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# A NEW PERSPECTIVE ON THE “WAR ON DRUGS”: COMPARING THE CONSEQUENCES OF SENTENCING POLICIES IN THE UNITED STATES AND ENGLAND

MaryBeth Lipp\*

## I. INTRODUCTION

While the Bush Administration continues to fight the war on terrorism abroad, a long-waged battle continues at home as fervently as ever.<sup>1</sup> Rather than diverting resources and attention away from

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1. There is evidence of President George W. Bush's continued commitment to the drug war. *See, e.g.*, Attorney General John Ashcroft, Prepared Remarks at the Operation Tripecta Announcement (July 31, 2003) (announcing the conclusion of Operation Tripecta, “a 19-month multi-national Organized Crime, Drug Enforcement Task Force investigation . . . . The American public should know that the[] tools that have allowed us to make gains in our war on drugs, are the same tools that allow us to make gains in our war on terrorism . . . . Just as in the war on terrorism, the war on drugs is truly a fight between those who love freedom and respect the rule of law and those who seek to enslave and to corrupt [the rule of law].”), *available at* <http://www.usdoj.gov/ag/speeches/2003/073103tripressfinallarge.htm>; *National Drug Control Strategy*, Office of National Drug Control Policy (Feb. 2002) (“Illegal drug use threatens everything that is good about our country . . . . Internationally, it finances the work of terrorists who use drug profits to fund their murderous work. Our fight against illegal drug use is a fight for our children’s future, for struggling democracies, and against terrorism.”), *available at* [http://www.whitehousedrugpolicy.gov/publications/policy/03ndcs/pages1\\_30.pdf](http://www.whitehousedrugpolicy.gov/publications/policy/03ndcs/pages1_30.pdf); *Bush Seeks a 25% Drop in Drug Abuse*, DESERET NEWS (Salt Lake City), Feb. 13, 2002, at A03 (discussing the anti-drug advertising campaign the White House launched during the Super Bowl 2002, which suggests “that money used to buy drugs may benefit terrorists”), *available at* LEXIS, News Library, Deseret News File, 2002 WL 11576063; James Gerstenzang, *Bush Sets Goals for Major Cuts in Drug Use*, L.A. TIMES, Feb. 13, 2002, at A28 (“Citing

the support he said terrorist networks get from selling drugs, whether in South America or Afghanistan, Bush said: 'When people purchase drugs, they put money in the hands of those who want to hurt America, hurt our allies.');

President George W. Bush, *Remarks by the President on the 2002 National Drug Control Strategy at the East Room*, Office of National Drug Policy (Feb. 12, 2002) ("One big challenge . . . is to defend freedom, is to remain united as we fight for the very values that we hold so dear. [A]nother big challenge is to battle drug use . . . [Drugs] destroy the souls of our children. And the drug trade supports terrorist networks . . . When we fight drugs, we fight the war on terror."), at <http://www.whitehousedrugpolicy.gov/news/speech02/021202/strategyremarks.pdf> ; Dana Milbank & Cheryl W. Thompson, *Bush Seeks Cut in Drug Use; Aides Say Plan Stresses Treatment Rather than Enforcement*, WASH. POST, Feb. 13, 2002, at A10 (quoting President Bush: "Drugs help supply the deadly work of terrorists . . . Make no mistake about it: If you're buying illegal drugs in America, it is likely that money is going to end up in the hands of terrorist organizations."), available at LEXIS, News Library, Wash. Post File, 2002 WL 13817192; Bill Straub, *Administration Unveils New Anti-Drug Program*, SCRIPPS HOWARD NEWS SERVICE, June 26, 2003 (discussing the "25-Cities Initiative," in which the federal government will work together with local officials in twenty-five of the largest U.S. cities so that "all drug-fighting units work in concert" and noting that the federal government invested 11.2 billion dollars in the war on drugs in 2003 and that President Bush, despite the budget deficit, seeks to add 440 million dollars to the total drug war effort), available at LEXIS, News Library, Scripps Howard News Service File; Jacob Sullum, *When Holding a Party is a Crime*, N.Y. TIMES, May 30, 2003, at A27 (discussing the passage of the Reducing Americans' Vulnerability to Ecstasy or RAVE Bill in April 2003), available at LEXIS, News Library, N.Y. Times File, 2003 WL 56604591 ; Patrick Timmons, *Bush Official Visits Texas to Discuss War on Drugs*, U. WIRE (U. Texas-Austin), June 27, 2002, available at LEXIS, News Library, University Wire File; Will Weissert, *U.S. Drug Czar Says Homeland Security Department Will Revitalize the Drug War*, ASSOCIATED PRESS, Dec. 5, 2002 (detailing the nexus between the drug trade and international terrorism, according to President Bush and Commissioner of Narcotics John P. Walters). President Bush is not the first President to tie the war on drugs to concerns about national security. During his tenure, President Ronald Reagan endorsed a National Security Decision Directive, which categorized drug traffickers as a national security threat and authorized the use of the national security regime to combat drug trafficking. Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 397 (1995). As both "wars" continue, the international military offensive against terror may continue to influence domestic "drug war" policies. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 204, 237 (2000) (discussing the nexus between the Vietnam War and domestic "wars" against poverty, misery, disease, and ignorance and President Lyndon Johnson's characterization of the Voting Rights Act "in the rhetoric of militarism"); MICHAEL S. SHERRY, *IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S* (1995)

the "war on drugs," the war on terror has renewed interest in U.S. domestic drug policies.<sup>2</sup> The White House has promoted the most recent National Drug Control Strategy as a compassionate approach, focused on treatment and prevention rather than enforcement.<sup>3</sup> Critics charge, however, that notwithstanding "the shiny new wrapping paper, this is the same old failed and racially biased drug policy."<sup>4</sup>

Illicit drug use presents a difficult problem with many competing aims. Effective strategies should guard against the societal harms associated with drug culture, promote the prevention of drug dependence, and assist current users in overcoming their addiction to lead productive lives. By some accounts, the existing federal drug sentencing scheme fails to achieve these objectives and has proven unsuccessful. Federal sentencing laws arguably communicate prohibitionist goals,<sup>5</sup> though they operate in a climate of persistent drug addiction.<sup>6</sup> Some scholars charge that mandatory

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(connecting U.S. "war" efforts abroad to changes in domestic policies, culture, politics, and art).

2. See *supra* note 1.

3. See, e.g., *Bush Seeks a 25% Drop in Drug Abuse*, *supra* note 1, available at LEXIS, News Library, Deseret News File; 2002 WL 11576063 (reporting that the new policy would use "armies of compassion" via faith-based organizations to communicate to drug addicts that "[w]e love you. We love you so much we're going to convince you not to use drugs in the future."); Gerstenzang, *supra* note 1 (quoting President Bush: "We're determined . . . to provide addicts with effective and compassionate drug treatment"); Hemmer, *supra* note 1 (quoting President Bush: "We must aggressively promote drug treatment. Because a nation that is tough on drugs must also be compassionate to those addicted to drugs."). This approach recalls President Bush's campaign, in which he termed himself a "compassionate conservative." See Dan Balz, *Bush Claims GOP Nomination; Change in "Tone of Washington" is Vowed; Reforms and Tax Cuts Pledged*, WASH. POST, Aug. 4, 2000, at A01, available at LEXIS, News Library, Wash. Post File, 2000 WL 19622564.

4. Milbank & Thompson, *supra* note 1 (quoting Rep. John Conyers, Jr. (D-Mich.)); see also *Bush Seeks a 25% Drop in Drug Abuse*, *supra* note 1, available at LEXIS, News Library, Deseret News File; 2002 WL 11576063 (quoting William McColl of the Drug Policy Alliance: "It's drug war on autopilot. It's not anything any different than what we've seen.").

5. See EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* 9 (1996); JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 7, 9, 125, 151-63, 167, 183, 222 (2001) (categorizing U.S. federal drug policy as a "zero-tolerance" approach).

6. See *infra* Part V.C.

minimum sentencing and sentencing guidelines have contributed to alarming incarceration rates<sup>7</sup> with a disproportionate impact on drug offenders comprising racial and ethnic minorities.<sup>8</sup> Without comprehensive reform, the existing federal sentencing scheme

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7. As they currently exist, federal sentencing schemes continue to result in the imprisonment of non-violent drug offenders at a higher rate and for longer prison terms than many violent offenders. GRAY, *supra* note 5, at 36 (criticizing federal laws and prison overcrowding, a situation that requires wardens to release violent offenders so that nonviolent drug offenders may serve their full sentences according to federal statutory mandate); Deborah Small, *The War on Drugs is a War on Racial Justice*, 68 SOC. RES. 896, 898 (alleging that our current drug policies “provide economic incentives for rural communities to embrace prisons as a form of economic development”); Allen J. Beck & Paige M. Harrison, *Prisoners in 2000*, Bureau of Justice Statistics (tbl. 19, detailing number of sentenced inmates in federal prisons by most serious offense, 1990, 1995, 1999), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf> (last visited Oct. 6, 2003). [hereinafter *Prisoners in 2000*].

8. As a consequence of federal sentencing legislation for drug offenses, a disproportionate number of young black men are currently imprisoned, many of them for drug offenses, and many of them now disenfranchised. See Small, *supra* note 7, at 897 (reporting that one of every three black men in his twenties is subject to criminal justice control and that while black people are only thirteen percent of all drug users, they comprise thirty-five percent of all people arrested for illegal drug possession, fifty-five percent of persons convicted, and seventy-four percent of all people sent to prison); *The Expanding Federal Prison Population*, The Sentencing Project (contending that more than two-thirds of federal prisoners are racial or ethnic minorities and that the percentage of felony drug prisoners has risen by approximately thirty-five percent in the last two decades), available at <http://www.sentencingproject.org/pdfs/1068.pdf> (last visited Oct. 6, 2003); *Facts About Prisons and Prisoners*, The Sentencing Project (citing that one in eight young black men and one in twenty-three Hispanic men between the ages of twenty-five and twenty-nine were imprisoned in mid-2002, as compared to one in sixty-three white males in the same age group; asserting that forty-five percent of prison inmates were black and eighteen percent were Hispanic in 2002; and providing the startling statistic that black men face a thirty-two percent chance of being imprisoned at some time in their lives, while Hispanic males have a seventeen percent chance of the same occurrence, and white males face only a six percent chance of serving time in prison during their lifetimes), available at <http://www.sentencingproject.org/pdfs/1035.pdf> (last visited Oct. 6, 2003); see also *infra* Part V.B. Accordingly, Small notes that disenfranchisement of convicted felons have “politically marginalized” communities of color. Small, *supra*, note 7, at 898. For a brief summary of felony disenfranchisement laws nationwide, see *Felony Disenfranchisement Laws in the United States*, The Sentencing Project, at <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Oct. 6, 2003).

deemphasizes hopes of approaching drug abuse also as a health and social crisis, rather than an exclusively criminal problem that additional incarceration will solve.<sup>9</sup>

Many scholars have approached the "drug war" from a rights-based perspective; they have critiqued federal drug sentencing statutes, particularly those imposing longer sentences on "crack" cocaine as compared to powder cocaine violations because of the resulting lopsided impact on racial minorities.<sup>10</sup> The Supreme Court has rejected various rights-based arguments, upholding questionable sentencing schemes.<sup>11</sup> With little hope for reform situated in such a

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9. See, e.g., GRAY, *supra* note 5, at 28–46. Mandatory minimums emphasize incarceration to the exclusion of reducing drug addiction to an appreciable degree, decreasing the frequency and amount of the drugs that addicts use, and abating the spread of disease. See Melody M. Heaps & James A. Swartz, *Toward a Rational Drug Policy: Setting New Priorities*, 1994 U. CHI. LEGAL F. 175, 190–93 (1994).

10. For a discussion of the crack-cocaine sentencing disparity in mandatory minimum legislation, see, for example, DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 141–46 (1999); Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613 (2000); Doris Marie Provine, Symposium, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823, 837 (1998); Andrew N. Sacher, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1154 (1997); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1287–90 (1995); Laura A. Wytsma, *Punishment for "Just Us"—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 GEO. MASON INDEP. L. REV. 473, 474 (1995). For a discussion of the crack-cocaine sentencing disparity in sentencing guidelines, see, e.g., Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994).

11. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that the Eighth Amendment cruel and unusual provision contains a proportionality principle only for capital cases but not for prison sentences and consequently upholding a mandatory life imprisonment term without the possibility of parole for cocaine possession); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding sentencing guidelines as constitutional); see also *infra* note 50 (discussing *Harmelin* in more detail). But see *United States v. Armstrong*, 517 U.S. 456, 478–80 (1996) (Stevens, J., dissenting) (acknowledging the "regime of extremely high penalties for the possession and distribution of so-called 'crack' cocaine" in mandatory minimum legislation and sentencing guidelines as well as the disproportionate impact such laws have had on blacks).

rights-based context, federal sentencing critics might employ an alternative framework. Considering the consequences of federal drug sentencing laws presents a viable option for critically assessing existing federal sentencing policies. To facilitate this consequentialist analysis, Part II reviews the historical underpinnings of federal mandatory minimums to help explain the development of federal drug control laws into contemporary mandatory minimum legislation and sentencing guidelines. This section then details existing federal sentencing laws.

Once armed with knowledge about the workings of federal drug sentencing, looking beyond the U.S. system provides one helpful way to evaluate American policies and their consequences. Part III investigates England's drug control legislation, including sentencing for drug offenses. While no panacea for the drug problem inheres in the British system, comparing both sentencing approaches uncovers worthwhile ideas and techniques for addressing drug addiction and its attendant harms, as the countries share similar values and political systems. With the parameters of each legal system outlined, Part IV compares the legislation of each system, while Part V evaluates some of the consequences of sentencing practices for drug offenses in both countries, arguing that the United States might benefit from looking critically at the English system.

Revising federal drug sentencing policy presents no small task. As such, this Article does not promote a radical approach, such as legalization, as the appropriate alternative for effectively reorienting the "drug war."<sup>12</sup> Instead, it seeks to rejuvenate the discussion about the problems federal sentencing practices have bred by adding a comparative consequentialist angle. Part VI concludes that U.S. legislators might learn from comparing our sentencing scheme to the British experience in particular, and more generally, that engaging in a comparative consequentialist enterprise puts forth an innovative method for considering some of the troubling aspects of federal drug sentencing laws in the United States.

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12. *But see, e.g.,* Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSPECTIVES, Autumn 1995, 175, 176 (1995) (using an economic perspective to argue for legalization of drugs). "The bottom line is that a relatively free market in drugs is likely to be vastly superior to the current policy of prohibition." *Id.* at 176.

## II. HISTORY OF FEDERAL DRUG CONTROL

Federal mandatory minimum sentences<sup>13</sup> and sentencing guidelines based upon them<sup>14</sup> have dramatically increased the incarceration rate in the United States and have resulted in a disproportionate rise in the imprisonment of drug offenders as compared to violent offenders.<sup>15</sup> These pieces of sentencing legislation grew out of an extensive trajectory, beginning with non-control of illicit drugs at the federal level. A brief review of the origin of the American "drug war" places mandatory minimums and sentencing guidelines in a broader social and historical context that will help to evaluate the consequences of the existing U.S. federal sentencing scheme and to facilitate a comparison to English sentencing policies.

### *A. The Beginnings of Drug Control in the United States*

From the late eighteenth century until the early twentieth century, the U.S. federal government did not criminalize the sale, manufacture, possession, or use of substances defined as illicit today.<sup>16</sup> Without federal legal controls or penal sanctions in place, medicine became one of the main vehicles through which Americans addressed drug use.<sup>17</sup> The lack of legal proscriptions on illicit drugs and medical ignorance as to the dangerous and addictive character of many narcotics, including morphine and cocaine, led to a notable drug addiction problem.<sup>18</sup> In 1906, Congress brought regulation of

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13. See 21 U.S.C. § 841(b)(1) (2001).

14. See 28 U.S.C. §§ 991–99 (1984) (creating United States Sentencing Commission); 18 U.S.C. § 3553 (1984) (detailing factors to consider in imposing a sentence); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2000) (Commission sentencing guidelines for drug manufacture, import, export); *id.* § 2D2.1 (U.S. Sentencing Commission guidelines for drug possession); *id.* app. (sentencing table used to determine guideline ranges).

15. See, e.g., Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 365–66 (1995) (arguing against the myopic emphasis on incarceration as the only remedy to contend with drug addiction and drug-related crime). See also *infra* Part V.A.

16. Sterling, *supra* note 1, at 391–92.

17. JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 17 (2001).

18. See BERTRAM ET AL., *supra* note 5, at 62–63; NOLAN, *supra* note 17, at 17; Sterling, *supra* note 1, at 392; see also GRAY, *supra* note 5, at 21. Gray notes that the generous use of narcotics to ease pain during the Civil War may



such drugs to the federal level with the Pure Food and Drug Act.<sup>19</sup> Additionally, anti-drug activists and missionaries pushed for stricter regulation of narcotics, specifically opium, in the early twentieth century.<sup>20</sup>

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have promoted addiction among soldiers, or "soldier's disease." *Id.* The inclusion of narcotics in widely available patent medicines, which were over-the-counter elixirs or snake oils used to self-medicate, also contributed to drug addiction. *Id.*; Sterling, *supra* note 1, at 392. The non-regulation of patent medicines allowed Coca-Cola to contain cocaine for several years at the end of the nineteenth century and Bayer Pharmaceuticals to sell heroin over the counter before introducing aspirin in 1899. GRAY, *supra* note 5, at 21; *see also* BERTRAM ET AL., *supra* note 5, at 61 (discussing unregulated patent medicines, including cigars, hypodermic injections, ointment, and morphine sold through the Sears Roebuck catalogue).

