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The Senseless War: The Sentencing Drug Offenses Arms Race

Abstract	101
Introduction	102
A. Overview of the Fifty-Year War On Illicit Drugs..	102
B. Structure of the Article and Definitional Matters...	103
I. Current Approach to Sentencing Drug Offenders	107
A. Number of Drug Prisoners in the United States and Its Approach to the Sentencing of Drug Offenders	107
B. Number of Drug Prisoners in Australia and the Sentencing of Drug Offenders.....	112
II. The Move to Decriminalize Illicit Drugs	118
III. The Efficacy of Punishment to Deter Drug Offenders and Protect the Community from Them.....	123
A. Specific Deterrence Does Not Work.....	124
B. General Deterrence (Also) Does Not Work	126
C. Incapacitation	132
D. Overview of Effectiveness of Drug Policies	139
E. Can Proportionality Justify Severe Punishment for Drug Offenders?.....	139
Conclusion.....	143

ABSTRACT

There has been a considerable increase in the penalties for drug trafficking following the United Nations Single Convention on

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Narcotic Drugs 1961, over fifty years ago. In many parts of the world, the sanctions are as severe as those for homicide and rape. This penalty escalation is at odds with the counter movement to decriminalise illicit drugs. Drug supplying is the only serious crime where there are widespread moves to decriminalize the main outcome of the crime – the use illicit drugs. This paper explores this paradox. It also examines the rationales for the increasingly harsh penalties for drug suppliers. We conclude that while there is no conclusive argument in favour of the decriminalizing drugs, the weight of empirical data does not establish any concrete benefits stemming from severe penalties for serious drug offenses. In particular, there is no correlation between longer prison terms for drug offenders and a reduction in the availability and use of drugs. We propose that the penalties for drug offenses should be reduced considerably. There is no useful objective that can be achieved by a twenty-five-year term of imprisonment that cannot be achieved by a term of five to ten years. A more measured sentencing response to serious drug offense penalties would make sentencing fairer and enable billions of dollars currently directed to imprisonment to be spent on more pressing community needs.

INTRODUCTION

A. Overview of the Fifty-Year War On Illicit Drugs

The global “war on drugs” commenced following the United Nations Single Convention on Narcotic Drugs 1961¹ and gained momentum following the clampdown on drugs by U.S. President Nixon more than forty years ago.² The sharp end of the war of drugs is harsh penalties for offenders involved in the distribution of drugs. The objective of this is to “reduce the scope and scale of drug markets via

¹ All nations are parties to the Convention except Afghanistan, Chad, East Timor, Equatorial Guinea, Kiribati, Nauru, Samoa, South Sudan, Tuvalu, and Vanuatu.

² See REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY, WAR ON DRUGS 2 (June 2011); As noted by Lauren M. Cutler, in *Arizona’s Drug Sentencing Statute: Is Rehabilitation a Better Approach to the “War on Drugs”?* 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 397, 399 (2009). The author argues that the war escalated in 1982: “Officially declared on October 2, 1982, by President Reagan in a radio address, the ‘War on Drugs’ has intensified to the extent that it has affected the entire American criminal justice system. The theory was if law enforcement got ‘tough on crime’ by securing more arrests and punishing offenders with harsher penalties, it would have a deterrent effect, thus decreasing the net volume of drug offenses”; see also Michael A. Simons, *New Voices on the War on Drugs: Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921 (2002) for an overview of the background and roll out of the war on drugs.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 103

supply-side initiatives, particularly through tough and uncompromising law enforcement.”³

In recent decades there has been an escalation in the penalties imposed on serious drug offenders in many parts of the world. Penalties exceeding twenty years of imprisonment are now increasingly imposed, thereby often exceeding sanctions typically imposed on homicide offenders. In some parts of the world, even the death penalty applies for drug distribution offenses. Despite a general international trend over the past sixty years towards an abolition of the death penalty, there has been an increase in the number of countries that have introduced the death penalty for drug offenses. The number grew from approximately ten in 1979, to twenty-two in 1985 and thirty-six countries in 2000.⁴ This is a trend that seems to be receding slightly recently, as a result of the general trend towards the abolition of capital laws.⁵

There is a common political narrative to the “arms race” that has emerged in relation to the sentencing of serious drug offenders. Illicit drugs are widely available; they cause harm to users; suppliers make large amounts of money and harsh penalties are needed to discourage the trade in drugs. Moreover, people involved in the distribution of drugs are regarded as a scourge on the community, who profit from the misery of others. Not surprisingly, there is no mainstream opposition to increasingly harsher penalties for drug crime.

B. Structure of the Article and Definitional Matters

Although serious drug offenses are nearly universally punished harshly, there is no established normative or empirical justification for this practice. In this paper we examine the desirability of severe punishment for these offenses. We do this from two different perspectives.

First, we explore the paradox that exists when the sentencing of serious drug offenders is examined against the backdrop of the move

³ MARCUS ROBERTS ET AL., THE BECKLEY FOUNDATION DRUG POLICY PROGRAMME, LAW ENFORCEMENT AND SUPPLY REDUCTION, DRUGSCOPE, REPORT THREE 2 (2004).

⁴ HARM REDUCTION INTERNATIONAL, THE DEATH PENALTY FOR DRUG OFFENCES: GLOBAL OVERVIEW 2012, TIPPING THE SCALES FOR ABOLITION 5 (2012). Drug offences account for the most executions in Malaysia (69%) and Singapore (76%); see Andrew Novak, *Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya*, 45 SUFFOLK U. L. REV 282, 306–07 (2012).

⁵ See *supra* note 4.

to decriminalize drugs. Serious drug crime is the only heavily punished crime where there are considered arguments in favor of decriminalizing the outcome of the crime (i.e., the use of drugs). No such arguments exist for offenses that are at the similar end of the crime severity spectrum, such as homicide, rape, armed robbery and serious assault. As noted by Ben Mostyn et al.:

Some offences, such as murder, sexual assault and theft, are *mala in se* (wrong in themselves). We know why these acts are criminal. Drug offences, on the other hand, are *mala prohibita* (wrong because prohibited). That is, the use of certain drugs is criminal because parliaments have proscribed it, not because we think the conduct is necessarily wrong in itself and deserving of punishment. We do not think the consumption of the drugs alcohol or nicotine or even caffeine is criminal and parliaments have not prohibited it to make it so.⁶

Why is a crime which results in conduct which some regard as being innately not criminal, now punished as severely as conduct that incontestably causes intentional gross harm to victims? Given the increasing support for decriminalizing the use of drugs, the logic underlying the imposition of harsher sentencing for the supply of drugs is inherently contestable.

Secondly, we explore the rationales that the courts and legislatures provide for the increasingly tough drug sentences.⁷ The principal justification is the perceived need to deter people from participating in the drug trade. Subsidiary reasons include the need to discourage the offender from again committing crime and the need to protect the community. In sentencing terms, these rationales are termed general deterrence, specific deterrence and incapacitation. We examine the wide-ranging empirical data regarding the efficacy of punishment to achieve these goals. More broadly, inflicting harsh penalties on drug suppliers seek to reduce the availability and use of drugs and limit the associated supposed negative effects of drug use. The main supposed adverse effects of drug use relate to the bad health outcomes of users and their increased disposition to commit crime.

There are a number of criteria upon which the success of the anti-drug policy can be measured. Logically they map directly to the rationales for the harsh penalties. As with all crime, the principal

⁶ Ben Mostyn, Helen Gibbon & Nicholas Cowdery, *The Criminalisation of Drugs and the Search for Alternative Approaches*, 24 CURRENT ISSUES CRIM. JUST. 261, 262 (2012).

⁷ The issue was explored extensively as a thematic concept more than twenty years ago. See Donald W. Dowd, *The Sentencing Controversy: Punishment and Policy in the War Against Drugs*, 40 VILL. L. REV. 301 (1995).

measure of success is the extent to which the incidence of the relevant crime is reduced. Thus, an important consideration in evaluating anti-drug policy is whether serious drug crime is reduced. Drug manufacture and supply is closely associated with organized crime and the availability and use of illicit drugs. Organized crime has numerous causes and hence it is not tenable to measure its size or impact as being indicative of the success of drug policy. However, drug availability (and use) is directly linked to the level of which drugs are made and distributed. Thus, the key measure upon which current drug sentencing policy will be measured is the extent of drug use in the community.

As noted below, there are many commentators that advocate for the decriminalization of drugs. We do not necessarily support this proposition. For the sake of clarity, the new propositions that are canvassed in this paper are (i) that irrespective of the legal status of drug use, the penalties for serious drug offenses should be reduced and (ii) the decriminalization of drug use in many jurisdictions and the effects of this support a reduction in the penalties for serious drug offenses because decriminalization of drug use is the sine qua non for a revised attitude to drug offenses.

In Part II of the paper we examine the current approach to sentencing serious drug offenders. In part three, we discuss the move toward legalization of drugs and consider the key rationales that have been offered to this end. We do not make a definitive conclusion regarding the merits of these arguments. Rather we note that the arguments are logically sound, have some empirical validity, and are pragmatically tenable.

Part IV of the paper examines whether harsh sentences are capable of deterring drug crime offending and protecting the community. The weight of the empirical data suggests that this not feasible.

Moreover, the harmful effects of drug trafficking are often treated as axiomatic, and there is a “disturbing essentialism” connected with this because the causal connection between drug trafficking and the harm caused by drug use is not always evident—meaning that the imposition of severe penalties is not necessarily defensible.⁸ We conclude that increasing the sentencing tariffs for drug offenses is an illustration of community and political venting trumping the rational implementation of coherent and workable criminal justice practices. If drug offenses

⁸ See Andrew F. Sunter, *The Harm of Drug Trafficking: Is there Room for Serious Debate?*, 32 MAN. L.J. 174, 176 (2006); see also Peter Alldridge, *Dealing with Drug Dealing*, in HARM AND CULPABILITY 239 (A.P. Simester & A.T.H. Smith eds., 1996).

are to remain illegal (which is likely in the foreseeable future), there is no community benefit that can be achieved by a five- or ten-year term of imprisonment that cannot be achieved by a sentence of twenty-five years—the additional fifteen to twenty years is a concession to the impulsiveness and frailty of contemporary policy making.

This paper examines most closely sentencing law and practice in the United States and Australia. The United States is an important jurisdiction because it imprisons the most number of drug offenders in the world. Australia is also examined because it is now starting to follow the United States trend of a considerable increase in drug offender jail numbers, and is potentially a jurisdiction that is still amenable to evidence-based reform before it whole-heartedly embraces a flawed model.

Severe penalties exist for all forms of drug offenses, except those relating to personal use. This paper focuses on what is loosely termed serious drug offenses. The paradigm serious drug offense is drug “trafficking” or “supplying.” Other forms of conduct relating to drugs that attract severe penalties are importation, possession and manufacture. As noted below, from the sentencing perspective there is no meaningful distinction between these forms of conduct. All attract harsh penalties.

The U.S. Department of Justice, Bureau of Statistics, in calculating the number of offenders incarcerated for “drug crime,” states that this term encompasses “trafficking, possession and other drug offenses,”⁹ which means “violations of laws prohibiting or regulating the possession, distribution, or manufacture of illegal drugs.”¹⁰ Similar terminology is employed by the Australian Bureau of Statistics (which is the institution that is responsible for officially documenting prisoner numbers in Australia). It defines illicit drug offenses as “the possessing, selling, dealing or trafficking, importing or exporting, manufacturing or cultivating of drugs or other substances prohibited under legislation.” In this paper so far, we have used the phrase serious drug

⁹ E. Ann Carson & William J. Sabol, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2011* (Dec. 2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

¹⁰ See U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Drugs and Crime*, <http://www.bjs.gov/index.cfm?ty=tp&tid=35> for the definition of “drug-defined” offenses.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 107

offenses to accord with the above definitions.¹¹ Henceforth, we use the term drug offenses.

