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Emerging from the Haze of America's War on Drugs and Examining Canada's New Half-Baked Laws

Ramy Oden*

*Fordham University School of Law

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*Ramy Odeh**

INTRODUCTION

On June 17, 2006, seven former US drug czars met in Washington D.C. to mark the thirty-first anniversary of the war on drugs and to proclaim a unanimous conclusion: the United States had won the war against illegal drugs.[1] By most measures, however, the current state of the US criminal justice system would suggest a different conclusion. [2] Currently 489,000 Americans sit behind bars for drug offenses, while a recent poll shows 12.8 million citizens use illegal drugs on a regular basis.[3] The United States has the highest documented incarceration rate in the world, imprisoning 730 of every 100,000 adults.[4] Further, more than half of all federal inmates are incarcerated for drug crimes.[5]

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* J.D. Candidate, 2013, Fordham University School of Law; B.S. Brain, Behavior, & Cognitive Science, 2008, University of Michigan. The Author would like to thank the Honorable John McBain. Clerking in Judge McBain's courtroom inspired this Note. The Author would also like to thank Professor Youngjae Lee for his feedback as well as the Editorial Board of the *Fordham International Law Journal*, namely Tonya Rodgers and Kara Baquizal. The Author also wishes to thank his loving family for their guidance. Finally the author would like to thank his closest friends: Christine Krauland, Anna Gabbay, Ariel Colangelo, Bill Crowe, and Jeff Tremblay for their endless support.

1. *See* John C. Burnham, *Former Drug Czars Believe Their War Has Been Won*, COLUMBUS DISPATCH, June 30, 2006, *available at* http://www.freerepublic.com/focus/f-news/1658884/posts (commenting on a meeting of US drug czars, in which the statement was made that the United States has emerged as the victor in the war on drugs). This meeting included the first White House drug-control director, Dr. Jerome H. Jaffe, as well as the six other former directors. *Id.*

2. *Key Facts at a Glance: Correctional Populations*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm (last visited Mar. 19, 2012) (showing the total number of persons under correctional supervision including probation, jail, prison, and parole from 1980 to 2009, including prisoners held in the custody of state or federal prisons and juveniles held in adult facilities in the six states (Connecticut, Delaware, Hawaii, Rhode Island, Vermont, and Alaska) with combined jail-prison systems).

3. *See* TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES 6 (2001) (noting that US federal prisons spend over US$6 billion every year); *see also* JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RES., THE HIGH BUDGETARY COST OF INCARCERATION 11 (June 2010) (noting an annual operating cost of US$25,500 per federal prisoner). All currency figures will be in USD.

4. *See World Prison Brief: United States of America*, INT'L CENTRE FOR PRISONSTUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (last visited Dec. 9, 2011) (detailing that for every 100,000 adults in America, 730 are presently incarcerated).

5. *See True Cost of Drugs: More Than Half of Inmates Currently in U.S. Federal Prisons Were Convicted of Narcotics Offences*, DAILY MAIL (U.K.), June 11, 2011, http://www.dailymail.co.uk/news/article-2002666/More-half-U-S-inmates-convicted-

Just across the border, in stark contrast to the United States, Canada's prison population has remained stable for the past four decades.[6] With only 116 of every 100,000 individuals imprisoned, Canada's smaller prison population has cost taxpayers less than the United States' prison system—money which can potentially be spent on treatment options for drug addicts.[7] Yet despite this relatively low and stable incarceration rate, Canadian officials elected in May 2011 decided to overhaul their drug sentencing system.[8] A newly proposed bill, entitled the Safe Streets and Communities Act, will largely emulate the US sentencing framework, despite its highly documented failure to achieve even modest success in the US war on drugs.[9]

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drugs-offences.html (noting that 50.8% or 215,888 federal prisoners were incarcerated for drug offenses); *see also* Fareed Zakaria, *Incarceration Nation*, TIME, Apr. 2, 2012,, *available at* http://www.time.com/time/magazine/article/0,9171,2109777,00.html (stating that 1.6 million individuals were arrested for federal and state drug crimes in 2009, with four out five arrests for simple possession).

6. Cheryl M. Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 CRIME & JUST. 296, 311 (2007) (detailing the level rate of incarceration in Canada over the past forty years and contrasting it with the rising rate in the United States).

7. *See World Prison Brief: Canada*, INT'L CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=188 (last visited Mar. 4, 2012) (listing the number of Canadian citizens incarcerated). *But see* Donna Calverly, *Adult Correctional Services in Canada, 2008/2009*, 30 JURISTAT 3, at 5 (2010), *available at* www.statcan.gc.ca/pub/85-002-x/2010003/article/11353-eng.pdf (noting that Canada spends nearly four billion dollars on operating costs for correctional services). It should also be noted that the current population of the United States and Canada is quite disparate: there are 314 million individuals in the United States and less than 35 million in Canada. *Compare Canada's Population Clock*, STATISTICS CANADA, http://www.statcan.gc.ca/ig-gi/pop-ca-eng.htm (last visited Dec. 1, 2012), *with U.S. and World Population Clocks*, UNITED STATES CENSUS BUREAU, http://www.census.gov/main/www/popclock.html (last visited Dec. 1, 2012).

8. *Harper Touts Tory Anti-Crime Agenda: Ignatieff Heads West; Layton Campaigns in Atlantic Canada*, CBC NEWS, Apr. 16, 2011, 4:02 PM, http://www.cbc.ca/news/politics/canadavotes2011/story/2011/04/16/cv-election-leaders-west.html (detailing new Prime Minister Stephen Harper's plans to increase a new tough on crime policy).

9. *See* Press Release, Office of Nat'l Drug Control Policy, Opening Statement of the Government of the United States of America Before the 55th UN Commission on Narcotic Drugs (Mar. 12, 2012), *available at* http://www.whitehouse.gov/ondcp/news-releases-remarks/opening-statement-of-the-government-of-the-united-states-of-america-before-the-55nd-un-commission (providing US drug czar Gil Kerikowske's statements regarding the war on drugs as stating: "[b]ut we must be candid—some aspects of our approach need to change. Speaking for the experience of the United States, I believe we have historically been over-reliant on incarceration and too slow to build a robust treatment and prevention system."); *see also* Susan S. Giroux, *The Lessons of Law and Order: What Canadians Can Learn From Failed U.S. Crime Policy*, TRUTHOUT (Oct. 5,

The United States and Canada are at a crossroads. Many critics argue that the United States' punitive treatment of drug offenders has been misplaced, yet the Canadian Legislature is intent on introducing legislation that copies this failed approach. [10] Part I of this Note summarizes the differing approaches within the United States and Canada to sentencing drug crimes and the disparate incarceration rates that result. Part II examines the American and Canadian federal sentencing schemes, including a discussion of the US Federal Sentencing Guidelines ("US Guidelines") and proposed Canadian legislation. Part III argues that both the United States and Canada should modify their approach to dealing with drug crime sentencing by reducing reliance on incarceration in favor of a more rehabilitative model involving the expanded use of drug courts.

I. *APPROACH TO DRUG CRIMES IN THE UNITED STATES AND CANADA*

Over the past forty years, the United States has taken an increasingly punitive approach to dealing with drug offenders, while Canada has historically favored judicial discretion over fixed guideline sentence ranges. This Part provides an overview of both countries' approaches to sentencing drug offenders, including prison statistics and the fiscal cost of imprisonment. Parts I.A and I.B respectively examine the US and Canadian approaches to sentencing policy. Finally, Part I.C discusses the goals of sentencing and how the psychological and physiological effects of drug addiction complicate these objectives.

2011), http://truth-out.org/index.php?option=com_k2&view=item&id=3750:the-lessons-of-law-and-order-what-canadians-can-learn-from-failed-us-crime-policy (detailing the similarities between the new Canadian legislation and the American drug policy of the past three decades).

10. *See* Veronique de Rugy, *'Prison Math' and the War on Drugs*, NAT'L REV ONLINE (June 9, 2011), http://www.nationalreview.com/corner/269208/prison-math-and-war-drugs-veronique-de-rugy (criticizing the misguided approach of the United States that has resulted in the over-incarceration of drug offenders); *see also* Neiko Will & Amalia Bersin, *Drug War Critics Rally on 40th Anniversary*, KPBS (June 17, 2011), http://www.kpbs.org/news/2011/jun/17/local-rally-opposing-drug-war-its-40th-anniversary (outlining the immense expenditures spent by the United States on imprisoning drug offenders).

A. *The US War on Drugs*

In 1971, President Richard Nixon, in response to the public's growing concern about crime, declared a war on drugs.[11] This policy shift was intended as a deterrent for drug crimes through increased imprisonment, and as replacement for the then-existing rehabilitative ideal.[12] Following this declaration of war, the number of Americans in prisons and jails exploded, growing by 800%, with the rate of imprisonment increasing by more than 500%.[13] As a result, the United States today has the world's largest prison population, accounting for nearly one-fourth of all individuals incarcerated around the world.[14]

Nearly half of all inmates in federal prisons are incarcerated for drug offenses.[15] Meanwhile, federal, state, and local governments have spent billions of dollars trying to make the United States drug-free.[16] Since 1980, the number of drug

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11. *See* ENDING THE DRUG WAR: A DREAM DEFERRED, LAW ENFORCEMENT AGAINST PROHIBITION (2011), *available at* http://big.assets.huffingtonpost.com/LEAP.40.pdf (discussing the creation of the war on drugs, and President Nixon's statements on June 17, 1971).

12. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1974, at 164 tbl.281 (95th ed. 1974), *available at* http://www2.census.gov/prod2/statcomp/documents/1974-03.pdf (showing that the US imprisonment rate in 1971 per 100,000 was 95.1); Ed Vulliamy, *Nixon's 'War on Drugs' Began 40 Years Ago, and the Battle is Still Raging*, OBSERVER, July 23, 2011, *available at* http://www.guardian.co.uk/society/2011/jul/24/war-on-drugs-40-years (describing the aftermath of President Nixon's declaration of the war on drugs).

13. *See* de Rugy, *supra* note 10 (discussing the exponential rise in the American prison population).

14. *See World Prison Brief: United States of America*, INT'L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (last visited Dec. 12, 2011) (displaying the prison population in the United States); *see also* Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER, Jan. 30, 2012, at 73 (detailing the US prison population).

15. *See* DAVE BEWLEY-TAYLOR ET AL., THE BECKLEY FOUNDATION DRUG POLICY PROGRAMME, THE INCARCERATION OF DRUG OFFENDERS: AN OVERVIEW 6 (2009) (showing that in 2007, fifty-three percent of federal prisoners were incarcerated for drug offenses); Kara G. Goodwin, *Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States "War on Drugs"*, 22 BUFF. PUB. INT. L.J. 199, 200–09 (2004) (comparing the history of marijuana criminalization in Canada and the United States); *see also Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, http://www.bop.gov/news/quick.jsp (last visited December 19, 2012) (stating that 47.8% of federal prisoners are currently incarcerated on drug offenses).

16. *See* RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990'S 2 (2005), *available at* http://www.sentencingproject.org/detail/publication.cfm?publication_id=

offenders in jails and prisons has increased 1,100%, with over 500,000 individuals currently incarcerated for drug offenses.[17] This dwarfs the 41,000 figure of incarcerated persons for the same crimes in 1980.[18] Incidentally, the national crime rate is currently continuing its historic twenty-year decline, achieving levels unseen since the war on drugs began.[19] Despite this reduction in crime, the rate of imprisonment has steadily increased.[20]

One powerful weapon in the United States' arsenal in the war on drugs has been the US Guidelines, which restrict judicial discretion in favor of predetermined sentencing and mandatory sentence minimums.[21] In the decades following President Nixon's "declaration of war," nearly every state, as well as the federal government, sought to enact a similar model of predetermined sentences.[22] In 1984, the Sentencing Reform Act

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12 (estimating that "[US]$4 billion is spent annually on the arrest, prosecution, and incarceration of marijuana offenders" in the United States alone); *see also Pros and Cons of Drug Legalization, Decriminalization, and Harm Reduction: Hearings before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources*, 106th Cong. 220 (1999) (statement of David Boaz, Executive Vice President, Cato Institute) (statement of David Boaz, Executive Vice President, Cato Institute), *available at* http://www.cato.org/testimony/ct-dbz061699.html (stating that drug convictions accounted for over eighty percent of the increase in the federal prison population from 1985 to 1995).