By the beginning of the twentieth century, about 250,000 people suffered from addiction to illicit substances. Sterling, *supra* note 1, at 392. This diverse group included people of all races and classes, *id.*, but had a disproportionate number of Civil War soldiers and agrarian housewives. GRAY, *supra* note 5, at 21. Despite the prevalence of drug addiction among various populations, the public perceived drug users as people of color, including black Americans and Mexican and Chinese immigrants. Sterling, *supra* note 1, at 392; *see* GRAY, *supra* note 5, at 20–21; NOLAN, *supra* note 17, at 22. In the Southern United States, whites identified blacks with cocaine addiction. BERTRAM ET AL., *supra* note 5, at 64; NOLAN, *supra* note 17, at 24–25; Sterling, *supra* note 1, at 392. Long-held racial intolerance and animosity, and ethnic stereotypes generated fear that black drug addicts would "attack white society" and that cocaine engendered Herculean qualities in blacks, making them legendarily invincible. BERTRAM ET AL., *supra* note 5, at 64; Sterling, *supra* note 1, at 392. The American public similarly stigmatized Chinese immigrants, who were linked to opium smoking. BERTRAM ET AL., *supra* note 5, at 64; Sterling, *supra* note 1, at 392. In fact, the Chinese were credited with attempting to "spread" the practice of opium smoking in an "effort to undermine American society." Sterling, *supra* note 1, at 392; *see also* BERTRAM ET AL., *supra* note 5, at 61–62. ("A small percentage of addicts—especially those who were black (in the South) or Chinese (in the West)—were considered social pariahs and were feared."). It was widely believed that drug use led to criminality, immorality, and death and that drug addiction threatened "America's moral superiority and progress." BERTRAM ET AL., *supra* note 5, at 64. These ideas and deep prejudices against minorities promoted racist anti-drug laws at the state and local level and contributed to some legislation at the federal level. *Id.*

19. 34 Stat. 768 (1906). This legislation required detailed labeling of all narcotic ingredients. *Id.*

20. BERTRAM ET AL., *supra* note 5, at 66; NOLAN, *supra* note 17, at 20–21. Concerns about opium use began just after the United States occupied the Philippines in 1898, when missionaries discovered rampant opium addiction among the Filipino people. BERTRAM ET AL., *supra* note 5, at 65; NOLAN,

Since then federal drug policies have continued to move away from a medical model and have become more oriented toward penal controls. During the 1930s, the federal government began to build the groundwork of the anti-drug criminal apparatus that exists today.<sup>21</sup> Congress established the Federal Bureau of Narcotics ("FBN") within the Treasury Department,<sup>22</sup> and President Hoover appointed Harry Anslinger as the first Commissioner of Narcotics, more popularly known as the "Drug Czar."<sup>23</sup> Anslinger supported the Marijuana Tax Act, passed in 1937, which taxed the medicinal use of marijuana and outlawed possession or sale of the drug for any other purpose.<sup>24</sup>

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*supra* note 17, at 20. The Harrison Act, which followed, had three aims: directing producers, distributors and purchasers of narcotics to register with the federal government; imposing a tax on registered parties on the sale or purchase of illicit substances; and limiting the legitimate dispensing of drugs to physician prescriptions issued "in good faith" and "in the course of [a doctor's] professional practice." BERTRAM ET AL., *supra* note 5, at 68; NOLAN, *supra* note 17, at 27. *See also* 63d Cong., CONG. REC. 3rd Sess., Chap. 1 (Public Act No. 223), 785–90.

The Supreme Court initially resisted understanding the largely administrative Harrison Act as authorizing the arrest of doctors for maintaining addicts or of addicts for illegal possession of drugs. *United States v. Jin Fuey Moy*, 241 U.S. 402 (1916); *see also* BERTRAM ET AL., *supra* note 5, at 69; NOLAN, *supra* note 17, at 28 (discussing the *Jin Fuey Moy* case). Eventually, however, the Court relented, ruling that physicians could not legally prescribe drugs to maintain addicts because such a custom was not legitimately within the course of professional practice. *Webb v. United States*, 249 U.S. 96, 99–100 (1919). ("[T]o call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative.")

21. BERTRAM ET AL., *supra* note 5, at 78.

22. *Id.* at 79; NOLAN, *supra* note 17, at 32. One charge of the FBN was to oversee narcotics farms with help from the Department of Justice. NOLAN, *supra* note 17, at 32. Although these farms were originally intended to provide treatment to addicts who were now unable to procure maintenance drugs via medical prescriptions, "they ended up being nothing more than glorified prisons for drug addicts." *Id.*; *see also* BERTRAM ET AL., *supra* note 5, at 77 (asserting that one of the two narcotics farms was eventually transformed into a treatment facility when steel bars were removed from cells in the 1960s).

23. BERTRAM ET AL., *supra* note 5, at 79; NOLAN, *supra* note 17, at 32–33.

24. BERTRAM ET AL., *supra* note 5, at 81. Deliberately inflated taxes on medical marijuana (approximately \$100 per pound, while actually costing only \$2.00 per pound) eliminated the use of marijuana in the medical context. *Id.* Anslinger also promoted the belief that marijuana caused crime. *Id.* Objections of critics, such as Senator Coffee (D-Washington), who suggested

The conclusion of World War II and the dawn of McCarthyism made the atmosphere ripe for additional sanctions on drug users and marked the dawn of the mandatory minimum legislative scheme in place today.<sup>25</sup> According to Nolan, “[d]uring the World War II and postwar period, federal narcotics laws [continued] to ignore the medical perspective and [became] even more severe than before.”<sup>26</sup> A 1951 federal law, imposing mandatory minimum sentences on drug offenders for the first time, reflected this trend away from medical rhetoric toward “moralism.”<sup>27</sup> The Narcotic Control Act of 1956 continued this shift, increasing the mandatory minimum penalties established five years earlier.<sup>28</sup>

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that taxes on drugs would create a black market and that current FBN policy denied effective treatment to drug addicts, fell on deaf ears. *Id.* at 83.

25. *Id.* at 84.

26. NOLAN, *supra* note 17, at 34.

27. Boggs Act of 1951, 21 U.S.C. § 174 (1952) (repealed by Pub. L. No. 91-513, § 1101(a)(2), (4), 84 Stat. 1291 (1970)) [hereinafter Boggs Act]. First time drug possession offenders faced a mandatory two-year minimum sentence, while second time offenders faced five to ten years, and third time offenders would have to serve ten to twenty years in prison. *Id.* The twentieth century regulation of birth control followed a similar path in which “moral” undertones supplanted a previously “medical” approach. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 498–509 (1961) (dismissing on justiciability grounds an appeal from the Supreme Court of Errors of Connecticut, which held applicable to married people a statute that proscribed the use of contraceptives, even in cases where pregnancy posed a severe risk of harm to a married woman’s health and vitality, and prohibited doctors from disseminating information about birth control to such couples) (decided with *Buxton v. Ullman*); *Tileston v. Ullman*, 318 U.S. 44, 45–46 (1943) (dismissing for lack of standing an appeal from the Supreme Court of Errors of Connecticut, which held applicable to physicians a state statute that prohibited doctors from prescribing birth control in cases where pregnancy endangered a woman’s life or health and finding that abstinence provides a viable alternative to birth control for married couples).

28. Narcotics Control Act of 1956, 8 U.S.C. §§ 1182, 1251 (Supp. IV 1953–1957); 18 U.S.C. §§ 1401–07 (repealed by Pub. L. No. 91-513, § 1101(b)(1)(A), 84 Stat. 1292 (1970)) (Supp. IV 1953–1957); 21 U.S.C. §§ 174 (repealed by Pub. L. No. 91-513, § 1101(a)(2), (4), 84 Stat. 1291 (1970)), 176a, 176b, 184a (all repealed by Pub. L. No. 91-513, § 1101(a)(2), (9), 84 Stat. 1291, 1292 (1970)), 198 (repealed by Pub. L. No. 91-513, § 1101(a)(4), 84 Stat. 1291 (1970)); 26 U.S.C. §§ 4744, 4755, 7237 (repealed by Pub. L. No. 91-513, § 1101(b)(4)(A), 84 Stat. 1292 (1970)) (Supp. IV 1953–1957), 7607 (repealed by Pub. L. No. 98-473, § 320(b), 98 Stat. 2056 (1984), Pub. L. No. 98-573, § 213(b)(1), 98 Stat. 2988 (1984), 7608 (Supp. 1953–1957)). Congress increased the Boggs Act sentence maximums from ten to twenty

Until Richard Nixon, presidents generally did not involve themselves actively in drug control policy.<sup>29</sup> According to Bertram, however, President Nixon became the first president to make the drug problem a "central national-policy concern"—a preeminent position that the drug war continues to hold more than three decades later.<sup>30</sup> Bertram suggests that during his 1968 presidential campaign Nixon laid the foundation for the "drug war" by exploiting the nation's discomfort with "urban riots" and "rising street-crime rates,"<sup>31</sup> while Reichley points out that Nixon's staff members prodded Presidential hopeful Nixon to reach out to "black militants" and unlikely "liberals."<sup>32</sup> Powe argues that through this "law and order" focus, President Nixon added an unspoken racial element to his political campaign<sup>33</sup> and successfully politicized the Supreme Court by voicing his opposition to the expansion of criminal rights under Chief Justice Warren.<sup>34</sup> Once in the White House, Bertram notes that Nixon steadfastly held to his fixation on the national drug *and* crime problem, always insisting they held an inextricable link.<sup>35</sup>

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years for second time offenders and twenty to forty years for third time offenders. 26 U.S.C. § 7237(a) (1956).

29. BERTRAM ET AL., *supra* note 5, at 104.

30. *Id.*; See also GRAY, *supra* note 5, at 27 (noting that Nixon was the first President to declare a war on drugs).

31. BERTRAM ET AL., *supra* note 5, at 105; see also MIKE GRAY, DRUG CRAZY 93–94 (1998) [hereinafter GRAY, DRUG CRAZY] (discussing Nixon's role in shifting the drug war into "overdrive"); A. JAMES REICHLEY, CONSERVATIVES IN AN AGE OF CHANGE: THE NIXON AND FORD ADMINISTRATIONS 54 (1981) (discussing a campaign radio talk in which Nixon discussed "the spread of violence and disorder").

32. REICHLEY, *supra* note 31, at 54.

33. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 475 (2000); GARRY WILLS, NIXON AGONISTES: THE CRISIS OF THE SELF-MADE MAN 51–52 (1973) ("The desire for 'law and order' is nothing so simple as a code word for racism; it is a cry, as things begin to break up, for stability, for stopping history in mid-dissolution."); see also RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE *passim* (2001) (noting various indicators that crime remained at the top of President Nixon's personal agenda during his presidency). In April 1972, President Nixon indicated that "[c]rime with particular emphasis on drugs" should be the third major priority issue for winning the presidential campaign that year. *Id.* at 467.

34. *Id.* at 410, 473; WILLS, *supra* note 33, at 15 (discussing "[w]hat . . . Nixon mean[s] when he says *some* of the courts have weakened the forces of law").

35. BERTRAM ET AL., *supra* note 5, at 105. Notably, Nixon claimed victory and deescalated the drug war after the 1972 Congressional election. Despite

Bertram further notes that the President directly communicated his concerns about drug addiction to the public, to Congress, and to the media—indelibly denoting drug dealing and *drug addiction* as synonymous with crime.<sup>36</sup> Nixon also supported the Comprehensive Drug Abuse Prevention and Control Act of 1970, which merged various federal anti-drug statutes into one law and established a schedule of controlled substances.<sup>37</sup>

While President Nixon may have been the first President to bring modern-day national attention to the drug problem, President Ronald Reagan contributed to the rhetoric. In June 1982, he declared “war”: “We’re rejecting the helpless attitude that drug use is so rampant that we’re defenseless to do anything about it. We’re taking down the surrender flag that has flown over so many drug efforts; we’re running up a battle flag. We can fight the drug problem, and we can win.”<sup>38</sup> President Reagan called for total abstinence, a campaign made famous through the First Lady’s “Just Say No”

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moving the drug war from the forefront of his domestic policy agenda, the tools the Nixon administration put in place and the high “drug war” budgetary allocations remained intact. *Id.* at 108; *see also* GRAY, DRUG CRAZY, *supra* note 31, at 95 (suggesting that erroneously calculated and astronomically inflated statistics on the number of drug addicts contributed to the downshift in the drug war).

36. BERTRAM ET AL., *supra* note 5, at 105–06; *see* GRAY, DRUG CRAZY, *supra* note 31, at 94. Some charge that the Nixon White House resorted to grossly exaggerated drug addiction statistics, claiming that in just two years (from 1969–1971), the number of heroin abusers grew tenfold. BERTRAM ET AL., *supra* note 5, at 106; *see* GRAY, DRUG CRAZY, *supra* note 31, at 95 (describing this “fabrication” in detail).

37. 21 U.S.C. §§ 801–966 (1970). This legislation intensified domestic law enforcement. *Id.* §§ 951–55, 960–62. In addition to the legislation, Nixon created the Office of Drug Abuse Law Enforcement when a division of the Justice Department resisted Nixon’s edict to target street-level dealers instead of “kingpins.” BERTRAM ET AL., *supra* note 5, at 107. Eventually, Nixon consolidated various drug-related agencies into the Drug Enforcement Agency, the agency with primary responsibility for enforcing federal drug laws today. *Id.* at 107–08; GRAY, DRUG CRAZY, *supra* note 31, at 96 (describing the powers of the DEA).

38. Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions, PUB. PAPERS (June 24, 1982); *see also* David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH. L. REV. 151, 165 (1993) (suggesting Reagan declared the war on drugs to deflect attention from the recession and redirect it toward the national problem on the eve of midterm Congressional elections).

promotion.<sup>39</sup> During Reagan's presidency, Congress showed its support for the "war on drugs" by passing the Comprehensive Crime Control Act, which increased sentence lengths for drug offenders.<sup>40</sup>

### *B. Federal Mandatory Minimum Sentencing*<sup>41</sup>

In 1985, the *New York Times* broke the "crack story," reporting that the potent drug allowed for an inexpensive and intense high that offered a safer alternative to drugs requiring intravenous injection.<sup>42</sup> Because of its low price, crack became a "blue-collar" drug with mostly white users,<sup>43</sup> although news images of "urban chaos" and gang warfare suggested that inner city minorities comprised the bulk of crack, or cocaine base, addicts.<sup>44</sup> When Len Bias, a promising young basketball star slated to play for the Boston Celtics, died of

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39. See BERTRAM ET AL., *supra* note 5, at 110–12; see also LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 25, 813 (2000) (discussing President Reagan's domestic drug policy).

40. Pub. L. No. 98-473, 98 Stat. 1976 (1984) (amending 21 U.S.C. § 841).

41. Federal sentencing laws and practices remain the narrow focus of this Paper. A large part of the "war on drugs," however, has been interdiction and international efforts to control drug supply. See, e.g., *The Anti-Drug Effort in the Americas and the Implementation of the Western Hemisphere Drug Elimination Act: Hearing Before the House Subcomm. on the W. Hemisphere of the Comm. on Int'l Relations*, 106th Cong. (1999). These "drug war" policies have been charged with having negative transnational effects. See, e.g., GRAY, *supra* note 5, at 80, 88–93.

42. Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1, available at LEXIS, News Library, N.Y. Times File.

43. GRAY, *DRUG CRAZY*, *supra* note 31, at 107.

44. *Id.*; see William Overend, *Adventures in the Drug Trade: How 4,000 Colombians Took the 'Champagne Drug' to the Inner City and Turned L.A. Into a Cocaine Capital*, L.A. TIMES, May 7, 1989, at 14, 38 ("Just as the white-user population was beginning to peak . . . [cocaine] found its way to the ghetto and . . . black gangs. With the spread of crack cocaine in the inner city, a new and poorer user population was created . . . overnight in the black community . . . . Although many white users turned to crack, it became most popular among inner-city blacks.").

cocaine poisoning,<sup>45</sup> his sudden death, and the dawn of crack, stimulated support for immediate and stiff anti-drug measures.<sup>46</sup>

Congress responded with the Anti-Drug Abuse Act of 1986.<sup>47</sup> This legislation eliminated the federal judicial flexibility to customize sentences based on the individual circumstances of each case.<sup>48</sup> Before this law, judges possessed great authority in sentencing: They could choose the appropriate length of incarceration or place a drug offender on probation or parole.<sup>49</sup> The 1986 Act, however, adopted mandatory minimum sentences based on limited criteria.<sup>50</sup> This removal of discretion fell in line with the aims of the Sentencing Reform Act of 1984,<sup>51</sup> designed, in part, to "avoid[] unwarranted sentencing disparities among defendants with similar records . . . found guilty of similar criminal conduct."<sup>52</sup> Prior

45. *Bias' Killer: Cocaine*, CHI. TRIB., June 25, 1986, at C1, available at LEXIS, News Library, Chi Trib. File, 1986 WL 2679260; Rick Reilly, *When the Cheers Turned to Tears*, SPORTS ILLUSTRATED, July 14, 1986, at 28, available at LEXIS, News Library, Sports Illustrated File; *9 Days in June; Drugs Claimed Two Sports Stars—and 149 Others*, LIFE, Jan. 1987, at 83.

46. GRAY, DRUG CRAZY, *supra* note 31, at 107–08; Sterling, *supra* note 1, at 408; see Jonathan Fuerbringer, *Making the Punishment Fit the House's Politics*, N.Y. TIMES, Sept. 14, 1986, at 4, available at LEXIS, News Library, N.Y. Times File; David Reyes, *Deaths of Sports Stars Raise Awareness at Drug Centers*, L.A. TIMES, July 1, 1986, at Metro 2.

47. 21 U.S.C. §§ 841–69 (1988).

48. *E.g.*, Spencer, *supra* note 15, at 343.

