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

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**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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\(^1\) 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.


Just across the border, in stark contrast to the United States, Canada's prison population has remained stable for the past four decades. 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. Yet despite this relatively low and stable incarceration rate, Canadian officials elected in May 2011 decided to overhaul their drug sentencing system. 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.

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).


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. 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.
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.\textsuperscript{11} This policy shift was intended as a deterrent for drug crimes through increased imprisonment, and as replacement for the then-existing rehabilitative ideal.\textsuperscript{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%.\textsuperscript{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.\textsuperscript{14}

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

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\item \textsuperscript{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).
\item \textsuperscript{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--years (describing the aftermath of President Nixon’s declaration of the war on drugs).
\item \textsuperscript{13} See de Rugy, supra note 10 (discussing the exponential rise in the American prison population).
offenders in jails and prisons has increased 1,100%, with over 500,000 individuals currently incarcerated for drug offenses.\(^\text{17}\) This dwarfs the 41,000 figure of incarcerated persons for the same crimes in 1980.\(^\text{18}\) Incidentally, the national crime rate is currently continuing its historic twenty-year decline, achieving levels unseen since the war on drugs began.\(^\text{19}\) Despite this reduction in crime, the rate of imprisonment has steadily increased.\(^\text{20}\)

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.\(^\text{21}\) 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.\(^\text{22}\) In 1984, the Sentencing Reform Act

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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).


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).


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.\(^\text{23}\) Post-*Mistretta*, the enactment of the US Guidelines ushered in a new era of handling criminal sentencing.\(^\text{24}\)

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

Additionally, criminal activity, and politicians' need to respond to public concerns created a tripartite motive for stiffer punishments.\(^\text{28}\) The rehabilitative ideal that dominated the first

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\(^\text{26}\) 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).

\(^\text{27}\) 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).

\(^\text{28}\) 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.\textsuperscript{29} Public opinion polls in the 1980s revealed strong support for the adoption of stricter guidelines, such as the three strikes law in California.\textsuperscript{30} Moreover, legislators viewed any opposition to these provisions as "akin to political suicide."\textsuperscript{31}

State legislatures also embraced the movement towards a more punitive model of justice.\textsuperscript{32} Many states opted to supplement fixed sentencing guidelines with recidivist statutes, similar to California's three strikes law.\textsuperscript{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.\textsuperscript{34}

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\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{32} The US Sentencing Guidelines will be discussed in greater depth in Part II.
\item \textsuperscript{33} See Beale, supra note 29, at 414 (stating that California was the first state to adopt a "three strikes" 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).
\item \textsuperscript{34} Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev 1915, 1929 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. 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. At the state level, correctional and prison expenditures rose over seven percent annually between 1985 and 1996.

There are minimal options to alleviate these financial burdens: either decrease the prison population or lower the per capita cost of prison housing. As prisons become increasingly privatized, the latter option is unlikely to be feasible. Further, lowering prison costs without reducing the quality of life for inmates and staff is incredibly difficult, if not impossible.

Some states, such as Illinois, have eliminated college classes for 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).


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.\textsuperscript{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.\textsuperscript{42} One Ohio prison director predicted that those moves would likely result in a long-term increase in crime.\textsuperscript{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.\textsuperscript{44} In the first eight months of 2012, trade between the two countries totaled over US$400 billion.\textsuperscript{45} Additionally, the United States is the largest foreign investor in Canada and the largest benefactor of Canadian investment.\textsuperscript{46} The shared border,

\textsuperscript{41} See Trachtenberg, supra note 22, at 493 (citing Illinois's decision to cut classes for 25,000 prisoners); see also Megan Doherty, Shrink 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).

\textsuperscript{42} See Trachtenberg, supra note 22, at 493 (noting that some states have eliminated prisoner rehabilitation programs despite graduates' far lower rates of reoffending); 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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.\textsuperscript{47} Canada is rapidly becoming a source country for marijuana products imported and sold in the United States.\textsuperscript{48} Marijuana seized in attempted border smuggling between the two countries increased almost tenfold between 1999 and 2000.\textsuperscript{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.\textsuperscript{50} However, Canada admits far fewer prisoners for drug offenses than the United States.\textsuperscript{51}

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\textsuperscript{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/ie/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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.policymonitor.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).