17. *See Pros and Cons of Drug Legalization, Criminalization, and Harm Reduction*, *supra* note 16, at 221 (stating that drug arrests total over 1.5 million every year).

18. *See id.*; *see also* de Rugy, *supra* note 10 (noting the incarceration rates post-1980).

19. *See* Chris McGreal, *America's Serious Crime Rate is Plunging, But Why?*, GUARDIAN (U.K.) (Aug. 21, 2011), http://www.guardian.co.uk/world/2011/aug/21/america-serious-crime-rate-plunging (commenting on the dramatic reduction in American crime rates in recent decades).

20. *See* William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 419 (2000) (noting that the decrease in crime rates following the national doubling of prison capacity makes a case that incarceration reduces crime, but cautioning that "just as prison affects crime, so does crime affect prison, and it is difficult to isolate one effect from the other"); *see also* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 36 (1998) (summarizing studies concluding that increased incarceration may have negligible effect on crime).

21. *See* Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners"*, 114 W. VA. L. REV. 373, 390–92 (2012) (discussing the Sentencing Reform Act passed by Congress and its role in the creation of federal sentencing guidelines).

22. *See* Ben Trachtenberg, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 483 (2005) (noting that in 1970 the federal system and every state criminal justice system had adopted some kind of indeterminate sentencing); *see*

gave rise to fixed sentences, and in 1989, the Supreme Court bolstered the Act's guidelines by ruling in *Mistretta v. United States* that such a legislative delegation was constitutionally valid.[23] Post-*Mistretta*, the enactment of the US Guidelines ushered in a new era of handling criminal sentencing.[24]

In the 1970s and 80s the American public also embraced a more punitive approach to handling drug offenders.[25] The concern surrounding the crack cocaine epidemic in the early 1980s convinced the public that getting tough on drug crimes made sense.[26] As criminal justice experts note, the fear of potential crime led to a desire for an overly punitive sentencing model.[27]

Additionally, criminal activity, and politicians' need to respond to public concerns created a tripartite motive for stiffer punishments.[28] The rehabilitative ideal that dominated the first

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also PAULA M. DITTON & DORIS J. WILSON, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS (1999), *available at* http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf (detailing the tough on crime approach adopted by the United States).

23. Mistretta v. United States, 488 U.S. 361, 379–390 (1989) (holding that the 1984 Sentencing Reform Act did not violate separation of powers doctrine).

24. Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission Post* Mistretta*: Sunshine or Sunset*, 27 AM. CRIM. L. REV. 289, 290 (1989) (discussing the aftermath of *Mistretta* on the sentencing landscape); *see also* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guidelines Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1286–87 (1997) (reviewing the effect of post-*Mistretta* guidelines on the sentencing process for defendants convicted at trial).

25. *See* Alfred Blumstein, *Violence Certainly is the Problem—And Especially With Hand Guns*, 69 U. COLO. L. REV. 945, 945 (1998) (stating that fear of crime and victimization drives public support for more punitive approaches); *see also* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1812 (1997) (discussing the public's skepticism of rehabilitation in the 1960s).

26. *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular*, 11 STAN. L. & POL'Y REV. 9, 10–11 (1999) (discussing the movement to tough-on-crime policies, in response to public concern over the rise in crack cocaine usage, that led to increased incarceration rates over the past thirty years).

27. *See* Blumstein, *supra* note 25, at 965 (noting the public sentiment that desired to increase punishment for crimes); *see generally* GARY CORDNER, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, REDUCING FEAR OF CRIME: STRATEGIES FOR POLICE (Jan. 2010) (detailing the interaction between public perception of crime and the criminal justice policies).

28. *See* Mauer, *supra* note 26, at 9–10 (noting that the punitive model has directly led to the current position of the United States as a world leader in the use of incarceration and arguing that "data are not very supportive of a strong relationship between locking up offenders and reducing crime"); *see also* JONATHAN SIMON,

half of the century declined in the 1970s and was replaced by an ideology of crime prevention through incarceration.[29] Public opinion polls in the 1980s revealed strong support for the adoption of stricter guidelines, such as the three strikes law in California.[30] Moreover, legislators viewed any opposition to these provisions as "akin to political suicide."[31]

State legislatures also embraced the movement towards a more punitive model of justice. [32] Many states opted to supplement fixed sentencing guidelines with recidivist statutes, similar to California's three strikes law.[33] The amended state legislatures echoed the federal changes, which saw the average federal drug trafficking sentences become longer than penalties for manslaughter and sexual abuse.[34]

GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 23 (2007) (discussing influences of politicians in the 1970s and 80s on affecting the public's perception of crime).

29. *See* Sara S. Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV 413, 414–15 (2003) (detailing the rise in punitive punishment in the United States in light of the war on drugs); *see also* JOHN CLARK ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THREE STRIKES AND YOU'RE OUT: A REVIEW OF STATE LEGISLATION 9–10 (1997) (noting that between 1994–1997 twenty-two states adopted similar laws imposing harsher punishments on recidivists).

30. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 140, tbl.2.47 (2004), *available at* http://www.albany.edu/sourcebook/pdf/section2.pdf (indicating the majority of respondents believed courts were not sentencing harshly enough for crimes). Upon a defendant's third conviction for a violent crime, the three strikes law prescribes that he will receive a mandatory life prison sentence. CAL. PENAL CODE § 667(e)(2)(A).

31. Beale, *supra* note 29, at 417 (noting the political based fear legislators held in opposing new punitive laws); *see also* Earl Hutchinson, *Supreme Court Should Oust "Three Strikes Law,"* ALTERNET (Apr. 3, 2002), http://www.alternet.org/story/12778/supreme_court_should_oust_%22three_strikes%22_laws (discussing the fear of politicians to oppose the three strikes law, as it would be politically damaging).

32. The US Sentencing Guidelines will be discussed in greater depth in Part II.

33. *See* Beale, *supra* note 29, at 414 (stating that California was the first state to adopt a "three strike" policy, but other states soon followed in enacting their own recidivist statutes); *see also* STEPHANIE BUSH-BASKETTE, MISGUIDED JUSTICE: THE WAR ON DRUGS AND THE INCARCERATION OF BLACK WOMEN 25 (2010) (describing the impact of New York's Rockefeller Statute, which introduced mandatory minimum for drug related crimes, on increasing the prison population).

34. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV 1315, 1329 n.69 (2005) (comparing the average sentencing length between drug crimes and violent crimes). In 2001 the average federal drug trafficking sentence was 72.7 months. By contrast, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months. *Id.*; *see* BUSH-BASKETTE, *supra* note 33, at 25 (noting that between 1982 and 1991 the average sentence length for

Consequently, imprisoning drug offenders has imposed an enormous fiscal burden upon United States taxpayers.[35] In addition to the nearly US$100 billion annual increase in police functions including added street patrol and greater officer presence, housing each federal inmate costs US taxpayers US$22,632 per year.[36] At the state level, correctional and prison expenditures rose over seven percent annually between 1985 and 1996.[37]

There are minimal options to alleviate these financial burdens: either decrease the prison population or lower the per capita cost of prison housing.[38] As prisons become increasingly privatized, the latter option is unlikely to be feasible.[39] Further, lowering prison costs without reducing the quality of life for inmates and staff is incredibly difficult, if not impossible.[40] Some states, such as Illinois, have eliminated college classes for

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drug offenders increased from 54.6 months to 85.7 months, while sentence length for violent crimes decreased).

35. *See* KYCKELHAHN, *supra* note 3, at 6 (noting the average expenditure for US prisoners); *see also* JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE STATE PRISON EXPENDITURES, 1996 1 (1999) (discussing the overall fiscal cost of the US prison system).

36. *See* Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 20–21 (2009) (noting that from 1972 to 2009, the US population increased by about forty-five percent, yet almost two and a half times as many police are employed compared to 1972); *see also World Prison Brief: Canada*, *supra* note 7 (indicating that Canada's average expenditure per prisoner is thirty-five dollars).

37. *See* STEPHAN, *supra* note 35, at iv, 1 (noting that the annual increase in prison expenses contributed to an overall cost of US$24.5 billion to run US prisons in 1996).

38. *See* Trachtenberg, *supra* note 22, at 493 (noting the limited options states have in attempting to reduce the prison population); RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 11–16 (2002), *available at* http://www.sentencingproject.org/doc/publications/inc_statesentencingpolicy.pdf (discussing states' attempts to reduce costs by cutting prisoner rehabilitation programs).

39. *See* Robert Worth, *A Model Prison*, ATLANTIC ONLINE, Nov. 14, 1995, http://www.theatlantic.com/past/docs/unbound/aandc/trnscrpt/worth.htm (examining the rising cost of maintaining prisons and the difficulty of trying to lower costs); *see also* Paul Heroux, *Reducing Prison Overcrowding, Improving Justice and Preventing Crime*, HUFFINGTON POST (Aug. 16, 2011), http://www.huffingtonpost.com/paul-heroux/ways-to-reduce-prison-ove_b_925603.html (reporting on the challenges faced in attempting to lower prison costs).

40. *See* Trachtenberg, *supra* note 22, at 493 (noting cuts in housing expenditures strain already overcrowded prisons); *see also* KING & MAUER, *supra* note 38, at 13 (citing Iowa's decision to reduce prison costs, resulting in diminished health care options, food and library services, and prison chaplains).

prisoners.[41] Others like California have reduced the size of substance abuse rehabilitation facilities, despite evidence that prisoners who have access to treatment have lower recidivism rates than the general prison population.[42] One Ohio prison director predicted that those moves would likely result in a long-term increase in crime.[43] With cost-cutting techniques nearly impossible to implement, the United States could learn a valuable lesson from its neighbor to the north.

B. *Canada's Approach to Sentencing Drug Offenders*

Canada and the United States share a nearly 4,000 mile border and enjoy an economic partnership unlike any other in the world.[44] In the first eight months of 2012, trade between the two countries totaled over US$400 billion.[45] Additionally, the United States is the largest foreign investor in Canada and the largest benefactor of Canadian investment.[46] The shared border,

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41. *See* Trachtenberg, *supra* note 22, at 493 (citing Illinois's decision to cut classes for 25,000 prisoners); *see also* Megan Doherty, *Shrinking Prison Budgets Eliminate Educational Opportunities*, WBEZ 91.5 (June 7, 2012), http://www.wbez.org/series/front-center/shrinking-prison-budgets-eliminate-educational-opportunities-99903 (telling the story of one Illinois inmate who was affected after the state cut educational programs for inmates).

42. *See* Trachtenberg, *supra* note 22, at 493 (noting that some states have eliminated prisoner rehabilitation programs despite graduates' far lower rates of re-offending); Nathan Hurst, *Prison Education Programs Reduce Inmate Prison Return Rate, MU Study Shows Correctional Programs a Good Investment for State of Missouri*, U. MO. NEWS BUREAU (Oct. 3, 2011), http://munews.missouri.edu/news-releases/2011/1003-prison-education-programs-reduce-inmate-prison-return-rate-mu-study-shows (detailing a University of Missouri study that showed educational programs such as offering GED programs for inmates can reduce recidivism by up to thirty-three percent).

43. *See* KING & MAUER, *supra* note 38, at 13 (noting the benefit rehabilitation programs have in reducing prisoner recidivism rates); *see also* Hurst, *supra* note 42 (examining the benefits of welfare programs for prison inmates on recidivism levels).

