, some guideline sentencing ranges exceeded the mandatory minimums in the 1986 Act, and some currently exceed the minimums in the 1988 Act. Therefore, some drug offenders are sentenced to mandatory minimum sentences which are higher than the mandatory minimums in either Act.


The Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Bill) significantly increases the penalties for and expands the use of mandatory minimums for drug-defined and drug-related offenses. The 1994 Crime Bill also establishes new offenses, authorizes capital punishment for several new offenses,


90. Currently, there are over 100 federal mandatory minimum sentencing provisions in 60 criminal statutes. Mandatory Minimum Penalties in the Criminal Justice System, supra note 88, at 8-10. However, only four of the 60 criminal offense statutes with mandatory minimum provisions result in frequent convictions, and these four prohibit only drug and weapons offenses. Id.

91. U.S.S.G., supra note 11, § 2D1.1, cmt. n.10 ("The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences.").


and for the first time, emphasizes alternative punishments, prevention, treatment, and flexibility in the application of mandatory minimums for some drug offenses.\footnote{95} In addition, the 1994 Crime Bill provides funds for prison construction, places new limits on the role of federal courts in overseeing prison conditions and includes a racial justice provision aimed at eliminating racial discrimination in the imposition of the death penalty.\footnote{96}

One of the most controversial sections of the 1994 Crime Bill is the "three-strikes-you're-out" or "three time loser" provision.\footnote{97} It mandates life imprisonment without release for an offender convicted of a federal offense, if the offender had two prior state or federal court convictions for qualifying offenses. These offenses either must both be violent felonies or must be one violent felony and one serious drug offense.

When the provision reached the House floor for debate, drug felonies could not count as one of the two prior convictions. Viewing the nation's drug problem as significant a problem as violent crime, the House rejected the provision limiting section 70001 (then known as section 2408) only to violent offenses, and instead approved an amendment allowing "serious" drug felonies to count as any or all of the "three-strikes" offenses.\footnote{98}

\footnote{95} See H.R. 3355, \S\ 80001 (Limitation on Applicability of Mandatory Minimum Penalties in Certain Cases) (amending 18 U.S.C. \S\ 3553). For further discussion of the ability of judges to deviate from mandatory minimums, see infra notes 107-09 and accompanying text.

\footnote{96} See id. \S\ 60002 (adding 18 U.S.C. \S\ 3595(c)(2)(A)) ("Whenever the court of appeals finds that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor . . . the court shall remand the case.").

\footnote{97} See id. \S\S\ 70001-70002 (amending 18 U.S.C. \S\S\ 3559, 3582(c)(1)(A)) (Mandatory Life Imprisonment for Persons Convicted of Certain Felonies). The 1994 Crime Bill provides in part:

\begin{enumerate}
\item \textbf{(c) IMPRISONMENT OF CERTAIN VIOLENT FELONS. —}
\item \textbf{(1) MANDATORY LIFE IMPRISONMENT. —}
\end{enumerate}

Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if —

(A) the person has been convicted . . . on separate prior occasions in a court of the United States or of a State of —

1. 2 or more serious violent felonies; or
2. one or more serious violent felonies and one or more serious drug offenses . . . .

\footnote{Id. \S\ 70001 (amending 18 U.S.C. \S\ 3559); see also id. \S\ 60002 (codified at 18 U.S.C. \S\ 3592(c)(10)) (adding two or more prior felonies to list of aggravating factors in death penalty cases).}

\footnote{98} See House Passes Crime Bill; Racial Justice Provisions Stay, CRIMINAL JUSTICE
The Incarceration Addiction

The Sentencing Commission criticized this “three-strikes” provision. The Commission stated that the provision could lead to unwarranted disparity in sentencing similar defendants and unwarranted uniformity in sentencing non-similar defendants. Currently, there are wide variations among states and within the federal system on the maximum statutory penalties assigned to criminal conduct of comparable severity. There are also differences in the manner in which prosecutorial discretion is exercised with respect to charging the current offense and qualifying predatory offenses. These variations and differences would result in disparity in the treatment of otherwise similarly-situated offenders. At the same time, the “three-strikes” provision would produce uniformity in sentencing for very dissimilar offenders because of the broad definition of violent crimes. The Commission had a number of other objections to the “three-strikes” provision, noting that its application would have a disproportionate impact on native Americans convicted of committing crimes on federal lands and would result in the inclusion of “one time” offenders because one criminal episode could result in three qualifying convictions, and thereby defeat the purpose of punishing “three-time” offenders. The Commission recommended that the provision be deleted from the final statute, or that, if included, be made “more compatible” with the goals of the 1984 Sentencing Reform Act.

The 1994 Crime Bill also includes a number of new mandatory minimum provisions for crimes which involve guns. It enhances penalties for “crimes of violence” and “drug trafficking crimes” if the crime is committed while using a semiautomatic firearm. This provision “federalizes” many state crimes, such as armed robberies, and may create confusion between investigative authorities.

The provision may also result in disparate sentencing. Defendants who are not similarly situated, either in the commission of the underlying state offense, or in the conduct which constitutes “pos-

Newsletters (Pace Publications), Apr. 18, 1994, at 1-2 (discussing expansion of “three strikes” provision).

99. Sentencing Commission Issues Critical Analysis of Proposed Federal Crime Bill, Crim. L. Rep. (BNA) No. 54, at 1513 (Mar. 2, 1994). In a February 22, 1994, analysis of the Crime Bill, the Commission also noted that the Guidelines already include a life imprisonment sanction for violent offenders and drug offenders. Guidelines Sections 4B1.1 and 1.2 are conceptually similar to the three strikes provision, “except that instead of a mandatory life sentence . . . in every case, regardless of the degree of seriousness, the guidelines require sentencing at or near the maximum penalty Congress has authorized for the violent or drug offenses the defendant has recently committed.” Id.

session of the firearm," would receive the same enhancement. Moreover, prosecutions under the provision would increase the demands on an already overburdened federal criminal justice system. Convictions under section 110501 would increase the overall average of sentences served in the federal system from 3.7 years to 6.8 years, and increase the total federal prison population by 383.9% over a nine-year period.\footnote{101}

Another new provision triples the punishment for drug traffickers over twenty-one years of age who sell to or use minors in their crimes.\footnote{102} The 1994 Crime Bill also authorizes the death penalty for gun murders during federal drug trafficking crimes\footnote{103} and for drive-by shootings committed to further a drug conspiracy, if the drive-by shooting results in a first-degree murder.\footnote{104}

The 1994 Crime Bill continues the trend of increasing the penalties for possession and distribution of drugs. As stated above, it triples the maximum punishment normally available under the Controlled Substances Act for anyone who employs or persuades a person under eighteen to distribute drugs near schools and playgrounds. It directs the Sentencing Commission to "appropriately enhance" the penalty for a person convicted of both simple possession and smuggling, distribution or intended distribution of a controlled substance within a federal prison or federal detention facility.\footnote{105} It also provides that any sentence for drug trafficking within a prison will be consecutive to any other sentence for an offense involving a controlled substance.\footnote{106}

The 1994 Crime Bill also includes a provision which will allow some defendants to escape mandatory minimums.\footnote{107} A judge can ignore a mandatory minimum if the following criteria exist: (1) the defendant has no more than one criminal history point; (2) the defendant did not use violence or carry a firearm; (3) the offense did not result in death or serious bodily injury; (4) the defendant

\begin{footnotes}
\item[104] \textit{Id.} § 60008 (adding 18 U.S.C. § 96).
\item[105] \textit{Id.} § 90101 (amending 18 U.S.C. § 1791).
\item[106] \textit{Id.}
\item[107] \textit{Id.} § 80001 (amending 18 U.S.C. § 3553).
\end{footnotes}
was not an organizer or leader; and (5) the defendant fully cooperated with the government. The sentencing judge could impose a sentence consistent with the Guidelines and unrestrained by the otherwise applicable statutory mandatory minimum.