\textsuperscript{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

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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.\(^5\) 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.\(^5\) In so doing, the bill appears to emulate the US punitive model favoring punishment over rehabilitation.\(^5\) Thus, critics of C-10 fear that Canada will follow in the United States' footsteps lending to overcrowded prisons and increased incarceration operating costs.\(^5\) 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."\(^5\)
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. While both countries have treated drug offenses differently in the past, their goals remain the same: to deter crime and rehabilitate the individual.

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. General deterrence involves punishing a guilty party in order to discourage the general community from engaging in future criminal behavior. The defendant’s sentence is meant to instruct the public on what conduct is impermissible and to instill fear of punishment in potential criminals. Meanwhile,

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


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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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).

chemistry. 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. Thus, an individual user typically becomes desperate to replicate the stimulation that can only be achieved with drugs. As this neuroadaptation develops, addicts become increasingly unable to control their use. Addiction inhibits the efficacy of deterrence-model drug sentencing, since punishing an individual for an inability to control themselves is counter-intuitive.

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. According to the US Guidelines,
the goals of criminal punishment are deterrence, incapacitation, just punishment, and rehabilitation. The Criminal Code of Canada contains similar provisions. In contrast to deterrence, retributionists argue that punishment is necessary because of the desert of the criminal’s action. 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.

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. Thus, if by committing a crime, a drug offender harms society, merely sending her to drug rehabilitation does not serve justice to those wronged. The mere threat of incapacitation also serves retribution.


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 Vitello, 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.\textsuperscript{80}

Utilitarianism and retribution are not, however, mutually exclusive philosophies.\textsuperscript{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.\textsuperscript{82} Thus, while retribution looks backwards at the crime committed, utilitarianism looks to the future.\textsuperscript{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.\textsuperscript{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.\textsuperscript{85} The main reason for this disparity lies in each country's approach to sentencing drug offenders.\textsuperscript{86}

\begin{itemize}
  \item \textit{also} Cottingham, supra note 76, at 238 (exploring the idea of retribution and incapacitation).
  \item \textit{See} HART, supra note 79 (noting that retribution is based on the crime actually committed and is not focused on mitigating factors); \textit{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).
  \item HART supra note 79, at 8–13 (determining that utilitarianism and retribution can be and often are part of the same philosophy of punishment)
  \item \textit{See} HART, supra note 79 (finding that this combination of retribution and utilitarianism bridges the gap between the two models of punishment).
  \item \textit{See} LAFAVE, supra note 60, at 33–35 (discussing the conflicting views between the theories of punishment, and whether they can be reconciled); \textit{see also} DRESSLER, supra note 60, at 16–17 (discussing the contrasting way punishment is viewed under retributive and utilitarian models of punishment).
  \item \textit{See} DRESSLER, supra note 60, at 16–17 (differentiating the theories of punishment and the role they play in dealing with criminals).
  \item \textit{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).
  \item \textit{Compare} infra Part II.A (discussing the US Federal Sentencing Guidelines), \textit{with} infra Part II.B (distinguishing the Canadian guidelines from the US sentencing scheme).
\end{itemize}
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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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." \textsuperscript{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.\textsuperscript{95} Unique in their complexity, the Guidelines' corresponding sentencing table contains "43 offense levels, 6 criminal history categories, and 258 sentencing range boxes." \textsuperscript{96}

The following excerpt from the Guidelines' sentencing table illustrates the statute's complexity:\textsuperscript{97}

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\textsuperscript{91} Id.

\textsuperscript{92} See id.

\textsuperscript{93} See supra Part I.A (discussing the history of the US war on drugs).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

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

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

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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.\textsuperscript{108} Offense levels range from six to thirty-eight points, with higher scores issued to more egregious offenses.\textsuperscript{104}

To illustrate its application, a violation relating to 250 grams of marijuana would receive the base level of six points.\textsuperscript{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.\textsuperscript{106} A violation involving between one and two and a half kilograms of marijuana, however, jumps to a level ten offense.\textsuperscript{107} Correspondingly, the potential penalty increases to six to thirty months in prison, depending on the defendant's criminal history.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110}

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

\textsuperscript{103} See \textit{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. \textit{Id.}

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} ch. 5, pt. A.