44. *See* Goodwin, *supra* note 15, at 229 (citing the nexus between the United States and Canada in complicating the US approach in handling drug crimes); *see also Top Ten Countries with Which the U.S. Trades: For the Month of July 2012*, U.S. CENSUS BUREAU, http://www.census.gov/foreign-trade/top/dst/current/balance.html (last visited Sept. 25, 2012) (ranking Canada ahead of every other US trading partner in terms of total value of imports and exports and listing the total value of US–Canadian imports and exports as over US$47 billion in July 2012).

45. *See Top Ten Countries with Which the U.S. Trades: For the Month of July 2012*, *supra* note 44 (showing the total year to date in billions of US dollars, and ranking Canada ahead of China and Mexico).

46. *See id.* (describing the shared economic partnership between the two countries); *see also Canada–United States Border Drug Threat Assessment*, PUBLIC SAFETY

however, also leads to a shared drug community.[47] Canada is rapidly becoming a source country for marijuana products imported and sold in the United States.[48] Marijuana seized in attempted border smuggling between the two countries increased almost tenfold between 1999 and 2000.[49] Today, the Canadian Royal Mounted Police estimates that its country produces over 800 tons of marijuana each year, a large portion of which finds its way illegally into the United States via the loosely guarded border.[50] However, Canada admits far fewer prisoners for drug offenses than the United States.[51]

CANADA (Oct. 2004), http://www.publicsafety.gc.ca/prg/le/bs/uscabdta-eng.aspx (stating, in a joint US–Canadian publication, that despite the growing economic partnership, illegal drug transport across the border remains a concern, and that marijuana and cocaine, in particular, are the drugs most transported across the border); *U.S. Relations with Canada*, U.S. DEPTARTMENT OF STATE (June 29, 2012), http://www.state.gov/r/pa/ei/bgn/2089.htm ("The United States is Canada's largest foreign investor"); *Canada's State of Trade: Trade and Investment Update 2011*, FOREIGN AFFAIRS & INT'L TRADE CANADA, http://www.international.gc.ca/economist-economiste/performance/state-point/state_2011_point/2011_5.aspx?lang=eng&view=d (stating that the United States accounted for 74.9% of total Canadian exports in 2010).

47. *See Canada–United States Border Drug Threat Assessment*, *supra* note 46, at 4 (noting the difficulty in patrolling the border between the two countries, that has resulted in 250% increase in marijuana seizures since 2001); *see also* PUB. SAFETY CANADA, UNITED STATES–CANADA BORDER: DRUG THREAT ASSESSMENT 2007, 1 (2008), *available at* http://www.publicsafety.gc.ca/prg/le/oc/_fl/us-canadian-report-drugs-eng.pdf (detailing the rise of Canada as the number one trafficking country of ecstasy to the United States).

48. *See* Goodwin, *supra* note 15, at 200 (noting the prevalence of cross-border drug smuggling between the United States and Canada); *see also* UNITED STATES-CANADA BORDER: DRUG THREAT ASSESSMENT 2007, *supra* note 46 at 8–11 (detailing marijuana trafficking at the border).

49. *See* Goodwin, *supra* note 15, at 200 (describing the efforts of US border patrol); *see also* UNITED STATES–CANADA BORDER: DRUG THREAT ASSESSMENT 2007, *supra* note 47, at 11 (detailing the efforts of border patrol to eliminate marijuana trafficking).

50. *See* Goodwin, *supra* note 15, at 200 (noting the amount of marijuana smuggled across the border annually); *see also* U.S. DRUG ENFORCEMENT AGENCY, DRUG TRAFFICKING IN THE UNITED STATES (2004), *available at* http://www.policyalmanac.org/crime/archive/drug_trafficking.shtml (noting that US federal authorities seized 1,236 metric tons of marijuana in 2000 at the US–Canadian border); Colin Nickerson, *Canada Offers Liberal Marijuana Bill Decriminalization Would Hike Use, White House Warns*, BOSTON GLOBE, May 28, 2003, at A8 (stating that during Canada's failed legalization attempt, the US drug czar noted that Canada was a burgeoning source of marijuana production and this would complicate border relations between the two countries).

51. *See* BEWLEY-TAYLOR ET AL., *supra* note 15, at 6 (charting the percentage of drug offenders as proportional to the total prison population and finding Canada to have a 4.5% rate compared to 19.5% of American state prisoners and 53% of American

Despite the historically stable incarceration rates, Canada is set to pass the Safe Streets and Communities Act, which will introduce sweeping changes to the way drug crimes are handled.[52] Commonly known as the C-10 Bill ("C-10"), the proposed law aims to impose a more severe punishment scheme for drug crimes and to introduce mandatory minimum sentences for certain drug offenses.[53] In so doing, the bill appears to emulate the US punitive model favoring punishment over rehabilitation.[54] Thus, critics of C-10 fear that Canada will follow in the United States' footsteps lending to overcrowded prisons and increased incarceration operating costs.[55] As one pundit put it: "[f]orget about scaring evildoers; the bill frightened nearly everyone but cops and jailers, who'll benefit from the increased work, and victims yearning for a return to Old Testament-style sentences."[56]

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federal prisoners); *see also* Webster & Doob, *supra* note 6, at 315–20 (noting the differences between the United States and Canada in sentencing drug offenders).

52. *See* Webster & Doob, *supra* note 6, at 311–12 (noting the stability of the Canadian prison population); Safe Streets and Communities Act, S.C. 2011, c. C-10 (Can.) (introducing legislation aimed at increasing sentences for those convicted of drug offenses).

53. *See* News Release, Dep't of Justice (Can.), Government of Canada Introduces the Safe Streets and Communities Act (Sept. 20, 2011), *available at* http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32631.html (highlighting the focus on heightened sentences for drug crimes); *see also* Kathryn Blaze Carlson, *Crime and Punishment: Inside the Tories' Plan to Overhaul the Justice System*, NAT'L POST (Can.), May 20, 2011, http://news.nationalpost.com/2011/05/21/crime-and-punishment-inside-the-tories-plan-to-overhaul-the-justice-system (explaining the intent for introducing the bill).

54. *See* John Ibbitson, *Conservatives Set to Flex Majority Muscle; Primary Focus on Economy, But Long-Gun Registry, Political Funding, Crime Bill, Terrorism All on Agenda*, GLOBE & MAIL (Can.), Sept. 19, 2011, at A1 (introducing the Tory plan to enact legislation that is tough on crime, specifically drug offenders); *see also Canada's Omnibus Crime Bill Impacts Criminal Justice System*, CORRECTIONAL NEWS (Dec. 7, 2011), http://www.correctionalnews.com/articles/2011/12/7/canada-s-omnibus-crime-bill-impacts-criminal-justice-system (calculating that costs could amount to US$2.5 billion over the next five years).

55. *See* Ian Mulgrew, *Costly Crime Bill Sure to Intensify Justice System's Problems*, VANCOUVER SUN, Sept. 21, 2011, http://www.canada.com/vancouversun/news/westcoastnews/story.html?id=7523778f-f194-43ef-953a-51abb2988dfc (discussing the potential costs of the proposed legislation); *see also* Tonda MacCharles, *Don't Adopt U.S.-Style Drug Laws, Groups Warn Conservative Government*, TORONTO STAR, Feb. 22, 2012, at A4 (citing critics of C-10 who compare the costly bill to the US war on drugs).

56. *See* Mulgrew, *supra* note 55 (noting that law enforcement officers fear that C-10 will strain court dockets and overcrowd prisons); *see also Omnibus Crime Bill C-10*, CANADIAN CIVIL LIBERTIES ASS'N, http://ccla.org/omnibus-crime-bill-c-10 (last visited

Historically, Canada's approach to handling drug offenders has been less punitive than the US model. Canada, unlike the United States, has never used mandatory minimums for drug possession, nor has it required sentencing guidelines that hinder judicial independence.[57] While both countries have treated drug offenses differently in the past, their goals remain the same: to deter crime and rehabilitate the individual.[58]

C. *Achieving the Goals of Punishment*

1. Deterrence and Addiction

A major objective of the criminal justice system is to punish offenders and promote both specific and general deterrence.[59] General deterrence involves punishing a guilty party in order to discourage the general community from engaging in future criminal behavior.[60] The defendant's sentence is meant to instruct the public on what conduct is impermissible and to instill fear of punishment in potential criminals.[61] Meanwhile,

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Sept. 17, 2012) (commenting on the likely increase of the Canadian prison population if C-10 is passed).

57. *See* News Release, *supra* note 53 (examining C-10's mandatory minimum sentences); *see also* Douglas Quan, *U.S. Law Panel Urges Harper to Avoid 'Costly Failure' of Mandatory Minimum Pot Punishment*, NAT'L POST, Feb 22, 2012, http://news.national.com/2012/02/22/u-s-law-panel-urges-harper-to-avoid-costly-failure-of-mandatory-minimum-pot-punishments/ (describing criticisims of Canada's intention to adopt mandatory minimums for marijuana sentencing).

58. *Compare* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, ch.1, pt. A, Introductory Cmt. (2004) (establishing goals of sentencing as deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender), *with* Criminal Code, R.S.C. 1985, c. C-46 (Can.) (detailing one goal of punishment is to "deter the offender and other persons from committing offences" and to "assist in rehabilitating offenders").

59. *See* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 58, ch.1, pt. A, Introductory Cmt. (stating a goal of punishment is to deter the offender and other persons from committing offenses); *see also* Criminal Code, *supra* note 58, § 718 (declaring the goal of deterring criminal conduct).

60. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 29 (2d ed. 2011) (stating "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate"); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (5th ed. 2009) (discussing deterrence as a means to control and prevent future criminal activity).

61. *See* Colin S. Gray, *Gaining Compliance: The Theory of Deterrence and its Modern Application*, COMPARATIVE STRATEGY, 29:3, at 278–79 (2010) (describing the defendant's thought process in being deterred by punishment); *see also* DRESSLER, *supra*

specific deterrence aims to deter the individual criminal from committing future offenses.[62] Specific deterrence operates through incarceration, which threatens the individual with a fear of returning to prison, and further sends the message that such behavior will not be tolerated.[63] Criminal law commonly prescribes more severe penalties for recidivists on the basis that if a subsequent arrest carries a harsher prison sentence, offenders are more likely to be deterred.[64]

Deterrence presumes that the punished, as well as any members of the general population considering criminal behavior, are rational and responsive to the threat of imprisonment.[65] In instances of drug addiction, however, the individual's ability to make rational decisions may be greatly compromised.[66] Addiction is a disease that affects the brain's

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note 60, at 15 (noting that punishment serves as notice to the public of how those who break the law will be treated).

62. *See* DRESSLER, *supra* note 60, at 15 (explaining the role deterrence plays in attempting to modify future criminal behavior); *see also* Goodwin, *supra* note 15, at 203 (noting, however, that many drug offenders who enter prison find ways to abuse drugs while incarcerated, thus reducing the deterrence effect).

63. *See* Robert H. Dorff & Joseph R. Cerami, *Deterrence and Competitive Strategies: A New Look at an Old Concept, in* DETERRENCE IN THE 21ST CENTURY 109, 111 (Max G. Manwaring ed., 2001) (discussing the role deterrence plays in repeat offenses); *see also* DRESSLER, *supra* note 60, at 15 (stating, "[f]irst there is deterrence by *incapacitation*: *D's* imprisonment prevents him from committing crimes in the outside society during the period of segregation. Second, upon release there is deterrence by *intimidation*: *D's* punishment reminds him that if he returns to a life of crime, he will experience more pain.").

64. *See* Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 121 (2009) (conceding that some evidence implies that incarceration has a null or mildly criminogenic effect on future criminal behavior). While the conclusion does not definitively guide policy generally, it does cast doubt on claims that imprisonment has strong specific deterrent effects. *Id.*; *see* VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 6 (Nov. 2010), *available at* http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf (finding longer prison sentences correlated with a three percent reduction in recidivism).