The 1994 Crime Bill also authorizes funding for several innovative programs, making it somewhat more balanced than prior crime bills. It provides grants for juvenile drug trafficking and gang prevention programs; community coalitions to combat substance abuse; and programs for drug testing upon arrest, pre-trial, or post conviction. It also authorizes grants to develop and implement substance abuse treatment programs for prisoners within state correctional facilities. It mandates residential substance abuse treatment in federal prisons "subject to the availability of appropriations." The treatment will be phased in over the next three years, with treatment capacity for 50% of eligible prisoners by the end of fiscal year 1995, 75% by the end of fiscal year 1996, and 100% by the end of fiscal year 1997. As an incentive to participation, prisoners will be offered a possible reduction in sentence of up to one year following successful completion of treatment. The 1994 Crime Bill also makes drug testing a condition of release for federal prisoners.

In addition, the 1994 Crime Bill authorizes grants to the states for boot camps and other alternative punishment methods (such as community-based incarceration, weekend incarceration and electronic monitoring) for young, non-violent offenders. It also authorizes grants for states to construct and to operate low-to-medium security prisons, local detention facilities and prisons for violent drug offenders. Grants are also authorized for "drug court" programs with continuing judicial supervision over specific categories of persons with substance abuse problems. These programs involve the integrated administration of sanctions and services including drug testing, substance abuse treatment, community diversion,
probation, supervised release, aftercare (programmatic or health related), and incarceration based on noncompliance.

With the 1994 Crime Bill, Congress intended to provide "the necessary weapons to combat drug dealers."\(^{118}\) The majority of these weapons, however, like the weapons provided by earlier bills, are more severe penal sanctions for convicted defendants.\(^{119}\)

B. Judicial Response

The Supreme Court has neither endorsed nor advocated a specific theory of punishment for drug offenders. The Court has, however, upheld the Federal Sentencing Guidelines\(^{120}\) and validated the mandatory minimum penalties in the Anti-Drug Abuse Acts.\(^{121}\) The Court's more recent pronouncements affect its role in interpreting any constitutional limitations on the lengthy incarceration sentences imposed on drug offenders. In a 1991 decision on excessive imprisonment and proportionality, *Harmelin v. Michigan*,\(^{122}\) the Court deferred to the punishment method adopted by the state for drug offenses, and embraced the incarceration addiction.

Ronald Harmelin, a first time offender, was convicted in a Michigan state court of possessing 672.5 grams of cocaine. He was sentenced to mandatory life imprisonment without possibility of parole.\(^{123}\) The Supreme Court upheld the constitutionality of his sen-


\(^{119}\) Congress had such an anti-crime agenda in 1994 that, according to Senator Biden of Delaware, "[i]f someone proposed barbwiring the ankles of anyone who jaywalks, I think it would pass." Helen Dewar, *New Penalties' Scope Would be Limited: Few Violent Crimes Go to Federal Court*, WASH. POST, Nov. 10, 1993, at A22. However, virtually all violent crimes and the other non-drug crimes are tried in state courts, where federal penalties do not apply. Only about one-tenth of one percent of violent crimes have been tried in federal court. *Id.* Nevertheless, given the political climate, Congress was compelled to increase federal penalties for violent crime.


\(^{123}\) *Id.* at 961. Harmelin's conviction was initially reversed and remanded by the Michigan Court of Appeals on Fourth Amendment grounds. *Id.* This appel-
While the vote of the Court was five to four, the Harmelin decision had a curiously structured framework. The Justices could not reach a majority opinion. There were three separate opinions on the constitutional issue and the principal dissenting opinion had the largest plurality. Justice Scalia authored the decision of the five Justice majority, but only the Chief Justice concurred with his opinion. Justice Kennedy authored the concurring opinion, which agreed only with Justice Scalia's result. Two Justices agreed with Justice Kennedy's analysis, but three Justices joined in the principal dissenting opinion, authored by Justice White.

Two Eighth Amendment issues were before the Court: whether the sentencer must consider mitigating circumstances when imposing a mandatory life without parole sentence, and whether Mr. Harmelin's sentence was disproportionate to his drug possession offense. The Scalia and Kennedy opinions concluded that the Eighth Amendment's Cruel and Unusual Punishment Clause did not guarantee individualized consideration of mitigating circumstances in non-capital cases, even if first time drug offenders, convicted of possession, must be sentenced to life without parole. According to Justice Scalia, this mandatory punishment is justifiable, because it is not unusual, even if cruel. Justice Kennedy claimed that the punishment was justifiable because the state legislature had the authority to establish it and because it served one of "the first purposes of criminal law — deterrence."

The punishment goal of deterrence and its relationship to the

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124. Id. at 996.
125. Id. at 961-62.
126. Justice Scalia, in a detailed analysis, reviewed the historical context of the framing of the Bill of Rights and of the Eighth Amendment. He noted that the framers of the Constitution adopted verbatim the cruel and unusual punishment language from the English Bill of Rights. See id. at 975-85. "The Eighth Amendment was based on Article 1, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights." Solem v. Helm, 463 U.S. 277, 285 n.10 (1983). Scalia then strictly construed the Eighth Amendment's Cruel and Unusual Punishment Clause only to prohibit punishment that the Constitution's Framers thought was both cruel and unusual. Id. at 984-85. Life imprisonment without parole was not an unusual penalty in the penal codes of early America, and mandatory imprisonment was not an unusual punishment. Therefore, Mr. Harmelin's sentence did not violate the Cruel and Unusual Punishment Clause. Id. at 994-95.
127. Harmelin, 501 U.S. at 1007-08 (Kennedy, J., concurring).
"drug war" also justified the majority's conclusion that Mr. Harmelin's life sentence was proportionate to his offense. Justice Scalia rejected any constitutional proportionality principle because the Framers did not intend to incorporate a proportionality principle into the Eighth Amendment. He also found that:

the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values. This becomes clear, we think, from a consideration of the three factors . . . relevant to the proportionality determination: (1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions.128

As to the gravity of a drug possession offense, Scalia claimed only that the state legislature could determine "how odious and socially threatening one believes drug use to be."129 When comparing the life sentence for drug possession to the penalty for other offenses, Scalia rationalized that the deterrent effect of lengthy incarceration may justify a disproportionate sentence.130 Justice Scalia added, "[f]or example, since deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties."131

Justice Kennedy recognized that a proportionality requirement had existed in the Court's Eighth Amendment jurisprudence for the last eighty years, but that the application of the requirement was limited by four principles: (1) setting prison terms for crimes is exclusively a function of the legislature; (2) the Eighth Amendment does not require adoption of any one penological theory (retribution, deterrence, incapacitation or rehabilitation); (3) differences in sentencing theory and constitutional sentences are "the inevitable, often beneficial, result of the federal structure;" and (4) proportionality review by federal courts should be informed, to the maximum extent possible, by objective factors.132

128. Id. at 986-87 (citing Solem, 463 U.S. at 290-91).
129. Id. at 988 ("But surely whether it is a 'grave' offense merely to possess a significant quantity of drugs — thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute — depends entirely upon how odious and socially threatening one believes drug use to be.").
130. Id. at 988-89.
131. Id.
132. Id. at 998-1001 (Kennedy, J., concurring).
Based on these principles, Justice Kennedy concluded that the Eighth Amendment does not require strict proportionality between offense and punishment, but prohibits only extreme penal sanctions that are grossly disproportionate. Justice Kennedy then found that Mr. Harmelin's life sentence was not unconstitutionally disproportionate because the Michigan legislature could have rationally decided that drug possession "threatened to cause grave harm to society" and warranted a mandatory severe penalty.\(^{133}\)

Moreover, Justice Kennedy acknowledged that a mandatory life sentence "gave force to one of the first purposes" of criminal law — deterrence, and specifically invoked deterrence and retribution as appropriate legislative motivations.\(^{134}\) He emphasized "the pernicious effects of the drug epidemic" and the "direct nexus between illegal drugs and crimes of violence."\(^{135}\) Although there was no evidence that Mr. Harmelin had engaged in any violent conduct or had ever sold or distributed drugs, Justice Kennedy noted the harm caused by a "professional seller of addictive drugs" and concluded that his crime may be "as serious and violent as the crime of felony murder."\(^{136}\)

Justices White and Stevens, in dissenting opinions, challenged the unrestricted application of the deterrent and retributive functions of punishment.\(^{137}\) They concluded that the Eighth Amendment's proportionality requirement placed constitutional limits on state sentencing decisions. Justice White concluded that Mr. Harmelin's sentence was disproportionately severe because the "absolute magnitude" of the drug possession offense was not "exceptionally serious," the sentence was the harshest available under Michigan law (because Michigan had no death penalty), and no other jurisdiction imposed such a severe punishment for his crime.\(^{138}\) As Justice White stated, "the fact that a punishment has been legislatively mandated does not automatically render it 'legal' or 'usual' in the constitutional sense. . . . [I]f this were the case,

\(^{133}\) Id. at 1002 (Kennedy, J., concurring).