I

CURRENT APPROACH TO SENTENCING DRUG OFFENDERS

A. Number of Drug Prisoners in the United States and Its Approach to the Sentencing of Drug Offenders

As noted above, over the past few decades there has been a near universal trend of increasing penalties for drug offenses. This has been most marked in the United States. A paper by Ilyana Kuziemko and Steven D. Levitt¹² observed that in the United States in the two decades from 1980 to 2000 the number of offenders imprisoned for drug offenses increased fifteen-fold.¹³

The rate of growth has declined over the most recent decade (to 2010), but in absolute terms the numbers remain very high. The most recent data shows that (on the preferred official assessment for counting prisoners) on December 31, 2011, there were 1,598,970 prisoners in U.S. state and federal prisons that were sentenced for a term of one year or more.¹⁴ The number of prisoners in state prisons for

¹¹ Australian Bureau of Statistics, *Prisoners in Australia*, 87 (Apr. 2013), [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/\\$File/45170_2012reissue.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/$File/45170_2012reissue.pdf).

¹² Ilyana Kuziemko & Steven D. Levitt, *An empirical analysis of imprisoning drug offenders*, 88 J. PUB. ECON. 2043, 2044 (2004) (noting the dearth of literature concerning the impact of increased sentences for drug offences on crime and summarizing the findings of other research).

¹³ *Id.* By 2005, this figure had increased to nearly 500,000. See DAVE BEWLEY-TAYLOR ET AL., INCARCERATION OF DRUG OFFENDERS: COSTS AND IMPACTS 3 (2005), http://www.iprt.ie/files/incarceration_of_drug_users.pdf.

¹⁴ U.S. Dep't of Justice, *supra* note 10. The total number of incarcerated people was in fact 2,239,800 (i.e., 937 adults per 100,000 population); Lauren E. Glaze & Erika Parks, U.S. Dep't of Justice, Office of Justice Programs, Bureau Of Justice Statistics, *Correctional Populations In The United States, 2011* 3 (Nov. 2012). This measure is termed the "custody [prison] population" and differs from the "jurisdiction [prisoner] population" (which is the official measure) in the following manner. The difference is obscure but is explained as follows:

BJS's official measure of the prison population is the count of prisoners under the jurisdiction or legal authority of state and federal adult correctional officials (1,598,780 in 2011). The jurisdiction population count is reported in *Prisoners in 2011*, BJS website, NCJ 239808, December 2012. These prisoners may be held in prison or jail facilities located outside of the state or federal prison systems. The prison population reported in table 2 in this report is the number held in custody or physically housed in state (1,289,376 in 2011) and federal (214,774 in 2011) adult

drug offenses was 237,000 (17% of total state prisoners).¹⁵ In the ten years from 2000 to 2010 there was a reduction of 21,100 drug offenders in state prisons.¹⁶ However, the number of drug offenders in federal prisons increased by 29,800 during this period.¹⁷ Drug offenders comprise 48% of all offenders in federal prisons.¹⁸ The total number of drug offenders in federal prisons in 2011 was 94,600.¹⁹ Thus, in the United States there are well over 300,000 offenders in prison for drug offenses.²⁰

The main reason for the increased incarceration rate of drug offenders in the United States is penalty escalation against the backdrop of mandatory sentencing laws and presumptive guidelines, which has been the trend of sentencing reform in the United States since the 1970s.²¹

Most states in the United States as well as the federal jurisdiction have advisory or presumptive sentencing grid guidelines, which use criminal history score²² and offense seriousness to calculate the

correctional facilities, regardless of which entity has legal authority over the prisoners (appendix table 1). This includes state and federal prisoners held in privately operated facilities. The difference between the number of prisoners in custody and the number under jurisdiction is the number of state and federal prisoners held in the custody of local jails, inmates out to court, and those in transit from the jurisdiction of legal authority to the custody of a confinement facility outside that jurisdiction. Because table 2 presents data on the number of individuals under the supervision of the adult correctional systems by correctional status, BJS uses the count of the number of prisoners held in custody to avoid double counting prisoners held in local jails. *Id.* at 2.

¹⁵ Carson & Sabol, *supra* note 9.

¹⁶ *Id.* at 10.

¹⁷ *Id.* (although there was a reduction from 2010 to 2011).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ For a discussion of the magnitude of the problem in Ohio, see Jelani Jefferson Exum, *Sentencing, Drugs, and Prisons: A Lesson from Ohio*, 42 U. TOL. L. REV. 881 (2011). A study of Kentucky appears in Robert G. Lawson, *Drug Law Reform-Retreating from an Incarceration Addiction*, 98 KY. L.J. 201 (2010).

²¹ See, e.g., MICHAEL TONRY, SENTENCING MATTERS 146 (1996). For an overview of sentencing reform in the United States, see William W. Wilkins Jr., Phyllis J. Newton & John R. Steer, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 305 (1993); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1 (2006). Some states appear to be in the process of moderating penalties for some offences. See AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE, *STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES* (Aug. 2011).

²² Which is based mainly on the number, seriousness and age of the prior conviction.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 109

appropriate penalty.²³ None of these policies and practices emanated from a clear theoretical foundation, but rather stemmed from “back-of-an-envelope calculations and collective intuitive judgements.”²⁴

The federal sentencing guidelines are especially harsh on drug offenders.²⁵ The guidelines are no longer mandatory in nature, following the U.S. Supreme Court decision in *United States v Booker*,²⁶ however, sentences within guideline ranges are still imposed in approximately 60% of cases.²⁷

The penalties for drug offenders are contingent on an offender’s prior history and the nature of the offense in question. The “base offense level” (i.e., the level for offenders with no prior convictions or a prior history score of 1) for offenses involving the manufacture, importing, exporting, or trafficking (including possession to commit such offenses) involving 30 kilograms or more of heroin or 150 kilogram or more of cocaine is level 38²⁸ which is a minimum of between 19.5 and 24.5 years imprisonment (235-293 months, to be precise).²⁹ Even much smaller amounts of drugs are dealt with severely. If an offender commits an offense involving at least 700 grams but less than 1 kilogram of heroin, at least 3.5 kilograms but less than 5 kilograms of cocaine, or at least 1,000 kilograms but less than 3,000 kilograms of Marijuana, the base level is 30,³⁰ which is a minimum of 9 to 11.25 years.³¹ Even relatively small amounts of drugs result in imprisonment. If an offender commits an offense involving at least 5

²³ Tonry, *supra* note 21, at 93.

²⁴ *Id.*

²⁵ U.S. SENTENCING COMM’N, 2012 GUIDELINES MANUAL 394 (2012), available at http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf.

²⁶ 543 U.S. 220 (2005) (holding that aspects of the guidelines that were mandatory were contrary to the Sixth Amendment’s guarantee of trial by jury); see also *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States* 552 U.S. 38 (2007); *Irizarry v. United States*, 553 U.S. 708 (2008); *Greenlaw v. United States*, 554 U.S. 237, (2008); *Alleyne v. United States*, 133 S.Ct. 2151, (2013) (holding that any fact that increases the penalty for an offence, including one where a mandatory penalty applies, is an element of the offence and hence must be established beyond reasonable doubt to the satisfaction of the jury).

²⁷ Sarah French Russell, ‘*Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions*’ 43 U.C. DAVIS L. REV 1135, 1160 (2010). The offense levels range from 1 (least serious) to 43 (most serious). The criminal history score ranges from 0 to 13 or more (worst offending record).

²⁸ U.S. SENTENCING COMM’N, *supra* note 25, at 394.

²⁹ *Id.*

³⁰ *Id.* at 141.

³¹ *Id.* at 394.

grams but less than 10 grams of heroin or at least 25 grams but less than 50 grams of cocaine, the base level is 14,³² which is a minimum of fifteen to twenty-one months.³³

By way of further example, a relatively well-known presumptive sentencing system is the grid system in Minnesota, which also utilizes offense severity and prior criminality as the defining penalty variables.³⁴ The vertical axis of the grid lists the severity levels of offenses in descending order (there are ten different levels). The horizontal axis provides a (seven level) criminal history score, which reflects the offender's criminal record.³⁵ The presumptive sentence appears in the cell of the grid at the intersection of the offense score and the offender score. Where the sentence is one of imprisonment, a precise period is indicated, as is a range within which a court can sentence an offender without it being regarded as a departure.³⁶ The range allows for the operation of aggravating and mitigating circumstances other than those relating to an offender's prior criminal history. Sentences may only be imposed outside the range where substantial and compelling circumstances exist.³⁷ The guidelines are different to federal sentencing guidelines, but can operate just as severely. The presumptive penalty for a first-degree controlled substance crime (which can be committed by selling ten grams of cocaine or heroin or possessing twenty-five grams of cocaine or heroin)³⁸ for an offender without a prior criminal history is 74-103

³² *Id.* at 142.

³³ *Id.* at 394.

³⁴ MINN. SENTENCING GUIDELINES COMM'N, SENTENCING GUIDELINES GRID (2012), available at <http://mn.gov/sentencing-guidelines/images/2012%2520Standard%2520Grid.pdf>. For an explanation of the grid, see MINN. SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING AND GUIDELINES COMMENTARY (2012) (hereinafter MINNESOTA SENTENCING AND GUIDELINES COMMENTARY), available at <http://mn.gov/sentencing-guidelines/images/2012%2520Guidelines.pdf>. In the United States, over a dozen other states also utilize sentencing grids, see Richard S. Frase, *Sentencing Guidelines in Minnesota and Other American States: A Progress Report*, in THE POLITICS OF SENTENCING REFORM 169, 171 (Chris Clarkson & Rod Morgan eds., 1995).

³⁵ This is determined according to a criminal history score, with each felony carrying a pre-determined number of points, with felonies more than 15 years old being omitted. See MINN. SENTENCING GUIDELINES COMM'N, *supra* note 34, at comments 2.B.

³⁶ In which case the court must complete a departure report and submit it to the Sentencing Guideline Commission within fifteen days of the sentence.

³⁷ For a more detailed explanation of the Minnesota grid system, see Andrew von Hirsch, *Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards*, in THE POLITICS OF SENTENCING REFORM 149, 149 (Chris Clarkson & Rod Morgan eds., 1995).

³⁸ Minn. Stat. § 152.021 (2012).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 111

months imprisonment.³⁹ For a second-degree controlled substance crime (which can be committed by selling three grams of cocaine or heroin or possessing six grams of cocaine or heroin)⁴⁰ for an offender without a prior criminal history the presumptive penalty is forty-one to fifty-seven months.⁴¹

Some of the harshest types of mandatory sentencing laws are the three-strikes laws, which have been adopted in over twenty states.⁴² The Californian⁴³ three-strikes laws, which were reformed in 2012,⁴⁴ are the most well known.⁴⁵ Prior to the reforms, offenders convicted of *any* felony who had two or more relevant previous convictions were required to be sentenced to somewhere between twenty-five years to life imprisonment.⁴⁶ The Californian three-strikes law was somewhat softened in 2012, such that a term of at least twenty-five years would only be required where the third offense was a serious or violent felony. In such cases, offenders continue to receive a significant premium—they must be sentenced to double the term they would have otherwise received for the instant offense.⁴⁷ Thus, despite the softening of the

³⁹ MINNESOTA SENTENCING AND GUIDELINES COMMENTARY, *supra* note 34, at 73.

⁴⁰ Minn. Stat. § 152.022 (2012).

⁴¹ MINNESOTA SENTENCING AND GUIDELINES COMMENTARY, *supra* note 34, at 73.

⁴² See Kate McMurry, ‘Three-strikes Laws Providing More Show Than Go’ Trial 12 (1997); James Austin et al., The Impact of “Three Strikes and You’re Out”, 1 PUNISHMENT AND SOCIETY 131 (1999).

⁴³ Cal. Penal Code Ann. § 667(b)(i) (West 2012).

⁴⁴ Three Strikes Reform Act of 2012, Proposition 36, (see new Penal Code Section 1170.126).

⁴⁵ It has been held that the laws do not violate the Eighth Amendment of the U.S. Constitution (the “cruel and unusual punishment” prohibition). See *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

⁴⁶ This meant that some offenders were sentenced to grossly disproportionate sentences. Defendants have been sentenced to 25 years to life where their last offense was for a minor theft (which, prior to the three-strikes regime, would normally have resulted in a noncustodial sentence). For example, Jerry Dewayne Williams, a 27-year-old Californian was ordered to be imprisoned for 25 years to life without parole for stealing a slice of pepperoni pizza from a group of four youths, based on his previous convictions, <http://www.independent.co.uk/news/world/life-for-pizza-theft-enrages-lawyers-1609876.html>. Gary Ewing was sentenced to 25 years to life for stealing three golf clubs, each of which was worth US \$399. Prior to that he had been convicted of four serious or violent felonies. (This sentence was appealed to the Supreme Court which upheld the validity of the legislation, *Ewing v California* 538 U.S. 11 (2003). For a discussion of the case, see Sara Sun Beale, *The Story of Ewing v California: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review*, CRIMINAL LAW STORIES (July 28, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650021).