65. *See* Nagin, *supra* note 64, at 120 (discussing deterrence of the rational actor); *see also* WRIGHT, *supra* note 64, at 5 (stating that certainty of punishment, or the actor realizing he will be punished for his actions, is a stronger deterrent than sentence length).

66. *See* LESSENGER & ROPER, DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION 23–26 (1st ed., 2010) (introducing the appeal of drug courts over incarceration by first discussing the physiological basis of addiction and how it alters decision making); *see also* James C. Morton, *A Tough Approach That Might Work*, OTTAWA CITIZEN, Oct. 13 2008, http://www.canada.com/ottawacitizen/news/opinion/

chemistry.[67] Many illegal drugs, such as heroin and cocaine, activate chemical pathways in the brain, causing an overstimulation of the pleasure system, which result in neuron-adaptive changes that alter the normal pleasure experience.[68] Thus, an individual user typically becomes desperate to replicate the stimulation that can only be achieved with drugs.[69] As this neuroadaptation develops, addicts become increasingly unable to control their use. [70] Addiction inhibits the efficacy of deterrence-model drug sentencing, since punishing an individual for an inability to control themselves is counter-intuitive.[71]

2. Retribution and Incarceration

Through punishment, both the United States and Canada attempt to blend utilitarian goals of deterrence with the justice-oriented goal of retribution.[72] According to the US Guidelines,

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story.html?id=b6f57429-03e2-4a15-8cb8-f5461b0daf0d (noting deterrence relies on punishing a rational actor and how drug addicts are not rational).

67. *See* LESSENGER & ROPER, *supra* note 66 (discussing the effect of addiction on neural pathways); *see also* Steven E. Hyman & Robert C. Malenka, *Addiction and the Brain: The Neurobiology of Compulsion and Its Persistence, in* NAT. REV. NEUROSCIENCE 695, 696 (2001), *available at* http://www.sacklerinstitute.org/cornell/summer_institute/ARCHIVE/2005/papers/hyman2001.pdf (discussing the link between addiction, tolerance, and withdrawal on the brain's dopamine receptors).

68. *See* LESSENGER & ROPER, *supra* note 66, at 23, 25 (noting the changes in the brain associated with addiction); *see also* George E. Vaillant, *If Addiction is Involuntary How Can Punishment Help?, in* DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 6 (2001) (Philip B. Heymann & William N. Brownsberger eds., 2001) (analogizing addiction to a "neural avalanche" where once the sequence of addiction linked neural events is underway intervention becomes a hopeless solution thus leading to addiction being defined as a disease).

69. *See* LESSENGER & ROPER, *supra* note 66, at 23 (discussing the dependence created with addiction); *see also* Morton, *supra* note 66 (stating the basis for many drug crimes as being fueled by addiction and thus unaffected by the threat of deterrence).

70. *See* LESSENGER & ROPER, *supra* note 66, at 23–25 (defining neuroadaptation and its role in addiction); *see also* Vaillant, *supra* note 67, at 144 (noting that addiction to drugs is viewed as a disease outside the realm of free will).

71. *See* LESSENGER & ROPER, *supra* note 66, at 25 (noting that once established, these neuroadaptive changes persist for months to years, and upon release from incarceration, can resurface upon re-exposure to drug and overstimulation); *see also* Phillip B. Heymann, *Introduction: Drug Policy With a New Focus, in* DRUG ADDICTION & DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 1, 6 (Philip B. Heymann & William N. Brownsberger eds., 2001) (discussing the advent of neurobiology as a major step forward in understanding the effects of addiction on free will).

72. *See* Criminal Code, R.S.C. 1985, c. C-46, s. 718 (Can.) (listing the goals of punishment); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 58 (discussing the

the goals of criminal punishment are deterrence, incapacitation, just punishment, and rehabilitation.[73] The Criminal Code of Canada contains similar provisions.[74] In contrast to deterrence, retributionists argue that punishment is necessary because of the desert of the criminal's action.[75] Retribution is rooted in philosopher Immanuel Kant's idea that even if a society completely dissolved itself, every prisoner must still be punished as a result of the desert of the criminal's action; by committing a crime, the criminal must pay for her misdeed to society.[76]

Proponents of the retribution model argue that a focus on criminal rehabilitation has the potential to remove an offender from the realm of justice all together.[77] Thus, if by committing a crime, a drug offender harms society, merely sending her to drug rehabilitation does not serve justice to those wronged.[78] The mere threat of incapacitation also serves retribution.[79]

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goals of punishment under the sentencing guidelines); *see also* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 52 (2003) (referring to this combination as a "modified just desert" theory).

73. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 58.

74. *Compare* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 58 (noting deterrence and rehabilitation as the goals of punishment), *with* Criminal Code, R.S.C. 1985, c. C-46, s. 718 (Can.) (providing that among the sentencing goals are deterrence and rehabilitation).

75. *See* LAFAVE, *supra* note 60, § 1.5(a)(6) (citing the rationale of retribution as one who causes harm to others should herself suffer for it); *see also* DRESSLER, *supra* note 60, at 16–17 (discussing the necessity for punishment when a person has committed a crime).

76. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 198 (W. Hastie trans., 1887) (explaining that even if society disbanded it would still have the duty to punish every criminal based not on a utilitarian benefit, but based in the retributive idea of punishing an individual who breaks the law); *see generally* John Cottingham, *Varieties of Retribution*, 29 PHILOSOPHICAL Q. 238 (1979) (discussing the various theories of retribution and noting the repayment theory as just one theory of retribution).

77. *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1032 (1991) (supporting retributive punishment instead of rehabilitative ideals); *see also* Cottingham, *supra* note 76, at 238 (noting the necessity of punishment as being inherent to the crime, regardless of the defendant's rehabilitation).

78. *See* Cottingham, *supra* note 76, at 238 (discussing the necessity of punishment in a retribution minded framework).

79. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8–13 (2d ed. 2008) (arguing that while seemingly dissimilar, retribution and utilitarian models of punishment are merged together in current sentencing schemes). For example, while the general aim of criminal law may be to deter, a utilitarian motive, retributive concepts can also apply to determining sentence length. *See id.*; *see*

While the addictive nature of drugs is certainly a complicating factor, retributivists are likely to claim that regardless of physical dependence, crimes still need to be punished.[80]

Utilitarianism and retribution are not, however, mutually exclusive philosophies.[81] The two can be merged by reconciling the fact that while punishment is based on retribution, the threat of this punishment serves the utilitarian function of deterrence.[82] Thus, while retribution looks backwards at the crime committed, utilitarianism looks to the future.[83]Although retribution is concerned with punishing the addict for the past harm done to society, utilitarianism determines the best method to prevent such a crime from occurring in the future.[84] The United States, embracing the retributivist perspective, has spent the past forty years incarcerating millions of individuals who have committed drug crimes, while Canada has imprisoned far fewer in the same time.[85] The main reason for this disparity lies in each country's approach to sentencing drug offenders.[86]

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also Cottingham, *supra* note 76, at 238 (exploring the idea of retribution and incapacitation).

80. *See* HART, *supra* note 79 (noting that retribution is based on the crime actually committed and is not focused on mitigating factors); *see also* Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 468 (2012) (reasoning that offenders claiming addiction as an excuse are actually admitting wrongdoing, not denying it).

81. HART *supra* note 79, at 8–13 (determining that utilitarianism and retribution can be and often are part of the same philosophy of punishment)

82. *See* HART, *supra* note 79 (finding that this combination of retribution and utilitarianism bridges the gap between the two models of punishment).

83. *See* LAFAVE, *supra* note 60, at 33–35 (discussing the conflicting views between the theories of punishment, and whether they can be reconciled); *see also* DRESSLER, *supra* note 60, at 16–17 (discussing the contrasting way punishment is viewed under retributive and utilitarian models of punishment).

84. *See* DRESSLER, *supra* note 60, at 16–17 (differentiating the theories of punishment and the role they play in dealing with criminals).

85. *See* Webster & Doob, *supra* note 6, at 311 (detailing the level rate of incarceration in Canada over the past forty years and contrasting it with the rising rate in the United States).

86. *Compare infra* Part II.A (discussing the US Federal Sentencing Guidelines), *with infra* Part II.B (distinguishing the Canadian guidelines from the US sentencing scheme).

II. *SENTENCING FOR DRUG CRIMES*

Part II examines both the US and Canadian sentencing schemes. Part II.A focuses on US sentencing guidelines. Part II.B explains the current Canadian approach to sentencing for drug crimes, and then looks at the new legislation, which aims to be tougher on drug offenders. Part II.C explores an alternative approach to sentencing: the drug court model and an enhanced focus on rehabilitation.

A. *United States Sentencing Guidelines*

On September 7, 2010, thirty-one year-old Tanna Nacole Jarrell stood before a county circuit judge in rural Alabama for criminal sentencing.[87] A two-time felon, she was previously found guilty of purchasing four boxes of medication containing pseudoephedrine, a key ingredient in the manufacture of methamphetamine.[88] Jarrell, having a history of drug abuse and addiction, faced a minimum of fifteen years in prison, and Circuit Judge Jacob A. Walker ultimately sentenced her to twenty years in an Alabama penitentiary.[89] Meanwhile, in Texas, thirty-nine year-old Rickie York pled guilty to possession of 1.46 grams of methamphetamine.[90] Based on his prior convictions, the third-degree felony was enhanced to a first-degree with a

87. Amy Weaver, *Woman Gets 20 Years in Drug-Related Charge*, OANOW NEWS, Sept. 7, 2010 (http://www2.oanow.com/news/2010/sep/07/woman-gets-20-years-drug-related-charge-ar-801590), (sentencing Ms. Jarrell for unlawful possession of a precursor to producing methamphetamine).

86. *Id.* (explaining the use of pseudoephedrine in making methamphetamine).

89. *Id.* (noting that she was charged as a habitual offender with two prior felony conviction, and under state sentencing guidelines she faced life in prison). State laws can provide for higher sentences than the federal guidelines discussed in this Note. *See, e.g.*, NEV. REV. STAT. § 453.334 (1999) (stating the law in Nevada as a person convicted of a second offense of selling a controlled substance to a minor is automatically guilty of a felony offense, and can be sentenced to life in prison with the possibility of parole after five years or a definite term of fifteen years with a possibility of parole after five years and a fine up to US$20,000); Act of May 21, 2004, ch. 845, 2-3, 2004 Tenn. Pub. Acts 1922, 1923 (codified at Tenn. Code. Ann. 39-17-417 (Supp. 2005)) (dramatically lowering the triggering quantity of methamphetamine from 100 and 1000 grams to 26 and 300 grams for certain sentences).

90. Casey Knaupp, *Meth Possession Nets Convicted Felon 60 Years*, TYLER PAPER, Mar. 6, 2008, http://www.tylerpaper.com/article/20080306/NEWS08/803060308 (detailing the story of Rickie Dawson York who was sentenced to sixty years for a possession charge based on his previous convictions).

possible sentence of twenty-five years to life in prison.[91] He was ultimately sentenced to sixty years, meaning he would likely spend the rest of his life behind bars for possessing a highly addictive narcotic.[92]

While both Jarrell and York were sentenced under state law, their experiences illustrate the long sentences commonly associated with drug crimes in the United States since President Nixon announced the war on drugs.[93] The passage of the Sentencing Reform Act of 1984 led to the development of guidelines designed to further the basic purposes of criminal punishment: "deterrence, incapacitation, just punishment, and rehabilitation."[94] In 1987, the United States Sentencing Commission published the first set of federal sentencing guidelines to embody the legislative response to the war on drugs, imposing far stiffer punishments than in previous years.[95] Unique in their complexity, the Guidelines' corresponding sentencing table contains "43 offense levels, 6 criminal history categories, and 258 sentencing range boxes."[96]

The following excerpt from the Guidelines' sentencing table illustrates the statute's complexity:[97]

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91. *Id.*

92. *See id.*

93. *See supra* Part I.A (discussing the history of the US war on drugs).