\(^{134}\) Id. (Kennedy, J., concurring). "The Michigan Legislature could within reason conclude that the threat posed to . . . society by possession of this large an amount of cocaine — in terms of violence, crime, and social displacement — is momentous enough to warrant the deterrence and retribution of a life sentence without parole." Id. (Kennedy, J., concurring).

\(^{135}\) Id. at 1003 (Kennedy, J., concurring).

\(^{136}\) Id. at 1004 (Kennedy, J., concurring).

\(^{137}\) Id. at 1009 (White, J., dissenting); id. at 1028 (Stevens, J., dissenting).

\(^{138}\) Justice Marshall concurred with Justice White, "except insofar as it asserts that the Eighth Amendment's Cruel and Unusual Punishment Clause does not proscribe the death penalty." Id. at 1027 (Marshall, J., dissenting).
then the prohibition against cruel and unusual punishments would be devoid of any meaning." 139

Justice Stevens argued that the mandatory sentence of life imprisonment without possibility of parole is similar to the death penalty, because the offender will never regain freedom. 140 Because the sentence does not serve a rehabilitative function, it rests on a determination that the punished criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator. Justice Stevens then found the notion that Mr. Harmelin's punishment satisfies any meaningful formulation of proportionality was itself both cruel and unusual. 141

The essential issue for analysis is whether lengthy or mandatory imprisonment terms for all drug offenses is constitutional. In other words, did Mr. Harmelin's mandatory life sentence violate the Eighth Amendment because it was disproportionate to his crime of possessing cocaine? Justices Scalia and Rehnquist found the sentence constitutional because the Eighth Amendment contained no proportionality guarantee. The Justice Kennedy group found that the Eighth Amendment contained only a "gross" proportionality guarantee, but that there was no "gross" disproportionality between the sentence and Mr. Harmelin's drug crime.

Justice Scalia stated that the Framers did not intend to include a proportionality guarantee in the Eighth Amendment's prohibition against cruel and unusual punishment. 142 Other state constitutions had explicit proportionality guarantees, and the Framers would have explicitly stated such a guarantee in the Eighth Amendment. Moreover, the cruel and unusual punishments clause was based on the Framers' interpretation of the English Bill of Rights which only prohibited certain modes of punishment. 143

Justice Scalia's conclusion is questionable because scholars

139. Id. at 1016-17 (White, J., dissenting).
140. Id. at 1028 (Stevens, J., dissenting). Additionally, Justice White explained, "[t]he mandatory sentence of life imprisonment without possibility of parole 'is the most severe punishment that the State could have imposed on any criminal for any crime,' for Michigan has no death penalty." Id. at 1022 (White, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 297 (1983)).
141. Id. at 1029 (Stevens, J., dissenting).
142. Id. at 985 ("[T]hose who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences.").
143. After deciding that the Eighth Amendment had no prohibition against excessive punishment, Justice Scalia found that it only contained a proportionality guarantee for the death penalty. Id. at 968-69.
continue to disagree on the exact prohibitions in the English Bill of Rights. Moreover, even if there were no dispute about the historical analysis of the Eighth Amendment and Justice Scalia’s views were correct, his conclusion that the Amendment is confined only to the modes of punishment ignores the evolving meaning given the Cruel and Unusual Punishment Clause by the Court.

The Supreme Court has explicitly held that the Eighth Amendment does contain a proportionality guarantee. In *Weems v. United States,* the Court recognized that a comparative analysis is necessary to determine whether a punishment, deemed unusual, violates the Eighth Amendment. After *Weems,* the Court extended the Eighth Amendment’s proportionality guarantee to capital cases, to discretionary life sentences without parole, and to fines.

Justice Scalia claimed that *Solem v. Helm,* which held that the Eighth Amendment implicitly forbids disproportionate sentences of imprisonment, was “simply wrong.” He argued that *Solem* violated the essence of federalism and the constitutional separation of powers doctrine. The judicial branch could not review criminal sanctions because: (1) the Framers intended sentence proportion-
ality issues to be resolved by the legislature, and (2) there was no objective way to test the gravity of a crime against the severity of a punishment. Justice Scalia's analysis would thus preclude judicial review of the excessiveness of any non-capital sentence.\(^{153}\)

While Justice Scalia found that precedent was "simply wrong," Justice Kennedy analyzed and tried to distinguish the Court's prior proportionality cases. Kennedy examined the three comparisons set forth in *Solem* for reviewing sentence proportionality issues: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the commission of the same crime in other jurisdictions.\(^{154}\) He then found that the "intrajurisdictional and interjurisdictional analyses [in (2) and (3) above] are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."\(^{155}\) The second and third analyses in the *Solem* test would only supplement the first comparison, or "validate an initial judgement that a sentence is grossly disproportionate."\(^{156}\) Justice Kennedy thus established a "narrow proportionality principle" that limits the three-part *Solem* test to one analysis: the judicial balancing of the gravity of the offense against the severity of the punishment.\(^{157}\) If this balancing reveals gross disproportionality, the comparative analysis may support a violation of the Cruel and Unusual Punishment Clause. However, the guarantee only prohibits a sentence that is "extreme" and "'grossly disproportionate' to the crime."\(^{158}\)

Justice Kennedy then ignored the circumstances relevant to Mr. Harmelin's case and examined the crime and punishment in the abstract. He found there could have been a reasonable basis to believe that cocaine possession was a sufficiently dangerous crime to warrant mandatory life imprisonment without parole. In reaching this conclusion, Justice Kennedy equated possession with distri-

\(^{153}\) Justice Scalia argued that capital cases are unique, because they are part of the Court's capital punishment jurisprudence, which should not be extended to non-capital cases. *Id.* at 994.

\(^{154}\) *Solem* v. Helm, 463 U.S. 277, 290-91 (1983). In determining the gravity of the offense, the Court noted the following relevant factors: the harm to the victim or society, the culpability of the offender, and the absolute magnitude of the crime. *Id.* at 292-93.

\(^{155}\) *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

\(^{156}\) *Id.* (Kennedy, J., concurring).

\(^{157}\) *Id.* at 996-1002 (Kennedy, J., concurring).

\(^{158}\) *Id.* at 1001 (Kennedy, J., concurring).
bution and violent crimes. The "absolute magnitude" of possession was blurred with "the pernicious effects of the drug epidemic."

The "drug" crime was thus sufficiently grave, and the Michigan state legislature was not unreasonable in enacting the mandatory life penalty. Mr. Harmelin's sentence was within constitutional bounds and it was unnecessary for the Court to apply the jurisdictional analyses.159 In sum, Justice Kennedy used arguably irrational facts and the rational basis test to determine the constitutionality of Mr. Harmelin's punishment under the Eighth Amendment.160 He, too, embraced the addiction.