⁴⁷ This is the manner in which offenders are dealt with generally for second strikes.

laws, they still provide severe penalties for serious and violent offender third-strikers. These laws also continue to impose harsh penalties on drug offenders. This impact has been noted for well over a decade. In 2000, it was noted that while the law was principally aimed at sexual and violent offenders, after five years of operation, 19% of three-strikers had been deemed “simple drug offenders” and 31% of two-strike offenders (who are sentenced to three times the normal penalty) were drug offenders.⁴⁸ By 2010, the number of three-strike offenders who had solely committed drug offenses was still around 19%, exceeding 1,000 offenders in total.⁴⁹

B. Number of Drug Prisoners in Australia and the Sentencing of Drug Offenders

Australia has not escaped the trend of increased incarceration of drug offenders. Currently, the rate of imprisonment is 168 per 100,000 adult Australians. A decade earlier the rate was 148 per 100,000. Thus, there has been an overall increase of 13% in the Australian imprisonment rate. The number of people imprisoned for drug matters has grown considerably more during this period—both in relative and absolute terms. As of June 30, 2002, the number of prisoners whose most serious offense was a drug matter was 2014, of a total of 22,492 prisoners (i.e., 9%).⁵⁰ Ten years later, this had grown to 3,408 prisoners of a total 29,383 prisoners (12%).⁵¹

Thus, in the decade leading to June 30, 2012, in absolute terms, the number of offenders in prison for drug matters had increased by 1,396 (an increase of 69%). In relative terms the portion of the entire prison population that was imprisoned for drug matters had increased by 33%.

The marked increase in drug offenders imprisoned in Australia stems from severe sentences for drug crimes. In Australia, most

⁴⁸ Gerald F. Uelman, *The Impact of Drugs Upon Sentencing Policy*, 44 ST. LOUIS U. L.J. 359, 362 (2000).

⁴⁹ Neil Barnes, *Implications of New Study on Sentencing for Three Strikes Drug Offenders*, NCJOLT (Sept. 7, 2012), <http://ncjolt.org/implications-of-new-study-on-sentencing-for-three-strikes-drug-offenders>. This included thirty-two offenders sentenced to life imprisonment for marijuana offences. *Three Strikes Law*, THE HILLS TREATMENT CENTER (last visited Apr. 13, 2014), <http://www.thehillscenter.com/drug-rehab/three-strikes-law/>.

⁵⁰ See *Prisoners in Australia*, AUSTRALIAN BUREAU OF STATISTICS—30 June 2012 (Feb 20, 2003), [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/36AD2530CF827549CA256CD2008000E6/\\$File/45170_2002.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/36AD2530CF827549CA256CD2008000E6/$File/45170_2002.pdf).

⁵¹ *Id.* at 33. The figure is far higher in some other countries, e.g., Italy (29%); Luxembourg (42%); Spain (27%). Bewley-Taylor et al., *supra* note 13.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 113

jurisdictions do not have presumptive penalties. The overarching methodology and conceptual approach that sentencing judges undertake in making sentencing decisions is termed the “instinctive synthesis.” The term originates from the Full Court of the Supreme Court of Victoria decision of *R. v Williscroft*,⁵² where Adam and Crockett J.J. stated, “Now, ultimately, every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.”⁵³

Thus, sentencing judges retain a broad discretion to impose a penalty anywhere from a nominal finding of guilty to the statutory maximum penalty and are not required to set out the weight given to various sentencing considerations.⁵⁴

Despite the largely discretionary nature of the sentencing methodology in Australia, penalties have increased because the maximum penalty for drug offenses is severe. All jurisdictions have penalties up to life imprisonment for offenders that deal with large quantities of drugs.⁵⁵ And there are numerous cases, where in fact a life penalty has been imposed.⁵⁶

Further, while the instinctive synthesis is the orthodox approach to sentencing determinations, when it comes to serious drug cases, appeal courts in Australia have been quite prescriptive and detailed, even to the extent of setting out ranges that have been imposed for paradigm offense types. The most comprehensive analysis of a large number of serious drug cases is by McClellan C.J. at C.L. in *DPP v De La Rosa*,⁵⁷ McClellan C.J. at C.L. The analysis was endorsed by Maxwell P in

⁵² *R. v Williscroft* [1975] VR 292 (Austl.).

⁵³ *Id.* at 300. The High Court of Australia has affirmed this approach in numerous decisions, for example see *Wong v R.* (2001) 76 ALJR 79(Austl.), 94; *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520 (Austl.).

⁵⁴ For criticism of this approach, see Mirko Bagaric, *Sentencing: The Road to Nowhere*, 21 SYDNEY L. REV. 597, 605 (1999).

⁵⁵ The effective penalties for federal offences may increase further, see Consultation Paper issued by the Department of the Attorney General in June 2010. *Submission to the Consultation on Implementation of Model Drug Schedules for Commonwealth Serious Drug Offences*, ATODA (Mar. 17, 2011), <http://www.atoda.org.au/wp-content/uploads/ATODA-Submission-Consultation-on-implementation-of-model-drug-schedules-for-commonwealth-serious-drug-offences-170311-2.pdf>. For a discussion, see generally Ian Leader-Elliott, *Sentencing by Weight: Proposed Changes to the Commonwealth Code*, 9.1 *Serious Drug Offences*, 36 CRIM L.J. 265 (2012).

⁵⁶ See, e.g., *R. v Chung* [1999] NSWCCA 330 (Austl.); *Barbaro v R.* [2012] VSCA 288 (Austl.).

⁵⁷ [2010] NSWCCA 194. (Austl.).

Nguyen v The Queen; Phommalysack v The Queen,⁵⁸ who summarizes the observations of McClellan CJ as follows:

Import commercial quantity <i>Customs Act 1901</i> (Cth) s 233B and <i>Criminal Code Act 1995</i> (Cth) s 307.1		Range of sentences imposed	
		Head sentence	Non-parole period
Group 1	High quantity (tens or hundreds of kilograms); high value (tens of millions of dollars); large reward (hundreds of thousands of dollars) although finding of reward not required; not guilty plea in half of cases; no assistance; no remorse; mastermind, principal or part of organising committee; high degree of responsibility	25y to life	8y 6m–30y
Group 2	High quantity; high value; guilty plea; principal, member of upper management or “essential” role with moderate to very high level of responsibility; reward in tens of thousands of dollars although finding of reward not indicative	18–24y 6m	10–16y
Group 3	Quantity generally below 7 kg; mid-range role; discount for assistance, cooperation; plea not indicative	8–15y	4–11y
Group 4	No prior convictions; good antecedents; quantity not indicative; plea not indicative although discount provided for early plea; role not indicative although generally part of syndicate	6y 3m–8y	3–4y 6m

The above chart represents a judicial assessment of a large sample of surveyed cases.⁵⁹ The statistical data that exists is more wide-ranging and generally indicates softer penalties, presumably because the quantity of many of the drugs was on average lower. The Australian Law Reform Commission Report 103, *Same Crime, Same Time: The Sentencing of Federal Offenders* (2006) looked at sentences across Australia involving a commercial quantity of MDMA during the five

⁵⁸ [2011] VSCA 32.(Austl.).

⁵⁹ It has been noted that this summary, needs to be applied in a flexible manner. In *Trajkovski v The Queen* (2011) 211 A Crim R 118 (Austl.), the Court disapproved of the use of the chart in a prescriptive manner. The Court held that this is to adopt a two stage sentencing process.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 115

year period 2000–2004.⁶⁰ The report looked at sixty-three matters that involved a single charge. The jurisdictions where most cases occurred were New South Wales, Western Australia and Victoria. Overall the mean terms (maximum and minimum respectively) were 11.3 years and 5.5 years. For a commercial quantity of heroin, by comparison, the overall means were 27.75 years and 11 years.

These figures needed to be used with caution. In 2008, the High Court of Australia ruled that there is no difference in drug seriousness for sentencing purposes.⁶¹ Thus, the disparity between sentences for MDMA and heroin is no longer justified.

The Judicial Commission of New South Wales also sets out data for the offense of supplying a large commercial quantity of a prohibited drug, which has a maximum penalty of life imprisonment and a standard non-parole period of 15 years. The data is for offenses between 2003 and 2007. There were seventy-four such offenses.⁶² The guilty plea rate was 85%.⁶³ The imprisonment rate was 98%—this is the same whether the offender pleaded guilty or not guilty. The median sentence for offenders pleading guilty was 7 years and 7.5 months with the median non-parole period being 4 years and 9 months.⁶⁴

The Victorian Sentencing Advisory Council provides data for sentences for trafficking in large commercial quantity of drugs (the maximum penalty for this offense is life imprisonment). The first report is for all offenses committed between 2004–05 to 2008–09. During this period there were seventy offenders and the 90% of these received a term of imprisonment. The terms of imprisonment range from one year to sixteen years. The median term was six years and six months and the most common prison term was six years.⁶⁵ The most recent survey by Victorian Sentencing Advisory Council was for the period 2006-2007

⁶⁰ *Same Crime, Same Time: Sentencing of Federal Offenders*, AUSTRALIAN LAW REFORM COMM'N (2006), <http://www.austlii.edu.au/au/other/alrc/publications/reports/103/>.

⁶¹ *Adams v The Queen* (2008) 234 CLR 143 (Austl.).

⁶² PATRIZIA POLETTI & HUGH DONNELLY, *THE IMPACT OF THE STANDARD NON-PAROLE PERIOD SENTENCING SCHEMES ON SENTENCING PATTERNS IN NEW SOUTH WALES*, 51 (Judicial Commission of New South Wales 2010).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Sentencing Snapshot*, VICTORIAN SENTENCING ADVISORY COUNCIL (June 2010), https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_102_sentencing_trends_for_trafficking_in_a_large_commercial_quantity_of_drugs_in_the_higher_courts_of_victoria_june_2010.pdf.

to 2010-2011. This shows a hardening of penalties. During this period the number of sentenced offenders for trafficking in a large commercial quantity of drugs rose from seventy to eighty-nine and the imprisonment rate rose to 96%. The median term was imprisonment for seven years and the most common length of imprisonment was eight years to less than nine years.⁶⁶

The reason for the severe sentences imposed on drug offenders is not simply a manifestation of the high maximum penalty for the offense. It stems from the strict approach the courts have taken to sentencing such offenders and, in particular, that harsh penalties are needed to deter drug offenses and that drugs cause a large degree of harm in the community. This leaves little room for the operation of personal mitigating factors.⁶⁷

In *R v Nguyen; R v Pham* the New South Wales Court of Criminal Appeal usefully set out the principles that apply in sentencing serious federal drug offenders. The Court stated:

The following general propositions emerge from the authorities:

- (a) the criminality of an offender must be assessed by consideration of the involvement of the offender in the steps taken to effect the importation: *R v Lee* at [27]; . . .
- (c) it is the criminality involved in the importation that must be identified—the fact that another person may be characterized as the “*mastermind*” does not mean that a person who was responsible for managing the importation into Australia is properly described as having only a middle level of responsibility . . .
- (d) although the weight of the drug imported is not the principal factor to be considered when fixing sentence, the size of the importation is a relevant factor and has increased significance when the offender is aware of the amount of drugs imported . . .
- (g) the difficulty of detecting importation offenses, and the great social consequences that follow, suggest that deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case . . .