49. *Id.*

50. Under the law, a judge could only consider the weight and kind of drug involved in the offense and the defendant's criminal history. 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (1988). The 1986 Act also removed the possibility of parole or probation for most drug offenses. *Id.* § 841(b)(1)(A), (b)(1)(B), (b)(1)(C). In addition, this law extended imprisonment terms through mandatory minimum sentences, *id.* § 841(b)(1)(A), (b)(1)(B), and appreciably increased fines. *Id.* § 841(b)(1)(D), (b)(2), (b)(3).

The Supreme Court upheld the use of mandatory minimum sentences in *Harmelin v. Michigan*. 501 U.S. 957, 962 (1991). Justice Scalia wrote for the court, holding that the constitutional requirement of individualized sentencing is limited to capital cases. *Id.* at 996. While the Court recognized that life imprisonment without the possibility of parole constituted the second most severe sentence possible, retroactive legislation or executive clemency offered reasonable possibilities for reduction in a life sentence. *Id.* Individualized sentencing requirements do not extend to mandatory minimum sentencing regimes for drug offenses. *Id.*

51. 28 U.S.C. § 991–998 (1984).

52. *Id.* § 991(b)(1)(B); see JOSEPH C. CALPIN ET AL., ANALYTIC BASIS FOR THE FORMULATION OF SENTENCING POLICY 1 (1982) ("Sentencing guidelines

to these laws, a vast amount of criticism emerged raising fairness and due process concerns associated with judicial discretion in sentencing and challenging the disproportionate impact on people of color.<sup>53</sup>

The 1986 Act delineated mandatory minimum imprisonment terms based only on the weight and type of the particular drug involved in the offense.<sup>54</sup> For example, a person convicted of possessing one kilo of heroin, five kilos of cocaine, or fifty grams of crack with the intent to distribute faced a mandatory, non-negotiable prison term of ten years to life.<sup>55</sup> According to the Sentencing Project, this provision instituted "a 100:1 quantity ratio between the amount of crack and powder cocaine needed to trigger certain

provide a mechanism for making the sentencing decisionmaking process more open, more visible, and more equitable by establishing an explicit and objective basis for comparing offenders and the offenses they have committed.").

53. See, e.g., WILLARD GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* 32–34 (1974) (discussing racial bias among judges); EDWARD H. LEVI, *THE USE OF DISCRETION IN THE LEGAL SYSTEM* 22, 23 (1978) (1978 Herman Phleger Lecture, April 27, 1978, Stanford Law School) (suggesting that broad discretion in the courts "does not recognize sufficiently policy matters and proper political considerations"); Albert Reiss, Jr., *Discretionary Justice in the United States*, in *THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW* 54 (1978) (discussing "*de facto* discrimination" where "[t]he poor and minorities" were more likely to suffer under discretionary sentencing); see also MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) (arguing against "the almost wholly unchecked and sweeping powers we [gave] to judges in the fashioning of sentences" as "terrifying and intolerable for a society that professes devotion to the rule of law"). Cole argues that a just version of criminal law requires some degree of discretion, "[t]he open-ended character of 'substantive justice' mechanisms poses a constant threat to formal equality." COLE, *supra* note 10, at 185. Cole asserts that discretion within a criminal system "is troubling" because

[i]t allows race and class stereotypes to guide decisionmakers. And it fuels distrust and cynicism among the populace, who are asked to accept on blind faith that juries and law enforcement officials [or judges in the pre-sentencing guidelines era] are using their discretion fairly, even as the system produces widely disparate results.

*Id.* at 186. But see, e.g., *Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279 (1999) (debate between Judge Stanley Sporkin and Congressman Asa Hutchinson) (presenting both sides).

54. 21 U.S.C. § 841(b)(1)(A), (b)(1)(B) (1988).

55. *Id.* § 841(b)(1)(A). If death or serious bodily injury resulted, the offender faced double the mandatory incarceration term. *Id.*



mandatory minimum sentences for [drug] trafficking.”<sup>56</sup> The law also imposed mandatory minimums on drug offenders possessing much smaller quantities of drugs with the intent to distribute,<sup>57</sup> as well as for simple drug possession.<sup>58</sup> Sentences included a mandatory \$1,000 fine and a permissive imprisonment of up to one year for a first simple possession offense, a minimum of fifteen days and up to two years in prison for a second offense, and ninety days to three years incarceration for a third such offense.<sup>59</sup> In addition, the law criminalized the distribution of illegal drugs within one thousand feet of a vocational school or any college, junior college, or university.<sup>60</sup> Offenders of this provision faced a minimum of forty years’ imprisonment.<sup>61</sup>

The 1988 Congressional amendments enhanced the mandatory minimum regime adopted two years earlier. Most troubling, Congress increased penalties for “certain serious crack possession offenses,” while retaining the original penalties for possession of all

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56. *Crack Cocaine Sentencing Policy: Unjustified and Unreasonable*, The Sentencing Project, available at <http://www.sentencingproject.org/pdfs/1003.pdf> (last visited Oct. 6, 2003). See *supra* note 10 for literature criticizing this disparity and other instances of unequal treatment for crack versus powder cocaine offenders.

57. 21 U.S.C. § 841(b)(1)(B). A person confronted five to forty years of incarceration for possessing one hundred grams of heroin, a half a kilo of cocaine, or five grams of crack with the intent to distribute. *Id.* Again, if death or serious bodily injury resulted, the term mandatory minimum term jumped to twenty years, capped at life in prison. *Id.*

58. *Id.* § 844(a).

59. *Id.* The law also imposed a mandatory \$2,500 fine for a second offense, \$5,000 for a third offense. *Id.*

60. *Id.* § 860(a). Federal laws had already criminalized the same activity within one thousand feet of all elementary and secondary schools, playgrounds, or public housing facilities. *Id.* § 845a (1970) (current version at *id.* § 860). The law also criminalized the manufacture and possession of controlled substances with intent to distribute in the same locations. *Id.* § 860(a) (1988).

61. *Id.* § 860(a). Offenders faced twice the maximum penalty authorized by § 841(b), which is twenty years to life. *Id.* § 841(b). As a second offense, an offender faced sixty years to life in prison. *Id.* § 860(b). The law also imposed a mandatory life term on any drug offender whose third drug violation involved distributing an illegal drug to a person younger than twenty-one; distributing controlled substances near educational institutions, public housing, youth centers, swimming pools, or video arcades; or using youth younger than eighteen to violate any federal drug law. *Id.* § 860(b)–(c).

other controlled substances.<sup>62</sup> The amendments *required* at least five years' imprisonment for a first-time crack offender who possessed more than five grams of the drug, while a first time offender possessing more than five grams of heroin or cocaine *could* be imprisoned *up to one year*.<sup>63</sup> This sentencing disparity has been the subject of sharp and continued criticism.<sup>64</sup>

### C. Sentencing Guidelines

Before the federal drug legislation overhaul began in 1986, Congress passed the Sentencing Reform Act of 1984 to combat "disparate sentencing practices for similarly situated defendants

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62. *Id.* § 844(a) (1988).

63. *Id.* A second-time crack offender could face five to twenty years' imprisonment for possessing just more than three grams of crack, while a third-time offender faced the same sentence for possession of *just one* gram. *Id.*

64. *See supra* note 10 (criticizing crack-cocaine sentencing disparity in mandatory minimums). In the Violent Crime Control and Law Enforcement Act of 1994, Congress finally responded to widespread criticism of comparatively drastic sentences for crack offenses by directing the Sentencing Commission to conduct a study comparing various imprisonment sentences for different forms of cocaine. Pub. L. No. 103-322, § 280006, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13701-14223 (1994)) (cocaine penalty study). Congress also solicited recommendations for retaining or changing disparate sentences for crack and cocaine. *Id.* The report concluded that the 100 to one ratio disparity between crack and powder cocaine sentences in the 1986 Act proved unwarranted, as did the particularly long sentences for "special crack offenses" in the 1988 amendments. *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iii (Feb. 1995), available at <http://www.ussc.gov/crack/execsum.pdf> (last visited Oct. 6, 2003); *see also* COLE, *supra* note 10, at 143; William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1234-35 (1996); Press Release, American Civil Liberties Union, Freedom Network, A Brave First Step: ACLU Commends U.S. Sentencing Commission for Equitable Decision; Says Congress Must Now End Disparity Between Crack, Powder Cocaine (Apr. 11, 1995), at <http://archive.aclu.org/news/n041195a.html> (last visited Oct. 6, 2003); Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Submits New Recommendations on Cocaine Sentencing (Apr. 29, 1997), at <http://www.ussc.gov/press/4press.htm> (last visited Oct. 6, 2003). Congress, however, has not changed the sentencing disparity between crack and cocaine. Jesseca R.F. Grassley, *Federal Cocaine Sentencing Policy Following the 1995 Cocaine Report: Issues of Fairness and Just Punishment*, 21 HAMLINE L. REV. 347, 370-71 (1998).

among federal judges.”<sup>65</sup> This Act resulted in the creation of the U.S. Sentencing Commission, charged with creating federal sentencing guidelines that would embrace deterrence and incapacitation.<sup>66</sup> Although guidelines for drug violations did not take force until 1987, the Commission started developing the guidelines before the Anti-Drug Abuse Act of 1986 became law.<sup>67</sup> Consequently, Spencer argues, the Commission encountered a dilemma: in order to set guidelines consistent with federal laws previously in existence, the Commission had to consider mandatory minimum legislation in setting its recommended sentencing ranges.<sup>68</sup>

In most respects, guidelines for federal drug law violations resemble the mandatory minimum scheme.<sup>69</sup> For instance, a “level 38” drug violation is one in which someone dies or suffers serious

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65. Spencer, *supra* note 15, at 347–48; *see supra* note 52 and accompanying text.

66. 28 U.S.C. §§ 991–998 (1984); *see* 18 U.S.C. § 3553(a)(2) (1984) (detailing the factors to be considered in assessing “the need for the sentence imposed”). While judges may not depart from the sentence ranges set forth in the guidelines, the ranges should “maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” 28 U.S.C. § 991(b)(1)(B).

67. The Sentencing Reform Act created the Commission in 1984. *Id.* §§ 991–998.

68. Spencer, *supra* note 15, at 351. Under the guidelines, Federal judges consult a table to sentence offenders. The table includes two variables: the gravity of the crime and the defendant’s criminal history. *See* U.S. SENTENCING GUIDELINES MANUAL app. (2000). Because the guidelines require the court to consider a defendant’s criminal history, instead of only the type and amount of the drug involved, they might be characterized as somewhat more sympathetic. The Sentencing Reform Act also allows for departure from the guidelines if certain mitigating circumstances obtain; for example, if the defendant provides “substantial assistance in the investigation or prosecution of another person who has committed an offense.” 28 U.S.C. § 994 (n) (1984). Few low-level drug offenders possess knowledge useful enough to avail themselves of this reduction.

69. The Supreme Court upheld the sentencing guidelines in *Mistretta v. United States*, 488 U.S. 361, 412 (1989). Justice Blackmun wrote for the Court that Congress’ allocation of authority to the U.S. Sentencing Commission in order to determine sentencing guidelines was “sufficiently specific and detailed to meet constitutional requirements.” *Id.* at 374. The Court also rejected *Mistretta*’s contention that the Sentencing Reform Act violated separation of powers principles. *Id.* at 390.

bodily injury from using an illicit drug that the offender distributed.<sup>70</sup> Mandatory minimum legislation prescribed a minimum sentence of twenty years,<sup>71</sup> while the guidelines propose ranges beginning with nineteen years, almost twenty-one years, or just more than twenty-four years for this same offense, depending on the offender's prior criminal history.<sup>72</sup>

The guidelines also approximate mandatory minimums for possession convictions,<sup>73</sup> although they delineate among various drugs in addition to singling out crack from all other substances.<sup>74</sup> While in some cases the guideline ranges provide imprisonment terms that differ from mandatory minimums, they largely converge.<sup>75</sup> For instance, mandatory minimum legislation suggests permissive ranges of up to one year imprisonment for the first non-crack possession offense, fifteen days to two years for the second offense, and ninety days to three years for a third offense.<sup>76</sup> The guidelines advise relatively similar prison terms: between zero and six months for a first, second, or third offense involving possession of "low-grade" controlled substances, which might differ slightly from mandatory minimum sentences, depending on the judge in each case.<sup>77</sup> Unlike mandatory minimums for crack that require five years' imprisonment in certain circumstances,<sup>78</sup> the guidelines suggest either no incarceration or up to one year depending on the defendant's prior crack possession history.<sup>79</sup> This difference,

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70. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2000). This provision also applies for intent to distribute. *Id.*

71. 21 U.S.C. § 841(b) (1988).

72. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2000).

73. *Id.* § 2D2.1; *see also id.* app.

74. *Id.* § 2D2.1(a). While the Guidelines do differentiate between many different types of drugs based on potential harm, they impose the same suggested sentence for drug trafficking on offenders possessing more than five grams of *crack*, while not advocating the same for offenders possessing more than five grams of any other substance. *Id.* § 2D2.1(b). The Guidelines still reserve special treatment for crack. *Id.*

75. *See id.* § 2D2.1 (providing offense level for possession of various drugs); *id.* app. (indicating sentence guideline based on offense level).

76. 21 U.S.C. § 844(a) (1988).

77. U.S. SENTENCING GUIDELINES MANUAL § 2D2.1(a)(3); *id.* app.

78. 21 U.S.C. § 844(a) (1988).

79. U.S. SENTENCING GUIDELINES MANUAL § 2D2.1 (a)(1); *id.* app.

however, still penalizes crack offenders to a greater degree than powder cocaine offenders.<sup>80</sup>

#### D. Additional Sentencing Legislation

In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act,<sup>81</sup> which combined increased imprisonment terms<sup>82</sup> with alternative punishment,<sup>83</sup> drug prevention<sup>84</sup> and treatment,<sup>85</sup> and an "escape valve" allowing certain drug offenders to avoid mandatory minimums.<sup>86</sup> The 1994 Act added specific mandatory minimum sentences for drug crimes involving guns.<sup>87</sup> The

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80. See, e.g., Leitman, *supra* note 10, at 215–19 (discussing the disparate impact of the federal sentencing guidelines between crack and cocaine).

81. 42 U.S.C. §§ 13701–14223 (1994).

82. *Id.* §§ 14051–52; 18 U.S.C. § 3559(c) (1994) (creating the three strikes provision). The three strikes provision allows serious drug offenses to count as one of the prior strikes leading to life imprisonment. *Id.* § 3559(c)(1)(A)(ii).

83. 42 U.S.C. § 13725 (creating correctional job training and placement programs).

84. *Id.* § 13741–77; *id.* § 13862 (designating prosecutorial funds for violence prevention programs); *id.* § 14061 (authorizing grants to reduce or prevent juvenile drug activity in public or low-income housing); *id.* § 14222 (directing the Attorney General to consult with the Secretary of the Department of Health and Human Services in establishing and carrying out prevention programs); *id.* § 14192 (creating a National Commission on Crime Control and Prevention). The Commission is charged with developing proposals for preventing crime, including compiling "a comprehensive study of the economic and social factors leading to or contributing to crime and violence, including the causes of illicit drug use and other substance abuse." *Id.* § 14193.

85. *Id.* § 13742(a)(4) (creating the "ounce of prevention grant program," supporting "treatment programs to reduce substance abuse"); *id.* § 13751(a)(2)(A) (designating grants promoting "treatment, and rehabilitation programs to prevent . . . the use and sale of illegal drugs by juveniles"); *id.* § 13773(a) (authorizing grants to promote community substance abuse treatment facilities); *id.* § 14222 (directing the Attorney General to consult with the Secretary of the Department of Health and Human Services in establishing and carrying out substance abuse treatment programs).

86. 18 U.S.C. § 3553(f) (1994).

87. See, e.g., *id.* § 924(c)–(e), (h), (j)–(o); Pub. L. No. 103-322, § 110513, 108 Stat. 2019 (1994). Part of the 1994 crime bill, known as the Drive-by Shooting Prevention Act of 1994, imposed a mandatory minimum sentence of twenty-five years on drug offenders who fire a gun into a group of people intending to "intimidate, harass, injure, or maim" members of the crowd in order to further or evade detection for a major drug offense and who cause

legislation also continued to impose fixed minimum sentences for drug possession and distribution.<sup>88</sup> The 1994 law also created a federal "three strikes" provision.<sup>89</sup> This subsection imposed a mandatory life imprisonment term for a defendant convicted of a violent felony under federal law with two previous violent felonies, two serious drug convictions, or one of each under federal or state law.<sup>90</sup> Most notably, the 1994 law limited the applicability of mandatory minimums in certain circumstances for certain non-violent drug offenders.<sup>91</sup>

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"grave risk to any human life" in the process. Pub. L. No. 103-322 § 60008(b) (codified as amended at 18 U.S.C. § 36(b)(1) (1994)).

88. For example, the law doubled sentences authorized under 18 U.S.C. § 841(b) for offenders who distributed drugs within one thousand feet of a public housing authority. 21 U.S.C. § 860(a) (1994). Offenders who used children to distribute drugs near schools and playgrounds faced up to sixty years to life in prison. *Id.* § 860(c) (1994). The law also directed the Sentencing Commission to boost sentences for possessing, smuggling, or distributing drugs in relation to a federal prison. 42 U.S.C. § 14052 (1994).

89. 18 U.S.C. § 3559(c) (1994).

90. *Id.* § 3559(c)(1)(A). Because state law controls the prosecution of most violent felonies, this provision may not gravely impact a large number of violent offenders with prior drug convictions. Note, however, that the definition of "serious violent felony" is quite broad and includes the following: murder, manslaughter, assault with intent to commit murder, assault with intent to commit rape, aggravated sexual abuse and sexual abuse, abusive sexual contact, kidnapping, aircraft piracy, robbery, carjacking, extortion, arson, firearms use, firearms possession, or any other offense punishable by a maximum term of ten years' imprisonment or more that has as an element the use, attempted use, or threatened use of physical force. *Id.* § 3559(c)(2)(F).