The dissenting Justices found that there was a proportionality guarantee in the Eighth Amendment, relying on prior capital and non-capital cases. Justice White noted that Justice Scalia's abandonment of judicial review of sentences was contrary to Marbury v. Madison's proclamation that it "is emphatically the province and duty of the judicial department to say what the law is."161 Justice White embraced the three objective factors in Solem, and found that "reviewing courts have not baldly substituted their own subjective values for those of the legislature."162 He then applied the Solem test and concluded that Mr. Harmelin's sentence for drug possession was unconstitutional.

The five Justices who comprise the Harmelin majority essentially eliminated any judicial review of legislatively-mandated prison sentences. Justice Kennedy concluded that legislative decisions about the punishment for criminal offenses are, "as a general matter, . . . 'properly within the province of legislatures, not courts.' "163 Justice Scalia claimed that criminal sentences are solely within the legislature's prerogative and courts should not intrude into the area.164

Taken to its logical conclusion, the majority's legislative deference argument would validate the imposition of mandatory life sentences for petty violations. "Harmelin provides no mechanism for overcoming the presumption of constitutionality, but instead of-

159. Id. at 1008-09 (Kennedy, J., concurring).
162. Harmelin, 501 U.S. at 1015-16 (White, J., dissenting).
163. Id. at 998 (quoting Rummel v. Estelle, 445 U.S. 263, 275-76 (1980)) (Kennedy, J., concurring).
164. Id. at 986-87.
fers empty reassurances that these extreme cases will never occur." These extreme cases will occur because legislatures have and will enact reactionary or extremist statutes, which are more likely to be enacted in response to public demands to resolve the drug problem. Judicial review is essential to guard against punishment which, when enacted to advance a political agenda, may be unconstitutional. Nevertheless, the Scalia and Kennedy opinions preclude drug defendants from challenging the severity of any non-capital sentence in federal court. By over-emphasizing deference to legislators, the Harmelin Court lost sight of one crucial issue: the judiciary remains the gate-keeper of individual rights, even if those rights are possessed by drug offenders.

The "pernicious effects of the drug epidemic," to borrow Kennedy's phrase, cannot be disputed. It is obviously imperative to deal with drug offenders harshly. However, it is also imperative to deal with them in a manner that effectively addresses the drug epidemic, and which protects the rights embodied in the Eighth Amendment's Cruel and Unusual Punishment Clause. The drug epidemic, which includes violence, crime and social displacement, cannot validate every term of imprisonment imposed on every drug offender.

The Harmelin Court did more than declare mandatory life imprisonment without parole a proportional punishment for a first time offender convicted of drug possession. It joined the legislative and executive "incarceration addicts." The need to resolve the drug problem has now eliminated judicial review of criminal penalties, and the Eighth Amendment, another casualty in the drug war, is no longer a "brake on the mass hysteria" accompanying the drug epidemic.

166. See, e.g., Carmona v. Ward, 439 U.S. 1091, 1097 (1979) (Marshall, J., dissenting) (noting that punishments for drug crimes are set too high because legislatures focus "on the corrosive social impact of drug trafficking in general, rather than on [defendants'] actual . . . involvement in that enterprise").
168. "Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights." Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring).
IV. THE FAILURE OF INCARCERATION

The consequences of the incarceration addiction are self-evident. The United States Government now incarcerates more persons than any other country.\textsuperscript{170} The federal and state prison population doubled within the last ten years,\textsuperscript{171} and drug offenders bore the brunt of this increase. Drug offenders occupy sixty-one percent of the beds in federal prison.\textsuperscript{172} Drug offenders also constituted an estimated twenty-two percent of the state prison population in 1991, up from six percent of the population in 1979.\textsuperscript{173}

As a consequence of the 1986 and 1988 Acts and the Guidelines, the number of drug offenders convicted in federal courts has more than tripled, while the number of non-drug convictions in-

\begin{itemize}
  \item 169. Kathleen Vandy, Note, 24 Rutgers L.J. 883, 902 (1993) ("By refusing to void Harmelin's sentence the Court rejected the use of the Eighth Amendment as a brake on mass hysteria.").
  \item 170. MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 3 (1991). In 1990, the per capita incarceration rate in the United States was 455 per 100,000 while in South Africa, it was 311 per 100,000. \textit{Id.} Our rate jumped 6.8% in 1990, while South Africa's fell 6.6% \textit{Id.} The Sentencing Project's 1992 report did not include statistics from what was once the Soviet Union because reliable statistics were unavailable after its demise. In the 1991 report, however, the Sentencing Project reported per capita incarceration rates of 426 per 100,000 for the United States, 333 per 100,000 for South Africa, and 268 per 100,000 for the Soviet Union. \textit{Id.}
  \item 171. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1990, supra note 21, at 604. In 1972, the prison incarceration rate (per capita imprisonment rate) was 93 prisoners per 100,000 population, or 196,092 prisoners, and in 1990, the rate was 293 prisoners per 100,000 population, or 771,243 prisoners. In addition, an average of 386,845 people were in jail on any given day during the year preceding June 30, 1990. \textit{Id.}; BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 1990, at 1, 2 (1991); BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, JAIL INMATES 1989, at 1 (1990).
  \item 173. \textit{Id.}
\end{itemize}
creased by only thirty-two percent between 1980 and 1990. In addition, the number of drug offenders sentenced to incarceration has almost doubled. The proportion of convicted offenders sentenced to incarceration for drug crimes also rose over this period, and the likelihood of imprisonment for drug offenders increased from seventy-seven percent in 1980 to ninety-one percent in 1990.

Moreover, the average sentence imposed and the sentences actually served by convicted drug offenders increased dramatically. The average sentence imposed was forty-seven months in 1980, and eighty-one months in 1990. Drug offenders released from federal prison in 1986 served an average of twenty-two months. Drug offenders sentenced under the Guidelines during 1990 were expected to serve at least sixty-six months, but only if they earn good time credits for good behavior. Although the average length of imposed prison sentences increased for drug crimes, this average decreased substantially for all other crimes. The sentence actually imposed for crimes should be an indication of the harm caused by the offender. Thus, the relative harm caused by drug offenders has now been elevated above that of almost every other type of crime.

Has this incarceration strategy been effective? Has incarceration enhanced public safety? Have long periods of incarceration...

174. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT: FEDERAL SENTENCING IN TRANSITION 1986-90, at 2-4 (1991) [hereinafter SENTENCING IN TRANSITION]. The number of persons convicted of violating federal drug laws rose to 16,311 in 1990 from 5,135 in 1980. "This 218% increase exceeded the 59% growth in U.S. district court convictions for all federal offenses during the same years and accounted for over 64% of the total increase in federal convictions." DRUG AND CRIME FACTS, 1992, supra note 33, at 15.

175. In 1990, drug offenders accounted for nearly half (47%) of all persons sentenced to prison from federal courts, up from 27% in 1980. SENTENCING IN TRANSITION, supra note 174, at 2-4.

176. Id. at 2, 4. The proportion increased from 72% in 1980 to 86% in 1990. Id. Additionally, in 1989, 89.5% of convicted drug offenders were sentenced to prison. Id.

177. Id. The number of federal drug offenders sentenced to prison rose 48%, while the number of persons sentenced to prison for all other crimes rose only 14%. Id. The likelihood of incarceration for violent offenders also increased from 1986 to 1990, from 83% to 88%. Id. The likelihood of incarceration increased for public-order offenses, from 37% to 43%, but remained unchanged for property offenders, at 43% in both 1986 and 1990. Id. at 2.

178. Id. at 2, 4, 9. The average imposed sentence for all drug offenses was 62.2 months in 1986 and 81.2 months in 1990. Id. at 5 (table 2 and n.4).

179. Id. at 3. The average prison sentence for all violent crimes was 32% less in 1990 than in 1986; for property offenses, it was 35% less; and for public order offenses, it was 25% less. Id.
reduced drug-related crime? This issue has been hotly debated. However, there is little available information that establishes a positive correlation between increased incarceration and decreased crime rates. Indeed, there is some evidence that increased incarceration has failed to reduce violent crime. As stated before, the highest incarceration rates in the United States were between 1980 and 1993, yet violent crime rates rose faster between 1984 and 1993 than during either the 1960s or 1970s.