94. *See* Haney, *supra* note 21, at 390–92(introducing the Sentencing Reform Act and the development of the US federal sentencing guidelines); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 58 (noting deterrence and rehabilitation amongst the current goals of sentencing).

95. *See* Trachtenberg, *supra* note 22, at 486 (referring to the combined effect of the public desire for punishment as well as the political underpinnings of the war on drugs). *See generally* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (providing a detailed look into the genesis of the Sentencing Reform Act and the introduction of the sentencing guidelines in 1987).

96. Bowman, *supra* note 34, at 1325 (noting the complexity of the federal guidelines). Many "states have promulgated guidelines in the form of a two-dimensional grid, but a few employ narrative rules for each offense or offense group." *Id.* at 1325; *see also* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995) (noting states that have imposed sentencing guidelines).

97. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2010) (depicting the sentencing table in its entirety).

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B 10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C 12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51

US Sentencing Guidelines Manual, ch. 5

The offense level and criminal history category intersect on the sentencing table to determine the guideline sentencing range.[98] Depending on the number of previous offenses and sentences, the defendant falls in one of six criminal history categories, located on the horizontal axis.[99] Along the vertical axis is the offense level.[100] For drug crimes, the offense level is determined by the amount and nature of the drug in question.[101] Additional factors aggravating the crime, such as using a weapon, can impact the offense level determination.[102]

As a threshold matter, courts use the US Guidelines' complex points system to calculate an offender's initial base offense level. Depending on the amount and type of drug in question, the crime is given a point designation that represents

98. *See id.* (depicting the sentencing table, including guideline ranges in months).

99. *Id.* The steps taken to determine a defendant's criminal history point total will be discussed below. *See infra* notes 123–28 and accompanying text.

100. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2010) (showing the entire sentencing table, which includes forty-three offense levels and incarceration lengths in months).

101. *See id.* ch. 2, pt. D, drug quantity table (detailing the seventeen groupings of drug/quantity levels).

102. *See id.* (listing various aggravating characteristics that can increase a base offense level).

the offense level.[103] Offense levels range from six to thirty-eight points, with higher scores issued to more egregious offenses.[104]

To illustrate its application, a violation relating to 250 grams of marijuana would receive the base level of six points.[105] In the absence of any aggravating factors, an offender at this level would face zero to eighteen months in prison based on their criminal history category.[106] A violation involving between one and two and a half kilograms of marijuana, however, jumps to a level ten offense.[107] Correspondingly, the potential penalty increases to six to thirty months in prison, depending on the defendant's criminal history.[108]

Additionally, the starting base levels increase in relation to the seriousness of the drugs involved. Heroin, cocaine, and methamphetamine, for example, are all introduced at level twelve, meaning that trafficking in any amount of these drugs will result in a penalty of at least ten to thirty-seven months in prison, depending on the defendant's criminal history.[109] Base levels continue to increase as the volume of drugs increase. The rationale for this is that as drug quantities exceed amounts that can be considered solely for personal use, the gravity of the crime escalates. An offender caught with either forty to sixty grams of heroin, twenty to thirty grams of methamphetamine, or two to three hundred grams of cocaine is considered to be trafficking the substance, and is therefore assigned a base level of twenty.[110]

Base levels can be increased by a range of related crimes.[111] For example, under Section 2D1.1, if serious bodily injury occurs to a victim as a result of the substance, a base offense

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103. *See id.* (detailing specific drug and quantity levels). While a vast number of drugs are detailed in the Sentencing Guidelines, this Note seeks to focus on marijuana, methamphetamines, heroin, cocaine, and crack-cocaine. *Id.*

104. *Id.*

105. *Id.*

106 *Id.* ch. 5, pt. A.

107. *Id.* ch. 2, pt. D. (stating the amount and nature of drug that qualifies for an offense level of ten).

108 *Id.* ch. 5, pt. A (displaying the potential sentencing ranges).

109. *Id.*

110. *Id.*

111. *See, e.g., id.* (stating specific aggravators than can increase the base offense level).

level of thirty is applied regardless of the amount in question.[112] Specific offense characteristics, such as possessing a dangerous weapon at the time of the arrest, increase the offense level by two points.[113]

Once a base offense level is calculated, the next step in determining the sentencing range is to assess the defendant's criminal history.[114] According to the guidelines, the likelihood of recidivism is considered by looking at the number of times the individual had previously been incarcerated.[115] Using a system of six levels, courts assign offenders points based upon their criminal history ("criminal history points"), which is based on the number of previous offenses the defendant has.[116] According to the table above, a first time offense falls into level I, which equates to zero or one criminal history points. [117] If the defendant has already received at least one sentence of sixty days, or two sentences of less than sixty days, this results in two criminal history points.[118] The levels increase depending on the subject's criminal history point total, culminating with level VI, which applies to a defendant with thirteen or more criminal history points.[119] Once criminal history points are calculated, the number is used in conjunction with the base offense level to determine the final sentencing guideline range.[120]

Additionally, zones provide an optional third metric by which judges may measure the severity of a drug offense and use their discretion to depart from the mandatory minimum

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112. *Id.* § 2D1.1(a)(3) (stating that if bodily injury occurs in conjunction with a drug offense, and the defendant committed the offense after a prior conviction, an automatic offense level of thirty points shall be applied). If, however, this is the defendant's first conviction, the automatic points applied is twenty-six. *Id.*

113. *Id.* § 2D1.1(b)(1) (illustrating that if a defendant convicted of manufacturing or disturbing methamphetamine in the presence of a minor is automatically given an offense level of fourteen).

114. *See id.* ch. 4, pt. A, Introductory Cmt. (stating that a defendant with past criminal behavior is "more culpable than a first offender and thus deserving of greater punishment").

115. *Id.*

116. *Id.* § 4A1.1 (discussing criminal history as applied to the sentencing table).

117. *See id.* ch. 5, pt. A (noting the base criminal history point level for first or second-time offenders).

118. *Id.* § 4A1.1.

119. *Id.* ch. 5, pt. A.

120. *Id.*

sentence.[121] The sentencing table delineates four zones, with sentencing length correlating to zone designation.[122] This is important, as falling in to a certain zone can allow a judge to depart from mandatory minimum sentences.[123] For example, if a sentence falls in zone B, the judge can order sanctions such as home detention, as opposed to imprisonment.[124]

To illustrate, if a defendant is convicted of possession of seven grams of heroin with intent to distribute, the criminal history is first determined. Assume the defendant has been incarcerated for heroin possession twice before, once for six months and once for a year and a half. She will receive two points for the six-month incarceration and three points for the longer sentence, thus giving her five points total and placing her in criminal history level III as shown on the table.[125] Possessing seven grams gives her a base offense level of fourteen.[126] As depicted in the table, this places her sentencing guideline in the twenty-one to twenty-seven month range.[127]

While the guideline range typically governs the recommended sentence a judge will consider, mandatory minimums present an additional factor that can complicate a final sentencing determination. Mandatory minimums are sentences that a judge is required to give.[128] If a mandatory minimum has been established for the offense in question, it would overrule the guidelines and take sentencing discretion away from the judge.[129] Thus, while simple possession may result

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121. *Id.*

122. *See id.* (displaying the sentencing grid along with the zone lineation).

123. *See id.* § 5B1.1 (differentiating between zones for the purpose of a judicial imposition of probation).

124. *Id.* ch.5, pt. A.

125. *See id.* § 4A1.1 (explaining how to calculate a defendant's criminal history based on prior sentences).

126. *See id.* ch. 2, pt. D (outlining the base offense levels for drug offenses by drug quantity).

127. *See id.* ch. 5, pt. A (showing the sentencing grid and the recommended sentence range based on offense levels).

128. *See id.* § 2K2.4, cmt. n.2 (discussing mandatory minimums and the effect they have on guideline ranges).

129. *See* 18 U.S.C. § 3553(e) (2010) (stating that courts have the authority to issue a sentence below the established statutory minimums if a defendant provides substantial assistance in the investigation or prosecution of another person who has committed a crime); *see also* Hofer & Allenbaugh, *supra* note 72, at 28 n.35 (noting that

in an offense level that places the guideline sentence from zero to six months, if she is in the mandatory minimum range, the judge must issue at least the minimum length. Incidentally, a recent study found that drug offenders have the highest recidivism rate, increasing their criminal history category and thus placing them at risk for longer sentences.[130]

Penalties for the crime of simple possession are kept outside the regular guidelines.[131] Simple possession is codified in Section 844 of the US Code, which states, "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order . . . ." [132] Under Section 844, the penalty for possession of cocaine base, commonly referred to as crack cocaine, is treated more harshly than it is for cocaine.[133] If a person is caught with more than an ounce of crack cocaine, a mandatory minimum sentence of five years is imposed. [134] It should be noted that while simple possession is codified in Section 844 of the US Code, possession with intent to distribute, manufacture, or traffic is sentenced through the federal guidelines discussed above.[135]

1. Response to the US Guidelines: *United States v. Booker*

Though initially judges were required to adhere to the sentence ranges, years of prison overcrowding forced the

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if a guideline range is below a minimum sentence, the minimum sentence must be given).

130. *See* RYAN S. KING & MARC MAUER, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 14–15 (2002) (noting that non-drug court participants have over a fifty percent recidivism rate).

131. *See* 21 U.S.C. § 844(a) (2006).

132. *Id.*

133. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified 21 U.S.C. § 841) (increasing the amount of crack cocaine that would trigger a five-year mandatory minimum sentence from five grams to twenty-eight grams (one ounce) and the amount that would trigger a ten-year mandatory minimum from fifty grams to 280 grams).

134. *See id.* (noting the minimum sentence for crack-cocaine possession for any amount over twenty-eight grams).

135. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2010) (covering all offenses involving drugs and narco-terrorism, with Section 2D1.1 specifically covering "unlawful manufacturing, importing, exporting, trafficking, or possession; continuing criminal enterprise").

nation's criminal justice system to re-evaluate the Guidelines.[136] Additionally, federal judges became increasingly frustrated at not being able to impose sentences outside the guidelines, thus hindering their ability to tailor sentences based on the facts surrounding each defendant.[137] Taxpayers forced to foot the bill also became dissatisfied with the way drug offenses were being handled by the criminal justice system.[138]

By 2005, the question of the US Guidelines' constitutionality came before the US Supreme Court. In *United States v. Booker*, Freddie Booker, a man convicted of distributing 566 grams of crack cocaine and facing a minimum of thirty years in prison, argued that requiring judges to strictly follow the guidelines violated the Sixth Amendment right to trial by jury.[139] The Supreme Court agreed. [140] Instead of abolishing the guidelines, however, the 5–4 majority ruled that the guidelines should simply be utilized as an advisory framework.[141]

While statutory mandatory minimum sentences restrict judicial independence, the "safety valve" provision does allow

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136. *See generally* United States v. Booker, 543 U.S. 220 (2005) (citing the previously mandatory scope of the guidelines); *see also* Alan Vinegrad & Douglas Bloom, *Sentencing Guidelines: Above-the-Range Sentences After 'Booker'*, 235 N.Y.L.J. 116 (2006), (discussing the guidelines before and after *Booker*).

137. *See Judges in a Stew on Federal Sentences*, ARK. DEMOCRAT-GAZETTE (Sept. 1, 2003), http://www.november.org/dissentingopinions/Stew.html (quoting US District Judge G. Thomas Eisele as saying, "[i]t's hard to find a federal judge who finds the sentencing guidelines are working well"); *see also* Steven D. Silverman, *Judges' Hands No Longer Tied in Federal Sentencing*, MD. CRIME ATT'Y BLOG, (Sept. 24, 2008)), http://www.marylandcriminalattorneyblog.com/2008/09/judges_hands_no_longer_tied_in.html (noting the frustration of judges who were forced to adhere to mandatory sentencing ranges).

