

THE COURIER CONUNDRUM: THE HIGH COSTS OF PROSECUTING LOW-LEVEL DRUG COURIERS AND WHAT WE CAN DO ABOUT THEM

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Since the United States declared its “War on Drugs,” federal enforcement of drug-trafficking crimes has led to increased incarceration and longer prison sentences. Many low-level drug couriers and drug mules have suffered disproportionately from these policies; they face mandatory punishments that vastly exceed their culpability. Drug couriers often lack substantial ties to drug-trafficking organizations, which generally recruit vulnerable individuals to act as couriers and mules. By using either threats of violence or promises of relatively small sums of money, these organizations convince recruits to overlook the substantial risks that drug couriers face.

The current policies of pursuing harsh punishments for low-level couriers generate significant societal costs. These costs include not only monetary costs but also collateral damage imposed on both the couriers and innocent third parties. Further, these harsh policies fail to generate appreciable benefits or satisfy the goals of either retributive or utilitarian theories of punishment. This Note proposes a legislative amendment to the current importation statute that would create a carveout under which low-level drug couriers could be charged under a separate misdemeanor statute. The proposal lays out a number of criteria that drafters could use to identify low-level participants and exempt them from the stiff mandatory minimum sentences and the long-term consequences that accompany a felony drug conviction.

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INTRODUCTION

Laws are spiders' webs through which the big flies pass and in which the little ones are caught.

—Honoré de Balzac¹

On May 24, 2016, Chevelle Nesbeth entered the federal courthouse in Brooklyn, New York, prepared to be sentenced to anywhere from thirty-three to forty-one months in prison.² What she encountered, however, was mercy. District Judge Frederic Block sentenced Nesbeth to one year of probation and no prison time.³

About a year earlier, Nesbeth was arrested at John F. Kennedy International Airport for attempting to smuggle 600 grams of cocaine in her suitcases.⁴ Thousands of low-level drug couriers are sentenced to prison each year,⁵ many with stories like Nesbeth's. At the time of her arrest, Nesbeth was nineteen years old, living with her mother, and working to pay her way through college.⁶ Nesbeth had never had any trouble with the law until her

1. HONORÉ DÈ BALZAC, *THE HOUSE OF NUCINGEN 106* (William Walton trans., 1896).

2. *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016). Normally, Nesbeth would have been subject to the five-year mandatory minimum sentence based on the quantity of drugs involved. *See* 21 U.S.C. § 960(b)(2)(B) (2012). However, the Holder Memo, which is no longer in place, instructed federal prosecutors to avoid charging low-level participants in drug-related crimes under statutes triggering the mandatory minimum penalties. *See infra* note 121.

3. *Nesbeth*, 188 F. Supp. 3d at 180.

4. Benjamin Weiser, *U.S. Judge's Striking Move in Felony Drug Case: Probation, Not Prison*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/nyregion/in-a-striking-move-brooklyn-judge-orders-probation-over-prison-in-felony-drug-case.html> [<https://perma.cc/Q3FW-ADMP>].

5. According to the U.S. Sentencing Commission, drug couriers account for 23 percent of federal drug-trafficking cases. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES 167–68 & fig.8-9 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf [<https://perma.cc/YB6M-Q3KY>]. The U.S. Sentencing Commission defines “courier” as one who “[t]ransports or carries drugs using a vehicle or other equipment.” *Id.* at 167. A “mule,” on the other hand, is a person who “[t]ransports or carries drugs internally or on his or her person.” *Id.* Because both couriers and mules occupy the lowest levels of the hierarchy of a drug-trafficking organization, this Note will use the term “courier” to encompass both couriers and mules.

6. *Nesbeth*, 188 F. Supp. 3d at 189; *see also* Lincoln Caplan, *Why a Brooklyn Judge Refused to Send a Drug Courier to Prison*, NEW YORKER (June 1, 2016), <https://www.newyorker.com/news/news-desk/why-a-brooklyn-judge-refused-to-send-a-drug-courier-to-prison> [<https://perma.cc/H32R-JRLU>]; Weiser, *supra* note 4.

boyfriend convinced her to visit some friends in Jamaica.⁷ He purchased Nesbeth's plane ticket and told her to bring two suitcases back to the United States.⁸ Hidden in the suitcases' handles was 1.3 pounds of cocaine, which U.S. Customs and Border Patrol seized upon Nesbeth's arrival.⁹

In his opinion, Judge Block stated that his decision to spare Nesbeth of approximately three years in prison was largely driven by the collateral consequences that she would suffer after her term of incarceration ended.¹⁰ Judge Block also opined that despite his leniency in sentencing, legislative action was ultimately necessary to effectively mitigate the consequences of a felony conviction for low-level participants in drug-trafficking offenses.¹¹ This Note offers one potential legislative solution that would allow low-level drug couriers like Nesbeth to avoid the devastating consequences attending heightened sentences that far outweigh the culpability for low-level drug offenses.¹²