⁶⁶ *Id.*

⁶⁷ General deterrence does not totally overwhelm all other considerations. In *Sukkar v R* [No 2] (2008) 178 A Crim R 433 the Court stated at [21]: “It is established that the major sentencing considerations for offences of trafficking in dangerous drugs of addiction, including cocaine, are general and personal deterrence.” See *Bellissimo* (1996) 84 A Crim R 465, 471. Although the weight of the illicit drug is not, generally, the chief factor to be taken into account in fixing a sentence, it is, plainly, a matter of importance. Other matters to be taken into account include the offender’s knowledge of the type and quantity of the drug in question, and the nature and level of the offender’s participation in its trafficking. See also *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 [67] - [70] (Austl.).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 117

- (h) the sentence to be imposed for a drug importation offense must signal to would-be drug traffickers that the potential financial rewards to be gained from such activities are neutralized by the risk of severe punishment . . .
- (j) the prior good character of a person involved in a drug importation offense is generally to be given less weight as a mitigating factor on sentence . . .⁶⁸

Specific deterrence is also regarded as an important consideration in relation to offenders who have prior convictions for drug offenses.⁶⁹ The seriousness of the harm that courts regard drug offending is illustrated in *Mokbel v The Queen*⁷⁰ where the court stated:

The sentences imposed had to be seen to reflect the community's abhorrence of trafficking in drugs, and the Court's denunciation of a person who, for reasons of sheer greed, was prepared—repeatedly and determinedly—to inflict untold harm on the community.⁷¹

In summary, the key principles that guide sentencing courts in Australia in sentencing drug offenders are as follows:

1. General deterrence is the most important consideration.
2. It is rare for offenders who are found guilty of large-scale drug offenses to not receive a custodial term.
3. In terms of offense severity, the most important consideration is the offender's role.
4. The second most important consideration is the amount of drugs.
5. The Courts do not distinguish between degrees of dangerousness of drugs.
6. There is scope for mitigating factors to reduce the sentence.
7. The most important mitigating factors are:
 - assistance to authorities;
 - low purity of drugs;
 - drug addiction;
 - no commerciality; and
 - previous good character.⁷²

⁶⁸ [2010] NSWCCA 238 (Austl.).

⁶⁹ See *Barbaro v The Queen*; *Zirilli v The Queen* [2012] VSCA 288 (Austl.).

⁷⁰ [2013] VSCA 118 (Austl.).

⁷¹ *Id.* at 108.

⁷² See MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING (2011).

The culmination of these considerations in addition to the high maximum penalties for drug offenses has resulted in a significant increase in drug offender prison numbers in Australia.

II

THE MOVE TO DECRIMINALIZE ILLICIT DRUGS

In this part of the paper, we examine the evidence regarding the actual impact of drug use. This is important because it is suggested that one of the main reasons underlying the imposition of harsh penalties for serious drug offenders is the correlative link made between drug trafficking and the negative effects that drugs have on users, and the wider community in the form increased crime. This suggestion is challenged when consideration is given to the arguments supporting the decriminalization of drug use. If using drugs does not constitute a crime, the correlation between drug trafficking and serious crime is less obvious. Hence, if there is a softening of the law relating to drug use there needs to be a parallel and corresponding reduction in the penalties for drug supplying.

The decriminalization of drugs involves the reduction or removal of preexisting controls and penalties. This is generally achieved by replacing prison terms with other non-incarceration penalties such as fines or recording the incident without imposing a permanent criminal record. A core aspect of the decriminalization of drugs involves a shift towards harm reduction via the imposition of noncriminal sanctions.⁷³

In some respects, drug decriminalization represents an intermediate balance between drug prohibition and drug legalization. It has been criticized as amounting to “the worst of both worlds”, because whilst personal drug usage may no longer attract a criminal sentence, drug sales remain illegal, thereby perpetuating one of the core concerns connected with drug offenses that relates to the fact that the production and distribution of drugs continues to constitute an activity undertaken by the criminal underworld.

It has also been argued that decriminalization fails to discourage illegal drug use as it removes the criminal penalties that might otherwise cause some people to avoid drug usage. Whilst these are cogent arguments, it is also clear that the decriminalization of offenses relating to drug possession allows the law enforcement system of a country to put more effort into the process of arresting dealers and big

⁷³ GLEN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 6 (Cato Inst. 2009).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 119

time criminals, instead of apprehending minor offenders for possessory offenses.

The move to decriminalize drugs is gaining global momentum. In 2011, the Global Commission on Drug Policy called for an end to the criminalization of drug use and noted that despite the vast expenditure on the criminalization and repressive measures directed at producers, traffickers and consumers of illegal drugs, it has clearly failed “to effectively curtail supply or consumption.”⁷⁴

In subsequent reports in both 2012 and 2013 this message was reinforced.⁷⁵ In the 2013 report, the Global Commission on Drug Policy called for an end to the criminalization of drug use because of the enormous impact the criminalization of drugs has had in the spread of the hepatitis C infection.⁷⁶ It is estimated that of the 16 million people who inject drugs around the world, 10 million are now living with hepatitis C.⁷⁷ The latest report from the Global Commission on Drug Policy has condemned the drug war as a failure and recommended immediate and significant reforms of global drug prohibition.

During this period, it has been estimated that around twenty-five to thirty countries across the world have implemented some form of drug decriminalization, ranging from the decriminalization of drugs for personal use in Croatia from the start of 2013, to the creation of syringe exchange programs in many Middle Eastern and African countries including Egypt, Morocco, and the United Arab Emirates.⁷⁸

A diverse range of approaches have been implemented with respect to the possession of cannabis. For example, in 2003 Belgium passed laws distinguishing between the possession of cannabis for personal use and other types of drug offenses. The laws were subsequently amended and the Minister of Justice and Prosecutors-General issued a directive in 2005, instructing that adult individuals found with under three grams of cannabis for personal use would be issued a “Process-

⁷⁴ GLOBAL COMMISSION ON DRUG POLICY, WAR ON DRUGS AND HIV/AIDS: HOW THE CRIMINALIZATION OF DRUG USE FUELS THE GLOBAL PANDEMIC 2 (2012) [hereinafter WAR ON DRUGS].

⁷⁵ *Id.* See also GLOBAL COMMISSION ON DRUG POLICY, THE NEGATIVE IMPACT OF THE WAR ON DRUGS ON PUBLIC HEALTH: THE HIDDEN HEPATITIS C EPIDEMIC (2013) [hereinafter THE NEGATIVE IMPACT].

⁷⁶ THE NEGATIVE IMPACT, *supra* note 75, at 3.

⁷⁷ *Id.*

⁷⁸ See AIR ROSMARIN & NIAMH EASTWOOD, A QUIET REVOLUTION: DRUG DECRIMINALISATION POLICIES IN PRACTICE ACROSS THE GLOBE’ DRUGS (Release 2011).

Verbal Simplifé” (PVS) or “simple record.” The issuance of a PVS does not attract a penalty and the cannabis is not confiscated. The purpose of the PVS is merely to record the circumstances of the possession and for a copy to be kept at the local police station.⁷⁹

Portugal is one of the most groundbreaking countries in terms of the breadth and scope of its approach to drug decriminalization. Drug use and possession were decriminalized in Portugal in 2001 in response to what the Portugal government perceived as a nationwide and uncontrollable drug problem, exacerbated by a criminalization regime that was effectively draining all of the financial and human resources of the country.⁸⁰ Decriminalization in Portugal was enacted following the issuance of an expert study by the Commission for a National Drug Strategy that recommended a drug strategy premised around the core principles of “harm reduction, prevention and reintegration of the drug user into society.”⁸¹ The Commission concluded that decriminalization was the most advantageous strategy to fight the growing drug problem in Portugal. Significantly, the ultimate objective of the strategy recommended by the Commission was to reduce drug usage and abuse.⁸²

The strategy eventually implemented in Portugal relied heavily upon the recommendations outlined by the commission. Decree Law 30/2000 was enacted in October 2000 and took effect on July 1, 2001. The new law decriminalizes the use and possession of drugs and makes it clear that the commission of these acts only constitutes an administrative offense, provided the possession or consumption does not exceed up to ten days worth of an average daily dose of drugs, which are intended only for personal use. An individual found in possession of drugs will only be referred to a criminal court where they are in possession of more than ten days worth of personal supply. No distinction is made in this law between different forms of hard or soft

⁷⁹ *Country Overview: Belgium*, EMCDDA (May 28, 2013), <http://www.emcdda.europa.eu/publications/country-overviews/be>.

⁸⁰ GREENWALD, *supra* note 73.

⁸¹ PORTUGUESE DRUG STRATEGY, 82 (1998) [hereinafter PORTUGUESE DRUG STRATEGY]. COMISSÃO PARA A ESTRATÉGIE NACIONAL DE COMBATE À DROGA COMISSION FOR A NATIONAL DRUG STRATEGY, [NATIONAL STRATEGY FOR THE FIGHT AGAINST DRUGS] 82 (1998) (Port.).

⁸² *Id.* at 6–7.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 121

drugs, nor is a distinction made between private consumption and public consumption.⁸³

A police officer may issue an individual a citation to attend Commission for the Dissuasion of Drug Addiction, “CDTs”, which are not a component of the criminal justice system. The police will generally refer a user to a CDT within seventy-two hours of the offense being committed, however no arrest is made.⁸⁴ The CDT panel is comprised of three government appointed civilians. One of the members must be a legal expert but the other two are appointed by the Ministry of Health and may come from medical, psychology or social services backgrounds. The panel is non-adversarial and the focus of the discussion is upon the health of the individual in issue and whether treatment is required.⁸⁵ Participants are not legally represented to further emphasize the noncriminal nature of the proceedings.⁸⁶

A broad range of different sanctions may be issued by a CDT. For addicts, these include prohibitions on dealing with particular people, expulsion from particular venues, restrictions on foreign travel and ineligibility for the practice of particular occupations. Similar penalties may be applied to non-addicts although a CDT may decide to simply issue a warning if it is clear, from the circumstances and the nature of the substance, that the non-addict will abstain from future use.⁸⁷

The impact of the decriminalization laws in Portugal has been widely debated, with some commentators suggesting that it has been enormously successful in reducing the impact of drug crime, despite the fact that it has resulted, in overall terms, in an increase in drug consumption.⁸⁸ Given, however, that the focus of the initiatives were to prevent the exacerbation of the problems stemming from

⁸³ See Kellen Russoniello, ‘*The Devil (and drugs) in the Details: Portugal’s Focus on Public Health as a Model for Decriminalization of Drugs in Mexico*,’ 12 YALE J. HEALTH POL’Y L. 7 ETHICS 371, 385 (2012).

⁸⁴ INEKE VAN BEUSEKOM ET AL., RAND EUROPE, GUIDELINES FOR IMPLEMENTING AND EVALUATING THE PORTUGUESE DRUG STRATEGY 7 (2002).

⁸⁵ *Id.* See, e.g., *Belgium Country Profile, Lisbon*, EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, 2011, <http://www.emcdda.europa.eu/htmlCFM/indexs174en.htm>.

⁸⁶ For a discussion on the options of introducing this type of process in the United States, see Alex Kreit, ‘*The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model*,’ U. CHI. LEGAL F. 299, 327 (2010).

⁸⁷ Russoniello, *supra* note 83 at 388; see also GREENWALD *supra* note 73, at 3.

⁸⁸ See A. Stevens & C.E. Hughes, *A Resounding Success of a Disastrous Failure: Re-Examining the Interpretation of Evidence on the Portuguese Decriminalisation of Illicit Drugs*, DRUG AND ALCOHOL REVIEW 101, 104–04 (2012).

decriminalization, it seems clear that these objectives have been successful.⁸⁹ Studies by the CATO Institute have revealed that whilst drug addiction and other associated pathologies have increased in most EU states, these problems have been either contained or significantly improved within Portugal since 2001.⁹⁰ Significantly, problem drug use, and by this we refer to long-term use or the injection of opioids, cocaine or amphetamines, is now far lower in Portugal than in other countries.⁹¹

Other countries have followed the example of Portugal. For example, Mexico introduced decriminalization laws in 2009 following enormous difficulties the country experienced with drug use and abuse.⁹² The main objective of the decriminalization laws in Mexico, however, was to avoid counter narcotic officials from having to focus upon the activities of small time drug offenders.⁹³

Many States adopting a decriminalization approach have, however, sought to balance their stance by significantly increasing the sentences of those who commit corresponding drug offenses beyond the threshold quantities or parameters of the decriminalized circumstances.⁹⁴ This represents an interesting trend, although its schematic focus lacks balance and proportion. As noted below, proportionality is crucial to the underlying sentencing objectives for drug offenses. It is unreasonable and disproportionate to impose a reactive sentencing framework. Such an approach ignores the consequential assumption, underlying decriminalization, that drug offenses derived from or associated with decriminalized drug offenses, including drug

⁸⁹ See Brian Vastag, *5 Years After: Portugal's Drug Decriminalization Policy Shows Positive Results*, SC. AM. (Apr. 7, 2009), <http://www.scientificamerican.com/article.cfm?id=portugal-drug-decriminalization>.