91. *Id.* § 3553(f). In order to benefit from this provision, the defendant must meet various requirements. First, the offender may not have more than one prior conviction. *Id.* § 3553(f)(1). Second, the drug offense must be non-violent, without any credible threat of violence or possession of a firearm or other dangerous weapon. *Id.* § 3553(f)(2). Third, the drug offense must not have resulted in death or serious bodily harm to any person. *Id.* § 3553(f)(3). Fourth, the defendant must not have been a ringleader in the drug offense or involved in a continuing criminal enterprise. *Id.* § 3553(f)(4). Finally, the defendant must assist the government with as much information as he or she possesses about events related to the drug offense. *Id.* § 3553(f)(5). If a defendant meets these criteria, the sentencing court should disregard mandatory minimums and impose an appropriate sentence pursuant to the sentencing guidelines. *Id.* § 3553(f). Because of little difference between mandatory minimums and the sentencing guidelines, this change may not result in a great relief for eligible drug offenders. See *supra* notes 69-80 and accompanying text.

While outside the scope of this piece, the federal “drug war” exceeds criminal sentencing legislation, and includes policies that also lend themselves well to a comparative analysis. See 42 U.S.C. § 1437d(l)(6) (2000) (Pub. L. No. 101-625, § 503(b)) (providing for eviction from public housing based on “any drug-related criminal activity on or off such premises” or where “any member of the tenant’s household, or any guest or other person under the tenant’s control” engages in drug-related criminal activity on or off the premises); see also Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002) (rejecting a challenge to this provision); Linda Greenhouse, *Supreme Court Roundup*, N.Y. TIMES, Feb. 20, 2002, at A16 (describing the arguments before the U.S. Supreme Court in *Rucker*), available at LEXIS, News Library, N.Y. Times File, 2002 WL 13358234 ; Dahlia Lithwick, *Too Old to Narc*, SLATE MAGAZINE, Feb. 19, 2002 (questioning the scope of the provision as applied to the elderly), available at LEXIS, News Library, Slate Magazine File; Warren Richey, *One Strike and Out*, in *Public Housing*, CHRISTIAN SCI. MONITOR, Feb. 19, 2002, at 2 (describing the tenants being evicted under this statute), available at LEXIS, News Library, Christian Sci. Monitor File, 2002 WL 6424199; Nina Totenberg, *Public Housing Law that Goes Before the Supreme Court Today*, MORNING EDITION-NPR, Feb. 19, 2002 (interviewing attorney representing public housing authorities across the country); Nina Totenberg, *Supreme Court Hears Case Regarding Zero Tolerance Drug Policy at Housing Projects*, ALL THINGS CONSIDERED-NPR, Feb. 19, 2002 (reviewing the government’s oral argument before the Court); *U.S. Supreme Court: Housing Evictions Challenged; Elderly Say Drug Rules Hurt Innocent*, ATLANTA J. CONST., Feb. 20, 2002, at 7A (relating the policy arguments on both sides), available at LEXIS, News Library, Atlanta J. Const. File .

Congress also authorized the denial of government benefits to offenders convicted of felony drug violations under state or federal law. 21 U.S.C. § 862a (2000) (allowing states to exclude the drug felon from the household in determining financial assistance to a family); see also 42 U.S.C. §§ 601–619 (2000); Patricia Allard, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses* (detailing a recent study showing that at least 92,000 women have been affected by the law since its inception and noting that many children exposed to highly stressful living environments perform comparatively poorly in school, and they experience behavioral and emotional problems, drug use, teenage pregnancy, and delinquency in disproportionate numbers), at <http://www.sentencingproject.org/pdfs/9088.pdf> (last visited Oct. 7, 2003).

In 1998, Congress also extended “drug war” policies to affect financial aid for secondary education. Pub. L. No. 105-244, § 483(f)(2), 112 Stat. 1581, 1736 (codified as amended at 20 U.S.C. § 1091(r) (1998)) (making a student convicted of selling drugs ineligible for grants, loans, or work assistance for two years from the date of a first conviction, or indefinitely upon a second conviction and taking away financial aid from students convicted of possession for one year for a first offense, two years for a second offense, and indefinitely upon a third offense).

The Bush administration also has shown that the drug war includes marijuana medicinal clubs. See Ann Harrison, *Battle Brews as San Francisco*

## III. ENGLAND AND WALES

A. *Why Look Comparatively?*

It may seem counterintuitive that an Article examining U.S. legislation, enacted by political representatives whom the American people have elected, would consider sentencing laws and practices from a foreign legal system. One could argue that U.S. lawmakers must determine the most appropriate federal sentencing scheme based on the individual culture, politics, lawmaking system, and a myriad of other peculiarities in the United States. True, only a legislator serving the American populace ultimately can decide which strategy U.S. federal sentencing policies should adopt.

Comparing U.S. sentencing legislation and its consequences to another legal system, however, makes sense. In fact, as Hirschel and Wakefield argue, "[u]ntil one looks at another system there is always a tendency to take one's own system for granted, to assume that the way it operates is either the best or the only way for it to work."<sup>92</sup> As mentioned, U.S. opponents of federal sentencing laws who have taken a rights-based approach have met with little progress in dismantling the current sentencing system.<sup>93</sup> Realizing that the U.S. drug sentencing approach presents one option among many may persuade some legislators to take note of flaws in U.S. federal drug sentencing policies as they currently exist.

Furthermore, investigating and thinking about how a foreign jurisdiction tackles criminal sentencing for drug offenders produces at least two helpful outcomes. At the outset, and most obviously, looking abroad may provide resourceful legislators with specific, pragmatic suggestions for how we might reconfigure "drug war" sentencing as it currently exists. Perhaps most importantly, considering alternate drug sentencing legislation in a nation with

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*Rebels Against Medical Marijuana Raids*, AGENCE FRANCE PRESSE, Feb. 14, 2002, available at LEXIS, News Library, Agence France Presse File, 2002 WL 2339792. Federal agents raided one such center in San Francisco, simultaneously to President Bush's unveiling of the National Drug Control Strategy for 2002. *Id.*

92. J. DAVID HIRSCHEL & WILLIAM WAKEFIELD, *CRIMINAL JUSTICE IN ENGLAND AND THE UNITED STATES* 3 (1995).

93. See *supra* notes 10–11, 64, 69 and accompanying text.



which the United States shares a long-held, reverent relationship<sup>94</sup> may successfully open U.S. policymakers to reevaluating drug sentencing laws seriously. Such a project also might begin to examine the normative underpinnings that inform each nation's drug sentencing schemes and help us to think about what principles we regard as preeminent in sentencing drug offenders.

To propose that a comparative undertaking proves worthy of pursuit does not mean that the answer to sentencing for drug offenses lies in another country's policies. This piece never suggests that exploring alternatives will uncover a universal panacea for sentencing drug offenders. As demonstrated, sentencing for drug offenses involves complex and challenging questions, including, among others, how we might recognize the individual circumstances surrounding each drug offense, while at the same time taking earnest precautions to avoid potential negative biases inherent in a system premised only on judicial discretion.<sup>95</sup> Even the most ambitious scholars could not find an easy solution to such a multifaceted problem through any pursuit, including a comparative one. Nor does this Article posit that in comparing U.S. drug policies to those of England we should pick and choose among the various stratagems or adopt another system wholesale. This comparative exploration involves a much less noble pursuit, but one that presents an innovative way for exploring drug sentencing alternatives and that might provide a new way for conceptualizing the weaknesses in the U.S. system.

### *B. Why the United Kingdom?*

Of course, any comparative project raises questions about the profitability of making such an assessment. For example, skeptics might insist that the United States and England diverge in many regards. To begin with, Hirschel and Wakefield point out that any country must "be understood in its cultural, social, economic, and political context."<sup>96</sup> Americans include more diverse populations by race and ethnicity, for instance, than do the British.<sup>97</sup> The English

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94. *See infra* notes 100–03.

95. *See supra* Part II.

96. HIRSCHHEL & WAKEFIELD, *supra* note 92, at 5.

97. *See also infra* notes 217–20 and accompanying text (citing statistics indicating England's lopsided imprisonment of people of color). *Compare*

also respect different cultural values as compared to Americans, including a "greater tolerance . . . for deviance" and less acceptance of violence, especially the use of firearms, according to Hirschel and Wakefield.<sup>98</sup> In addition, Britain, unlike the United States, retains the monarch and the royal family, but at the same time has socialist programs to assist all Britons, particularly the poor.<sup>99</sup>

On the other hand, a comparison between drug sentencing in the United States with that of England works for a few reasons.<sup>100</sup> First, as Hirschel and Wakefield maintain, both legal systems share the same origin, which yields both a straightforward analysis and one whose function and sensibility fit, given the familiar foundation the jurisdictions share.<sup>101</sup> Moreover, the United States and England continue to align themselves as joint actors in the international community, reflecting a common approach and similar political objectives in many cases.<sup>102</sup> England also has heeded U.S. advice in

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*Profiles of General Demographic Characteristics: 2000 Census of Population and Housing*, U.S. Census Bureau (suggesting that 75.1% of Americans are white, non-Hispanic), at <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf> (last visited Oct. 7, 2003) [hereinafter *Profiles of General Demographic Characteristics*], with ANITA KALUNTA-CRUMPTON, RACE AND DRUG TRIALS: THE SOCIAL CONSTRUCTION OF GUILT AND INNOCENCE xiv (1999) (citing British statistics from 1985 that blacks comprised eight percent of male prisoners and twelve percent of female prisoners while their general population in England and Wales hovered between one and two percent).

98. HIRSCHSEL & WAKEFIELD, *supra* note 92, at 12–13.

99. *Id.* at 13–14.

100. I use "England" to refer to England and Wales throughout this piece.

101. HIRSCHSEL & WAKEFIELD, *supra* note 92, at 4.

102. Most recently, the United States and England joined forces in a military effort to oust Iraqi President Saddam Hussein, with little international support. See, e.g., *Blair Starts Mission to Secure War Consensus*, WESTERN MORNING NEWS (Plymouth), Jan. 29, 2003, at 24, available at LEXIS, News Library, Western Morning News (Plymouth) File, 2003 WL 7974487; Julian Coman & Colin Brown, *An Unruly Alliance: Tomorrow, Hans Blix Will Give His Report on Weapons Inspections. His Expected Plea for More Time Comes as Britain and the U.S. Struggle for Allies for a War in the Gulf*, SUNDAY TELEGRAPH (London), Jan. 26, 2003, at 18, available at 2003 WL 7190720; G. Robert Hillman, *U.S., British Troops Cross into Iraq, Pound Baghdad with Airstrikes*, THE DALLAS MORNING NEWS, Mar. 21, 2003, at 2A, available at LEXIS, News Library, The Dallas Morning News File; Edith M. Lederer, *U.S., Allies Want March 17 Iraq Deadline*, ASSOCIATED PRESS, Mar. 7, 2003, available at LEXIS, News Library, Associated Press File, 2003 WL 14960954; *Text of Joint Statement by Blair and Bush*, ASSOCIATED PRESS, Apr. 8, 2003, available at LEXIS, News Library, Associated Press File, 2003 WL 18222638;

constructing its drug policy in years past, arguably learning from following our “example.”<sup>103</sup> Finally, Britain has enacted the most

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*Today is UN's Last Chance to Act; Blair and Bush in Final Ultimatum*, DAILY POST (Liverpool), Mar. 17, 2003, at 4, 5, available at LEXIS, News Library, Daily Post (Liverpool) File; Brian Walker, *Blair Joins President to Rally Support; Bush Promises Evidence on Iraq*, BELFAST TELEGRAPH, Jan. 29, 2003, available at LEXIS, News Library, Belfast Telegraph File; Philip Webster & Roland Watson, *Saddam is on the Ropes, Say US and Britain*, THE TIMES (London), Jan. 22, 2003, at 1, available at LEXIS, News Library, The Times(London) File, 2003 WL 3097587. Even before this most recent military exercise, Prime Minister Tony Blair backed President Bush's opposition to Iraq generally in the international “war on terror.” See Doug Ireland, *Bad Posture; Bush's New Nukes and Far-Flung Bases Take the War into a Dangerous New Phase*, IN THESE TIMES, Apr. 15, 2002, at 10, available at LEXIS, News Library, In These Times File. The nations' participation in cooperative military action precedes the dismantling of Saddam Hussein's government in Iraq. See Mahmud Dehqan, *Iran: Paper Says Blair, Bush Must Calm Muslims' Anger to Avoid Adverse Consequences*, BBC MONITORING INTERNATIONAL REPORTS, Apr. 12, 2002 (recounting the various meetings between American and English leaders before launching joint military attacks), available at LEXIS, News Library, BBC Monitoring International Reports File. In the view of the international media, the two countries have generally allied themselves. See, e.g., Bela Arora, *Chamber Made: Blair Too Close to Bush for Comfort!*, BIRMINGHAM EVENING MAIL, Apr. 12, 2002, at 27 (“It seems as though the British Government is in fact promoting a new form of cloning, as Mr[.] Blair has taken to mimicking and copying American policy.”), available at LEXIS, News Library, Birmingham Evening Mail File; John Bersia, *Strains in the 'Special Relationship'; U.S.-British Tensions Not Unusual, Bad*, ORLANDO SENTINEL TRIBUNE, Apr. 15, 2002, at A15 (“[T]he United States and Britain are fated to work together. They stand to derive the most from a relationship that resists periodic fraying, and maintains its special tradition, intimacy and vitality.”), available at LEXIS, News Library, Orlando Sentinel Tribune File, 2002 WL 3041847; Mahmud Dehqan, *supra*, (discussing a British proverb that analogizes the U.S.-England relationship “to a pair of scales where money and power rests in the American pan and wisdom in the British pan”); Miki Kase, *U.S. Allies Must Engage More*, THE DAILY YOMIURI (Tokyo), Apr. 13, 2002 (calling Prime Minister Tony Blair the “American ambassador”), at 17, available at LEXIS, News Library, The Daily Yomiuri(Tokyo) File, 2002 WL 19069874.

103. See GRAY, DRUG CRAZY, *supra* note 31, at 44–45 (discussing U.S. influence on Britain to prohibit opium use in the early twentieth century); *id.* at 154 (writing that “the Americans asked the English to ‘harmonize’ their drug policy with the United States approach” with respect to psychiatrists prescribing narcotics to drug addicts as an element of treatment); *id.* at 162 (suggesting that the closure of a community healthcare clinic that prescribed heroin and cocaine to addicts mimicked American “total abstinence policies”); *id.* at 169–70 (implicating American complicity in the failures of the drug war in the United Kingdom); GRAY, *supra* note 5, at 199 (“For whatever reason,

penal laws of all the nations in Western Europe and the European Union.<sup>104</sup> Relative to the United States, however, England has markedly fewer people incarcerated and uses a more variable approach to drug sentencing.<sup>105</sup> Thus, this comparison provides an alternative system that American legislators can take seriously, because it takes a different, but not too radical, approach.<sup>106</sup>

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the British decided to follow the lead of the United States . . . and we convinced them that emphasizing total abstinence was the way to go . . . . In short, the British experience began to parallel our own"); KALUNTA-CRUMPTON, *supra* note 97, at 25 (arguing that "Britain only attended [an international opium conference] after pressure from America); Robert Sharpe, *US NY: OPED: U.S. Should Follow Europe's Lead in Drug-Law*, *NEWSDAY* (New York), Jan. 3, 2002 ("In response to U.S. pressure, prescription heroin maintenance was discontinued in 1971."), available at <http://www.mapinc.org/drugnews/v02/n009/a04.html> (last visited Oct. 7, 2003); Ethan A. Nadelmann, *Commonsense Drug Policy: Foreign Affairs* ("This tradition [of prescribing drugs to treat addicted patients] flourished until the 1960s, and has reemerged in response to aids and to growing disappointment with the Americanization of British prescribing practices during the 1970s and 1980s, when illicit heroin use in Britain increased almost tenfold."), available at <http://www.tni.org/drugs/links/foreigna.htm> (last visited Oct. 7, 2003).

104. See MARTIN WASIK & RICHARD D. TAYLOR, *BLACKSTONE'S GUIDE TO THE CRIMINAL JUSTICE ACT OF 1991: THE 1991 ACT IN THE COURTS 2* (1994) ("UK custodial population is 97.4 per 100,000 as compared with France (81.1), Sweden (50.6), Greece (44.0) and Holland (40.0)."); Adam J. Smith, *Drug War Retreat: England Moves to Decriminalize Narcotics*, *IN THESE TIMES*, Dec. 7, 2001, available at <http://www.inthesetimes.com/issue/26/03/news1.shtml> ("After 30 years under some of the harshest drug policies in the European Union, Britain's drug problem is among the worst in Europe.").

105. James P. Lynch et al., *Profile of Inmates in the United States and in England and Wales, 1991*, Bureau of Justice Statistics (Oct. 1994) (comparing U.S. incarceration rate of 640 per 100,000 with the 119 per 100,000 in England), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/walesus.pdf> (Oct. 1994); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 165 (2001) ("the punitive and incapacitive thrust of American policies has been markedly greater, and sustained over a much longer period, than is the case in the UK"); see also *infra* notes 181-86.