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

\textsuperscript{108} \textit{Id.} ch. 5, pt. A (displaying the potential sentencing ranges).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} See, \textit{e.g.,} \textit{id.} (stating specific aggravators than can increase the base offense level).
level of thirty is applied regardless of the amount in question.\textsuperscript{112} Specific offense characteristics, such as possessing a dangerous weapon at the time of the arrest, increase the offense level by two points.\textsuperscript{113}

Once a base offense level is calculated, the next step in determining the sentencing range is to assess the defendant’s criminal history.\textsuperscript{114} According to the guidelines, the likelihood of recidivism is considered by looking at the number of times the individual had previously been incarcerated.\textsuperscript{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.\textsuperscript{116} According to the table above, a first time offense falls into level I, which equates to zero or one criminal history points.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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").

\textsuperscript{115} Id.

\textsuperscript{116} Id. § 4A1.1 (discussing criminal history as applied to the sentencing table).

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

\textsuperscript{118} Id. § 4A1.1.

\textsuperscript{119} Id. ch. 5, pt. A.

\textsuperscript{120} Id.
The sentencing table delineates four zones, with sentencing length correlating to zone designation. This is important, as falling into a certain zone can allow a judge to depart from mandatory minimum sentences. For example, if a sentence falls in zone B, the judge can order sanctions such as home detention, as opposed to imprisonment.

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. Possessing seven grams gives her a base offense level of fourteen. As depicted in the table, this places her sentencing guideline in the twenty-one to twenty-seven month range.

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. 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. 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.\textsuperscript{130}

Penalties for the crime of simple possession are kept outside the regular guidelines.\textsuperscript{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 . . . ."\textsuperscript{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.\textsuperscript{133} If a person is caught with more than an ounce of crack cocaine, a mandatory minimum sentence of five years is imposed.\textsuperscript{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.\textsuperscript{135}

1. Response to the US Guidelines: \textit{United States v. Booker}

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

\textsuperscript{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).


\textsuperscript{132} Id.

\textsuperscript{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).

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

\textsuperscript{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.\textsuperscript{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.\textsuperscript{137} Taxpayers forced to foot the bill also became dissatisfied with the way drug offenses were being handled by the criminal justice system.\textsuperscript{138}

By 2005, the question of the US Guidelines' constitutionality came before the US Supreme Court. In \textit{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.\textsuperscript{139} The Supreme Court agreed.\textsuperscript{140} Instead of abolishing the guidelines, however, the 5-4 majority ruled that the guidelines should simply be utilized as an advisory framework.\textsuperscript{141}

While statutory mandatory minimum sentences restrict judicial independence, the "safety valve" provision does allow
judges to depart from any mandatory sentence.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145}

\textbf{B. Canada}

1. Current Sentencing Scheme

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

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{146} See generally Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Can.).
\item \textsuperscript{147} See id. pt. 1 (outlining the various sentences, none of which have a mandatory minimum).
\end{itemize}
the crime is an indictable or summary offense. 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).

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. It carries a maximum penalty of six months for the first conviction of possession. Schedule I contains methamphetamine, crack cocaine, and cocaine powder. 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. For a subsequent offense under summary conviction, the maximum sentence increases to one year.

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. Subsequent summary conviction offenses will subject the defendant to a maximum imprisonment term not exceeding one year.

The CSDA also factors trafficking offenses into its sentencing. 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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{163}

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{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).

\textsuperscript{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/c-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).


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. Second, the minimum sentence becomes two years for trafficking drugs on or near school grounds or other public places frequented by children. 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. 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.

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. He noted that the bill does not deal with preventative measures to reduce drug offenses. 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.

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).


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. 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.

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. As the war on drugs continued, a record number of US citizens were being incarcerated then released, only to offend again. Drug courts provide rehabilitation, thus reducing the risk of recidivism and lessening the overall cost to taxpayers responsible for the costs of incarceration. A US bipartisan public health study found

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").


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.\textsuperscript{176}

The first drug court was introduced in Miami, Florida in 1989.\textsuperscript{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.\textsuperscript{178} Overall, drug courts have been remarkably successful in reducing recidivism among those convicted of a drug offense.\textsuperscript{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.\textsuperscript{180}

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

\textsuperscript{176} See Diane Riley, Canadian Found. for Drug Pol'y, Drugs and Drug Policy: A Brief Review & Commentary (1998), \textit{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).

\textsuperscript{177} Rossman, \textit{supra} note 173, at 39 (examining the growth of drug courts in America and their effect on recidivism in addicts); see also Trachtenberg, \textit{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).


\textsuperscript{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, \textit{supra} note 175 (stating the beneficial effect of drug courts on recidivism).

\textsuperscript{180} See McKean, \textit{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, \textit{http://nationalantidrugstrategy.gc.ca/dtc-ttc.html} (noting the existence of six drug courts in Canada).