The average rate of incarceration was essentially stable from 1927 to 1980.180 There was some increase in the rate between 1970 and 1980, but a greater increase occurred between 1980 and 1990. During that period, incarceration in state and federal prisons doubled, from 138 per 100,000 to 271 per 100,000.181 Violent crime, however, rose during this period.182 Thus, violent crime increased despite rapidly escalating incarceration rates in the 1980s.

This relationship between violent crime and incarceration in the 1980s is particularly telling. Violent crime increased, even though incarceration rates also increased. The extraordinary increase in incarceration that occurred during the 1980s should have had its greatest influence on the crime rate from the mid-to-late 1980s into the 1990s. Instead, violent crime rates increased more rapidly than ever during this time period.183 There are two reasons why lengthy periods of incarceration have not correlated into lower crime rates. First, even with mandatory minimums, the likelihood of any incarceration is small; and second, incarceration has not had its intended specific or general deterrent effect.

There are vast numbers of hard-core drug users who possess and obtain drugs. These numbers are far greater than the numbers of users and drug offenders who are now incarcerated and who potentially could be incarcerated. In 1991, there were over 6 million cocaine users, 5.7 million users of hallucinogens and inhalants, and approximately 700,000 heroin users.184 According to one estimate, only about one-eighth of the hard-core cocaine and heroin abusers

180. Bureau of Justice Statistics, U.S. Department of Justice, Prisoners 1925-81, at 2 (1992). In 1928, the incarceration rate in state and federal prisons was 96 per 100,000 population, the same rate as in 1973. Id.


183. Id.

are now incarcerated. 185 If we add the "non-user" offenders to these "user" offenders, there are so many offenders that it is fiscally and practically unrealistic to incarcerate more than a small number of them.

The financial costs of operating prisons are legion. The construction and maintenance of prisons and jails costs billions of dollars a year. The average annual reported operating cost of the state and federal prison systems in 1990 was $17,545.55 per inmate, and the average annual cost of jail was $16,658.60 per inmate. 186 If we wanted to double the numbers of users and traffickers now incarcerated, we simply could not afford to hold them. We would leave others still not incarcerated and "would do nothing to prevent new ones from emerging in otherwise unchanged communities to take the place of those behind bars." 187

Incarceration may also have little effect on the crime rate if we are incarcerating the "wrong" drug offenders. One result of our response to the problem is the incarceration of low-level drug offenders: offenders with little or no prior criminal history, no violent offense behavior and no involvement in sophisticated criminal activity. These offenders, who serve an average sentence of at least 5.75 years before release, constitute 21.2% of all sentenced federal prisoners and 36.1% of all drug offender prisoners. 188

Among low-level drug offenders, sentences have increased 150% above what they were prior to the implementation of the Guidelines and the Anti-Drug Abuse Acts which established mandatory minimums for drug offenses. 189 Two-thirds of these low-

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185. Id. (noting that while American court system has been "flooded" with drug-related cases, numbers are still small compared to overall potential).

186. BRANHAM, supra note 22, at 20-21 (1992) (study by ABA Section on Criminal Justice). Costs directly attributable to the operations of prisons and jails are commonly omitted from correctional department budgets and, therefore, omitted from their reported costs. Id. at 21. These costs may include correctional employees' pensions and fringe benefits, litigation costs by the attorney general's office, and the costs of educating inmates, all of which are sometimes excluded from the budgets of state education or correctional education departments. In addition, the amortized costs of facility construction are not included in operating costs. When these additional expenses are considered, the "true cost of incarcerating one person is at least $30,000 a year, almost twice the reported figure." Id.

187. CURRIE, supra note 184, at 152.

188. U.S. Department of Justice: An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, Crim. L. Rep. (BNA) No. 54, at 2101, 2108-09 (Feb. 16, 1994) [hereinafter An Analysis of Non-Violent Drug Offenders] (noting that low-level offenders with no criminal history points constitute 28.2% of all drug offenders and 16.6% of all sentenced prisoners, and that approximately 42.3% of the low-level offenders were couriers or played peripheral roles in drug trafficking).

189. Id. at 2110-11; see also ABC News, Nightline: Judges Protest Mandatory Drug Sentences (ABC television broadcast, July 14, 1993) (statement by Rep. Schumer
level offenders received mandatory minimum sentences.\textsuperscript{190}

Under the Guidelines, offenders with mandatory minimum behavior are not being sentenced to mandatory minimum terms.\textsuperscript{191} “As late as the first half of 1990, almost half the offenders who would appear to be eligible for a minimum term received a lesser sentence.”\textsuperscript{192} Moreover, as is true of the federal offender population generally, the majority of mandatory minimum offenders (like Patillo and Cadiz) have no prior criminal record.\textsuperscript{193}

Why are we incarcerating the “wrong offenders”? Although one goal of the Guidelines was to eliminate discretionary sentencing, considerable discretion remains within the system. However, much of this discretion is now with the prosecutor rather than the judge. Prosecutors decide whether to charge, what to charge, whether to offer a plea, what plea bargains are acceptable, and whether to request a sentence below the applicable mandatory minimum because of a defendant’s “substantial assistance” to the government.\textsuperscript{194} The judge reviews the acceptability of plea bargains and may choose to sentence below the minimum if provided the opportunity to do so by the prosecutor. A sentence below a potentially applicable minimum therefore requires the concurrence of the government and the court. Low-level drug offenders may be unable to provide substantial assistance, and would therefore be de-

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\textsuperscript{190.} An Analysis of Non-Violent Drug Offenders, supra note 188, at 2110-11 (noting that “33.0% received no mandatory-minimum penalty, while 33% received a 5-year mandatory-minimum penalty and another 33% received a 10-year mandatory-minimum penalty”); MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM, supra note 88, at 10-11.


\textsuperscript{192.} Id.; see also MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM, supra note 88, at 91 (explaining that “[d]efendants whose offense conduct and offender characteristics appear to warrant application of mandatory minimum sentencing provisions do not receive those sentences approximately 41% of the time”).

\textsuperscript{193.} MEIERHOEFER, supra note 191, at 9-10, 14, 25.

\textsuperscript{194.} See U.S.S.G., supra note 11, § 5K1.1; 18 U.S.C. § 3553(e) (1988); 28 U.S.C. § 994(n) (1988). Like 18 U.S.C. § 3553(e), section 5K1.1 of the Guidelines requires a motion by the government for a departure based on substantial assistance. See U.S.S.G., supra note 11, § 5K1.1. If the government refuses to request a substantial assistance departure, the defendant must make a substantial threshold showing that the refusal is not “rationally related to a legitimate government end” before any right to discovery or a hearing on the issue of the refusal. Wade v. United States, 504 U.S. 181, 186 (1992) (noting that “a defendant would be entitled to relief if a prosecutor refused to file a substantial assistance motion, say, because of race”).
nied the opportunity to plea, making them more likely to be sentenced to a maximum term. Yet, the opposite is true for higher-level offenders. Thus, our response has not increased the risk of incarceration for higher-level offenders.

Incarceration also does not prevent new offenses by new offenders who do not view prison as punitive. When incarceration "holds few terrors" for offenders, it has only a modest effect on drug use, drug trafficking and drug-related crimes. For many drug offenders, prison is not stigmatizing, but rather a challenge to be outwitted and overcome. Prison confers status and a "badge of courage," or something to brag about when the offender is released from prison and returns home.

Moreover, prison conditions are not terribly threatening to many offenders. Some may not be socially isolated from family and friends while confined, and for others, the food, shelter, clothing, health services, recreation and level of physical safety are an improvement. For these offenders, life in the inner city may be so desperate that the threat of incarceration, by comparison, loses its power to deter criminal activity.