106. This piece is not the first to engage in a U.S.-England comparison in the area of criminal justice. See, e.g., Lynch et al., *supra* note 105; Patrick A. Langan & David P. Farrington, *Crime and Justice in the United States and in England and Wales, 1981-96*, Bureau of Justice Statistics (Oct. 1998), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjusew96h.pdf> (last revised Nov. 6, 1998); GARLAND, *supra* note 105, at vii (comparing "the culture of crime control and criminal justice in Britain and America"); HIRSCHL & WAKEFIELD, *supra* note 92 (comparing the criminal justice system in England to the United States, including law enforcement and the judicial and

### C. *The Beginnings of Drug Control in England*

The English instituted drug control laws before the U.S. federal government did, imposing restrictions on opium, cannabis, and morphine in the 1868 Pharmacy Act.<sup>107</sup> Similar to U.S. policies,<sup>108</sup> bias fueled a prevalent concern with drug addiction—in this case socio-economic or class-based bias rather than racial or ethnic prejudice, according to Kalunta-Crumpton.<sup>109</sup> Britons feared recreational use of opium among working-class people, justifying regulations on certain substances.<sup>110</sup> She asserts that “the ‘disease’ theory developed in the late nineteenth century by the medical profession to explain alcoholism was later applied principally to explain the middle-class addiction to opium—a view which called for treatment and cure involving gradual withdrawal and maintenance prescribing on low dosages of opiates.”<sup>111</sup>

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correctional systems); *Silvia S.G. Casale & Sally T. Hillsman, National Institute of Justice, Executive Summary: The Enforcement of Fines as Criminal Sanctions: The English Experience and Its Relevance to American Practice* (Nov. 1986) (examining the imposition and enforcement of fines as criminal sanctions for assault offenses in four English magistrates’ courts). At least one other comparison between the United States and England has been made that specifically addresses illicit drugs. *See, e.g.,* HORACE FREELAND JUDSON, HEROIN ADDICTION IN BRITAIN: WHAT AMERICANS CAN LEARN FROM THE ENGLISH EXPERIENCE (1974) (exploring heroin maintenance and the use of addiction treatment clinics in England). Some drug policy experts also pursue comparisons between the United States and Western Europe generally. *See, e.g.,* Hans-Jörg Albrecht, *Drug Policies and National Plans to Combat Drug Trafficking and Drug Abuse: A Comparative Analysis of Policies of Co-ordination and Co-operation*, in *POLICIES AND STRATEGIES TO COMBAT DRUGS IN EUROPE; THE TREATY ON THE EUROPEAN UNION: FRAMEWORK FOR A NEW EUROPEAN STRATEGY TO COMBAT DRUGS?* 182 (Georges Estievenart ed., 1995); Robert MacCoun et al., *Comparing Drug Policies in North America and Western Europe*, in *POLICIES AND STRATEGIES TO COMBAT DRUGS IN EUROPE; THE TREATY ON THE EUROPEAN UNION: FRAMEWORK FOR A NEW EUROPEAN STRATEGY TO COMBAT DRUGS?* 197 (Georges Estievenart ed., 1995).

107. PHILIP BEAN, THE SOCIAL CONTROL OF DRUGS 19–20 (1974); KALUNTA-CRUMPTON, *supra* note 97, at 26; HARVEY TEFF, DRUGS, SOCIETY AND THE LAW 10 (1975).

108. *See supra* note 20 and accompanying text.

109. KALUNTA-CRUMPTON, *supra* note 97, at 26–27.

110. *Id.*

111. *Id.* at 27 (emphasis added). In addition to overuse of opium as a recreational, working-class drug, “[o]ther views were that the self-indulgence and recreational use of opiate was a vice, a deviance and a social problem

Accordingly, the 1916 Defence of the Realm Act criminalized the non-medical use of cocaine, heroin, hemp, opium, and morphine.<sup>112</sup> Next came the Dangerous Drugs Act of 1920, which moved away from viewing drug use as a medical problem and began to criminalize drug activities, paralleling the development of U.S. legal controls in the early twentieth century.<sup>113</sup> Britons could no longer legally possess, distribute, or import cocaine, heroin, or morphine without a medical prescription.<sup>114</sup> The 1923 Dangerous Drugs and Poisons Act added court-fashioned penalties for illegal possession and supply of drugs and expanded law enforcement power to conduct searches for illicit substances.<sup>115</sup> Simultaneously, doctors continued to advocate treating drug addiction as a medical condition, ultimately helping to establish the "'British system' of maintenance prescribing for dealing with drug addiction."<sup>116</sup>

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meant to be eradicated through methods of penal control." *Id.* As in the United States, early drug control laws grew out of the international conference on opium in Asia in 1909 and the Hague in 1912. BEAN, *supra* note 107, at 19, 20–26; KALUNTA-CRUMPTON, *supra* note 97, at 25, 28; P.W.H. LYDIATE, *THE LAW RELATING TO THE MISUSE OF DRUGS 1* (1977); TEFF, *supra* note 107, at 13–14.

112. KALUNTA-CRUMPTON, *supra* note 97, at 27; LYDIATE, *supra* note 111, at 1; *see* BEAN, *supra* note 107, at 28–30.

113. *See supra* notes 21–28 and accompanying text.

114. KALUNTA-CRUMPTON, *supra* note 97, at 28. Teff points out that this legislation established the "British system" of prescribing low doses of controlled substances to addicts. *See infra* note 116 and accompanying text; TEFF, *supra* note 107, at 15–16. This law was interpreted to allow doctors to prescribe addicts with morphine or heroin as treatment, for maintenance, or to help the patient lead a productive life. BEAN, *supra* note 107, at 62–63; TEFF, *supra* note 107, at 15. This configuration helped categorize drug addiction as a medical *and* criminal problem. TEFF, *supra* note 107, at 16. Bean argues that this law hastened the view that "although varying factors may be present, drug addiction should be regarded as a manifestation of a disease and not a form of vicious indulgence." BEAN, *supra* note 107, at 62.

115. BEAN, *supra* note 107, at 31; KALUNTA-CRUMPTON, *supra* note 97, at 28.

116. KALUNTA-CRUMPTON, *supra* note 97, at 29. This system involved doctors prescribing narcotics or opiates to help addicts control their addictions. *See id.*; Griffith Edwards, *Some Years On: Evolutions in the "British System"*, in *PROBLEMS OF DRUG ABUSE IN BRITAIN: PAPERS PRESENTED TO THE CROPWOOD ROUND-TABLE CONFERENCE 1* (D.J. West ed., 1977).

Kalunta-Crumpton argues that racial prejudice energized the next round of drug control legislation enforcement in Britain, in response to the emigration of West Indians and Asians. KALUNTA-CRUMPTON, *supra* note 97, at 29. The Dangerous Drugs Act of 1925 already criminalized cannabis

The Dangerous Drugs (Prevention of Misuse) Act of 1964 extended the criminalization of drug possession to additional illicit substances and required registration of manufacturers and wholesalers in controlled drugs.<sup>117</sup> Lydiate suggests that Parliament meant this legislation to respond to “the widespread misuse of amphetamines which had occurred in the early 1960’s mainly because of their availability as a result of over-prescribing.”<sup>118</sup> Three years later, 1967 brought an end to the treatment approach to drug addiction when, according to Kalunta-Crumpton, the Dangerous Drugs Act reduced “authority to prescribe addictive drugs for maintenance of physical and psychological dependence . . . to a limited number of medical facilities, and more emphasis was placed on persuading addicts to either use less addictive drugs or abstain completely.”<sup>119</sup> The law required the reporting of heroin addicts and imposed restrictions on providing them with prescriptions for “drugs

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smoking. BEAN, *supra* note 107, at 39–40; LYDIATE, *supra* note 111, at 2 (“This Act replaced all previous legislation: it continued to control narcotics and, for the first time, imposed controls on the misuse of cannabis (known as Indian Hemp).”). Kalunta-Crumpton maintains, however, that this influx of racial and ethnic minorities prompted vigorous prosecution of recent immigrants between 1946 and 1959. KALUNTA-CRUMPTON, *supra* note 97, at 29–30. In fact, the English government asserted to the League of Nations that use of cannabis was “confined to Arab and Indian seamen,” “mainly orientals,” and “practically confined to two [N]egro groups in London.” *Id.* at 29. The British government likewise associated the Chinese with opium use. *Id.* at 31. Eventually, blacks became associated with marijuana, prompting law enforcement to focus their efforts on frequent drug raids and arrests in black neighborhoods in the 1960s, even though cannabis use was not confined to black populations. *Id.* Compare racial bias in the development of the U.S. federal sentencing regime, *supra* note 18 and accompanying text.

117. KALUNTA-CRUMPTON, *supra* note 97, at 34–35. Prior to the 1964 law, other drug control legislation came into existence. The Pharmacy Poisons Act passed in 1933 “regulates the sale and supply of listed poisons” and “subject[s] narcotics and cannabis to the Poisons Rules which restrict their sale and supply.” LYDIATE, *supra* note 111, at 2. Parliament amended the 1933 Act in 1956 to add amphetamines and barbiturates to the list of poisons. *Id.* The 1950 and 1951 versions of the Dangerous Drugs Act replaced the 1932 Act but “continued to control narcotics and cannabis.” *Id.*

118. LYDIATE, *supra* note 111, at 2–3. Lydiate notes, however, that this law “did not solve the problem of amphetamine misuse, because over-prescribing continued to be the main source of supply for unlawful suppliers and users.” *Id.* at 3.

119. KALUNTA-CRUMPTON, *supra* note 97, at 32–33; see BEAN, *supra* note 107, at 83; TEFF, *supra* note 107, at 22–23.

of dependency."<sup>120</sup> This change in the law sprouted hospital-based treatment centers for drug addicts that allowed specially licensed doctors, mostly psychiatrists, to prescribe heroin and cocaine to treat patients dependent on drugs.<sup>121</sup>

#### *D. English Drug Sentencing Legislation*

In 1971, Parliament passed the Misuse of Drugs Act ("MDA"), which encompasses the breadth of national drug sentencing legislation in England today.<sup>122</sup> Scholars contend that the fragmentary, inadequate, and inflexible nature of previous drug legislation served as the impetus for this law.<sup>123</sup> Lydiate writes that Parliament wanted to "provide a comprehensive and flexible scheme for controlling the misuse of drugs."<sup>124</sup> Further, scholars note that none of the preceding laws sufficiently addressed drug misuse because they were focused on trafficking and distribution.<sup>125</sup> Lastly, according to Lydiate, earlier drug controls did not allow for a great enough distinction in sentencing between drug traffickers as compared to possessors and failed to address medical over-prescribing.<sup>126</sup>

Much like the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>127</sup> the MDA classified illicit substances based on their perceived harmfulness.<sup>128</sup> Unlike existing United States federal drug policies in America,<sup>129</sup> however, the MDA imposed different penalties based on the danger of the drug and the offense

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120. LYDIATE, *supra* note 111, at 3; *see* BEAN, *supra* note 107, at 83–84.

121. KALUNTA-CRUMPTON, *supra* note 97, at 33.

122. Misuse of Drugs Act, 1971, c. 38 (Eng.).

123. BEAN, *supra* note 107, at 88; LYDIATE, *supra* note 111, at 3–4.

124. LYDIATE, *supra* note 111, at 4.

125. BEAN, *supra* note 107, at 88; LYDIATE, *supra* note 111, at 4.

126. LYDIATE, *supra* note 111, at 4.

127. *See supra* note 37 and accompanying text.

128. Misuse of Drugs Act, 1971, c. 38, sched. 2, Parts I–III (Eng.). The Act divides controlled substances into three classes according to harmfulness. *Id.* The danger of each drug takes into account toxic effect, pervasiveness of abuse, and the perceived danger to society. LYDIATE, *supra* note 111, at 9. Class A includes drugs such as cocaine and heroin. Misuse of Drugs Act, 1971, c. 38, sched. 2 Part I, (Eng.). Class B contains amphetamines and codeine. *Id.* Part II. Class C consists of the least harmful drugs or mild stimulants. *Id.*

129. *See supra* Part II.



committed, whether possession, production, importation, exportation, supply, or sale.<sup>130</sup> In addition, British legislators opted for maximum sentences, or ceilings,<sup>131</sup> rather than the mandatory minimum sentence lengths used in the United States.<sup>132</sup>

Instead of determining the mandatory minimum sentence based only on the type and amount of drug involved in the offense as in the U.S. drug sentencing scheme,<sup>133</sup> the British MDA provides the sentencing judge with the maximum sanction that may be imposed given the type of offense, the class of the drug involved, and the court in which the case takes place.<sup>134</sup> In England, adult criminal offenders may be tried in one of two ways: in a jury trial in the Crown Court (once indicted), or a non-jury, summary trial in a Magistrates' Court, unless a statutory exception applies.<sup>135</sup> The majority of criminal cases take place summarily before magistrates, who are primarily prominent lay members of the community who also serve as justices of the peace.<sup>136</sup> As compared to Crown Court proceedings, most summary trials before magistrates take place quickly, informally, and often on guilty pleas.<sup>137</sup>

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130. Misuse of Drugs Act, 1971, c. 38, sched. 4 (Eng.).

131. *See id.*; LYDIATE, *supra* note 111, at 10.

132. Compare Misuse of Drugs Act, 1971, c. 38, sched. 4 (Eng.) with *supra* Part II.B.

133. *See supra* notes 54, 68 and accompanying text.

134. Misuse of Drugs Act, 1971, c. 38, sched. 4 (Eng.).

135. PHILIP ASTERLEY JONES & RICHARD CARD, CROSS AND JONES' INTRODUCTION TO CRIMINAL LAW 389 (8th ed. 1976); TERENCE INGMAN, THE ENGLISH LEGAL PROCESS 47 (8th ed. 2000); C.F. SHOOLBRED, THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND AND WALES 9 (1966).

136. JONES & CARD, *supra* note 135, at 389; E.C. FRIESEN & I.R. SCOTT, ENGLISH CRIMINAL JUSTICE: AN INTRODUCTION FOR AMERICAN READERS 29, 33 (1977); HIRSCHER & WAKEFIELD, *supra* note 92, at 111, 219. Larger metropolitan areas also employ full-time, paid district judges who possess the same jurisdiction as lay magistrates. INGMAN, *supra* note 135, at 43-44. Local advisory committees accept nominations for lay magistrates from various groups and forward their recommendations to the Lord Chancellor, who appoints the selected magistrates. *Id.* at 44. Magistrates must reside within fifteen miles of the jurisdiction they serve and must retire at age seventy-two. *Id.* at 44-45.

137. FRIESEN & SCOTT, *supra* note 136, at 33; INGMAN, *supra* note 135, at 46 (noting that about ninety percent of defendants plead guilty on summary offenses).

The sentence imposed at the jury or summary trial depends on which court hears the case.<sup>138</sup> For example, a person convicted of supplying a "Class A" or "Class B" drug could receive up to six months' imprisonment, a £2,000 fine, or both in a summary trial before magistrates.<sup>139</sup> A drug offender who supplied a "Class C" drug would face a potential term of up to three months, a £2,500 fine, or both on summary conviction.<sup>140</sup> In the Crown Court, however, an offender supplying a "Class A" drug could receive up to life imprisonment,<sup>141</sup> while a drug defendant convicted of supplying a "Class B" drug could face a fourteen-year sentence.<sup>142</sup> The "Class C" drug supplier could receive a five-year sentence.<sup>143</sup> As mentioned, however, magistrates dispose of most criminal cases, including drug offenses.<sup>144</sup>

Sentences for simple possession offenses also rely on the type of offense, the type of drug possessed, and the court in which the trial occurs. For instance, possession of opium or morphine, both "Class A" drugs, would carry a maximum sentence of six months'

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138. Under the Magistrates' Court Act of 1980, magistrates may not sentence a defendant who could have been tried in the Crown Court to more than six months' imprisonment or more than a £5,000 fine. Magistrates' Courts Act 1980, §§ 31(1), 32(1), 32(9). According to Ingman, if the magistrates hearing the case believe the offense "is so serious that greater punishment should be inflicted than they have power to impose," which is six months, then the case may be committed to the Crown Court for sentencing. INGMAN, *supra* note 135, at 50. The Crown Court is not bound by the same sentencing limits. *Id.* In addition to incarceration or fines, "[o]ther sentences available to the court . . . include absolute discharge, conditional discharge, probation, community service order and compensation order." *Id.* at 46.

139. Misuse of Drugs Act, 1971, c. 38, sched. 4 (Eng.).

140. *Id.*

141. Controlled Drugs (Penalties) Act, 1985, c. 39, § 1 (Eng.) (stating the punishment for a person convicted of offenses under sections 4(2) and 5(2) under the 1971 Misuse of Drugs Act shall be substituted "life" instead of fourteen years).

142. Misuse of Drugs Act, 1971, c. 38, § 4(3), sched. 4 (Eng.). The Court could impose an unlimited fine, up to the appropriate maximum sentence, or both for each offense. Controlled Drugs (Penalties) Act, 1985, c. 39, § 1 (Eng.); Misuse of Drugs Act, 1971, c. 38, § 4(3), sched. 4 (Eng.).