138. *See* James Sterngold & Mark Martin, *Hard Time: California's Prisons in Crisis*, S.F. CHRON. (July 3, 2005), http://www.sfgate.com/health/article/HARD-TIME-California-s-Prisons-in-Crisis-High-2624762.php (reporting on the frustration of taxpayers burdened with the cost of additional prisoners); *see also The Cost of a Nation of Incarceration*, CBS NEWS (Apr. 22, 2003), http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration/(describing the costly affect on taxpayers of a tough on crime approach).

139. *See* Booker, 543 U.S. at 226.

140. *Id.* (holding that the federal sentencing statute, as amended, makes the Guidelines effectively advisory and no longer mandatory).

141. *Id. But see* 21 U.S.C. § 841 (2006) (stating minimum sentences must still be adhered to and are not considered merely advisory). Statutory penalties take precedence over the Guidelines so if the two penalty structures conflict, the mandatory minimum penalties "trump" the Guidelines. *Id.*

judges to depart from any mandatory sentence.[142] Developed to promote cooperation with prosecutors seeking to build cases against more serious offenders, safety valves reduce sentencing ranges in exchange for useful information.[143] For example, under safety valve provision 28 U.S.C. § 994(n), a defendant may escape the mandatory minimum by assisting in the investigation or prosecution of another person who has committed an offense.[144] Low-level offenders, however, may not benefit from this safety valve if they have little or no information that will be of use to the prosecution.[145]

B. Canada

1. Current Sentencing Scheme

In Canada, crown attorneys prosecute illicit drugs under the Controlled Drugs and Substances Act ("CDSA").[146] The statute does not prescribe mandatory minimum sentences, nor does it utilize a complicated sentencing guideline chart.[147] Instead, Canada's guidelines use a scheduling system that places drugs into eight categories based on danger level, and whether

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142. *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2010) (eliminating the mandatory minimum in return for a suspect's willingness to cooperate in an ongoing investigation as long as he meets the other specified criteria).

143. *See id.* (stating the safety valve requirements is met only if all five of the following criteria apply: no one was harmed during the offense, the offender has little or no history of criminal convictions, the offender did not use violence or a gun, the offender was not a leader or organizer of the offense, and the offender willingly gave the prosecutor information to assist in the investigation); *see also* FAMILIES AGAINST MANDATORY MINIMUMS, SAFETY VALVES IN A NUTSHELL (2009), *available at* http://www.famm.org/Repository/Files/Safety_valves_in_a_nutshell_7.16.09%5B1%5D.pdf (describing the efforts of those opposed to mandatory minimums in pushing for safety valve provisions).

144. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(stating that a judge may consider the character of the information provided as well as the timeliness of the assistance, in sentencing outside the guidelines).

145. *See* Noah Mamber, *Coke and Smack at the Drugstore: Harm Reductive Drug Legalization: An Alternative to a Criminalization Society*, 15 CORNELL J.L. & PUB. POL'Y 619, 634 (2006) (noting that since low level offenders typically have less access than higher level drug dealers to information that could be used by authorities, they are less likely to be given reduced sentences based on substantial assistance).

146. *See generally* Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Can.).

147. *See id.* pt. 1 (outlining the various sentences, none of which have a mandatory minimum).

the crime is an indictable or summary offense.[148] Judges first examine the amount and nature of the drug involved (determined by schedule), and then determine whether the crime can be indictable (similar to a felony in the United States) or is a summary offense (similar to a US misdemeanor charge).[149]

Like the US Guidelines, the CSDA categorizes drugs based on their composition and severity. Marijuana, for example, is contained in its own class, Schedule II.[150] It carries a maximum penalty of six months for the first conviction of possession.[151] Schedule I contains methamphetamine, crack cocaine, and cocaine powder.[152] Possession of such substances results in a maximum sentence of seven years for an indictable offense, or a six-month maximum if the offense is punishable on summary conviction. [153] For a subsequent offense under summary conviction, the maximum sentence increases to one year.[154] Schedule III contains amphetamines, with maximum penalties of three years imprisonment for an indictable offense, or six months maximum for a first time summary conviction offense.[155] Subsequent summary conviction offenses will subject the defendant to a maximum imprisonment term not exceeding one year.[156]

The CSDA also factors trafficking offenses into its sentencing.[157] Where the trafficked substance is a Schedule I or II drug, the offender is guilty of an indictable offense, with a

148. *See generally id.* (providing the sentencing guidelines for drug related criminal activity in Canada).

149. Michael Ashby, *Canadian Criminal Offence: Summary vs. Indictable*, THE NATIONAL PARDON CENTRE (Sept. 21, 2012), http://www.nationalpardon.org/blog/national-pardon-centre/canadian-criminal-offence-summary-vs-indictable (noting that the difference between a summary and indictable offense is based on the severity of the crime).

150. *See* Controlled Drugs and Substances Act, S.C. 1996, c. 19, sched. 2 (Can.).

151. *Id.* § 4(3)(b)(i).

152. *Id.* sched. 1.

153. *See id.* §§ 4(3)(a)-(b) (stating the sentences differ depending on the nature of the crime).

154. *See id.* § 4(3)(b)(ii) (noting that imprisonment terms include a potential fine, though it is not necessarily imputed).

155. *Id.* sched. 3; *id.* §§ 4(6)(a)–(b).

156. *Id.* § 4(6)(b).

157. *See id.* § 5 (providing the specific provisions for drug trafficking).

corresponding prison term of up to ten years.[158] If the individual is guilty of an offense punishable on summary conviction, such as possessing a very small amount of marijuana, the accompanying term of imprisonment may not exceed eighteen months.[159]

2. Proposed Legislation

While Canada's model has resulted in fewer incarcerations than the United States', Canada's newly installed conservative leaders are hoping to dramatically alter the nation's criminal justice system.[160] Holding the majority of Parliamentary seats for the first time since 1988, the Conservative Party of Canada has promised a "tough on crime" approach.[161] When introducing the bill to Parliament, the Minister of Justice and Attorney General, Rob Nicholson, stated, "We campaigned on a promise to . . . crack down on illegal drug trafficking, and improve the overall efficiency of our judicial system."[162] The bill combines nine individual pieces of legislation and aims to significantly toughen sentences for, inter alia, drug traffickers and repeat violent young offenders.[163]

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158. *Id.*

159. *Id.*

160. *See* Steven Chase, *Tories Unveil Tough-on-Crime Legislation*, GLOBE &MAIL (Can.), Sept. 21, 2011, at A4 (quoting newly installed Justice Minister Rob Nicholson: "This is not the end; this is just the beginning of our efforts in this regard."); Webster & Doob, *supra* note 6, at 311 (noting the stable prison population in Canada over the past forty years).

161. *See* Chase, *supra* note 160 (detailing the tough on crime approach that will be taken by the newly elected leaders); *see also* Mark Gollom & Andrew Davidson, *Harper: Majority Win Turns Page on Uncertainties*, CBC NEWS, May 2, 2011, http://www.cbc.ca/news/politics/canadavotes2011/story/2011/05/02/cv-election-main.html (providing commentary on the Conservative Party's success in the 2011 elections, taking out of 308 total seats in the House of Commons).

162. Press Release, Can. Dep't of Justice, Government of Canada Introduces the Safe Streets and Communities Act (2011), *available at* http://www.justice.gc.ca/eng/news-nouv/nr-cp/2011/doc_32631.html (noting the plan to treat drug crimes more harshly). *See generally* Canada Safe Streets and Communities Act, S.C. 2011, c. C-10 (Can.) (providing the newly instituted Act which provides for harsher sentences for dru-related offenses).

163. *See Nicholson Says Crime Bill Not Based on Latest Stats*, CTV OTTAWA, http://www.ctvnews.ca/nicholson-says-crime-bill-not-based-on-latest-stats-1.700244 (last visited May 19, 2012) (noting that Minister Nicholson dismissed criticism of the price concerns over the proposed bill).

Several provisions highlight this more severe approach to sentences. First, C-10 introduces a minimum penalty of one year in prison for drug traffickers, participants in organized crime, repeat offenders, and individuals who used violence during the commission of the offense.[164] Second, the minimum sentence becomes two years for trafficking drugs on or near school grounds or other public places frequented by children.[165] C-10 also doubles the maximum sentence for marijuana production to fourteen years and imposes a minimum six-month sentence for the production of between 6 and 200 plants.[166] Additionally, amphetamines would become Schedule I drugs, resulting in higher maximum penalties when used in the commission of an offense. Finally, more legislation is promised that will attempt to crack down on crime.[167]

Given the potential impact this bill could have on the Canadian legal system, reaction to C-10 has been mixed. In the House of Commons debate, Don Davies, a Member of Parliament for Vancouver Kingsway, raised the issue of increased costs associated with C-10, specifically referring to US expenditures in the war on drugs.[168] He noted that the bill does not deal with preventative measures to reduce drug offenses.[169] The Honorable Vic Toews, the Minister of Public Safety who defends the Bill, admitted that more police officers will be necessary to handle the likely rise in new arrests.[170] He did not,

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164. *See* Canada Safe Streets and Communities Act, S.C. 2011, c. C-10, § 40(a) (Can.) (stating a minimum sentence of one year for trafficking drugs that would be an indictable offense).

165. *See id.* § 39(a)(ii) (noting a minimum sentence of two years for the commission of an offense near school grounds, or any other public place typically frequented by persons under the age of eighteen).

166. *See id.* § 41(b)(i) (stating the newly imposed minimum for growing marijuana in excess of six plants).

167. *See id.* § 44 (amending the Controlled Drug and Substances Act to include amphetamines as a Schedule I drug).

168. *See* 146 PARL. DEB., H.C. (41st Parl.) (1st Sess.) (Sept. 22, 2011) (Can.) (statement of Mr. Don Davies), *available at* http://parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=18&Parl=41&Ses=1&Language=E&Mode=1#SOB-4267318 (citing Mr. Don Davies as stating that the United States introduction of mandatory minimum sentencing was a critical error).

169. *See id.* (quoting Mr. Davies: "There is nothing in this bill that deals with prevention. There is nothing in this bill that addresses the need for increased resources to help prevent crimes from happening in the first place").

170. *See id.* (quoting Mr. Toews: "[W]e would provide funding to the provinces and territories to allow them to hire additional police officers").

however, respond to questions about how to deal with overcrowded prisons and overburdened taxpayers.[171] Lawmakers also discussed the merits of embarking on a punitive approach to drug offenders, and one parliament member noted that if most drug offenders are addicts, recidivism would likely be high.[172]

C. *The Advent of Drug Courts and a New Approach to Dealing with Drug Crimes*

As the public's focus shifted away from recidivism, the heightened focus on rehabilitation and a need to quell the ever-increasing courthouse dockets, resulted in the first drug court being founded in the United States.[173] As the war on drugs continued, a record number of US citizens were being incarcerated then released, only to offend again.[174] Drug courts provide rehabilitation, thus reducing the risk of recidivism and lessening the overall cost to taxpayers responsible for the costs of incarceration.[175] A US bipartisan public health study found

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171. *See Evidence: Standing Comm. on Justice and Human Rights*, 6 H.C. (41st Parl.) (1st Sess.) (Oct. 20, 2011) (Can.) (statement of Hon. Toews), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5186690&Language=E&Mode=1 (regarding the cost of the bill, Hon. Toews was quoted as saying, "The cost of crime, ladies and gentlemen, not only consists of taxpayer dollars, but the loss of human life, which is immeasurable. Equally immeasurable is the loss of family, the loss of law and order, and the loss of faith in the criminal justice system and in our government's ability to protect society."). The role of the Department of Public Safety is to lead the development of federal policy and legislation for Canada's correctional system. PUB. SAFETY CANADA (Oct. 11, 2011), http://www.publicsafety.gc.ca/abt/wwd/index-eng.aspx.