Unfortunately, prison may also provide low-level drug offenders an education in "advanced drug-trafficking." These offenders,

195. MEIERHOEFER, supra note 191, at 9-10 (arguing that discrepancy may be result of defense attorneys more aggressively pursuing bargains for higher-level offenders).
196. CURRIE, supra note 184, at 155, 158.
197. Id. at 160. One young Detroit drug dealer declared: "a lot of dudes like prison because it's where all their boys is [sic]." Id. Few changes occurred in offender profiles of federal inmates from 1984 to 1990: The majority of sentenced offenders had no prior record, were males, and were aged 27 to 35. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, at 648 (1992) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991]. However, while the percentage of Hispanic offenders, and offenders classified as "other," remained generally constant, and the percentage of white offenders decreased from 60% to 53%, the percentage of black offenders increased from 21% to 26%. MEIERHOEFER, supra note 191, at 4. The only other major change in the offender population — the percentage of offenders described as using drugs increased from 16% to 27% — may represent increased drug use as well as better or increased detection methods used during recent years. Id. The typical state inmate is uneducated, has no high school degree, and is within the 18-24 age bracket. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, supra, at 648. One-third of the inmates were unemployed when arrested, more than half had annual incomes of less than $10,000 and one fourth earned less than $3,000 during the year preceding their arrests. Id. The majority of state prison inmates were raised by a single parent, and of jail inmates surveyed in 1989, approximately 44% of the females and 13% of the males reported being subjected to physical or sexual abuse. BRANHAM, supra note 22, at 5.
embittered by the system, develop relationships with high-level offenders. "The overuse of incarceration may strengthen the links between street and prison, and help cement users and dealers identity as members of an operational drug culture, while simultaneously shutting them off from the prospect of successfully participating in the economy outside the prison when they get out."  

If imprisonment is not judged as severe as we presume it is, it has important policy implications. Two of the purposes of punishment — retribution and deterrence — require that imprisonment be deemed punitive. Theoretically, for prison to have the effect on drug offenders that the public demands, a fundamental assumption must be established: drug offenders must generally share the government's view of its punitiveness in the ranking of criminal sanctions. If incarceration is to accomplish its deterrent function, drug offenders must perceive it as more punitive and severe than their current environment and other alternative sanctions. If they do not, then legislators and judges — who imprison drug offenders because of the drug war and the public's demand to get tough on drug offenders — should consider other means besides prison to exact punishment.  

Imprisonment, however, serves purposes other than deterrence and retribution. Incarceration incapacitates offenders. In that sense, drug offenders who may recidivate are removed from the community. The effectiveness of incarceration in accomplishing its incapacitative purpose then is measured by the numbers of offenders who are in fact incarcerated, and by the effect of incarceration on recidivism rates.  

Federal drug offenders are no more likely to recidivate than federal offenders overall. In fact, released drug offenders were less likely than all other types of offenders to be returned to prison.
and low-level drug offenders are much less likely to recidivate than high-level offenders. Moreover, if they do recidivate, they are unlikely to commit a violent crime. Thus, the United States Department of Justice concluded that the length of incarceration does not positively or negatively influence their recidivism. The majority of state and federal prison studies support this conclusion. In sum, lengthy mandatory incarceration has little deterrent effect and its effect on recidivism is questionable.

V. ALTERNATIVES TO INCARCERATION

We can maintain the integrity of the criminal justice system and continue to punish drug offenders. However, we must limit our incarceration resources. Dangerous drug offenders should be incarcerated, with lengthy imprisonment periods. Drug traffickers with prior criminal histories and violent offense behavior who engage in sophisticated criminal activities should be subject to long mandatory sentences.

203. See An Analysis of Non-Violent Drug Offenders, supra note 188, at 2102.
204. Id. at 2117. The report noted: [The] amount of time inmates serve in prison does not increase or decrease the likelihood of recidivism, whether recidivism is measured as a parole revocation, rearrest, reconviction, or return to prison . . . either when the time served is examined alone in relation to recidivism, or when controls are introduced for demographic variables (including age), education, work experience, prior arrests, convictions, and incarcerations, drug and alcohol dependency, and post-release living arrangements.


206. Decriminalization, in theory and in practice, can not be seen as an alternative solution to the drug crisis. To eliminate drug-related crime under a "decrim" scheme, all drugs, including crack, heroin, ice and any new drug that may come on the market, must be available to everyone, including juveniles. These drugs must also be supplied in unlimited quantities. If not, the demand would continue for drugs by juveniles, for drugs not yet legalized, and for additional quantities of drugs. The gap would be filled by a flourishing black market.

Moreover, although there is a link between violent crime and drug trafficking, most drug-related crime is committed by drug users and buyers, not sellers. Drug users, many with little or no income, commit crimes either in support of their addiction or because of the pharmacological effect of drugs. Even if legalization reduces the cost of drugs, it will not affect these crimes. Finally, the numbers of pregnant addicts and drug-addicted babies would increase, rather than decrease, with decriminalization. This problem, alone, should be sufficient to warrant continued criminalization.
imprisonment terms and full institutional controls. By carefully developing sensible sentencing policies and a wide range of sanctions, sensitive to resource limitations and public concerns, we can hold drug offenders accountable to the public. We must reframe the issue not in terms of what sounds tough for all drug offenders, but in terms of what is most effective for most offenders.

There are viable alternatives to incarcerating all drug offenders. Intermediate sanctions may be just as effective in enhancing public safety and yet less costly. Policymakers concerned with more intelligent sentencing, in addition to "tougher" sentencing, should consider alternatives to incarceration, rather than alternative incarceration. Less restrictive sanctions could include: (1) quasi-incarceration, where an offender is supervised nine to twenty-three hours per day in programs such as halfway houses, electronically monitored house arrest and residential drug treatment; (2) intensive supervision, involving one to eight hours per day of direct

207. An educated public, with knowledge of the costs and alternatives, will support intermediate sanctions, if more dangerous offenders are still incarcerated. See John Doble, The Public Agenda Foundation, Crime and Punishment: The Public's View 12 (1987) (noting that "Americans are even more inclined to support alternatives to incarceration when they understand the cost of building and maintaining new prisons"). This research study shows that the public would support alternatives to incarceration in particular cases because they believe prisons fail to accomplish their primary objectives and fail to instill attitudes and values that prepare inmates for jobs after their release. Id.; see also Donna Hunzeker, National Conference of State Legislatures, Bringing Corrections Policy into the 1990s, at 3 (1992) (noting that by 1987, Delaware had "in place voluntary sentencing guidelines that included intermediate sanctions").


209. Many legislators strongly supported the drug treatment provisions in the 1994 Crime Bill. See, e.g., 139 Cong. Rec. H8723 (daily ed. Nov. 3, 1993) (statement of Rep. Brooks) ("We all know that a great deal of crime is committed to feed drug addictions. This substance abuse treatment program — by decreasing drug and other substance dependencies — should lead to a corresponding decrease in the levels of crime."); 139 Cong. Rec. H8725 (daily ed. Nov. 3, 1993) (statement of Rep. Meek) ("We need treatment for drugs. We need it in prisons as well as in other segments of the public."). Other legislators disagreed. See, e.g., 139 Cong. Rec. S14,940-02 (daily ed. Nov. 3, 1993) (statement of Sen. Hatch) ("Instead of lowering prison sentences that are provided for offenders of drug traf-
supervision, in which offenders are subject to curfew checks, employment checks and close monitoring for attendance in treatment programs; or (3) minimal supervision, involving less than one hour of contact per day.\textsuperscript{210}

Because intermediate sanctions may also be as punitive as imprisonment, it is no longer necessary to equate criminal punishment with incarceration. At some level of intensity and length, intermediate sanctions are equally as severe or have the same punitive effect as prison, and may actually be the more dreaded penalty.