143. Misuse of Drugs Act, 1971, c. 38, § 4(3), sched. 4 (Eng.). The Court could impose an unlimited fine in the alternative of the prison term, or both. *Id.*

144. *See supra* note 136.

imprisonment, a £2,000 fine, or both.<sup>145</sup> Possession of “Class B” drugs could mean up to half that incarceration term but a steeper fine of £2,500.<sup>146</sup> Finally, possession of a “Class C” mild stimulant could land the offender in prison for three months, require a £1,000 fine, or both.<sup>147</sup>

While the Misuse of Drugs Act currently remains the law governing controlled substances in England, British Home Secretary David Blunkett announced in September 2003 that a new government policy would reclassify marijuana as a “Class C” drug, meaning an end to arresting, or even cautioning people who *possess* marijuana.<sup>148</sup> Those discovered smoking the drug near schools or playgrounds face arrest, however, and confiscation of the drug.<sup>149</sup> Government officials also are considering loosening restrictions on the distribution of medical prescriptions for heroin to addicts and lowering the classification for ecstasy.<sup>150</sup> In addition, the Police Foundation published a report in 2000 recommending downgrading the classifications for LSD, ecstasy, and cannabis, and eliminating prison sentences for simple possession of “Class B” and “Class C” drugs.<sup>151</sup>

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145. Misuse of Drugs Act, 1971, c. 38, § 5(2), sched. 4 (Eng.). In the Crown Court, the penalty would be a maximum of seven years, an unlimited fine, or both. *Id.*

146. *Id.* Before the Crown Court, the sanction could reach up to five years' incarceration, an unlimited fine, or both. *Id.*

147. *Id.* The imprisonment term could be up to two years, a fine, or both in a Crown Court jury trial. *Id.*

148. See, e.g., *Britain to Reduce Marijuana Penalties; Possession of Drug Would Be Nonarrestable Offense*, ALCOHOLISM & DRUG ABUSE WKLY., Nov. 12, 2001, at 8; *England OKs Recreational Marijuana*, UNITED PRESS INT'L, Sept. 12, 2003, available at LEXIS, News Library, United Press Int'l File; Ian Burrell, *2001 Review of the Year: Drugs—War on Drugs Disappears in a Cloud of Smoke; Token Gesture: Cannabis Becomes Class-C Drug*, INDEP. (London), Dec. 28, 2001, at 8, available at LEXIS, News Library, Indep. File; Smith, *supra* note 104; Jacob Sullum, *British Drug Reform – Pot Stops*, REASON, Apr. 2002, at 14.

149. *England OKs Recreational Marijuana*, *supra* note 150.

150. Smith, *supra* note 104.

151. *Part 1, National Strategies: Institutional and Legal Framework*, DrugScope (2001), at [http://www.drugscope.org.uk/druginfo/drugsearch/ds\\_report\\_results.asp?file=\wip\11\3\003chapter1.html](http://www.drugscope.org.uk/druginfo/drugsearch/ds_report_results.asp?file=\wip\11\3\003chapter1.html) (last visited Oct. 8, 2003); Jason Bennetto, *Inquiry Calls for Softer Line on Hard Drugs—But Blair Says No*, INDEP. (London), Mar. 29, 2000, at 1, available at LEXIS, News Library, Indep. File, 2000 WL 7595622; T.R. Reid, *British Commission Concludes*

## IV. U.S. AND ENGLISH DRUG SENTENCING LEGISLATION COMPARED

Even assuming that magistrates and Crown Court judges often sentence drug offenders to the maximum possible sentence in summary trials,<sup>152</sup> the sentences vary from the mandatory minimum and sentencing guideline system in the United States.<sup>153</sup> The English and U.S. sentencing regimes for simple possession of controlled drugs seems similar, except for offenses involving marijuana and crack. As discussed, mandatory minimum legislation and sentencing guidelines in the United States penalize offenders possessing smaller amounts of crack as compared to those possessing larger quantities of all other illicit substances.<sup>154</sup> 1988 Amendments to the Anti-Drug Abuse Act increased the penalties for possession of crack based on the amount possessed and the defendant's prior criminal history.<sup>155</sup> A U.S. defendant possessing crack with no previous drug offenses *must* serve a five-year prison term for possessing five grams of the illicit drug, while U.S. courts *may* impose up to one year imprisonment on a defendant possessing any "personal use" amount of other serious drugs that are classified as "Class A" drugs in England.<sup>156</sup>

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*Tough Drug Law 'Produces More Harm'*, WASH. POST, Mar. 30, 2000, at A14, available at LEXIS, News Library, Wash. Post File, 2000 WL 2292917; David Taylorhome, *Police: Make Ecstasy Legal*, EXPRESS, Mar. 29, 2000, available at LEXIS, News Library, Express File.

152. Statistics on average sentence length imposed on drug offenders participating in summary trials and the frequency with which these cases become committed to the Crown Court for sentencing would require analyzing the drug cases before the approximately thirty-thousand magistrates serving in about seven hundred courts throughout England and Wales. See INGMAN, *supra* note 135, at 44. Ingman aptly points out that "[p]recise uniformity is impossible to achieve unless Parliament were to lay down fixed penalties for each offence." *Id.* at 61. He argues that regimented sentences "would be most undesirable as [they] would exclude [the] flexibility which the court needs in order to arrive at the most appropriate penalty in the light of any mitigating circumstances." *Id.* at 62. Ingman concedes that "[v]ariations in sentences for the same offence are inevitable as long as there is a system in which Parliament lays down a *maximum* but *no minimum penalty*." *Id.* Compare *supra* note 53 and accompanying text.

153. See *supra* Part II.B-D.

154. See *supra* notes 62-64, 78-80 and accompanying text.

155. See *supra* notes 62-64 and accompanying text.

156. See *supra* notes 62-64 and accompanying text.

Possession for most controlled drugs in England carries a maximum incarceration period of three to six months depending on the type of drug involved in a summary trial, and a maximum of two to seven years in a jury trial.<sup>157</sup> Even without data indicating the average or commonly imposed prison term on drug possessors in either country, sentencing laws addressing crack possession in the United States as compared to "Class A" drugs in England present the most prominent sentencing difference. In Britain, an offender possessing five grams of crack *could* serve from zero to six months' incarceration; while in the United States, the same first-time offender *must* serve five years' incarceration.<sup>158</sup>

Possession of controlled drugs with the intent to sell provides an even more helpful example. An American federal court must impose at least a ten-year prison term on a defendant who possessed a kilo of heroin, five times that amount of powder cocaine, or only fifty grams of crack.<sup>159</sup> Federal law in the United States caps the allowable term for this offense at life imprisonment.<sup>160</sup> British law differs. In a summary proceeding, a person possessing *any* "Class A" or "Class B" drug with the intent to distribute might face up to six months' imprisonment, with half that maximum term permissible for a "Class C" offense.<sup>161</sup> The maximum penalties jump for jury trials to life imprisonment for a "Class A" offense, fourteen years for a "Class B," and five years for a "Class C" violation.<sup>162</sup> In most cases, offenders convicted of possessing drugs with the intent to sell receive drastically different treatment in the U.S. as compared to England. A criminal defendant who possessed one kilogram of heroin, or five kilos of cocaine, must serve at least ten years under United States federal law, while the same offender may receive six months' imprisonment at the very most in a British summary trial.<sup>163</sup>

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157. See *supra* notes 147-49 and accompanying text.

158. See *supra* notes 63, 141 and accompanying text.

159. See *supra* note 55 and accompanying text.

160. See *id.*

161. Misuse of Drugs Act, 1971, c. 38, § 5(3), sched. 4 (Eng.). Class "C" drug offenses may be punished with a fine, or three-month imprisonment, or both. *Id.*

162. *Id.*

163. Of course, in cases with original jurisdiction in the Crown Court, these offenders could spend the remainder of their lives in prison. *Id.* Also, magistrates hearing the case could decide to remove it to the Crown Court for

Again, however, sentencing for crack offenses presents the most striking difference. Federal law in the United States requires a mandatory minimum sentence of ten years for possessing five kilograms of cocaine as compared to only fifty grams of crack. This policy means that an offender possessing only 100 grams of crack and a defendant possessing one hundred times that amount of cocaine would receive the same sentence.<sup>164</sup> The same does not hold true in England. Offenders possessing crack or cocaine with an intent to sell the drug will face a maximum of six months' imprisonment in a summary proceeding.<sup>165</sup>

These examples illustrate some significant differences between criminal sentencing legislation in England as compared to the United States. English statutes include fixed ceilings for sentences, allowing judges the discretion to impose any incarceration sentence up to that maximum prison term, or none at all. Magistrates and Crown Court judges presumably could consider a myriad of factors in selecting an appropriate sentence length or in choosing alternate sanctions, including mitigating or aggravating factors, prior convictions or sentence terms, or drug addiction or dependence. In contrast, laws requiring mandatory minimum sentences constrain judges applying federal law in the United States, who may consider only the type and amount of drug involved in the particular offense, and in some cases, the defendant's drug offense history. Although the sentencing guidelines give U.S. judges some discretion to tinker with a sentence, this discretion is quite narrowly drawn.<sup>166</sup>

In addition, British drug sentencing legislation penalizes categories of purportedly more dangerous drugs as compared to others. The MDA classifies controlled substances into different categories and imposes maximum prison terms and fines for different offenses given that classification.<sup>167</sup> Courts hearing drug cases retain the discretion to consider the amount of the statutorily classified drug involved in the offense and may impose more stringent sentences

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sentencing if they deem the offense serious enough to warrant doing so. *See supra* note 140.

164. *See supra* note 55 and accompanying text.

165. *See supra* note 163 and accompanying text.

166. *See supra* notes 68–80 and accompanying text.

167. *See supra* notes 133–49 and accompanying text.

within the statutory allotment based on that factor.<sup>168</sup> Legislation in the United States, on the other hand, treats drugs offenders differently based on the amount of each particular drug involved in a case.<sup>169</sup> The statutorily mandated amounts that trigger mandatory minimum sentences in the United States oblige courts to penalize crack offenders more harshly than offenders involved with any other type of illicit drug, without regard to the potential dangerousness of that drug as compared to crack.<sup>170</sup>

#### V. COMPARING THE CONSEQUENCES OF THESE DRUG SENTENCING SCHEMES

Sentencing for drug offenses in the United States and England differs in three main ways. First, the British system constrains judges with maximum incarceration terms instead of mandating minimum sentences. Second, English law bestows considerable leeway on magistrates to deal with criminal drug offenders, from discharging a drug indictment to imposing community service, a sizable fine, or a six-month prison term. Magistrates alternatively can seek to commit especially troubling drug cases to the Crown Court for sentencing. Finally, British drug statutes impose sentences based on the perceived danger of the drug, while U.S. legislation penalizes crimes involving small amounts of crack as harshly as much larger amounts of other drugs that pose an equally great danger.

Understanding these major differences between the two systems provides a good foundation for a more nuanced comparative analysis. While on paper, criminal drug sentencing legislation looks markedly different in England as compared to the United States, examining the practical effect of the two systems provides more insight. Evaluating some of the major consequences of each system side-by-side will help us to evaluate how different the systems prove in practical effect.

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168. See *supra* notes 140–49 and accompanying text.

169. See *supra* notes 54–91 and accompanying text.

170. *Id.*

*A. An Emphasis on Incarceration in the United States*

As Americans ushered in the new millennium, they also reached the two million mark, in terms of the number of people incarcerated in the United States.<sup>171</sup> With this "achievement," the United States earned the dubious distinction of having the highest incarceration rate in the world—five to eight times that of most industrialized nations.<sup>172</sup> For the seventy years between 1910 and 1980, the American prison population grew by approximately 462,000, a conservative growth rate compared to the more than 816,000 person increase during the 1990s alone.<sup>173</sup> In fact, the number of people incarcerated in America *quadrupled* between 1980 and 2000.<sup>174</sup> While the population of the United States comprises only five percent of the entire world population, *Americans claim one-fourth of the globe's prison population.*<sup>175</sup> America also incarcerates six times more people than the entire European Union ("EU"), even though the twelve EU nations possess 100 million more citizens than the United States.<sup>176</sup> Schiraldi and Ziedenberg charge that "[o]ur jails and prisons have literally become the 51st state, with a greater

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171. See, e.g., *U.S. Imprisoned Population May Hit 2 Million in 2000*, WASH. POST, Jan. 1, 2000, at A04, available at LEXIS, News Library, Wash. Post File, 2000 WL 2277557; Vincent Schiraldi & Jason Ziedenberg, *The Real Y2K Problem—Two Million Prisoners in 2000*, Pacific News Service, at <http://www.ncmonline.com/commentary/1999-12-24/prisoners.html> (Dec. 24, 1999).

172. Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 164 (2001). *But see* GRAY, *supra* note 5, at 29 (alleging that as recently as 1998, Russia had a higher incarceration rate than the United States, with 685 of every 100,000 residents imprisoned).

173. Vincent Schiraldi et al., *Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States*, Justice Policy Institute 2 (July 2000), at <http://www.justicepolicy.org/downloads/pp.pdf> (last visited Oct. 8, 2003).

174. Editorial, *Too Many Behind Bars*, WASH. POST, Aug. 20, 2001, at A14, available at LEXIS, News Library, Wash. Post File, 2001 WL 23188144; *see also* Gerber, *supra* note 174, at 164 (noting that the national prison population quintupled since 1973 and increased six fold since 1970); GRAY, *supra* note 5, at 29 (recounting that the national number of prisoners doubled between 1973 and 1983; that it more than doubled again between 1983 and 1993; and that 1.8 million people were imprisoned in the United States by the end of 1998).

175. Schiraldi et al., *supra* note 175, at 3.

176. Schiraldi & Ziedenberg, *supra* note 173; Schiraldi et al., *supra* note 175, at 6; *see also* Roy Walmsley, *Research and Findings: World Prison Population List*, Home Office, at <http://www.homeoffice.gov.uk/rds/pdfs/r88.pdf> (last visited Oct. 8, 2003) (comparing incarceration across the world).



combined population than Alaska, North Dakota and South Dakota.<sup>177</sup>

While this imprisonment explosion alone is alarming, the contribution of U.S. drug policies to this dramatic rise is equally as troubling.<sup>178</sup> From 1980 to 1997, nationwide drug arrests tripled.<sup>179</sup> The FBI has even reported that drug offenses accounted for more than one million of its arrests in 1991.<sup>180</sup> Moreover, only six percent of state prisoners and twenty-five percent of federal prisoners were drug offenders in 1980.<sup>181</sup> By 1999, however, the state prison population included twenty-one percent drug offenders, an increase of twelve times.<sup>182</sup> The federal drug offender population also spiked to more than double its numbers in 1980.<sup>183</sup> Of prisoners nationwide, the United States now has 100,000 more people incarcerated for drug offenses than the EU has imprisoned for all offenses combined.<sup>184</sup>

As compared to the two million U.S. prisoners in 2000, England has 73,802 people incarcerated in the year 2003.<sup>185</sup> This number grew from the average imprisoned population of 64,600 in 2000 and marked the highest incarcerated population in England and Wales

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177. Schirladi & Ziedenberg, *supra* note 173.

178. See, e.g., *The Role of Violent Crime in U.S. Incarceration Rates*, Human Rights Watch (discussing how changes in public policy rather than increased rate of violent crime affects incarceration rates), at <http://www.hrw.org/reports/2000/usa/Rcedrg00-02.htm> (last visited Oct. 8, 2003).

179. *Drug Policy and the Criminal Justice System*, The Sentencing Project 1 (2001), available at <http://www.sentencingproject.org/pdfs/5047.pdf> (last updated August 2001) [hereinafter *Drug Policy and the Criminal Justice System*]. In 1999, four out of five drug arrests were for simple possession, with the remainder for drug sales or trafficking. *Id.*

180. GRAY, *supra* note 5, at 30.

181. *Drug Policy and the Criminal Justice System*, *supra* note 181, at 1.

182. *Id.*

183. *Id.*; see also GRAY, *supra* note 5, at 30 (writing that drug offenders comprised fifty-eight percent of all federal prisoners near the end of 1998).

184. Schirladi et al., *supra* note 175, at 6 (alleging that America has 458,131 people behind bars for drug crimes, while the EU has imprisoned 356,626 for drug and non-drug offenses).

185. *Prison Population*, Her Majesty's Prison Service, at <http://www.hmprisonservice.gov.uk/statistics/dynpage.asp?Page=18> (last visited Oct. 8, 2003).

ever, next to the 65,300 population in 1998.<sup>186</sup> While quite low compared to the United States, the English incarceration rate marked the second highest in Europe next to Portugal in 2000.<sup>187</sup> Of the approximately 64,600 people imprisoned in England in the year 2000, fifteen percent were imprisoned on drug offenses as compared to more than thirty percent incarcerated for sexual offenses and violent crimes combined.<sup>188</sup>

Part of the incarceration escalation in the United States stems from drug policies that target people who commit non-violent offenses. In fact, "[t]wo-thirds of the inmates in America's prisons and jails—over 1.2 million prisoners—are locked up for non-violent offenses[.]" according to Schiraldi and Ziedenberg.<sup>189</sup> While the number of violent offenders doubled from 1980 to 1999,<sup>190</sup> the number of non-violent prisoners has tripled,<sup>191</sup> and the number of drug prisoners has increased seven-fold.<sup>192</sup> Accordingly, almost twenty-five percent of American prisoners are serving time for a non-violent drug offense.<sup>193</sup>

The comparative incarceration rates in the United States and England draw out numerous harmful consequences of the emphasis on incarceration in the United States. As mentioned, the violent prisoner population doubled in the same timeframe that the drug offender population increased by seven times.<sup>194</sup> United States drug sentencing laws have focused on incarceration as the primary

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186. *Prison Statistics: England and Wales 2000*, Home Office 1 [hereinafter *Prison Statistics: England and Wales 2000*] (presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty August 2001), at <http://www.homeoffice.gov.uk/rds/pdfs/prisstat2krev.pdf> (last visited Oct. 8, 2003); Mike Elkins & Jide Olagundoye, *The Prison Population in 2000: A Statistical Review*, Home Office 1, at <http://www.homeoffice.gov.uk/rds/pdfs/r154.pdf> (last visited Oct. 8, 2003).

187. *Prison Statistics: England and Wales 2000*, *supra* note 188, at 1.

188. Elkins & Olagundoye, *supra* note 188, at 2 tbl. 1 (showing 22% incarceration for violent crimes and 10% for sexual offenses).

189. Schiraldi & Ziedenberg, *supra* note 173.

190. GRAY, *supra* note 5, at 29.

191. Schiraldi & Ziedenberg, *supra* note 173.

192. *Id.*; see GRAY, *supra* note 5, at 29; see also Schiraldi et al., *supra* note 175, at 3 ("Fully 76% of the increase in admissions to America's prisons from 1978 to 1996 was attributable to non-violent offenders, much of that to persons incarcerated for drug offenses.").