The current legal landscape governing drug trafficking first emerged in the 1980s, when the United States's drug laws underwent a massive transformation; Congress, determined to win its "War on Drugs," enacted several pieces of legislation intended to curb the influx of drugs into the United States.¹³ Also in the 1980s, Congress amended federal sentencing laws to limit judicial discretion.¹⁴ This undertaking involved adding stringent mandatory minimum penalties to many of the federal drug statutes.¹⁵ Lawmakers operated under the assumption that the quantity of drugs a person possessed correlated to the individual's culpability; therefore, lawmakers tied the severity of the mandatory minimum penalties to the weight of the drugs seized.¹⁶

7. Caplan, *supra* note 6.

8. *Id.*

9. *Id.*

10. *Nesbeth*, 188 F. Supp. 3d at 190–93 (explaining the long-term consequences of incarcerating low-level drug offenders).

11. *Id.* at 198 ("It is for Congress and the states' legislatures to determine whether the plethora of post-sentence punishments imposed upon felons is truly warranted, and to take a hard look at whether they do the country more harm than good.").

12. *See infra* Part IV (proposing a legislative amendment to the federal importation statute). This Note focuses solely on federal enforcement policy. While there are applicable state laws under which couriers can be charged, this Note will not address them. *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 13 (2017) ("A major barrier to reform . . . is the fractured nature of our criminal justice system. In fact, there is no single 'criminal justice system,' but instead a vast patchwork of systems that vary in almost every conceivable way.").

13. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

14. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1837, 1987–2040 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, and 28 U.S.C. §§ 991–998 (2012)).

15. *See generally* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

16. *See* H.R. REP. NO. 99-845, at 12 (1986).

Low-level drug couriers have suffered major consequences as a result of these increased penalties.¹⁷ Drug-trafficking organizations target vulnerable individuals—typically women¹⁸—to become drug couriers in smuggling operations.¹⁹ Couriers often lack strong ties to the larger drug-trafficking conspiracy, and they are recruited only for the limited purpose of drug transportation.²⁰ This job description means that couriers are in possession of often large quantities of drugs, which exposes them to significant mandatory minimum penalties but does not necessarily indicate a high status within the drug organization.²¹ For example, a courier in possession of just over one pound (or 500 grams) of cocaine might face a five-year mandatory minimum sentence.²² To make matters worse, because drug couriers have little involvement in the larger drug-trafficking conspiracy, they typically lack the valuable information needed to trade to the authorities in exchange for leniency.²³ As a result, low-level drug couriers have very few options to avoid the stringent mandatory minimum sentences, and any options they do have may only provide limited relief.²⁴ Even where couriers are lucky enough to appear before a judge who spares them of any jail time, they still face the long-term consequences of being labeled a convicted felon.²⁵ Take Chevelle Nesbeth for example, who had to switch her college major from education to sociology because it is likely that her felony conviction will prohibit her from becoming a teacher.²⁶

This Note explores the discrepancy between the actual culpability of low-level drug couriers and the harsh penalties that they face. This Note evaluates the costs that current policies impose on individual defendants and society as

17. U.S. SENTENCING COMM’N, *supra* note 5, at 167 (estimating that high-level drug suppliers and importers account for less than 11 percent of federal drug cases).

18. See Stéphanie Martel, *The Recruitment of Female “Mules” by Transnational Criminal Organizations: Securitization of Drug Trafficking in the Philippines and Beyond*, 1 SOC. TRANSFORMATIONS, Aug. 2013, at 13, 29 (explaining why drug-trafficking organizations recruit women as drug couriers).

19. Kevin Lerman, Note, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 702 (2017) (“Often drug-trafficking organizations recruiters—like others offering dangerous and risky employment—deliberately seek out people in dire circumstances to make them an offer they can’t refuse.”).

20. See Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1495 (2000) (explaining how drug couriers play a peripheral role in the overall drug-trafficking conspiracy).

21. See generally 21 U.S.C. § 960(b) (2012) (prescribing mandatory minimum penalties tied to the quantity of drugs involved).

22. *Id.* § 960(b)(2)(B).

23. See Stephen J. Schulhofer, *Rethinking the Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211–13 (1993) (discussing how low-level offenders often lack valuable information to provide to the authorities).

24. See *infra* Part I.B.2.b (explaining the safety valve provision as a possible avenue of relief from mandatory minimum penalties).

25. See *infra* Part III.A.2 (discussing the effects of a felony conviction on, inter alia, employment prospects and eligibility for public benefits).