Developing and utilizing a full continuum of criminal sanctions is essential. It will reduce the overreliance on prisons, while satisfying public demands that offenders be treated in a manner that does not trivialize crime or jeopardize public safety. We should not prefer incarceration, regardless of its costs and effectiveness, simply because we have no other satisfactory alternative. A sufficient range of intermediate sanctions is available. For instance, in the 1994 Crime Bill, Congress recommended state grants for "drug court" programs with mandatory treatment, electronic monitoring programs and boot camps.\textsuperscript{211} A brief discussion of these alternatives is instructive.

\textbf{A. Electronic Monitoring}

At least thirty states now use electronic monitoring, with a daily average of 30,000 offenders, either as an alternative to incarcerating non-violent offenders or as a condition of post-incarceration supervision.\textsuperscript{212} The monitoring systems use electronic devices, often ankle bracelets, to alert corrections officials if offenders violate the terms of their release or confinement. These devices trigger an

\textsuperscript{210} See MICHAEL N. CASTLE, U.S. DEPARTMENT OF JUSTICE, ALTERNATIVE SENTENCING: SELLING IT TO THE PUBLIC 1-5 (1991). Delaware has instituted all these alternatives, at a savings of almost $8 million annually in corrections costs. \textit{Id.} at 4. In addition, Delaware’s prison growth rate slowed to 5.8\% over a two year period. \textit{Id.} Conversely, the prison growth rate for neighboring states was much higher: Maryland, 15.8\%; Virginia, 22.4\%; New Jersey, 22.3\%; New York, 25.8\%; and Pennsylvania, 31.6\%. \textit{Id.}

\textsuperscript{211} For a discussion of the "drug court" programs under the 1994 Crime Bill, see supra notes 110-17 and accompanying text.

\textsuperscript{212} Paul Barton, \textit{Crime and the Cost of Punishment}, CINCINNATI ENQUIRER, June 27, 1993, at A1 (noting that "there is renewed emphasis on 'intermediate sanctions' — alternatives to prison — that range from parole and probation, boot camps, acupuncture treatment for drug abusers, electronic monitoring and community service work"). Cook County, Illinois, with 1,130 participants, has the largest electronic monitoring program in the country. Andrew Fegelman, \textit{Cook Monitor System Sets Off a False Alarm}, CHI. TRIB., Mar. 15, 1993, at 1.
alarm if the offender goes beyond the bounds of confinement and allow officials to verify that offenders meet specified curfews, such as returning home immediately after work. The systems work by randomly dialing the offenders' homes and alerting officials if offenders are more than an allowable distance away from a device connected to their home phones.

There are technical problems with electronic monitoring, including bracelet failures which allow offenders complete freedom, or confused signals (such as calling the wrong phone). However, these problems can be overcome with technological advances. More serious problems involve the proportion of offenders who have no telephones or who are homeless. Without a stable address and phone, the program cannot be used for an otherwise eligible offender.

However, there are advantages to electronic monitoring. It is a cost-saving measure, allowing intensive supervision of an offender's location while saving prison space. Additionally, the offender often continues to work and pays the state for the cost of the monitoring. Electronic monitoring is also seen as a less stigmatizing alternative to incarceration.

### B. Boot Camps

Para-military boot camps in some form are already in operation in some state and federal correctional systems. In 1993, there were sixty-five adult boot camps in twenty-seven states and nineteen juvenile camps in eight states. These camps generally target young non-violent offenders, ages eighteen to forty, although programs for young adults are most common. They offer offenders the opportunity to enter a structured, more demanding environment and to receive a shorter sentence. Programs range in duration from three to six months, and all programs involve strict discipline, highly structured time and physical training. Most programs include academic and job training, and have an aftercare component.

Boot camp programs vary in different states and it may be too early to assess their overall impact on the criminal justice system. The camps generally offer a cheaper alternative than traditional in-

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214. John Barbour, *Young Inmates in Boot Camp March to Different Drummer*, MIAMI HERALD, April 11, 1993, at 4B; John Gorman, *The Boot Fits: Special Camp Stint Puts Ex Con on the Right Track*, CHI. TRIB., Dec. 24, 1993, at 1 (noting that "these inmates are willing to take 120 days of shock therapy to avoid five years of prison").
carceration, although at least one state found its boot camp program more costly, per inmate, than its prison system. A hidden cost of the programs is the cost of dropouts, who are then incarcerated and serve regular prison sentences. Recidivism rates for boot camps are also mixed. Although programs in California boast an improvement in recidivism rates of greater than fifty percent, other programs found that boot camp recidivism rates approach rates for the general prison release population.

On the whole, however, "[b]oot camps serve as a viable alternative to adding inmates to our already overcrowded federal [and state prisons]." Additionally, support seems strong in Congress for boot camps, not only as an alternative for certain inmates, but also precisely because they offer an inexpensive solution to the prison overcrowding problem.

C. Drug Court Treatment Programs

Drug courts are specialized courts for drug cases. Offenders sentenced in many drug courts are not incarcerated, but are required to participate in a drug treatment program and are subject to more direct supervision of their daily activities. Drug court treatment programs are present in approximately twenty-five cities and counties, but not all drug courts are used to resolve drug cases with treatment alternatives to incarceration. Other drug courts only segregate drug cases in specialized courtrooms or process drug cases

215. See, e.g., Barbour, supra note 214, at 4B. New York has the largest, most successful program, with a 3,000 per year inmate capacity. Id. Additionally, the program is cost effective, as it saved the state more than $220 million over five years. Id.

216. Pat Doyle, Prison Boot Camps: A Solution or a New Problem? Woes of Wisconsin Program Stir Doubts About the Concept, STAR TRIB. (Minneapolis - St. Paul), Nov. 1, 1993, at 1B (stating that "it cost [Wisconsin] twice as much per day to house an inmate in the boot camp in 1991-92 than in other Wisconsin prisons").

217. Caroline Zinko, Instilling Pride Boot Camp's Order Builds Discipline in Female Inmates, DETROIT FREE PRESS, Mar. 5, 1993, at 3A ("Corrections officers say the recidivism rate for PRIDE graduates is 33%, compared to 75-85% for the rest of the jail population.").

218. For example, in Louisiana, 14% of those who finish boot camp are rearrested within six months, "about the same rate as other Louisiana parolees, according to a study by the U.S. Department of Justice." Duke Helfand, Booted Into Shape, L.A. TIMES, Oct. 14, 1993, at J1; see also Anderson, supra note 213, at 7B (noting similar results).

219. 139 CONG. REC. S14,950 (daily ed. Nov. 3, 1993) (statement of Sen. Hel- lin) ("This program is unique in that it targets first-time offenders, in an attempt to keep them away from career criminals, who often lead young people into becoming repeat offenders.").

with expedited case management principles.221

Proponents of drug court treatment programs claim that they: (1) help judges gain "expertise" in dealing with drug offenses and offenders, (2) force judges to use the full range of resources available when adjudicating drug cases, and (3) force judges to develop "new" alternative methods to handle drug cases.222 Opponents claim that the quality of justice decreases in a segregated drug court. Judges may have tunnel vision and may not evaluate drug cases in the context of other crimes. "Canned" plea offers work against individual attention to cases and defendants plead guilty, even when innocent, because of light sentences, such as probation and drug treatment.

The Dade County Drug Court, which has received national attention, was designed to divert first time non-violent drug offenders into treatment, and to avoid the stigma of a criminal conviction. The court alters the adversarial role of the prosecutor and defense attorney, as both are active participants who effectively "goad" drug offenders to successful treatment. Progress is monitored by the sentencing judge rather than a probation officer and offenders are usually retained in the program even when they fail to comply with program mandates. Progress is tracked over a one-year treatment period and offenders must appear before the judge every thirty to sixty days. The judge expunges the criminal record upon successful completion of the program.223

The recidivism rate for first time Dade County drug offenders was sixty percent, but for those who successfully completed the Dade County Drug Court treatment programs, the recidivism rate reported by Dade County officials was only seven percent.224 Drug court treatment programs are also cost effective. It costs Florida only $2,000 to put a drug offender through a drug court program, as compared to $17,000 per drug offender for incarceration.225


224. Id.

225. Id.
a result, other drug court programs are being established throughout the country.226

The field of intermediate sanctions is relatively new and there is no proven successful sanction for low-level drug offenders. However, we must examine intermediate sanctions and develop an effective system of punishing offenders who can be deterred from future, more severe criminal activity.