⁹⁰ GREENWALD, *supra* note 73, at 28.

⁹¹ See LOUISA DEGENHARDT ET AL., THE BECKLEY FOUND. DRUG POLICY PROGRAMME: COMPARING THE DRUG SITUATION ACROSS COUNTRIES: PROBLEMS, PITFALLS AND POSSIBILITIES 4, 3 (2009).

⁹² See David Luhnnow & Jose de Cordoba, *Mexico Eases Ban on Drug Possession*, WALL ST. J., Aug. 22, 2009, available at <http://online.wsj.com/news/articles/SB125086054771949269>. See also Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1318 (quoting UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 168 (2009), "decriminalizing drug use falls within the Convention parameters because 'drug possession is still prohibited but the sanctions fall under the administrative law not the criminal law.'").

⁹³ Luhnnow & Cordoba, *supra* note 92. The authors refer to Mexican authorities who have justified the laws on the basis that it is a positive move as it "helps the government focus on the bad guys and lets state and local governments get involved in drug abuse as a public health issue." *Id.*

⁹⁴ ROSMARIN & EASTWOOD, *supra* note 78, at 40.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 123

trafficking, will no longer have the same criminal impact and do not generate the same marginalization and stigmatization that might previously have been the case.

Given the above trends and effects, a sound argument can be made that decriminalization policies should not be implemented in a vacuum. Interconnected drug offenses are necessarily impacted by a decriminalization policy because they are connected to an overall strategy of reductive criminalization. The imposition of non-incarceration penalties for small, personal-usage drug possession offenses should result in a corresponding decrease in drug-trafficking offenses because the two are inextricably connected. The decriminalization process should not be regarded as a discrete and isolated process that targets specific offenses. Arguably, the underlying objectives of the process are best achieved in the context of comprehensive and interconnected decriminalization and sentencing reduction initiatives.

III

THE EFFICACY OF PUNISHMENT TO DETER DRUG OFFENDERS AND PROTECT THE COMMUNITY FROM THEM

In this part of the article we move from arguments relating to the decriminalizing of drug use and the effect of this to the efficacy of one of the main current means used to reduce the drug trade. As noted above, the sharp end of enforcement is imposing sanctions on drug offenders. As we have seen, offenders who distribute or make drugs are generally subjected to harsh penalties.

There have been few studies that have focused on the specific issue of whether sentencing can reduce the amount of drugs in the community. However, many studies have been undertaken on the efficacy of sentencing to achieve common sentencing objectives. These objectives aim to reduce crime in general. We examine these general studies and also the more specific ones that have been undertaken in relation to drug offenses.

There are three rationales that are typically provided for harsh criminal penalties. Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay. In effect, it attempts to dissuade offenders from re-offending by inflicting an unpleasant experience on them (normally imprisonment) that they will seek to avoid in the future. General deterrence seeks to dissuade potential

offenders with the threat of anticipated punishment from committing similar offenses by illustrating the harsh consequences of offending. Incapacitation aims to prevent crime by placing offenders in prison and segregating them from the rest of the community.

A. Specific Deterrence Does Not Work

The available data suggest that specific deterrence does not work. Inflicting harsh sanctions on individuals does not make them less likely to reoffend in the future. The level of certainty of this conclusion is very high—so high that it has been suggested that specific deterrence should be abolished as a sentencing consideration.⁹⁵

There have been numerous studies across a wide range of jurisdictions and different time periods that come to this conclusion.⁹⁶ Daniel Nagin, F. T. Cullen and C. L. Johnson⁹⁷ provide the most recent extensive literature review regarding specific deterrence.⁹⁸ They reviewed separately the impact of custodial sanctions versus noncustodial sanctions and the effect of the length of sentence on reoffending. The review examined six experimental studies where custodial versus noncustodial sentences were randomly assigned;⁹⁹ eleven studies that involved matched pairs;¹⁰⁰ thirty-one studies that were regression-based¹⁰¹ and seven other studies that did not neatly fit into any of those three categories, and included naturally occurring social experiments that allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.

The last category included a study based on clemency granted to over 20,000 prisoners in Italy in 2006. A condition of release was that if those who were released re-offended within five years they would be required to serve the remaining (residual) sentence plus the sentence for the new offense. It was noted that there was a 1.24% reduction in

⁹⁵ See Mirko Bagaric & Theo Alexander, *The capacity of criminal sanctions to shape the behaviour of offenders: specific deterrence doesn't work, rehabilitation might and the implications for sentencing*, 36 CRIM. L.J. 159 (2012).

⁹⁶ *Id.*

⁹⁷ Daniel S Nagin, Francis T. Cullen & Cheryl L. Johnson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 145 (2009).

⁹⁸ The main studies are summarized in Don Weatherburn, et al., *The specific deterrent effect of custodial penalties on juvenile reoffending*, CRIME AND JUST. BULLETIN No.132 (2009) and in the VICTORIAN SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE (2011).

⁹⁹ Nagin, *supra* note 97, at 144–45.

¹⁰⁰ *Id.* at 145–54.

¹⁰¹ *Id.* at 154–55.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 125

re-offending for each month of the residual sentence. This observation can be explained on the basis that the threat of future imprisonment discouraged imprisonment. However, it was also noted that offenders who had served longer sentences prior to being released had higher rates of re-offending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behavior.¹⁰²

Nagin et al. conclude that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who are not and, in fact, some studies show that the rate of recidivism is higher. They conclude that:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.¹⁰³

The review suggests that not only do longer jail terms not deter, but neither do tougher jail conditions. Studies also show that offenders who are sentenced to maximum-security prisons as opposed to minimum-security conditions do not re-offend less.¹⁰⁴

A more recent study by the Victorian Sentencing Advisory Council, which compared similarly placed offenders who had been sentenced to imprisonment with those who had not been imprisoned, found that those who were not sentenced to imprisonment had a lower recidivism rate.¹⁰⁵

Few specific deterrence studies have focused on drug offenders in particular. However, one recent study by Donald Green and Daniel Winik¹⁰⁶ observed the re-offending of 1003 offenders who were initially sentenced for drug-related offenses between June 2002 and May 2003, by a number of different judges whose sentencing approaches varied significantly (some were described as “punitive,” others as “lenient”), resulting in differing terms of imprisonment and

¹⁰² *Id.* at 155.

¹⁰³ *Id.* at 145. See also VICTORIAN SENTENCING ADVISORY COUNCIL, REOFFENDING FOLLOWING SENTENCING IN THE MAGISTRATES' COURT OF VICTORIA (2013), available at <http://www.sentencingcouncil.vic.gov.au/content/publications/reoffending-following-sentencing-magistrates-court-victoria>.

¹⁰⁴ Nagin, *supra* note 97, at 124.

¹⁰⁵ VICTORIAN SENTENCING ADVISORY COUNCIL, *supra* note 98.

¹⁰⁶ Donald Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, CRIMINOLOGY (2010), <http://ssrn.com/abstract=1477673>.

probation. The study concluded that neither the length of imprisonment nor probation had an effect on the rate of re-offending during the four-year follow-up period.

Accordingly, the weight of evidence supports the view that subjecting offenders (including drug offenders) to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future. There is no evidence to support the argument that imposing increasingly severe hardship on recidivists will increase the likelihood that they will become law-abiding citizens.

B. General Deterrence (Also) Does Not Work

The main form of deterrence that is used to justify the harsher penalties is general deterrence, not specific deterrence. The data regarding general deterrence, however, reveals a similar picture.

There are two forms of general deterrence. *Marginal general deterrence* concerns the correlation between the *severity* of the sanction and the prevalence of an offense. *Absolute general deterrence* concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.¹⁰⁷

It seems that marginal deterrence does not work and absolute general deterrence does work. The findings regarding general deterrence are relatively settled.¹⁰⁸

The failure of even the death penalty to act as a marginal deterrent is exemplified by the experience in New Zealand. During the period of 1924 to 1962 there were periods when the death penalty (for murder) was in force, then abolished, then revived, and abolished again. The changes generally followed some level of public debate and were well publicized. Although the murder rates fluctuated during this period, they bore no correlation to the prevailing penalty, whether capital punishment or life imprisonment.¹⁰⁹

Similar findings have emerged in the United States.¹¹⁰ The absence of a link between lower homicide rates and the death penalty in the

¹⁰⁷ FRANKLIN ZIMRING & GORDON HAWKINS, DETERRANCE, THE LEGAL THREAT IN CRIME CONTROL 14 (1973).

¹⁰⁸ For an overview of the literature, see *supra* note 98.

¹⁰⁹ See NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61, 191 (1969); see also Richard Hood, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 211–12 (1996).

¹¹⁰ See, e.g., John Cochran et al., 'Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment,' 32 CRIMINOLOGY 107, 129 (1994).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 127

United States has, however, been challenged by some commentators.¹¹¹ However, the evidence used in support of a connection between the lower homicide rates on which it is based are statistically significant and the evidence goes against the overwhelming homicide rates, and capital punishment has been debunked on the basis that the data upon trend of the data. As has been pointed out by Richard Berk,¹¹² the main findings in support of the hypothesis that capital punishment is a deterrent are based on eleven findings¹¹³ out of a sample size of 1,000 observations¹¹⁴ where the homicide rate dropped in a U.S. state following an execution in the previous year. The data are statistically meaningless and contrary to the trend of 99% of the observations. Beck states:

Whatever one makes of those 11 observations, it would be bad statistics and bad social policy to generalize from the 11 observations to the remaining 989. So, for the vast majority of states for the vast majority of years, there is no evidence for deterrence in these analyses. Even for the remaining 11 observations, credible evidence for deterrence is lacking.¹¹⁵

Berk concludes that what clearly emerges from the literature is “that for the vast majority of states in the vast majority of years, there is no evidence of a negative relationship between executions and homicides.”¹¹⁶

The strongest evidence in support of the theory of marginal general deterrence stems from the considerable drop in serious crime levels in the United States over the past thirty years. As noted in the discussion below, the drop coincided with a significant increase in the

¹¹¹ See, e.g., Dale Cloninger & Roberto Marchesini, *Executions and Deterrence: A Quasi-Controlled Group Experiment*, 35 J. APPLIED ECON. 569 (2001); Paul Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004).

¹¹² See Richard Berk, *New Claims about Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005).

¹¹³ Situations in which five or more executions occurred in a state in a single year. *Id.*

¹¹⁴ Each “observation” is the homicide rate in a U.S. state over the period of one year. *Id.*

¹¹⁵ Berk, *supra* note 112, at 328.

¹¹⁶ *Id.*; see D. Dölling et al., *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POLICY RES. 201–24 (2009); see also J. Donohue, *Assessing the Relative Benefits of Incarceration: The Overall Change over the Previous Decades and the Benefits on the Margin*, DO PRISONS MAKE US SAFER (S. Raphael & M.A. Stoll eds., 2009); A.N. Doob & C.M. Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 13 CRIME & JUST. 143 (2003).

imprisonment rate. The rate of violent crime in the United States dropped by more than 60% from 1990 to 2009.¹¹⁷

These figures, at face value, suggest that imprisoning ever greater numbers of offenders effectively reduces the crime rate. A number of detailed studies have been undertaken to examine and explain this causal connection. One analyst, William Spelman, has stated that up to 21% of crime reduction is attributable to the increased rate of imprisonment.¹¹⁸ However, it is not clear whether this reduction is attributable to the incapacitation of offenders (who are thereby prevented from committing crimes whilst they are imprisoned) or to the effects of marginal deterrence.¹¹⁹ Removing more than one million offenders from the community obviously makes it impossible for them to participate in crime and hence adds to the crime statistics during their period of incarceration.¹²⁰

Further, it has been noted that similar crime reduction trends occurred in the United States' nearest neighbor, Canada, over approximately the same period. During that period, the imprisonment rate in Canada actually fell.¹²¹

Empirical evidence not only questions the causal link between higher penalties and lower crime, but also provides strong evidence of alternative explanations for falling crime rates. For example, it has been argued that 50% of the fall in the United States crime rate is the result of an increased number of women from disadvantaged groups (teenagers, the poor, and minority groups) whose children would have been most likely to commit crimes as adults, being able to abort unwanted pregnancies after legalization in the 1970s. This ostensibly incredible finding is supported by the fact that states with higher

¹¹⁷ BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm> (The rate of decline in other forms of crime was similar. This is discussed further below in the context of the discussion on general incapacitation.).