172. *See* 146 PARL. DEB., H.C. (41st Parl.) (1st Sess.) (Sept. 22, 2011) (Can.) (statement of Mr. Don Davies), *available at* http://parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=18&Parl=41&Ses=1&Language=E&Mode=1#SOB-4267318 (noting that drug offenders "get into that revolving door of prison, which is very expensive for taxpayers, ineffective, and leads to recidivism, which everybody on all sides of the House would like to reduce").

173. *See* SHELLI B. ROSSMAN ET AL., URB. INST. JUSTICE POL'Y CTR., THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE DRUG COURT EXPERIENCE 39 (Shelli B. Rossman et al. eds., 2011) (discussing the first drug courts).

174. *See supra* notes 60–63 and accompanying text (discussing the rise in recidivism as prison populations grew).

175. *See* NAT'L INST. OF JUSTICE, DO DRUG COURTS WORK?: FINDINGS FROM DRUG COURTS RESEARCH (2008), *available at* http://www.nij.gov/topics/courts/drug-courts/work.htm (showing data that found in a two-year period felony re-arrest rate decreased from forty percent to twelve percent); *see also supra* note 166 and accompanying text.

that medical treatment for drug offenders dramatically reduces crime and is more cost-effective than jail, as every dollar invested in drug treatment can save seven dollars in societal and medical costs.[176]

The first drug court was introduced in Miami, Florida in 1989.[177] In the past twenty years, the number of drug courts has exploded, and as of 2007, nearly two thousand drug courts existed throughout the country.[178] Overall, drug courts have been remarkably successful in reducing recidivism among those convicted of a drug offense.[179] Despite their success, fifty-six percent of US counties do not boast drug courts, and ninety-six percent of states reported that drug court capacity could be expanded but for lack of funding.[180]

In Canada, drug courts are a more recent and slower expanding phenomenon.[181] To date, the country hosts just six drug courts, scattered throughout major cities such as Toronto

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176. *See* DIANE RILEY, CANADIAN FOUND. FOR DRUG POL'Y, DRUGS AND DRUG POLICY: A BRIEF REVIEW & COMMENTARY (1998), *available at* http://www.cfdp.ca/sen1841.htm (citing an American study that discusses the cost savings of using drug treatment as opposed to incarceration).

177. ROSSMAN, *supra* note 173, at 39 (examining the growth of drug courts in America and their effect on recidivism in addicts); *see also* Trachtenberg, *supra* note 22, at 484, n.16 (noting that almost everyone in the criminal justice system now doubts that rehabilitation can be achieved in a prison setting).

178. *See* C. WEST HUDDLESTON, III ET AL., NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 7 (2011) (detailing the drug court approach in the United States).

179. *See* LISA MCKEAN & CHARLES RANSFORD, CTR. FOR IMPACT RESEARCH, CURRENT STRATEGIES FOR REDUCING RECIDIVISM 17 (2004) (noting that drug courts plus mandatory treatment have resulted in a thirty-two percent decrease in recidivism); *see also* NAT'L INST. OF JUSTICE, *supra* note 175 (stating the beneficial effect of drug courts on recidivism).

180. *See* MCKEAN, *supra* note 173, at 27 (finding that eighty percent of respondents said that insufficient state or federal funding was the primary obstacle limiting the capacity of their drug courts); *see also* GOVERNMENT OF CANADA, NATIONAL ANTI-DRUG STRATEGY: DRUG TREATMENT COURTS, http://nationalantidrugstrategy.gc.ca/dtc-ttt.html (noting the existence of six drug courts in Canada).

181. *See* Kimberly Y.W. Holst, *A Good Score?: Examining Twenty Years of Drug Courts in the United States and Abroad*, 45 VAL. U. L. REV. 73, 82–83 (detailing the introduction of drug courts in Canada, specifically the first Canadian drug court, which opened in Toronto in 1998); *see also*, UNIV. OF ALBERTA, DRUG TREATMENT COURTS FACT SHEET (2010), http://www.knowmo.ca/Libraries/Fact_Sheets/Fact_sheet_Drug_Treatment_Courts.sflb.ashx (discussing the recent rise of drug courts in Canada).

and Vancouver.[182] The first Canadian drug court was introduced in 1998, and mimicked the United States drug court model, which provided participants with rehabilitation instead of mere incarceration.[183]

In both countries, drug courts provide tailored treatment programs that target the root causes of addiction and crime, instead of simply incarcerating addicted individuals.[184] US drug court participants were significantly less likely than the comparison group to report using drugs.[185] Similarly, upon returning to society, treated individuals were much less likely to return to crime.[186]

Furthermore, investing in rehabilitation significantly lowers future incarceration, thereby providing future savings.[187] A recent study found that drug courts produced an average of US$2.21 in direct savings to the criminal justice system for every dollar spent—a 221% return on investment.[188] When drug courts targeted their services to higher-risk drug offenders, the return

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182. *See* Holst, *supra* note 181 (noting the first Canadian drug court was established in Toronto in 1998).

183. *See* DRUG TREATMENT COURTS FACT SHEET, *supra* note 181 (defining Canadian drug courts as specialized courts with the goal of reducing drug dependence and criminal activity); *see also* Holst, *supra* note 181, at 84 (noting the similarities between Canadian and American drug courts).

184. *See* HUDDLESTON, III ET AL., *supra* note 178, at 15 (detailing the unique approach of drug courts that attempts to treat and rehabilitate drug addicts).

185. *Id.* at 9–11 (discussing the benefits of the drug court model in reducing substance abuse in adults and juveniles).

186. *See id.* at 9 (citing that the best drug courts reduced crime by as much as forty-five percent over other dispositions). Recidivism rates were generally eight to twenty-six percentage points lower than for other justice system responses. *Id.*; *see also* John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 925 (2000) (discussing the emergence of drug courts and their implication on courts' treatment of drug offenders).

187. *See* AVINASH SINGH BHATI ET AL., URBAN INST. JUSTICE POLICY CTR., TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-INVOLVED OFFENDERS 56 (2008) (noting the overall fiscal savings in using rehabilitation methods over incarceration to deal with drug offenders). The Urban Justice Policy Center conducts nonpartisan research and evaluation, with the primary goal of this research to determine the size of the drug-involved offender population that could be served by partnerships between courts and treatment. *Id.* at xiii.

188. *See id.* at 56 (calculating the return on investment of drug courts); *see also* SHANNON CAREY & MICHAEL FINIGAN, NPC RESEARCH, INC., A DETAILED COST ANALYSIS IN A MATURE DRUG COURT SETTING: A COST-BENEFIT EVALUATION OF THE MULTNOMAH COUNTY DRUG COURT 3, 6 (2003) (finding that each drug court participant saved the county over US$5,000).

on investment was even higher: US$3.36 for every dollar invested.[189] These savings resulted from fewer court hearings, fewer incarcerated individuals to house and feed, and a decreased need for policing expenditures.[190]

The turn to drug courts may be indicative of a change in drug policy. Current US Drug Czar Gil Kerlikowske has called for an end to the war on drugs, and Congress's passage of the Fair Sentencing Act aims to alleviate the troublesome sentencing disparities between crack and cocaine possession.[191] For their part, judges noted that sentences were too harsh and on average reduced federal drug offender sentences from 95.7 months to 71.7 months between the years of 1991 and 2001.[192]

Public sentiment is also moving towards greater leniency for drug offenders.[193] Over the last twenty years, a US poll asked respondents if they felt courts dealt too harshly or not harshly enough in sentencing criminals.[194] In every year from 1980 to 1996, at least seventy-eight percent responded "not enough."[195] This fell to sixty-eight percent by 2000.[196]Similarly, research showed US citizens strongly favored rehabilitation and reentry

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189. *See* BHATI ET AL., *supra* note 187, at 58, 66 (noting that the long-term savings still existed when treatment was given to those who were likely to reoffend).

190. *See id.* at 40 (discussing the ways in which resources can be saved when using drug courts). Saving on policing expenditures is critical as some drug addicts are also drug dealers. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. Rev. 783, 797 (2008).

191. *See* Fair Sentencing Act of 2010, *supra* note 133; *see also* LAW ENFORCEMENT AGAINST PROHIBITION, *supra* note 11, at 6 (quoting current drug-control director Gil Kerlikowske's belief that the idea of a "war on drugs" is flawed and incorrectly represents a war on America's citizens by its own government).

192. *See* Bowman, *supra* note 34, at 1330, n.73 (discussing the average sentence length for federal drug offenders); *see also* Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 981 (1995) (noting that guideline lengths are "far longer than necessary to achieve maximum deterrence"); William Spelman, *The Limited Importance of Prison Expansion, in* THE CRIME DROP IN AMERICA 97, 123 (Alfred Blumstein & Joel Wallman eds., 2000) (noting that without prison expansion, a drop in crime rates "would have been 27 percent smaller").

193. *See* PETER D. HART, OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 1, 4–5 (2002) (observing the public opinion favoring a more rehabilitative approach for dealing with drug offenders).

194. *Id.* (citing poll results).

195. *See id.* (noting the poll respondents concern that sentences given for drug crimes were not as harsh as they should be).

196. *See id.* at 1(finding that in 1994, forty-two percent preferred the punitive approach, while in 2002, only thirty-two percent find the same approach preferable).

programs over incarceration as the desired methods of ensuring public safety.[197]

The United States and Canada have used vastly different sentencing structures for those convicted of drug crimes. While the United States relies on the once-mandatory federal sentencing guidelines and mandatory minimums, Canada has never used mandatory minimums or a rigid guideline scheme. Although *Booker v. United States* made the US guidelines merely advisory, prisons continue to be overcrowded. Frustration has led to the development of drug courts, which may be better suited to dealing with drug addicts than prisons. Canada, meanwhile, is close to introducing sweeping legislation that will imitate the punitive approach exemplified by the United States until recently.

III. *BALANCING THE VARIOUS GOALS OF SENTENCING*

Part III argues that the standard approach of imprisonment for drug crimes employed by the United States, and to a lesser extent Canada, is misguided. Part III.A examines how imprisonment is counterproductive in deterring future drug-related crimes, and why drug courts are a more effective model. Part III.B specifically details why retribution-based punishment is misplaced in dealing with drug crime sentencing. Part III.C argues that Canada is moving in the wrong direction in an attempt to enact new tough-on-crime legislation.

Deep social, economic, and political differences caution against superficial comparisons between the United States and Canada. The United States population exceeds 311 million, compared to just 34 million in Canada.[198]The two countries operate under different governments and criminal codes.[199] The fact remains, however, that the countries share a border and are both reaching a critical point with respect to their nation's drug policies.[200] Thus, examining the countries together provides a

197. *See id.* at 4 (observing that sixty-six percent of Americans believe rehabilitation is more effective than longer sentences).

198. *See supra* note 7 (stating the population of both countries).

199. *See supra* Parts II.A and II.B (comparing the sentencing structure of the United States and Canada).

200. *See supra* notes 44–50 (describing the nexus shared between the two countries and the associated concerns of illegal drugs crossing the border).

better picture of the path each country should take, and the lessons that can be learned from the cross-border allies. Furthermore, drug addiction is universally problematic.[201] On both sides of the border, addiction is complex, devastating, and unlikely to be conquered by incarcerating addicts.[202] Thus, both nations would be better served by an enhanced focus on rehabilitation.