D. Elimination of Mandatory Minimums

Mandatory minimum sentences should be eliminated from all sentencing systems, for both theoretical and practical reasons.227 Mandatory minimums are sentencing decisions made by the legislators. Legislators should establish sentencing policy, but sentencing commissions and courts should effectuate that policy with sentencing decisions. Legislative policy should impact, rather than define, case-by-case sentencing decisions. In addition to determining policy goals, legislators should define prohibited conduct, create the overall sentencing structure, and establish resource appropriations and fundamental procedures. Sentencing commissions should appropriately direct sentencing courts to presumptive dispositions, consistent with the sentencing structure, for the "ordinary" offense committed by the "ordinary" offender. This direction should eliminate indeterminate sentencing and serve as a starting point for the sentencing decisions. The actual sentencing decisions, in turn, must be made by sentencing courts, and not by legislators. By enacting mandatory minimums, however, legislators have usurped the courts' sentencing function.

The individualized sentencing role should rest solely with the court because it must be implemented with knowledge of all relevant circumstances about the offense and the offender. There is no "ordinary" offense or offender. Sentences should be determined after consideration of the gravity of the actual offense and the degree of culpability of the individual offender. Mandatory mini-

226. For example, Florida passed a bill that allows other counties to set up drug courts. Steve Bousquet, Drug Court Law Offers Treatment Instead of Prison, MIAMI HERALD, May 15, 1993, at 7B.

227. The ABA Sentencing Standards are consistent with this position. See ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES AND APPELLATE REVIEW OF SENTENCES Standard 18-3.21(b) (1994) ("A legislature should not prescribe a minimum term of total confinement for any offense.") (approved by the House of Delegates in Feb. 1993). Moreover, the Judicial Conference of the United States and the judges of the 12 Circuit Courts of Appeals that hear criminal cases adopted resolutions opposing mandatory minimum sentencing statutes. U.S.S.C. REPORT, supra note 83, at 93.
mums, however, are based on one factor, relevant to the offense or the offender, and ignore all other relevant factors, such as mitigating and aggravating circumstances. A sentencing decision is a judgment, uniquely suited for judicial discretion, and this realm of judicial discretion should be protected by legislators and sentencing commissions.

Determinate sentencing structures and judicial discretion are not mutually exclusive. The legislatures and state sentencing agencies in many states have established a determinate sentencing structure, with permissive departure standards and appellate review. Yet, the state sentencing courts impose presumptive sentences in a majority of cases. If there are a large number of departures, the sentencing agency may modify the standards or the guidelines. In rare cases, the departures may justify modifying the criminal code. Thus, there is a flexible approach to sentencing. Neither the legislative, the executive nor the judicial branch dominates the sentencing process and there is an ongoing dialogue about appropriate sentences. A needed balance will be struck between case-by-case sensitivity and systemic policymaking in sentencing.

In sum, it is essential to separate the structure of sentencing from the sentencing policies the structure is designed to implement. Sentencing judges, when sentencing individual offenders, should consider personal characteristics material and not material to their culpability which may justify imposition of sentences of lesser severity than would otherwise be imposed. Mandatory minimums preclude this type of consideration and should be eliminated.

As noted earlier, four federal statutes account for approximately ninety-four percent of the mandatory minimum sentencing cases and all four relate to drug offenses.228 There are six commonly-offered rationales for mandatory minimum provisions: (1) retribution, (2) deterrence, (3) incapacitation, especially of the serious offender, (4) elimination of disparity, (5) inducement of cooperation and (6) inducement of pleas. However, there are a number of problems with these rationales.

Mandatory minimums are structurally in conflict with sentencing guideline systems and allow two types of sentencing disparity.

Offenders with different characteristics receive similar sentences and defendants with similar characteristics receive different sentences. Guidelines provide a sentencing range based on categories of offenses and offenders, while mandatory minimums utilize the “tunnel vision” approach to sentencing. They focus on one factor relevant to the offense or one factor relevant to the offender. Thus, the same minimum sentence must be imposed in cases involving widely divergent offense and offender characteristics. For example, a defendant with a marginal role in the offense who accepts responsibility receives the same sentence as defendants with higher levels of participation. The mandatory minimum precludes application of a guideline sentence which is proportional to the defendant’s level of culpability and need for punishment, and greater demands are placed on prison resources than are necessary to satisfy the goals of sentencing.\(^{229}\)

Congress never intended for prison resources to be used in this manner. Mandatory minimums were aimed at the high-level and mid-level managers. Congress set mandatory minimums without any indication that defendants with lower culpability levels should serve ten and five-year sentences. Because defendants who should receive mandatory minimums avoid them forty-one percent of the time, lower-level drug offenders now constitute twenty-one percent of the total sentenced federal prison population.\(^{230}\)

Moreover, there are no proportional increases in sentence severity with mandatory minimums. Similar to the mandatory minimums’ failure to distinguish among offenders with diverse culpability, they distinguish too greatly among offenders who have committed offense conduct of similar seriousness. For example, first-time offenders who possess 5.01 grams of crack face a mandatory maximum of five years imprisonment. First-time offenders who possess 5.00 grams of crack face a statutory maximum of one-year imprisonment.\(^{231}\) Thus, offenders whose cases differ only

\(^{229}\) See id. at 120. Low impact projections suggest that 981 offenders in fiscal year 1990 received sentences above the applicable guideline range due to mandatory minimum sentencing provisions. Id. High impact projections suggest that 2,121 offenders received higher sentences due to mandatory minimums with an estimated total of 6,971 additional years of prison imposed. Id. Utilizing the annual cost per inmate for fiscal year 1990 ($17,909), this finding indicates that mandatory minimum provisions generated between $79 million and $125 million additional costs for offenders sentenced in fiscal year 1990. Id.

\(^{230}\) See id. at 91; An Analysis of Non-Violent Drug Offenders, supra note 188, at 2110 (noting that “the majority of low-level drug law violators who are U.S. citizens are kept in minimum security facilities”).

\(^{231}\) See 21 U.S.C. § 844(a) (1988). This statute provides in relevant part: “Any person who violates this subsection may be sentenced to a term of imprison-
by the possession of .01 grams of crack face a four-year difference in penalties. Again, the sentencing guidelines goal of reducing disparity is hampered by mandatory minimum sentencing provisions.282

VI. CONCLUSION

As the preceding sections indicate, federal statutes prescribe increasingly harsh penalties for drug offenders. The Supreme Court has not only sanctioned the penalties, but isolated them from judicial review. Despite the severity of these new laws, however, drug crimes continue and policy makers demand more severe penalties. The longer terms of incarceration dehumanize offenders and perpetuate inequalities, and in turn, preserve the drug crime status quo. The response to more drug crimes is more incarceration, and the response to more incarceration is more crime. The cycle is closed; we ignore all alternatives and no one questions the practice of using imprisonment to solve the drug problem.

We cannot continue our addiction to incarcerating drug offenders, because the consequences of this addiction are clear — we are ineffective in controlling and preventing crime. To be sure, treating drug crimes with preventive measures is complicated and there are no easy solutions. However, to cure the addiction, we must seek alternative solutions. The quest begins with the simple realization that preserving the dignity of every individual, even the convicted drug offender, is paramount to the pursuit of justice.

282 There is also evidence that mandatory minimums have a disparate impact on African-American offenders. The Sentencing Commission found that a greater proportion of African-American defendants (67.7%) received sentences at or above the indicated mandatory minimum than white (54%) or hispanic (57.1%) defendants. U.S.S.C. REPORT, supra note 83, at 78. The report concluded that “defendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon such factors as race, circuit, and prosecutorial practices.” Id. at 91.