¹¹⁸ William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 485, (2000); see also ALFRED BLUMSTEIN & JOEL WALLMAN, *THE CRIME DROP IN AMERICA* (2000); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPS. 163, 177 (2004).

¹¹⁹ On balance, studies show that a 10% increase in imprisonment rates produce a 2-4% reduction in the crime rate, most of which is in relation to nonviolent offenders. See Roger Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009) and the references cited therein.

¹²⁰ As noted below, some of this reduction is also attributable to more police.

¹²¹ Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, J. CRIM. L. & CRIMINOLOGY 765, 803 (2010).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 129

abortion rates in the 1970s had higher drops in crime in the 1990s; with each 10% rise in abortions corresponding to a 1% drop in crimes two decades later.¹²²

Recent research from Germany is consistent with U.S. findings regarding the failure of marginal general deterrence.¹²³ At the Goethe University Frankfurt, Horst Entorf reviewed twenty-four years of criminal sentencing practices in West German states for correlates to the crime rate. Entorf sought to examine the effect of each stage of the prosecution process, from investigation to conviction, on the commission rates of two specific crimes (“major property” and “violent crimes”), in order to assess their relative contribution to the overall effect of the criminal prosecution process on crime rates. The results were analyzed by the theoretical econometric analysis methodology, which considered the deterrent effects of formal and informal, as well as custodial and non-custodial, sanctions.¹²⁴

It was discovered that a deterrent effect was found at “the first two stages of the criminal prosecution process” (charge and conviction) rather than at the “less robust” severity of punishment stage (sentencing). Entorf also found that:

Results presented in [the] article suggest that crime is particularly deterred by certainty of conviction. Here, contrary to popular belief, neither police nor judges but public prosecutors play the leading role. Extending severity of sentences, however, does not seem to provide a suitable strategy for fighting crime. In particular, the *length of the imprisonment terms proves insignificant* (emphasis added).¹²⁵

By contrast, the evidence relating to absolute general deterrence is more positive. The strongest empirical evidence in support of absolute deterrence comes from the United States, which (as noted above) over the past two decades has seen a marked increase in police numbers and

¹²² M. Ellison, *US Study Ties Crime Fall to Abortions*, THE AGE 11, Aug. 1999, p. 13. See also Levitt, *supra* note 118, at 182–83.

¹²³ HORST ENTORF, GOETHE UNIVERSITY FRANKFURT, CRIME, PROSECUTORS AND THE CERTAINTY OF CONVICTION, IZA Discussion Paper No 5670 (2011). For a recent study supporting the inability of sanctions to deter domestic violence, see FRANK A. SLOAN ET AL., DETERRING DOMESTIC VIOLENCE: DO CRIMINAL SANCTIONS REDUCE REPEAT OFFENSES? (2013), available at <http://ssrn.com/abstract=2213310>.

¹²⁴ Theoretical econometrics studies statistical properties of econometric procedures. Such properties include power of hypothesis tests and the efficiency of survey-sampling methods, of experimental designs, and of estimators. See PINDYCK ET AL., ECONOMETRIC METHODS AND ECONOMIC FORECASTS (4th ed. 1998).

¹²⁵ See ENTORF, *supra* note 123, at 4.

a sharp decrease in crime.¹²⁶ The near universal trend of data, which have outlined this link, supports the view that more police, and hence the greater actual and perceived likelihood of detection, has contributed to the reduction in crime.¹²⁷

The connection is complex due to the multifaceted nature of the changes that occurred during this period, which may also have had an effect on the crime rate. The changes include such things as better police methods, a generally improving economy, and other variables including abortion trends and the greater use of imprisonment. It has been noted that the greatest reduction in crime numbers occurs where police are highly visible.

This accords with the ostensible success of “zero tolerance”¹²⁸ policing in locations such as New York City, which saw the greatest number of extra police employed and the sharpest decline in crime.¹²⁹ This trend was evident well over a decade ago. In a period of only several years following the introduction of zero tolerance policing, the rates of violent and property crime fell by approximately 35%.¹³⁰

After evaluating the large number of surveys analyzing the connection between more police and the crime rate, Raymond Paternoster concludes:

What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of

¹²⁶ See Levitt *supra* note 118, at 177 (estimating about a 14% increase).

¹²⁷ See John Eck & Edward R. Maguire, ‘Have Changes in Policing Reduced Violent Crime?: An Assessment of the Evidence,’ in BLUMSTEIN & WALLMAN, *supra* note 118.

¹²⁸ Zero tolerance policing is founded on “broken windows” theory which provides that strict enforcement of minor crime and restoring physical damage and decay, such as broken windows and graffiti, would prevent the fostering of an environment which was conducive to more serious offences being committed; see J Q Wilson & G Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29. The reduction in the New York crime rate has been largely attributed to this policy. JAMES AUSTIN & MICHAEL JACOBSON, HOW NEW YORK REDUCED MASS INCARCERATION (2013).

¹²⁹ FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007).

¹³⁰ Peter Grabosky, *Zero Tolerance Policing*, 102 AUST. INST. OF CRIMINOLOGY: TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE 1, 2 (1999). Grabosky notes that zero tolerance policing is not solely responsible for the drop in crime. He suggests that there are numerous contributing factors, including sustained economic growth; a reduction in the use of crack cocaine; the aging of the baby-boomer generation beyond the crime-prone years; restricting the access of teenagers to firearms; and longer sentences for violent criminals. See also Daniel Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century* 23 CRIME & JUST. 1 (1998); Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension* 22 L. & SOC’Y REV. 163 (1988); Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City* 90 AM. ECON. REV. 584 (2000).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 131

precision how much it deters. Let us take Levitt's estimate as a reasonable guess, that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.¹³¹

The link between lower crime rates and higher perceptions of being caught supports the theory of absolute deterrence, because the reason why the likelihood of being detected acts as a retardant to crime is the underlying assumption that *if* caught some hardship awaits. If rather than punishing offenders, police handed out lollies or movie tickets, more police would result in more crime.

Thus, general deterrence does work, at least to the extent that if there was no real threat of punishment for engaging in unlawful conduct, the crime rate would soar. It follows that the threat of punishment discourages potential offenders from committing crime. This justifies the punishment of wrongdoers. The evidence does not support the view, however, that this relationship operates in a linear fashion, that is, the deterrent effect of sanctions does not increase in direct proportion to the severity of sanctions.

Accordingly, while the objective of deterrence justifies imposing punishment, it is at best a remote consideration when it comes down to the question of how much punishment should be imposed. Absolute general deterrence provides a justification for imposing punishment but it does not justify the imposition of penalties that exceed the objective gravity of the offense. It follows that the pursuit of general deterrence cannot justify the imposition of harsh penalties for offenders.

The conclusions above relate to crime in general. They are not specific to drug offending. There have been few studies, which focus on drug offending in specific. A recent report that examined the effect of harsh penalties for cross-border drug mules (from Mexico to the United States) noted that such penalties only had a small deterrent effect and that in fact the deterrent effect diminishes with sentence length.¹³² The authors suggest that increasing penalties does result in less crime because many judges may not impose the longer penalty and

¹³¹ Raymond Paternoster, *A Century of Criminal Justice: Crimes and Punishment: So, how much do we really know about criminal deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 799 (2010). See also Levitt *supra* note 118. But see John Eck & Edward R. Maguire, 'Have Changes in Policing Reduced Violent Crime?: An Assessment of the Evidence,' in BLUMSTEIN & WALLMAN, *supra* note 118 (arguing that these conclusions are not valid, principally because of the incomplete nature of the data and cursory analysis involved).

¹³² Caleb Mason, *International Cooperation, Drug Mule Sentences, and Deterrence: Preliminary Thoughts from the Cross-border Drug Mule Survey*, 18 SW. J. INT'L L.J. 189, 194 (2011).

the marginal deterrent impact of sentence hikes decreases as sentences become more severe. They explained the latter point as follows:

That is, the relative deterrent effect of a year versus a month is much stronger than the relative deterrent effect of 6 years versus 5 years. Thus, it is by no means self-evident, especially given the low likelihood of detection, that there is a significant pool of potential mules who are not deterred by a 5-year expected sentence but would be deterred by a 10-year expected sentence.¹³³

Even a mandatory death penalty for drug trafficking does not seem to reduce drug crime or drug use. A study analyzing the impact of the death penalty for drug trafficking in Malaysia¹³⁴ noted:

The actual data on Malaysia's operation of its mandatory death penalty for drug traffickers demonstrate that Malaysia's solution to the drug problem is not effective, nor is it one that other countries should emulate. While it is impossible to say what would have happened in Malaysia without the enactment of section 39B [which imposes the mandatory penalty], domestic drug use remains at the high levels it reached before the enactment of the mandatory death penalty. Malaysia's experience demonstrates the application of a "drug war" model to the drug problem. In spite of draconian measures—including over a hundred executions, hundreds of death penalties imposed, the conversion of a huge paramilitary police force from fighting communists to fighting drugs, emergency trial processes that circumvent many due process protections, and a police force unfettered by search warrants—hundreds of thousands of Malaysians are still dependent on drugs, and tens of thousands of Malaysians are trafficking in drugs to meet those needs.¹³⁵

C. Incapacitation

Incapacitation is often used as a basis for longer sentences. Incapacitation aims to protect the community by confining offenders to imprisonment, during which time they can no longer commit offenses. The effectiveness of incapacitation cannot be judged by the height of the prison wall. Imprisonment as a means of community protection is only effective if *but for* being imprisoned, the offender would have committed a further offense.¹³⁶ With this in mind, two forms of

¹³³ *Id.* at 194–95.

¹³⁴ Technically the death penalty is mandatory for serious drug offences, but this is often softened in its application by a number of devices.

¹³⁵ Sidney L. Harring, *Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs*, 29 COLUM. J. TRANSNAT'L L. 365, 384 (1991).

¹³⁶ See further Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. (2013), forthcoming (noting that some incapacitative models assume that

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 133

incapacitation have been advanced. The first is selective incapacitation. This form focuses on the individual offender, and its success is contingent upon distinguishing between offenders who will reoffend from those who will not.

Most of the research in this area has been directed towards predicting which serious offenders will reoffend. In this regard, the focus has been offenders who commit violent and sexual offenses.

A wide-ranging analysis in the 1990s of the data regarding the capacity of any discipline to predict future criminal behavior noted that predictive techniques “tend to invite overestimation of the amount of incapacitation to be expected from marginal increments of imprisonment.”¹³⁷ More recent actuarial tools that have been developed to score a person’s level of risk by mapping their profile to variables that are known risk factors. Structured professional judgment and/or criminogenic needs tools also use a range of variables¹³⁸ but are designed to be more nuanced than actuarial tools because they aim to not only predict the likelihood of violence but also the imminence and severity and possible targets of the risk.¹³⁹ Despite this, more recent attempts to accurately predict dangerousness in the context of violent and sexual offenses have proven to be deficient.¹⁴⁰

All predictive tools use prior criminal history as a key variable. This has generally proven to be an unreliable indicator.¹⁴¹ A New South

prison is not part of society). See also Colin Murray, *To Punish, Deter and Incapacitate: Incarceration and Radicalisation in UK Prisons after 9/11*, in PRISONS, TERRORISM AND EXTREMISM 2013 (noting that for incapacitation to work, it is important that inmates do not corrupt other prisoners).

¹³⁷ F. ZIMRING & G. HAWKINS, INCAPACITATION 86 (1997).

¹³⁸ The LSI-R model, which is used in New South Wales, has 54 variables. NSW SENTENCING COUNCIL, HIGH-RISK VIOLENT OFFENDERS SENTENCING AND POST-CUSTODY MANAGEMENT OPTIONS 20–24 (2012).

¹³⁹ For a discussion of these tools, see *id.*

¹⁴⁰ See Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, J. APPL. SEC. RES. 317, 322–23; DANGEROUS PEOPLE: POLICY, PREDICTION AND PRACTICE (B. McSherry & P. Keyzer eds., 2011). See also B. McSherry & P. Keyzer, SEX OFFENDERS AND PREVENTATIVE DETENTION: POLITICS, POLICY AND PRACTICE (2009). Most recently it has been suggested that habitual criminals and serious offenders have a different brain anatomy to other people. Adrian Raine, in ANATOMY OF VIOLENCE (2013) (stating that neuroimaging of the brain shows that such offenders have less brain activity in areas of the brain (the *ventromedial prefrontal cortex* and *dorsolateral prefrontal cortex*) associated with self-awareness, learning from past experience and emotions).