193. Schiraldi et al., *supra* note 175, at 6.

194. See *supra* note 194.

solution to the drug problem. Rather than prioritizing the incapacitation of violent criminals, U.S. drug sentencing laws continue to incarcerate non-violent drug offenders at a higher rate and to the exclusion of violent offenders.

Even worse, U.S. legislation results in jailing these non-violent offenders alongside seriously dangerous criminals, increasing the chance that these inmates will become more violent while incarcerated, and thus, possibly transforming them from non-violent offenders before incarceration into potentially violent offenders upon release.<sup>195</sup> By imprisoning non-violent drug offenders for longer terms than violent offenders, and simultaneously contaminating the non-violent drug offender population with convicted violent felons, U.S. drug sentencing laws essentially privilege violence by punishing it less severely than drug violations and risk engendering violent behavior.

This result has both emblematic and pragmatic consequences. In a symbolic sense, the scheme conveys the message that criminal violence is “preferable” to, or more acceptable than, criminal drug activity. The public may interpret this outcome to suggest that selling, possessing, or using illicit substances imparts worse social harm than violent crimes with shorter statutorily mandated prison terms. Moreover, overcrowded prisons have forced U.S. penitentiaries nationwide to forego rehabilitation programs because officials must deal with the burdensome task of accommodating too many inmates.<sup>196</sup> This overcapacity, combined with cutbacks in

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195. See *Too Many Behind Bars*, *supra* note 176; Gerber, *supra* note 174, at 167. Incarcerating drug users with other inmates also may exacerbate the drug addiction problem among prisoners. See Vincent Schiraldi et al., *America's One Million Non-Violent Prisoners*, at [http://www.cjcb.org/pubs/one\\_million/onemillionpr.html](http://www.cjcb.org/pubs/one_million/onemillionpr.html) (last visited Oct. 8, 2003); see also Steven Belenko, *Behind Bars: Substance Abuse and America's Prison Population*, National Center on Addiction and Substance Abuse at Columbia University (CASA) (Jan. 1998) (reporting that 80% of incarcerated Americans abuse drugs and alcohol), at <http://209.208.151.183:8080/pdshopprov/files/5745.pdf> (last visited Oct. 8, 2003).

196. See *Prisoners in 2000*, *supra* note 7, at 1 (stating that federal prisons were at 131% capacity in 2000, while states prisons had 100% capacity in the same year); John T. Curtin, *A Judge's View*, 68 SOC. RES. 869, 871 (2001); *Too Many Behind Bars*, *supra* note 176. The federal “Truth-in-Sentencing” grant program requires states to ensure that both serious drug offenders and violent criminals serve eighty-five percent of the state sentence imposed. 42 U.S.C. § 13704(a)(1)(A)(i)-(ii) (2003). Because other federal legislation

funding, education, counseling, and occupational programs, ensures that an increased number of non-violent drug offenders will face few productive options upon release,<sup>197</sup> all the while having been exposed to seriously dangerous criminal offenders while incarcerated.<sup>198</sup>

In contrast, discretionary drug sentencing in England takes drug offenses seriously without privileging violent behavior or facilitating learned violence during incarceration. In 2000, drug offenders comprised fifteen percent of the prison population, while double that percentage included defendants who committed a violent crime against a person or a sexual offense.<sup>199</sup> Of drug offenders imprisoned in England, the smallest definable group included those convicted of simple possession, while drug traffickers, suppliers, and those who possessed drugs intending to supply them made up the bulk of incarcerated drug offenders.<sup>200</sup> Thus, the British sentencing scheme results in a proportionately higher imprisonment ratio of violent offenders as compared to those who commit drug offenses. In this way, the British system does not privilege violence by punishing it less severely than drug crimes but still regards drug violations as serious offenses requiring incarceration.

### *B. Disproportionate Impact on Non-White And Ethnic Drug Offenders*

In addition to the extraordinary increased rate of incarceration, existing drug sentencing legislation in the United States raises serious questions about fairness and racial bias. People of color have borne the brunt of federal drug-related legislation, comprising disproportionate numbers of people imprisoned for drug offenses in

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abolished parole, however, federal drug offenders must serve their entire prison terms. See *supra* note 50. These requirements may encourage states to parole violent drug-offenders once they have served eighty-five percent of their prison sentences to make room for offenders convicted under federal drug laws but serving sentences in state prison.

197. See Curtin, *supra* note 198, at 871; *Too Many Behind Bars*, *supra* note 176.

198. *Too Many Behind Bars*, *supra* note 176 (“[H]arsh conditions in prison may produce individuals more prone to violence than they were before incarceration. This is especially true of people locked up under mandatory drug-sentencing laws who were not violent in the first place.”).

199. See *supra* note 190 and accompanying text.

200. *Prison Statistics: England and Wales 2000*, *supra* note 188, at 10 tbl. 1(d).

America. In fact, one survey conducted by the U.S. Department of Justice indicates that one-third of black boys born today likely will spend at least some part of their lives behind bars,<sup>201</sup> while other sources conclude that nearly one-tenth of black males in their twenties already live in prison,<sup>202</sup> and almost one out of three black males currently remains under criminal justice control.<sup>203</sup> Most troubling, before mandatory minimums and sentencing guidelines, discretionary sentencing resulted in prison terms averaging about eleven percent longer for blacks as compared to whites who committed the same offense.<sup>204</sup> Today, *blacks face forty-nine percent longer sentences than whites.*<sup>205</sup>

The statistics make plain the lopsided effect that federal drug sentencing policies have had on people of color.<sup>206</sup> First, non-whites comprise a disproportionate number of those imprisoned when compared to their actual rates of drug use. While whites, blacks, and people of Hispanic descent share similar rates of current illicit drug

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201. Thomas P. Bonczar & Allen J. Beck, *Lifetime Likelihood of Going to State or Federal Prison*, Bureau of Justice Statistics (Mar. 1997), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lsgsf.pdf> (last visited Oct. 8, 2003); Schirladi & Ziedenberg, *supra* note 173. Thirty-two percent of young black men ages twenty to twenty-nine were under criminal justice control in 1995. *Young Black Americans and the Criminal Justice System: Five Years Later*, The Sentencing Project (Apr. 2001) (contending that one in four young black men was under criminal justice control in 1990, and one-third by 1995), available at <http://www.sentencingproject.org/pdfs/9070smy.pdf> (last visited Oct. 8, 2003).

202. See *Too Many Behind Bars*, *supra* note 176.

203. See Small, *supra* note 7, at 897 (including prison, jail, probation, or parole as elements of criminal justice control).

204. Jackie Jadrnak, *Racial Side of Drugs Recounted*, ALBUQUERQUE J., June 2, 2001, at E3, available at LEXIS, News Library, Albuquerque File, 2001 WL 22557818.

205. *Id.*

206. VI. *Racially Disproportionate Incarceration of Drug Offenders*, Human Rights Watch (2000) ("Blacks are incarcerated on drug charges at dramatically higher rates than whites and drug offenses also account for a much greater proportion of blacks sent to prison than they do for whites."), at <http://www.hrw.org/reports/2000/usa/Rcedrg00-04.htm> (last visited Oct. 8, 2003). For reasons why the "war on drugs" has severely impacted black Americans, see *Drug Policy and the Criminal Justice System*, *supra* note 181, at 4. Small blames the 100-1 crack-cocaine sentencing disparity for the disproportionate impact on blacks, calling crack sentencing "the modern equivalent of Jim Crow laws that reinforced postslavery discrimination." Small, *supra* note 7, at 899.

use,<sup>207</sup> their incarceration rates vary drastically. At the end of 2000, blacks accounted for forty-six percent of federal prisoners, while Hispanics totaled sixteen percent, even though each group makes up only twelve percent of the overall population in the United States.<sup>208</sup> In the same year, federal and state prisons contained 471,000 white prisoners as compared to 610,300 blacks and 216,900 Hispanics,<sup>209</sup> despite nearly identical drug use among all three groups and notwithstanding the fact that whites comprise seventy-five percent of the nation's population.<sup>210</sup>

In addition, people of color are incarcerated for drug offenses much more often than whites, and the drug offender population includes many more racial and ethnic minorities than whites.<sup>211</sup> According to Talvi, "[n]ationwide, there are 13 blacks in prison per one white for drug offenses."<sup>212</sup> A 1999 U.S. Bureau of Justice Statistics Special Report indicates that between 1984 and 1999, Hispanics comprised half of those charged with drug offenses, while

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207. *Summary of Findings from the 2000 National Household Survey on Drug Abuse*, Substance Abuse and Mental Health Services Administration 21 (Sep. 2001) [hereinafter *2000 National Household Survey*] (stating that 6.4% of whites, 5.3% of Hispanics, and 6.4% of blacks qualified as current illicit drug users in 2000), at <http://www.samhsa.gov/oas/NHSDA/2kNHSDA.pdf> (last visited Oct. 8, 2003); see *Who Are America's Drug Users?*, Frontline Drug Wars (2000) [hereinafter *Who Are America's Drug Users?*] (including slightly different statistical breakdown of 7.7% of blacks currently using drugs as compared to 6.8% of Hispanics, and 6.6% of whites), at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/whoare.html> (last visited Oct. 8, 2003).

208. *Prisoners in 2000*, *supra* note 7, at 10 ybl. 14 (detailing prisoners under state or federal jurisdiction by gender, race, Hispanic origin, and age in 2000); *Profiles of General Demographic Characteristics*, *supra* note 97, at 1 (indicating that blacks Americans comprise 12.3% of the population, while Hispanics account for 12.5%).

209. See *Prisoners in 2000*, *supra* note 7, at 10 tbl. 14 (detailing number of sentenced prisoners under state or federal jurisdiction by gender, race, Hispanic origin, and age in 2000); see also *Race and Incarceration in the United States*, Human Rights Watch (Feb. 27, 2002), at <http://hrw.org/backgrounders/usa/race/> (issued Feb. 27, 2002).

210. *Profiles of General Demographic Characteristics*, *supra* note 97, at 1.

211. VI. *Racially Disproportionate Incarceration of Drug Offenders*, *supra* note 208.

212. Silja J.A. Talvi, *Ready, Aim Imprison: New Report on Drug War Highlights Disproportionate Incarceration of Black Men*, WASH. FREE PRESS (Nov. 2000), at <http://www.washingtonfreepress.org/48/ready.html> (last visited Oct. 8, 2003).

blacks made up nearly thirty percent, and whites only one-quarter,<sup>213</sup> even though blacks and Hispanics have a combined total of only twenty-five percent of the general population.<sup>214</sup>

Arrest and incarceration rates for drug offenses by race also provide insight. In 1996, “[t]he overall rate of admission to prison for drug offenses was 63 per 100,000.”<sup>215</sup> Of those arrested, only twenty people in every group of 100,000 whites faced prison time for drug violations, while blacks were imprisoned at fourteen times that rate; 279 of each 100,000 blacks arrested ended up incarcerated.<sup>216</sup> As expected, the dawn of mandatory minimums and sentencing guidelines increased the incarceration rate for all groups of drug offenders. Before drug sentencing reform in the 1980s, nine whites of every 100,000 were imprisoned for drug violations.<sup>217</sup> While this rate increased by 115% from 1986 to 1996 to twenty whites of every 100,000, black incarceration rates for the same time period skyrocketed by a *non-comparable figure of 465%*.<sup>218</sup>

Not surprisingly, the crack-cocaine disparity in sentencing has facilitated the disproportionate imprisonment of black Americans. In 1997, blacks in fact comprised eighty-six percent of all federal drug offenders incarcerated for crack violations.<sup>219</sup> Whites made up only five percent.<sup>220</sup> David Cole argues that in spite of a U.S. Sentencing Commission Report issued in 1995 urging Congress to revise crack-cocaine sentencing disparities because of “the racial disparities and their corrosive effect on criminal justice generally,”<sup>221</sup> the vast difference between incarceration rates for white drug offenders as compared to non-whites persists.<sup>222</sup>

Looking comparatively, drug sentencing in England also results in lopsided imprisonment of people of color. Nineteen percent of the

213. John Scalia, *Special Report: Federal Drug Offenders, 1999 with Trends 1984–99*, Bureau of Justice Statistics 5 (Aug. 2001), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdo99.pdf> (last visited Oct. 8, 2003).

214. See *supra* note 210 and accompanying text.

215. Schiraldi et al., *supra* note 175, at 11.

216. *Id.* at 11.

217. *Id.* at 11–12.

218. *Id.*

219. Scalia, *supra* note 215, at 11.

220. *Id.*

221. COLE, *supra* note 10, at 143; see also, *supra* note 64 and accompanying text.

222. COLE, *supra* note 10, at 141–46.

total male prison population and twenty-five percent of the female prison inhabitants in Britain include racial and ethnic minorities, even though non-white males and females each represent only about eight percent of the total population in England.<sup>223</sup> Similarly to the United States, disproportionate numbers of those imprisoned on drug offenses include people of color. In fact, one-quarter of black men incarcerated in England are serving time for a drug violation, as compared to thirteen percent of white males.<sup>224</sup> Of the entire drug offender population, blacks make up twenty-eight percent, Asians twenty-three percent, and whites just thirteen.<sup>225</sup> Finally, blacks in England also are more likely to serve longer prison terms than whites and Asians.<sup>226</sup>

This data demonstrates that the drug sentencing schemes in both the United States and England have created disproportionate incarceration of racial and ethnic minorities as compared to their overall proportion of the population in each country. As stated at the outset of this project, however, the most appropriate solution does not inhere in any one system. The problems with discretionary sentencing in England and fixed mandatory minimums and sentencing guidelines that penalize crack as compared to other drugs in the United States illustrate that a similar racial unfairness exists attendant to each approach.

While both the U.S. and English accounts evidence the troubling burden that each sentencing scheme inflicts on non-whites, the comparison still proves useful. Most obviously, the troubling statistics from both countries demonstrate the critical nature of this problem. The data should compel conscientious lawmakers in both England and the United States to appreciate the urgent need for some kind of reform. British and U.S. policymakers should concern themselves with this racially unbalanced result because of their commitment to non-discrimination, to ensure the credibility of the

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223. Elkins & Olagundoye, *supra* note 188, at 3. This number includes foreign nationals. See *Statistics on Race and the Criminal Justice System: A Home Office Publication Under Section 95 of the Criminal Justice Act of 1991*, Home Office [hereinafter *A Home Office Publication*], at <http://www.homeoffice.gov.uk/rds/pdfs/s95race00.pdf> (last visited Oct. 8, 2003).

224. Elkins & Olagundoye, *supra* note 188, at 3.

225. *A Home Office Publication*, *supra* note 225, at 41.

226. *Id.*



drug control laws and sentencing schemes in each nation, and because of the collateral consequences that will result from such high imprisonment of non-whites.<sup>227</sup>

The English system also points out the flaws that accompany a discretionary system.<sup>228</sup> Racial bias among judges who possess great flexibility in sentencing for drug offenses has resulted in a situation similar to the problem in the United States before Congress instituted mandatory minimums and sentencing guidelines.<sup>229</sup> By adopting a fixed sentencing system in 1986, American lawmakers communicated in part that they understood the unequal impact that unrestrained judicial discretion could have on people of color. They adopted a new system, designed to some extent to accommodate for racial bias among judges, to ameliorate the disproportionate incarceration and sentence lengths borne by racial and ethnic minorities, and to reach a fair outcome.<sup>230</sup> That the same problem with judicial discretion persists in England today suggests that reversion to a totally discretionary system in the United States would likely result in the very problem that Congress expected mandatory minimums and sentencing guidelines to address.

While England confirms the difficulties that American legal scholars and policymakers already knew were associated with discretionary sentencing, the U.S. system suggests that mandatory minimum legislation and sentencing guidelines may not result in such racially disparate results in every case. For example, if the drug sentencing laws in the United States did not impose a special burden on crack as compared to all other controlled substances, at least part of the unbalanced numbers of blacks incarcerated in American prisons nationwide would not exist. Since eighty-six percent of all people incarcerated in the United States for federal crack offenses are black,<sup>231</sup> and mandatory minimums and sentencing guidelines require longer prison terms for smaller amounts of crack than any other

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227. COLE, *supra* note 10, at 146 (warning that “[t]he short-term ‘benefits’ of removing offenders from the community may well come back to haunt us in the long term”).

228. *See, e.g.*, ROGER HOOD, RACE AND SENTENCING (1992) (in collaboration with Graca Cordovil).

229. *See, e.g.*, *supra* notes 52–53, 207 and accompanying text.

230. *See supra* notes 51–52 and accompanying text.

231. *See supra* note 221 and accompanying text.

illicit drug,<sup>232</sup> the crack-cocaine sentencing disparity causes at least some of the racially disproportionate incarceration rates.

The most troubling lesson learned, however, is that attempts to revise a discretionary system very similar to the existing scheme in England, in order to ameliorate racial bias in the United States, have resulted in more alarming racial disparities than existed before fixed sentences. We should consider that black offenders prosecuted for crack violations might have a better chance of being treated fairly—as compared to all other drug offenders—in a discretionary system that previous experience has shown elicits racial bias. At least such a scheme would allow some conscientious and well-informed judges to consider the disproportionate incarceration rates affecting people of color in the United States and the unfairness of the crack-cocaine disparity.