\textsuperscript{181} See Kimberly Y.W. Holst, \textit{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), \textit{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. 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.

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

Furthermore, investing in rehabilitation significantly lowers future incarceration, thereby providing future savings. 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. When drug courts targeted their services to higher-risk drug offenders, the return

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, 65 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.\textsuperscript{189} These savings resulted from fewer court hearings, fewer incarcerated individuals to house and feed, and a decreased need for policing expenditures.\textsuperscript{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.\textsuperscript{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.\textsuperscript{192} 

Public sentiment is also moving towards greater leniency for drug offenders.\textsuperscript{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.\textsuperscript{194} In every year from 1980 to 1996, at least seventy-eight percent responded "not enough."\textsuperscript{195} This fell to sixty-eight percent by 2000.\textsuperscript{196} Similarly, research showed US citizens strongly favored rehabilitation and reentry

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{192} See Bowman, supra note 34, at 1390, 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. 957, 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").
  \item \textsuperscript{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).
  \item \textsuperscript{194} Id. (citing poll results).
  \item \textsuperscript{195} See id. (noting the poll respondents concern that sentences given for drug crimes were not as harsh as they should be).
  \item \textsuperscript{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).
\end{itemize}
programs over incarceration as the desired methods of ensuring public safety.\textsuperscript{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 \textit{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.

\textbf{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.\textsuperscript{198} The two countries operate under different governments and criminal codes.\textsuperscript{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.\textsuperscript{200} Thus, examining the countries together provides a

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197. \textit{See id.} at 4 (observing that sixty-six percent of Americans believe rehabilitation is more effective than longer sentences).
198. \textit{See supra} note 7 (stating the population of both countries).
199. \textit{See supra} Parts II.A and II.B (comparing the sentencing structure of the United States and Canada).
200. \textit{See supra} notes 44–50 (describing the nexus shared between the two countries and the associated concerns of illegal drugs crossing the border).
\end{flushleft}
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. On both sides of the border, addiction is complex, devastating, and unlikely to be conquered by incarcerating addicts. 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. It is not surprising that drug courts have achieved greater success, as they actually treat the root problem of drug crimes—addiction. While the initial cost is higher than simple incarceration, it is a sound investment. Simply put, drug courts work. The punitive model of incarcerating addicts does not. When an addict is released without treatment, it is likely that they will return to their old habits. With the current approach that punishes recidivists more harshly, this only leads

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

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. The theory of retribution hinges on the criminal deserving punishment for his decision to disobey the law. Strong arguments have been made, however, that a person acting under the power of addiction is not deserving of imprisonment.

A strict retributivist would counter by correctly noting that the actor made a decision to break the law and thus is deserving of punishment. 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. 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. 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. 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. If addicted individuals return to a society that is unforgiving of addiction, they are likely to re-abuse and, in turn, re-offend. 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. Attempting to send a message to a chemically-dependent individual, however, is likely impossible. 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

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.\textsuperscript{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.\textsuperscript{228}
The upper end of the US Guidelines are thus directed towards
high-level drug dealers.\textsuperscript{224}

Unfortunately, however, many drug dealers are addicts
themselves and turn to selling drugs in order to finance their
own drug abuse.\textsuperscript{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.\textsuperscript{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.\textsuperscript{227}

\textsuperscript{222.} See supra notes 177–84 and accompanying text (showing the effectiveness of
drug courts in reducing recidivism rates).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{225.} See supra note 190 and accompanying text (discussing the link between drug
dealers and drug addicts).
\textsuperscript{226.} See supra notes 65–70 and accompanying text (discussing dependence, and
the presence of which fuels drug addiction and thus criminal drug behavior).
\textsuperscript{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. 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. Canada’s prison population has remained stable, and the sentencing guidelines give full discretion to judges. They are not required to adhere to mandatory minimums nor to draconian sentence ranges.

Despite this stability, Canada is set to embark down the same troubled path that the United States followed. 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. The United States, meanwhile, has learned that the war on drugs has led to billions of taxpayer dollars being spent on incarcerating individuals. Not only is this

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. Accordingly, the drug court model should be used more frequently in both the United States and Canada. 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. Drugs are addictive, and can cause an individual to act in an irrational manner. Therefore, the threat of incarceration is unlikely to be an effective deterrent. Drug courts aim to provide not only a long-term cost reduction to the taxpayer, but also a rehabilitated individual. 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

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.