¹⁴¹ For a summary of some of the literature, see Lila Kazemmian, ASSESSING THE IMPACT OF A RECIDIVIST SENTENCING PREMIUM ON CRIME AND RECIDIVISM RATES 227 (2010); M.E. ENZELL & L.E. COHEN, DESTISTING FROM CRIME: CONTINUITY AND CHANGE

Study focused on offenders who committed serious violent offenses¹⁴² in 1994 and were released from custody no later than 2009. There were 435 such offenders and the tracking showed that by September 2011, seventy-three offenders had not committed another offense involving a serious degree of violence—meaning that 83.2% did not commit such an offense.¹⁴³ And in fact the offenders that were least likely to reoffend were those convicted of drug offenses.¹⁴⁴

While selective incapacitation does not work, general incapacitation is more effective in reducing crime.¹⁴⁵ General incapacitation involves imprisoning offenders simply because they have committed a criminal offense on the basis that while in prison they cannot inflict harm in the general community. Little or no effort is normally made to predict future offending patterns, whether on the basis of previous criminal history or other considerations.¹⁴⁶ There is no clear line between selective and general incapacitation and the difference is often simply one of degree. Once large numbers of offenders are imprisoned on the basis of predictive criteria that are demonstrably inaccurate then a process that may have initially had the appearance of selective incapacitation turns into a system of general incapacitation. All jurisdictions impose a recidivist premium and there has been escalation of penalties for certain crime, such as drug offenses.¹⁴⁷ This has effectively evolved into a process of general incapacitation.

Theoretically, general incapacitation should work: the more people who are in prison, the less people there will necessarily be who could commit crime in the general community. Accordingly, it should follow that this will reduce the crime rate in absolute terms. It should also reduce crime in a relative sense. This is because people who commit

IN LONG-TERM CRIME PATTERNS OF SERIOUS CHRONIC OFFENDERS, 2005; M.E. Ezell, *The Effect of Criminal History Variables on the Process of Desistance in Adulthood Among Serious Youthful Offenders*, 23 J. CONTEMP. CRIM. JUST. 18 (2007); K. Auerbahan, *Conceptual and Methodical Issues in the Prediction of Dangerous Behaviour*, 5 CRIMINOLOGY & PUB. POL'Y 771 (2006).

¹⁴² This included sexual offences. NSW SENTENCING COUNCIL, *supra* note 138.

¹⁴³ *Id.* at 31.

¹⁴⁴ *Id.*

¹⁴⁵ For a discussion regarding the distinction between special and collective incapacitation, see ZIMRING & HAWKINS, *supra* note 137, at 60–79.

¹⁴⁶ An exception is the Dutch law discussed below which is aimed at recidivists with ten prior convictions.

¹⁴⁷ For evaluation of this, see Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, SAN DIEGO L. REV. (forthcoming 2014).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 135

crime are disproportionately from one sector of the community: the lower socio-economic group. Poor people are grossly over-represented in gaols across the world.¹⁴⁸ Thus, imprisoning large numbers of poor people should reduce crime not only the number of crime offenses, but also the number of crimes per non-prison population.

Most of the research into the testing the general incapacitation model has been undertaken in the United States, presumably because of the unprecedented increase in the prison population over the past thirty years. The weight of evidence supports the view that general incapacitation works.

In the United States between 1990 and 2009:

- (a) the rate of violent crime in the United States dropped by more than 60%, with most of the decline being recorded after 1996;
- (b) the violent victimization rates per 1,000 people aged twelve years or older dropped from forty-four to seventeen.¹⁴⁹

During this period the imprisonment rate rose from 1.15 million to 2.3 million prisoners.¹⁵⁰ At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and an effective reduction in the crime rate.

As noted above, William Spelman has calculated that up to 21% of crime reduction is attributable to the increased rate of imprisonment.¹⁵¹ Other studies support the success of incapacitation, but remain equally unclear about its precise impact. According to literature examined by Roger Warren, a 10% increase in imprisonment rates produces a 2-4%

¹⁴⁸ See, e.g., S. BOX, RECISSION, CRIME AND PUNISHMENT 96 (1987) (reviewing sixteen major studies between income inequality and crime and concluding that income inequality is strongly related to crime); P. Carlen, *Crime, Inequality and Sentencing*, in A READER ON PUNISHMENT 309 (R.A Duff & D. Garland eds., 1994). Prison numbers illustrate this quite graphically. In Australia, the rate of indigenous imprisonment is fourteen times higher than the general population's; AUSTRALIAN BUREAU OF STATISTICS, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4512.0Main%20Features2Mar%202011?opendocument&tabname=Summary&prodno=4512.0&issue=Mar%202011&num=&view=>.

¹⁴⁹ BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY VIOLENT CRIME TRENDS, 1973–2008 (2008), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm>. The rate of decline in other forms of crime was similar.

¹⁵⁰ BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 (2009), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>.

¹⁵¹ Spelman, *supra* note 118. See also BLUMSTEIN & WALLMAN, *supra* note 118.

reduction in the crime rate; however most of this relates only to non-violent offenses.¹⁵²

While general incapacitation seems to have some validity, one constant finding is that it is usually most effective in relation to minor crime, although some success can also be achieved in relation to more serious forms of offending.¹⁵³ This is because minor offenders reoffend more frequently than serious offenders.

The most wide ranging study of the trajectory of offenders in Australia was undertaken by the Australian Bureau of Statistics and released in August 2010, in a report titled, *An Analysis of Repeat Imprisonment Trends in Australia*.¹⁵⁴

The report is based on a 14-year longitudinal study for the period July 1, 1994 to June 30, 2007. The study grouped prisoners into two cohorts. The first consisted of those released between July 1, 1994 and June 30, 1997. This consisted of 28,584 people. The second comprised prisoners released between July 1, 2001 and June 30, 2004. It consisted of 26,700 people. The study compared recidivism rates from both cohorts within three years from release. It also examined the ten-year re-imprisonment rate for the earlier cohort.

Most generally, the report noted that the number of prisoners with prior imprisonment grew at a rate of 3.2% each year,¹⁵⁵ although this was not steady—with the rate ranging from 56% to 62%.¹⁵⁶ The most illuminating data relates to the 1994 to 1997 release cohort, given that the tracking for these offenders was for ten years, as opposed to only three years. The report noted that for the 1994 to 1997 cohort, about 20% were re-imprisoned within two years; one-quarter were re-imprisoned within three years, and 40% by the end of the ten-year survey period.¹⁵⁷ Moreover, it emerged that prisoners with prior imprisonment were twice as likely as first timers to return to prisoners

¹⁵² See Warren, *supra* note 119, at 585, 594 and the references cited therein.

¹⁵³ D. Weatherburn, J. Hua & Steve Moffatt, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*, 93 CRIME & JUST. BULL. (2006), [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb93.pdf/\\$file/cjb93.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb93.pdf/$file/cjb93.pdf); B. VOLLAARD, PREVENTING CRIME THROUGH SELECTIVE INCAPACITATION, Center Discussion Paper No. 2010-141 (2010).

¹⁵⁴ JESSICA ZHANG & ANDREW WEBSTER, AN ANALYSIS OF REPEAT IMPRISONMENT TRENDS IN AUSTRALIA USING PRISONER CENSUS DATA FROM 1994 TO 2007 (2010), available at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031_aug%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf).

¹⁵⁵ *Id.* at 12.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 16.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 137

(50% compared to 25% imprisonment rates, respectively from ten years after release).¹⁵⁸ When a logistic regression was applied to this data it emerged that the odds ratio that a prisoner with a number of previous prison terms would be imprisoned were 2.9 times that of a first-time prisoner.¹⁵⁹

The data regarding imprisonment for offense type is telling for the purposes of this article. For the 1994 to 1997 release cohort it was noted that by June 30, 2007, the offenders who were most common re-imprisoned (for any offense) were those sentenced for burglary (58%); theft (53%) and robbery (45%); least were those convicted of drug offenses (24%) and sexual assault (21%).¹⁶⁰ Thus, prior drug offending is less indicative of a risk of recidivism than offending for nearly all other offenses. This is also reflected in the pattern of re-imprisonment for the same offense type. The data also looked for criminal specialization by offense type. It noted that for the above cohort, members who were most likely to re-imprisoned for the same offense were those initially convicted of burglary (31%); causing injury (23%); theft (19%); road traffic offenses (19%); road traffic offenses (18%). The rate for illicit drug offenses was 13%. Thus, drug offenders reoffend at the lower rate than most other types of offender and the extent of specialization for this offense is low.

Thus, it seems that detaining drug offenders longer to satisfy the objective of incapacitation is not justifiable given the low rate of re-offending for drug offending. This conclusion seems to apply not only when the looking at the impact on drug crime, but also other forms of crime. In the United States a wide ranging survey of the link between harsher between penalties for drug offenders and violent and property crime was undertaken in paper published in 2004, by Ilyana Kuziemko and Steven D Levitt.¹⁶¹ As noted in Part II of this article, the paper noted that during the survey (1980 to 2000) the number of offenders imprisoned for drug related offenders in the two decades from 1980 to 2000 increased fifteen-fold.¹⁶²

The paper concluded that despite this, the rate of imprisonment of drug offenders, there was only a reduction of between 1 and 3% of

¹⁵⁸ *Id.* at 19.

¹⁵⁹ *Id.* at 23.

¹⁶⁰ *Id.* at 30.

¹⁶¹ See Kuziemko and Levitt, *supra* note 12, at 2044.

¹⁶² *Id.* By 2006, this figure had increased to nearly 500,000; Bewley-Taylor et al., *supra* note 13, at 3.

violent and property crime.¹⁶³ The authors note that the contribution to the crime drop from increased incarceration of drug offenders is minor when compared to the crime drop of approximately 50% (in most categories) in the United States in the 1990s. The authors speculate that increased imprisonment of drug offenders may impact on violent and property crime in a number of ways, including reduced opportunity for drug offenders to engage in other forms of crime as a result of the incapacitation effects of prison.¹⁶⁴ The authors conclude that:

The question of foremost public policy interest related to our work is whether or not the investment in drug-offender incarceration has been cost effective. False First, for typical values of the costs of crime, even the most generous estimates of the crime reduction attributable to prison (Levitt, 1996) suggest that current levels of incarceration are excessive. Thus, it is not easy to justify drug imprisonment based on associated declines in violent and property crime alone. . . . Furthermore, even if one could conclude that the recent increase in drug punishment were cost effective, it might nonetheless be the case that alternative public policy approaches such as legalization accompanied by large taxes (e.g., Becker et al., 2001), or a greater emphasis on treatment would not have accomplished the same objective more cheaply.¹⁶⁵

The authors did not look at the impact of increased drug penalties on drug crime, although they noted that this may have increased the prices of cocaine by 5-15%¹⁶⁶ and speculated that this may have reduced cocaine consumption, although there was no evidence for this assumption.

As for the incapacitative impacts of harsher drug laws on drug offenses in the United States, the evidence is unclear; but some studies indicate there is no positive impact:

It is, however, difficult to find a correlation between trends in incarceration and a reduction of the market since research suggests that the US states with higher rates of drug related incarceration experienced higher not lower rates of drug use.¹⁶⁷

Thus, the data suggests that imprisoning drug offenders for longer periods will have little to no impact on the availability of drug; the amount of drug crime or other forms of crime.

¹⁶³ Kuziemko and Levitt, *supra* note 12, at 2062.

¹⁶⁴ *Id.* at 2056.

¹⁶⁵ *Id.* at 2062–63.

¹⁶⁶ *Id.* at 2054. The impact of the price of other drugs was not considered.

¹⁶⁷ Bewley-Taylor et al., *supra* note 13. See also DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY (2005).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 139

D. Overview of Effectiveness of Drug Policies

There are a number of different means that have been used to limit the use and availability of drugs. In addition to increased criminal penalties, other measures include education campaigns regarding the health dangers of illicit drugs and increased police and other surveillance techniques to detect drugs.