A. *Achieving the Desired Goals of Sentencing*

The United States and Canada both use incarceration as a critical tool to deal with drug crime. While the US Federal Sentencing Guidelines use a complex table to determine the recommended range, Canada simply prescribes maximum penalties. Canada, however, is on the verge of implementing a new law that mirrors the United States' punitive approach. The system of incarcerating addicted individuals while simultaneously expecting their recovery has been a failure.[203] It is not surprising that drug courts have achieved greater success, as they actually treat the root problem of drug crimes—addiction.[204] While the initial cost is higher than simple incarceration, it is a sound investment.[205] Simply put, drug courts work.[206] The punitive model of incarcerating addicts does not.[207] When an addict is released without treatment, it is likely that they will return to their old habits.[208] With the current approach that punishes recidivists more harshly, this only leads

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201. *See supra* notes 66–71 and accompanying text (discussing the widespread problem of addiction).

202. *See supra* notes 67–70 and accompanying text (discussing how addiction complicates the typical methods used to punish criminal behavior).

203. *See supra* notes 2–5 and accompanying text (detailing the number of prisoners incarcerated for drug crimes and the fiscal cost each prisoner represents).

204. *See supra* notes 175, 179 and accompanying text (showing improved recidivism rates in treating addicts with rehabilitation over incarceration).

205. *See supra* notes 187–189 and accompanying text (citing a long term saving of 221% when drug courts are used over imprisonment).

206. *See supra* notes 175–88 and accompanying text (detailing the success of the drug court approach).

207. *See supra* notes 175, 179 (discussing recidivism rates of drug court participant to non drug court individuals).

208. *See supra* notes 177 and accompanying text (noting the high recidivism rates of drug offenders).

to longer incarcerations at a greater expense to the US public.[209] The United States should expand on its highly successful drug court facilities while commencing a serious dialogue on amending the US Guidelines.[210]

B. *The Problem with Retribution and Incarceration in Punishing Drug Offenders and Drug Dealers*

While the idea of a criminal deserving punishment is fairly intuitive, when it comes to drugs and addiction, the retributivist argument is not as persuasive as a more utilitarian approach.[211] The theory of retribution hinges on the criminal deserving punishment for his decision to disobey the law.[212] Strong arguments have been made, however, that a person acting under the power of addiction is not deserving of imprisonment.[213]

A strict retributivist would counter by correctly noting that the actor made a decision to break the law and thus is deserving of punishment.[214] The punishment, however, must fit the crime, and the correct punishment is one that is most likely to benefit society in the long run. For example, some commentators argue that incapacitation is the strongest form of deterrence.[215] If every child in the United States were told he would receive life in prison for trying a recreational drug, certainly this would send a strong message, and it is very likely that fewer individuals would try drugs for the first time.

However, punishment must not only fit the crime, it must also strike a balance between fairness to the criminal and

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209. *See supra* notes 3, 16 and accompanying text (discussing the annual cost of incarcerating an individual).

210. *See supra* notes 175–89 and accompanying text (noting the benefits of drug courts over imprisonment).

211. *See supra* notes 175–80 and accompanying text (discussing why treatment is a better option than imprisonment for drug offenders).

212. *See supra* notes 74–80 and accompanying text (discussing the tenets of retribution).

213. *See supra* notes 66–71 (discussing how drug addicted individuals have a reduced capacity to make rational decisions thereby decreasing both the effectiveness and rational of deterrence).

214. *See supra* notes 75–80 and accompanying text (discussing the goals of retribution and just deserts).

215. *See supra* notes 60–64, and accompanying text (noting the deterrence and incapacitation theory).

deterrence to others. Furthermore, deterring a drug addict with the threat of punishment is likely to be a much more difficult task than deterring an individual not subject to the harsh realities of addiction.[216] Thus, even if retribution should necessarily be regarded as having a place in determining sentences, an overly harsh retributive-based punishment is misguided when applied to addicts.

The most effective sentence in a criminal case satisfies the goals of punishment, is fair, and deters similar behavior in the future.[217] By treating an addict, her likelihood of future abuse decreases, thus removing her from the drug market that fuels criminal behavior. If she is rehabilitated, not only is she less likely to commit a similar crime, she is also less likely to contribute to the crimes of other addicts.[218] If addicted individuals return to a society that is unforgiving of addiction, they are likely to re-abuse and, in turn, re-offend.[219] This does a disservice not only to the addicted individual who remains untreated, but also to the taxpayer who bears the economic costs of housing another inmate for a lengthy sentence.

What retribution and the punitive model fail to adequately recognize is that crimes borne from drug addiction cannot be analogized to the milieu of other potential crimes. For example, an individual sentenced for a violent crime will be incarcerated. This sends a message to the general public that if anyone is considering wanton violence, they should reconsider, as they will be punished.[220] Attempting to send a message to a chemically-dependent individual, however, is likely impossible.[221] Thus, it is axiomatic that rehabilitating the individual would provide a better basis for punishment than incarceration. Not only will the individual attempt to rehabilitate, thus accomplishing a

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216. *See supra* notes 65–71 and accompanying text (explaining deterrence and it's affect on a drug dependent individual).

217. *See supra* note 58 and accompanying text (detailing the goals of punishment).

218. *See supra* note 182–86 and accompanying text (discussing rates of re-offense in drug offenders).

219. *See supra* notes 177, 186 and accompanying text (evidencing the reduced recidivism of drug court participants).

220. *See supra* notes 59–60 and accompanying text (noting that punishment serves as a general deterrent to the public).

221. *See supra* notes 65–70 and accompanying text (discussing the chemical dependence created by drug use and the loss of control over one's actions).

principle goal of punishment, but greater deterrence will occur because repeat offenses are less likely to happen if an individual is treated for her addiction.[222]

Despite their success in rehabilitating addicts, drug courts cannot reach all drug offenders. While rehabilitation represents an improved strategy over incarceration, the role of drug dealers complicates the rehabilitative model. Certainly at the highest end of the guidelines, rehabilitation may be inapposite as the crimes are unlikely to be committed as a result of addiction.[223] The upper end of the US Guidelines are thus directed towards high-level drug dealers.[224]

Unfortunately, however, many drug dealers are addicts themselves and turn to selling drugs in order to finance their own drug abuse.[225] Thus rehabilitation aimed at these mid- to low-level dealers could potentially have a two-part impact. Not only will the dealer herself be best served by treating her addiction, but also a dealer who exits the drug market as a result of curing her addiction will no longer contribute to the drug abuse of others, namely her former customers. [226] While incarceration may provide an obvious deterrent to drug dealers, erasing the need to financially support their own addiction may be the greatest deterrent of all. Consequently, reducing the recidivism potential is much greater, and this coincides with long-term fiscal savings.[227]

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222. *See supra* notes 177–84 and accompanying text (showing the effectiveness of drug courts in reducing recidivism rates).

223. *See* Mamber, *supra* note 145, at 639 (noting that high profits fuel the constant supply of drug dealers); *see also* Boaz, *supra* note 16 (explaining that high profits entice people to become drug dealers).

224. *See supra* note 104 and accompanying text (explaining that the United States Sentencing guidelines consider it a more serious crime when a person is caught with more than drugs than what is considered for personal use).

225. *See supra* note 190 and accompanying text (discussing the link between drug dealers and drug addicts).

226. *See supra* notes 65–70 and accompanying text (discussing dependence, and the presence of which fuels drug addiction and thus criminal drug behavior).

227. *See supra* note 176 and accompanying text (showing data that supports the fiscal savings of drug courts in the long-term over incarcerating those convicted of drug crimes).

C. *Moving Forward: The Best Strategy for the United States and Canada*

Canada and the United States stand on opposites sides of the border between effective drug policy and ineffective sentencing schemes.[228] Canada is on the precipice of enacting legislation that will echo the overly-punitive US approach to dealing with drug convictions. The United States is moving in the right direction, relaxing the once mandatory sentencing guidelines and addressing the crack-cocaine sentencing disparity that once existed.[229] Canada's prison population has remained stable, and the sentencing guidelines give full discretion to judges.[230] They are not required to adhere to mandatory minimums nor to draconian sentence ranges.[231]

Despite this stability, Canada is set to embark down the same troubled path that the United States followed.[232] It will likely encounter the same hazards in attacking drug offenses with lengthy prison sentences. As a result, already full prisons will increase in size, court dockets will become overburdened, and the public will pay the exorbitant cost associated with this flawed approach.[233] The United States, meanwhile, has learned that the war on drugs has led to billions of taxpayer dollars being spent on incarcerating individuals.[234] Not only is this

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228. *See supra* notes 191–97, 52–58 and accompanying text (comparing the current movement of the United States towards slightly relaxing its sentencing guidelines, while Canada is looking to become more strict with sentencing for drug crimes).

229. *See supra* note 133 and accompanying text (reducing the sentence disparity for crack-cocaine possession by enacting the Fair Sentencing Act); *see also* National Criminal Justice Commission Act of 2011, S. 306, 112th Cong. (2011) (introducing legislation that establishes a national criminal justice commission to review all areas of the criminal justice system in an attempt to establish the most cost-effective and recidivism reducing criminal justice strategies).

230. *See supra* notes 6, 57 and accompanying text (noting Canada's four-decade-long stable prison population and the country's avoidance of mandatory minimums in favor of judicial independence).

231. *See supra* notes 146–56 and accompanying text (discussing Canada's sentencing scheme for drug crimes).

232. *See supra* notes 160, 164–67 (introducing Canada's new legislation and noting its similarity to approach taken by the United States).

233. *See supra* notes 35–36, 176 and accompanying text (illustrating the fiscal and administrative burden of prosecuting and incarcerating drug offenders).

234. *See supra* notes 35–36 (evidencing the cost of imprisonment).

fiscally irresponsible, but it ignores the goal of rehabilitating the individual.

Both countries must focus on expanding the existence of drug courts. The drug court model has proved successful when it has been implemented.[235] Accordingly, the drug court model should be used more frequently in both the United States and Canada.[236] The goal for both countries is to reduce the number of drug crimes that occur, and the best means of doing this is to eradicate the root causes of these crimes.[237] Drugs are addictive, and can cause an individual to act in an irrational manner.[238] Therefore, the threat of incarceration is unlikely to be an effective deterrent.[239] Drug courts aim to provide not only a long-term cost reduction to the taxpayer, but also a rehabilitated individual.[240] As the threat of recidivism declines, so should the size of prison populations. This is the goal that both countries want to achieve, and it is clearly not served by maintaining the status quo.

CONCLUSION

The United States and Canada are both in a position to address their current stances toward drug crime sentencing, and both should take into account the lessons from their respective cross-border ally. Canada should heed the warnings from the failed war on drugs in the United States, and resolve to not make the same mistakes. The United States, meanwhile, should acknowledge the more reasoned approach Canada has taken in prosecuting drug crimes, with a lack of mandatory minimums and rigid sentencing guidelines. Both countries need to focus

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235. *See supra* note 173 and accompanying text (citing the efficacy of drug courts when used to rehabilitate the drug abuser).

236. *See supra* notes 175–79 and accompanying text (noting the dramatic decrease in recidivism when drug courts are used instead of incarceration).

237. *See supra* notes 67–70 and accompanying text (discussing the role addiction plays in committing drug offenses and how punishment does not stop the cycle of addiction and crime).

238. *See supra* notes 69–70 and accompanying text (noting the loss of rational decision making in the drug addict).

239. *See supra* notes 67–70 and accompanying text (noting the reduced capacity of a drug addict to be persuaded by the threat of incarceration).

240. *See supra* notes 176–79, 187–90 and accompanying text (showing the long-run saving of using a rehabilitative model over sentencing that solely uses incarceration).

on rehabilitation over incarceration as the principal means of dealing with drug offenders. This approach is more likely to reduce recidivism and increase deterrence, thus decreasing the cost to taxpayers bearing the fiscal responsibility of already overcrowded prisons.

Given the increasing financial burden, it is fair to say the war on drugs is certainly not over. Since its inception there has been an endless flood of individuals entering the costly prison system. The United States is slowly making progress in alternative sentencing, while Canada is on the verge of repeating the errors of their neighbor. For both countries, at least one thing is certain: if the most used weapon in the war on drugs is incarceration, there is no hope that the battle will ever be won.

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