In both systems, people of color may suffer what Jody Armour terms the "Black Tax," or "the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes."<sup>233</sup> Under discretionary drug sentencing laws in England, non-whites may face conscious discrimination before judges who believe that non-white drug offenders pose a greater danger than whites.<sup>234</sup> More likely, magistrates and Crown Court judges harbor unconscious discrimination, which "resides in the inner recesses of the human psyche,"<sup>235</sup> resulting in imprisonment of racial and ethnic minorities more often and for longer prison terms than white offenders who commit the same crimes. In the United States, at least some members of Congress likely thought that crimes involving crack risked greater harm to society than those involving heroin or powder cocaine when they enacted mandatory minimums and sentencing guidelines.<sup>236</sup> The press may have helped create or exacerbate this unconscious bias among lawmakers, who already may have associated racial minorities with crime,<sup>237</sup> by linking crack abuse and black Americans.<sup>238</sup> Where such bias operated, mandatory

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232. See *supra* notes 62–64, 78–80 and accompanying text.

233. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 13 (1997).

234. *Id.* at 16.

235. *Id.* at 17.

236. See *supra* notes 62–64, 78–80 and accompanying text.

237. See *supra* notes 29–37 and accompanying text.

238. See *supra* notes 42–44 and accompanying text.

minimums and sentencing legislation codified a version of the Black Tax that should urge U.S. lawmakers to reform existing drug sentencing legislation.

Perhaps the most illuminating lesson gleaned from comparing the racialized consequences of the sentencing systems in both the United States and England is that the juxtaposition of fixed sentencing in the United States and discretionary sentencing in England as minimizing or contributing to a disproportionate impact on people of color does not hold true. The debate about discretionary and fixed sentencing has emphasized the racially biased results inherent in a system that relies on judicial discretion, while extolling the potential virtue of a system that attempts to streamline sentences for similar offenders who commit similar crimes through mandatory minimums. This comparison at least suggests that we should begin to look at other inputs into the sentencing equation in evaluating the racially lopsided results that drug sentencing schemes have had on people of color in both the United States and England.

### C. *Enduring Drug Abuse*

Despite more than a decade of mandatory minimum legislation and sentencing guidelines, drug dependence and addiction persist in the United States. In fact, approximately fourteen million Americans, or more than six percent of the population ages twelve and older, were classified as current illicit drug users according to the National Household Survey on Drug Abuse in 2000.<sup>239</sup> This number remained constant from 1999,<sup>240</sup> though it increased as compared to previous years. In 1996, about thirteen million Americans qualified as current illicit drug users.<sup>241</sup> By 1997, this number jumped to approximately 13.9 million Americans,<sup>242</sup> which remained relatively constant until 1999 when it surpassed fourteen million.<sup>243</sup>

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239. 2000 *National Household Survey*, *supra* note 209, at 1; see *Who Are America's Drug Users*, *supra* note 209.

240. 2000 *National Household Survey*, *supra* note 209.

241. *Preliminary Results from the 1997 National Household Survey on Drug Abuse*, Substance Abuse and Mental Health Services Administration [hereinafter *1997 National Household Survey*], at <http://www.samhsa.gov/Press/980821o.htm> (last visited Oct. 8, 2003).

242. *Id.*

243. 2000 *National Household Survey*, *supra* note 209.

The National Household Surveys show that while six percent of the population qualifying as illicit drug users is too many, today's category of drug abusers pales compared to the estimated twenty-five million drug users in 1979.<sup>244</sup> True, the Surveys reflect a positive decline in the approximate number of current illicit drug users. The Sentencing Project criticizes, however, that drug use rates began to decline before the mandatory minimum and sentencing guideline regime.<sup>245</sup> Furthermore, since mandatory minimums did not change between 1996 and 2000, the most recent time period in which the National Household Survey indicates a remarkable drug use fluctuation, perhaps drug sentencing has little causal connection to drug abuse.<sup>246</sup>

Even if we assume that strict drug sentencing schemes do impact drug abuse rates positively, however, and even if we accept that the drug sentencing reform that began in the 1980s is responsible for this overall positive trend, the evidence still indicates that drug use persists, and the category of habitual drug users has either stayed even or continued in an upward trend in recent years.<sup>247</sup>

It could be that no matter what sentencing practices legislators employ, a certain percentage of the population will always use drugs. Looking comparatively at the rate of drug abuse in England informs this discussion. The UK Drug Report on Trends in 2001<sup>248</sup> shows

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244. See 1997 National Household Survey, *supra* note 243.

245. *Drug Policy and the Criminal Justice System*, *supra* note 181, at 2.

246. Congress last amended the mandatory minimum scheme with the Crime Control and Law Enforcement Act in 1994. See *supra* notes 81–91 and accompanying text. If rigid drug sentencing statutes have a positive impact on drug use, then statistics should show a drop in current illicit drug use instead of a rise. One could argue, on the other hand, that the recent rise in the number of current illegal drug users could indicate that whatever may have been contributing to a decline in drug abuse, which could be mandatory minimum legislation and sentencing guidelines, may have reached its optimal level. This argument would support an increase in the mandatory minimum sentences already in place.

247. See *supra* notes 241–45.

248. The Report is issued by DrugScope, "the UK's leading independent centre of expertise on drugs" that "provide[s] quality drug information, promote[s] effective responses to drug taking, undertake[s] research at local, national and international levels, advise[s] on policy-making, [and] encourage[s] informed debate..." *Welcome to the DrugScope Website*, DrugScope, at <http://www.drugscope.org.uk/about/home.asp> (last visited Oct. 8, 2003).

that monthly users, or the equivalent of current illicit drug users in the U.S. National Household Survey on Drug Abuse, totaled about twelve percent of the English population in 2002.<sup>249</sup> This number, much like that in the United States, remained constant from 2001 and marks an increase from drug use rates of eleven percent in 2000 and 1998, and ten percent in 1996 and 1994.<sup>250</sup> With persistent drug abuse in both countries, the major question becomes whether the appreciably different drug sentencing schemes used in each country for the past fifteen years had any impact on the amount of illicit drug use in each nation.

Certainly, drug sentencing could meet many aims, with reducing use and abuse of illicit substances as only one of those goals. If existing drug sentencing laws actually were reducing drug use, legislators in either country might not feel compelled to give great weight to indicators demonstrating some amount of continued drug addiction. Moreover, non-sentencing policies may help both nations achieve a decline in illicit drug use in the future; these strategies may be compatible with the existing sentencing scheme in both countries, allowing lawmakers to leave their respective legislative sentencing schemes intact. On the other hand, if deterring illicit drug use comprises one of the principal objectives of the contemporary sentencing landscape in the United States,<sup>251</sup> largely stagnant drug use rates in the United States suggest that mandatory minimum

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249. *UK Drug Report 2001, Chapter 2: Epidemiological Situation*, DrugScope, at [http://www.drugscope.org.uk/druginfo/drugsearch/ds\\_report\\_results.asp?file=wip\11\3\004chapter2.html](http://www.drugscope.org.uk/druginfo/drugsearch/ds_report_results.asp?file=wip\11\3\004chapter2.html) (last visited Oct. 9, 2003).

250. *Id.*

251. Mandatory minimum legislation and sentencing guidelines for simple possession, or possession of drugs for personal use, suggest that at least part of the emphasis centers on deterring or reducing personal drug use. See *supra* notes 58–59, 62–64, 73, 80 and accompanying text. The Sentencing Reform Act, which created the U.S. Sentencing Commission, directed the Commission to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” 28 U.S.C. § 994 (k) (1984). Finally, the statute that created the Sentencing Commission listed various issues the Commission should consider in determining an appropriate sentence, including “the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct.” 18 U.S.C. § 3553(a)(2)(B) (1984). These legislative provisions suggest that deterrence may be one of the foremost goals of the current drug sentencing scheme.

penalties and the sentencing guidelines have done little to affect the desired change.

Evidence about illicit drug use in both the United States and England presents a difficult question. Mandatory minimum legislation and the sentencing guidelines have not reduced illicit drug use in dramatic or even significant terms in the United States.<sup>252</sup> The sentencing laws in England, which place ceilings on sentences, involve greater judicial discretion, and focus less on incarceration, also have yielded persistent drug use rates, and rates that hover around *double* the rate of illicit drug use in the United States.<sup>253</sup> Without a systematic statistical analysis, it may not be possible to conclude much of anything about the rates of illicit drug use in either country.<sup>254</sup> One way we might conceptualize the problem, however, is to consider whether the important data is that the English suffer twice as much illicit drug use as the United States, or that both countries experience a persistent drug abuse problem. England has endured greater drug abuse among its population than the United States for many years; that difference may not prove as significant as the fact that neither England nor the United States has experienced a perceptible decline in its drug abuse.

This comparison of drug abuse rates does not suggest that the incidence of drug use shares no relationship to the type of criminal sentencing scheme utilized. The point this comparison draws out, however, speaks to the absence of a positive effect of either sentencing scheme on the amount of illicit drug use in either country. We can imagine many reasons—other than the types of drug sentencing laws—that might impact drug use in both societies: the state of the economy, unemployment, lack of education, mental illness, boredom, peer pressure, or even recreation. For the sake of argument, however, persistent drug abuse rates in the United States and England across markedly different sentencing schemes at least question whether non-sentencing policies might have a more considerable bearing on drug abuse than drug sentencing legislation. If this comparison between U.S. and British drug addiction rates *does* suggest that policies other than criminal sentencing have the greatest

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252. See *supra* notes 242–45 and accompanying text.

253. See *supra* notes 250–54 and accompanying text.

254. It could be that the different sentencing system in England yields higher drug abuse rates than in the United States.

potential to decrease drug abuse rates, then U.S. policymakers should not allow a fear of persistent drug use in America to frustrate necessary sentencing reform.

## VI. CONCLUSION

The comparison between drug sentencing legislation in this piece presents two types of important lessons. First, a basic analysis of sentencing provisions shows various facial differences between the drug sentencing laws in the United States and England. British law affords magistrates and judges who determine sentencing for drug offenses more discretion than does the U.S. system. English drug sentencing laws restrain magistrates and judges only with maximum sentences, rather than requiring mandatory minimum incarceration terms for similar offenses as in the United States. Finally, the English drug sentencing scheme categorizes all drugs based on their perceived dangerousness for the purpose of determining the appropriate sentence, leaving magistrates and judges with discretion to weigh the amount of the drug in question and many other factors in determining a sentence. The U.S. sentencing scheme, in contrast, trusts judges much less to make the appropriate sentencing decision, allowing them to consider only the amount and type of drug involved in the offense, and in some cases, the defendant's criminal history. Drug sentencing laws in the United States also penalize crack offenders more harshly with respect to the quantity of the drug required to trigger mandatory minimums than offenders committing crimes involving any other drug.

Beyond the facial differences between the two systems, a comparison between the consequences of the drug sentencing system in each country advances the analysis. Rigid mandatory minimums and sentencing guidelines have resulted in U.S. incarceration rates higher than any nation in the world. Though England imprisons more people than most nations in Europe, the number of people incarcerated for drug offenses cannot compare to the many thousands serving time in America. This difference helps us to see that a fixed sentencing system for drug offenses, but not for violent offenses, consequently privileges violence as compared to drug offenses. This outcome communicates a dangerous message and also may expose the public to increased harm by imprisoning violent offenders for shorter terms than non-violent drug offenders, affording non-violent

drug offenders the opportunity to learn from and adopt the behavior of incarcerated violent offenders.

Comparing the consequences of the two different drug sentencing systems illustrates a disproportionate impact on people of color who commit drug offenses. The racial disparity among convicted drug offenders indicates that non-whites comprise disproportionate numbers of imprisoned drug offenders in both Britain and the United States. This consequence suggests that neither the discretionary drug sentencing legislation in England nor the pre-determined penalties in the United States achieves an acceptable outcome. Largely unbridled discretion in England and set sentences for non-violent drug offenders, as well as the crack-cocaine disparity in the United States, result in alarming racial disparities—a version of Armour's "Black Tax." Critically evaluating the flaws in each system helps us to see how both systems contribute to this tax. Moreover, this comparison suggests that the discussion about the disproportionate impact that the drug war has had on non-whites may be too narrowly focused on the polarization between discretionary sentencing and non-discretionary sentencing. In other words, the comparison between mandatory minimums in the United States and a less rigid system in England demonstrates that other considerations, in addition to the rigidity or flexibility of a sentencing scheme, matter to the impact that sentencing legislation will have on people of color.

Enduring drug abuse rates among English and U.S. populations intimate that edging away from the unyielding drug sentencing system in the United States to reduce overwhelming imprisonment, ceasing to privilege violent offenders as compared to non-violent drug offenders, and tackling the troubling racial disparities in incarceration may not result in increased drug use and addiction. With markedly more flexible sentencing laws, England suffers similarly constant rates of drug abuse as compared to the United States. Congress should explore the possibility that sentencing laws may have less of an impact on drug use than non-sentencing programs, such as education, alternative sentencing schemes, and limited decriminalization of less dangerous controlled substances.

This piece has not developed a concrete initiative for legislative reform. At worst, it has illustrated some of the disconcerting problems evident in the existing U.S. drug sentencing scheme from a



new perspective, and has shown some similar problems also inhere in a markedly different sentencing system. This paper makes a strong case for the urgency of drug sentencing reform, by illustrating (1) the distressing level of incarceration attendant to the U.S. sentencing scheme that is notably absent in England; and (2) the related privileging of violent criminals, as compared to non-violent drug offenders. We should heed these differences from the English system, a country that we consider an equal, a partner, and a nation similarly committed to democratic ideals, with great seriousness.

Beyond situating the problems associated with drug sentencing legislation in a new context, this comparative project also recommends a departure from the crack-cocaine disparity in U.S. mandatory minimums and sentencing guidelines. While some version of non-discretionary sentencing legislation may guard against racial disparities in sentencing, the provisions that penalize violations involving much smaller amounts of crack as compared to the same amount of other illicit drugs have exacerbated the disproportionately long sentences already inflicted on racial and ethnic minorities before federal drug sentencing reform. U.S. lawmakers who consider certain drugs more harmful than others could still fashion different fixed or discretionary sentences based on dangerousness categorizations, similar to British law, rather than targeting crack offenses as compared to crimes involving all other drugs.

Excepting the crack-cocaine disparity, U.S. legislators might consider adjusting mandatory minimums and sentencing guidelines to result in less drastic levels of incarceration. One appropriate amendment might reduce the mandatory minimum sentences from their current lengths or eliminate them altogether *for non-violent drug offenders*. Congress might take a cautious approach, commissioning a study that examines the incarceration crisis, the contribution of mandatory minimum sentences to this problem, and the ways in which this system treats violent offenders differently by subjecting them to less prison time than many non-violent drug offenders. Following this investigation, Congress might institute a reduction in sentence lengths for *non-violent offenders convicted of drug possession*.

Largely unregulated discretion in the English system results in racially disparate incarceration rates and sentence lengths,

undercutting the arguments of those seeking wholesale abandonment of the fixed sentencing scheme currently in place in the United States. Because the English system has resulted in racially lopsided sentencing results, however, does not mean that every sentencing scheme incorporating judicial discretion would fail to treat the drug problem seriously, deter repeat offenders, prevent initiation of drug use, protect the public, and achieve racially balanced consequences. A discretionary scheme that caps prison terms could provide judges with discretion to choose an appropriate sentence length *and* provide detailed guidelines for determining the appropriate sentence.

Beyond raising specific and very pragmatic lessons, looking comparatively at English drug sentencing laws also helps us to think seriously about what normative values we have incorporated into our federal drug sentencing laws and what other principles we care about but that remain noticeably absent from drug sentencing legislation. As mentioned, two important value-laden consequences of the current system include a benefiting or privileging of violent offenses as compared to all drug offenses, including non-violent drug crimes, and a disproportionate burdening of people of color as casualties in the drug war. Certainly, our aim, in constructing a sentencing scheme lies with addressing the serious criminal harm associated with drug crimes, a result we hope to reach without punishing violent crimes less harshly, or unfairly singling out any particular racial or ethnic group in the process.

By understanding the unfortunate and unintended consequences of our federal drug sentencing system, we begin to see the normative underpinnings that we want a drug sentencing scheme to uphold: one that punishes violent offenders, who pose the greatest risk of continued and serious harm to society, more severely than those who pose a less severe risk of harm as non-violent drug offenders; one that avoids brutalizing non-violent drug offenders, who are imprisoned for lengthy sentences alongside violent offenders; one that moves toward less racially biased results so that those arrested, prosecuted, and incarcerated for drug crimes do not include grossly disproportionate numbers of people of color; one that takes seriously the astonishing incarceration rates in the United States as compared to the rest of the world community; and one that takes the drug problem seriously and deals with it effectively. In addition, we seek an overall drug strategy that, perhaps independent from a sentencing

scheme, begins to decrease appreciably the persistent use of illegal drugs.

This piece only scratches the surface of a comparative consequentialist exercise in the area of drug sentencing. England provides one helpful example for examining the particular contours of drug sentencing legislation, substantial incarceration, and racially disparate imprisonment rates for drug offenses. Other legal systems may provide helpful insight into these consequences and many others. Moreover, future comparative papers might move beyond sentencing to explore another area of the American “drug war” or drug policies, investigating comparative consequences appropriate to that subject, such as effective, non-sentencing methods of decreasing illicit drug use.

Drug sentencing encompasses a breadth of areas in need of reform. From a practical standpoint, legislators might find it politically easiest to explore one aspect of the federal drug sentencing law or one particularly upsetting consequence with great enthusiasm. For example, lawmakers might first decide to revisit the crack-cocaine sentencing disparity, or strict mandatory minimums for non-violent drug offenders. They may, alternatively, set out to attack prison overcrowding and its relationship to federal drug sentencing legislation, or the ways in which the current system privileges violent offenders as compared to non-violent drug offenders. Most importantly, however, scholars and legislators should continue to engage in discussion about “drug war” dilemmas on the road toward reform, giving particular attention to the normative values that underlie the current sentencing choices we have made and the consequent practical results. Looking comparatively at foreign jurisdictions provides one helpful and novel way to frame this dialogue.