It is not tenable to isolate the impact of any one policy. The analysis above suggests that it is unlikely that severe penalties for drug offenders are capable of meaningfully limiting the availability of drugs. The efficacy of the sentencing system to achieve the goals of specific deterrence, general deterrence and incapacitation is doubtful. This applies equally in relation to drug offenses.

This is perhaps most evidently illustrated by the impact of the war on drugs at the global level. Cumulatively, at the global level the attempt to reduce the amount of drugs seems to have failed. The best estimates indicate that in the decade to 2008, there has been a 34.5% increase in the consumption of opiates.¹⁶⁸ The consumption of cocaine and cannabis has been increased less, but still at significant levels – 27% and 8.5% respectively.¹⁶⁹ It has also failed in the Australian context. Australians spend more than \$7 billion dollars annually on illegal drugs.¹⁷⁰ And during this time, the price for commonly trafficked drugs has decreased.¹⁷¹

E. Can Proportionality Justify Severe Punishment for Drug Offenders?

It may yet be arguable that harsh prison terms are appropriate for drug offenders on the basis on the proportionality principle. In its simplest and most persuasive form the proportionality principle is the view that the punishment should equal the crime. The principle of proportionality (at least in theory) operates to “restrain excessive, arbitrary and capricious punishment”¹⁷² by requiring that punishment

¹⁶⁸ REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY, *supra* note 2, at 4.

¹⁶⁹ *Id.*

¹⁷⁰ Amy Corderoy, *Nation's \$7b Drug Splurge*, THE AGE (June 22, 2013), <http://www.theage.com.au/national/nations-7b-drug-splurge-20130621-2o0e3.html>.

¹⁷¹ Ian Leader-Elliott, *Sentencing by Weight: Proposed Changes to the Commonwealth Code Serious Drug Offences*, 36 CRIM. L.J. 265 (2012). The same applies in the United States (at least for cocaine and heroin). Bewley-Taylor et al., *supra* note 13, at 11.

¹⁷² Richard G. Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 492 (1994).

must not exceed the gravity of the offense, even where it seems certain that the offender will immediately re-offend.¹⁷³

As the High Court of Australia stated in *Hoare v The Queen*¹⁷⁴, “a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.”¹⁷⁵ In fact, in *Veen v The Queen (No 1)*¹⁷⁶ and *Veen (No 2) v The Queen (No 2)*,¹⁷⁷ the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which at various times has also been declared as the most important aim of sentencing.¹⁷⁸ Proportionality has been given statutory recognition in all Australian jurisdictions.¹⁷⁹

Proportionality is a requirement of the sentencing regimes of ten states in the United States.¹⁸⁰ The precise considerations that inform the proportionality principle vary in those jurisdictions, but generally there are six relevant criteria:

- (1) Whether the penalty shocks a reasonable sense of decency;

¹⁷³ See, e.g., *R. v Jenner* (1956) CLR 495 (Austl.), in which the court reduced a term of imprisonment despite believing that “it appeared likely that [the offender] would commit a crime as soon as he was released from prison.”

¹⁷⁴ (1989) 167 CLR 348 (Austl.).

¹⁷⁵ *Id.* at 354 (emphasis altered).

¹⁷⁶ (1979) 143 CLR 458, 467 (Austl.).

¹⁷⁷ (1988) 164 CLR 465, 472 (Austl.).

¹⁷⁸ See, e.g., *Channon v The Queen* (1978) 33 FLR 433 (Austl.).

¹⁷⁹ The *Sentencing Act 1991* (Vic) s 5(1)(a) (Austl.) provides that one of the purposes of sentencing is to impose just punishment (s 5(1)(a)), and that in sentencing an offender the court must have regard to the gravity of the offence (s 5(2)(c)) and the offender’s culpability and degree of responsibility (s 5(2)(d)). The *Sentencing Act 1995* (WA) (Austl.) states that the sentence must be “commensurate with the seriousness of the offence” (s 6(1)), and the *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a) (Austl.) provides that the sentence must be “just and appropriate.” In the Northern Territory and Queensland, the relevant sentencing statute provides that the punishment imposed on the offender must be just in all the circumstances (*Sentencing Act 1995* (NT) s 5(1)(a) (Austl.); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a) (Austl.), while, in South Australia, the emphasis is upon ensuring that “the defendant is adequately punished for the offence” (*Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j) (Austl.). The need for a sentencing court to “adequately punish” the offender is also fundamental to the sentencing of offenders for Commonwealth matters (*Crimes Act 1914* (Cth) s 16A(2)(k)). The same phrase is used in the New South Wales *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a) (Austl.).

¹⁸⁰ This is discussed in Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241 (2012). The article focused on the operation of the principle in Illinois, Oregon, Washington, and West Virginia.

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 141

- (2) The gravity of the crime;
- (3) The prior criminal history of the offender;
- (4) The legislative objective relating to the sanction;
- (5) A comparison of the sanction imposed on the accused with the penalty that would be imposed in other jurisdictions; and
- (6) A comparison of the sanction with other penalties for similar and related offenses in the same jurisdiction.¹⁸¹

The prohibition against cruel and unusual punishment in the Eighth Amendment has been applied sparingly in the sentencing domain. To the extent that it has been applied in this area, it has been mainly in relation proscribing the death penalty to certain forms of crimes (non-homicide offenses)¹⁸² and criminals (juveniles)¹⁸³ In determining the scope of this limitation the Supreme Court has taken into account international standards relating to appropriate levels of punishment.¹⁸⁴ In relation to noncapital sentences the Supreme Court has endorsed the concept of proportionality as being a constraint on the level of punishment, but the concept has not been developed with any degree of precision and can only invoked to prohibit sanctions that contain “gross disproportionality.”¹⁸⁵

Broken down to its core features, proportionality has two limbs. The first is the seriousness of the crime and the second is the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied,

¹⁸¹ *Id.* at 250.

¹⁸² *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

¹⁸³ *Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

¹⁸⁴ *Id.* at 830–31; *Atkins v. Virginia*, 536 U.S. 304, 328 (2002); *Graham v. Florida*, 560 U.S. 48, 80 (2010).

¹⁸⁵ Donna H. Lee, *Resuscitating Proportionality In Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 529 (2008) (observing that gross disproportionality is a threshold requirement to the application of the proportionality principle and if this satisfied the Court will apply two further tests: “The second and third parts call for an intrajudicial review of sentences received within the state for more and less serious crimes, and an interjurisdictional review of sentences received in other states for the same crime”). *See also* *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003). *See generally* *Solem v. Helm*, 463 U.S. 277 (1983); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle* 445 U.S. 263 (1980); *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011); John F. Stinefford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

the seriousness of the crime must be equal to the harshness of the penalty.

Some commentators have argued that proportionality is so vague as to be meaningless, in light of the fact that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg notes that one of the key and damaging criticisms of proportionality is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”¹⁸⁶ The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime. Ryberg further notes that to give content to the theory it is necessary to rank crimes, rank punishments and anchor the scales.¹⁸⁷

There is some merit in Ryberg’s critique. And as noted by Ian Leader-Elliott and George Fletcher the application of the proportionality principle is especially in the case of offenses, such as drug offenses, where there is no direct, clear and observable harm caused by the crime:

The principle of proportionality applies to offenders who traffic in drugs no less than it does to offenders who inflict injury or death. In the trafficking offences, however, there is not the same intuitive, retributive ground for determining a punishment to fit the offence. There is no natural measure of proportionality in offences that are supposed to secure the common good. The American theorist George Fletcher makes the point in his discussion of crimes of *lese majeste*:

Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflictedThe more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim.¹⁸⁸

¹⁸⁶ Jesper Ryberg, *THE ETHICS OF PROPORTIONATE PUNISHMENT* 184 (2004).

¹⁸⁷ *Id.* at 185. (Even retributivists have been unable to invoke the proportionality principle in a manner which provides firm guidance regarding appropriate sentencing ranges). *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 122 (2005).

¹⁸⁸ Ian Leader-Elliott, *Sentencing by Weight: Proposed Changes to the Commonwealth Code’s Serious Drug Offences*, 36 *CRIM. L.J.* 265, 277–78 (2012) (quoting GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 43 (1993)) (citations omitted).

2014] *The Senseless War: The Sentencing Drug Offenses Arms Race* 143

While, doctrinally it has been argued that there is a manner in which firmer content could be accorded to proportionality doctrine¹⁸⁹ an exact matching of offense severity and penalty harshness is not feasible in light of the current understanding of proportionalism.

However, this is not an issue that needs to be settled and resolved for current purposes. Irrespective of the precise manner in which harmfulness is assessed, it is clear that a cardinal criterion is the extent to which it sets back the interests and welfare of victims. Accordingly, homicide offenses are the most serious. Offenses causing considerable degrees of permanent impairment (whether physical or mental) also rate highly. It is also assumed by many theorists¹⁹⁰ that culpability is an element of offense severity. To this end, offenses that involve the infliction of deliberate harm are worse than those where harm is caused recklessly or unintentionally.

Illicit drug use rarely results in permanent serious harm to users. Moreover, there is no evidence to suggest that suppliers want to harm the users of their drugs—this would, in fact, be self-defeating.

Thus, it is clear that drug offenses are less serious than homicide and serious assault and sexual offenses; and the penalties should reflect this ordering. To the extent that proportionality is a guiding determinant in relation to drug offenses, the overstated impact of illicit drugs dilutes the seriousness of the offense and this must lead to a corresponding reduction in appropriate penalty.¹⁹¹

CONCLUSION

Drug distribution offenses are a serious crime and result in the availability of substances that cause a large amount of damage to the community. But no drug offense is ever as bad as the offenses such as homicide, rape and assault causing serious injury. Yet, perversely drug offenses are punished at least as severely as these offenses.

¹⁸⁹ Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411, 421 (2013).

¹⁹⁰ See, e.g., Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1 (1991).

¹⁹¹ Bewley-Taylor et al., *supra* note 13, at 4. (The disproportionately harsh penalties on drug offenders is also a pointed noted in the U.S. context: “Sentencing statutes that result in low-level drug offenders serving longer sentences than bank robbers, kidnappers and other violent offenders (including in some cases rapists and murders) undermine the notion of proportionality and fairness of the law.”). See also Gloria Lai, *Drugs, Crime and Punishment: Proportionality of Sentencing for Drug Offences*, SERIES ON LEGISLATIVE REFORM OF DRUG POLICIES NR. 20 (June 2012).

The main reason for the ever-increasing tariff for drug offenses is the worship paid by the courts and legislatures to the notion of general deterrence. The theory is that if we send drug offenders to jail for long periods, other potential drug offenders will re-think their cost/benefit assessment of the activity and decide to get a day job instead. The *theory* is a good one—it sounds logical. But science shows that the theory is wrong. Study after study has established that longer jail terms (and even the death penalty) do not reduce crime. The only threat that does reduce crime is the threat of being apprehended. Hence, more uniform police on the streets reduces crime. It seems that the main cost/benefit assessment undertaken by offenders is whether or not they are likely to be caught; they do not project far enough to consider exactly what will happen if they are caught. The abject failure of general deterrence theory is evident from the fact that in virtually every city block in the world people can readily purchase illicit drugs.

The key findings from the above analysis are:

1. Decriminalization of illicit drugs probably reduces the level of drug use and the harm caused by drugs;
2. Drug distribution offenses are not as serious as conduct, which causes direct intentional harm to the bodily or sexual integrity of victims, such as homicide and rape;
3. Harsh penalties for drug offenses do not reduce drug crime because the goals of specific deterrence, marginal general deterrence and incapacitation in the context of drug offenses are not effective; and
4. There is nothing that can be achieved by a twenty-five-year term of imprisonment for drug offending that cannot be achieved by, a much shorter term. The bulk of a twenty-five-year term is gratuitous and punishes the community.

J.P. Caulkins and P.A. Reuter, in 2006 asked would the United States: would the United States be “worse off if it contented itself with 250,000 rather than 500,000 drug prisoners?”¹⁹² In the Australian context as we have seen there are approximately 3,500 drug offenders. A decade ago, the number was approximately 2,000. If Australia had 1,500 less drug offenders in jail today, would Australia have more drugs?

Resoundingly, the answer to both questions is no.

¹⁹² J.P. Caulkins & Peter Reuter, *Reorienting U.S. Drug Policy*, 23 ISSUES IN SCI. & TECH. 79, 85 (2006).