26. Caplan, *supra* note 6. Ms. Nesbeth’s lawyer also commented that despite Judge Block’s leniency, “all these doors . . . are closed to [Nesbeth] based on her conviction.” Weiser, *supra* note 4.

a whole. Ultimately, this Note concludes that the costs of harsh penalties for low-level drug couriers far outweigh the benefits and, therefore, proposes a legislative amendment to remedy these defects.

Part I of this Note outlines the federal statutes that govern the prosecution of drug couriers and provides a brief history of the trajectory of this legal regime. Part II then surveys the experiences and backgrounds of individuals who are recruited as low-level drug couriers. Part II also highlights the increased use of women as low-level drug couriers and addresses likely explanations for why certain individuals are more vulnerable to drug courier recruitment. Part III illustrates how the costs of the current policies outweigh the benefits, and Part IV addresses these failures by proposing a legislative amendment to the federal importation statutes that would create a carveout for low-level drug couriers.

I. THE DRUG-TRAFFICKING ENFORCEMENT REGIME: FEDERAL STATUTORY AND SENTENCING LAWS GOVERNING THE IMPORTATION OF NARCOTICS

Many of the developments to the law governing the prosecution of drug couriers occurred in the 1980s, and these policies have remained largely unchanged since then.²⁷ This Part discusses these developments and explains the law as it currently stands. Part I.A provides a brief history of the development of the current enforcement regime and specifically focuses on the history of the “War on Drugs” and sentencing reform, including the enactment of the Federal Sentencing Guidelines and the rise of mandatory minimum sentences. Part I.B outlines the legal landscape of federal enforcement of drug-trafficking crimes by highlighting the relevant statutes used to prosecute drug couriers. It also discusses the two primary methods of departure from mandatory minimum penalties: the “substantial assistance” provision and the “safety valve” provision.

A. *How We Got Here: A Brief History of the “War on Drugs,” the Federal Sentencing Guidelines, and the Rise of Mandatory Minimum Sentences*

This section explains the social context that informed President Ronald Reagan’s reforms, reviews the key pieces of legislation passed in the 1980s, and discusses the impact of that legislation on the enforcement of drug crimes today.

1. Sentencing Policy Leading Up to the 1980s

The current enforcement regime of drug crimes in the United States is rooted in President Richard Nixon’s famous declaration of America’s “War on Drugs” in 1971.²⁸ Yet, this “war” did not materialize until over a decade later, when the Reagan administration passed several pieces of landmark

27. See *infra* Part I.A.

28. *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/C2NW-KZME>] (last visited Feb. 12, 2019).

legislation that severely limited judicial discretion in sentencing²⁹ and imposed stringent mandatory minimum penalties for a wide range of drug-related offenses.³⁰

President Reagan's legislative reforms can be characterized as reactionary measures designed to steer the prosecution of drug crimes toward a different approach than those used in the decades leading up to the 1980s.³¹ Prior to the enactment of the Sentencing Reform Act (SRA) in 1984, judges had broad and nearly unlimited discretion to impose sentences that would best serve to rehabilitate the individual offender.³² Justice Hugo Black articulated these principles in *Williams v. New York*³³: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."³⁴ The rationale behind rehabilitation-based sentencing can be analogized to a doctor's diagnosis and treatment of a patient's disease.³⁵ For example, a conscientious physician would not give the same dose of chemotherapy to a thirty-year-old as she would to an eighty-year-old, even if the two patients suffered from the exact same form of cancer.³⁶ It follows that "[h]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics"³⁷ so the sentencing judge can similarly make the right sentencing "diagnosis" for the defendant.

While these principles aptly addressed the individualized, rehabilitative goal of criminal law, many commentators criticized the discretionary policies for producing significant sentencing disparities between similarly situated offenders.³⁸ Critics of these policies frequently cited studies demonstrating the effect of gender, race, and socioeconomic status as predictors of

29. See generally Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1837, 1987–2040 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, and 28 U.S.C. §§ 991–998 (2012)).

30. See generally Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

31. See Froyd, *supra* note 20, at 1473–74 (discussing how the Sentencing Reform Act came in response to the indeterminate sentencing policies prevalent in the 1970s).

32. See *id.*

33. 337 U.S. 241 (1949).

34. *Id.* at 248.

35. Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 184–85 (1994).

36. *Id.*

37. *Williams*, 337 U.S. at 247.

38. See, e.g., MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1973) (lamenting that policies giving judges such considerable discretion have led to "widely divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes"); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 353 (1979) (noting that sentencing disparities among similarly situated offenders "can be traced directly to the unfettered discretion the law confers on those judges and correctional authorities responsible for imposing and implementing the sentence").

sentences.³⁹ These overt disparities armed the Reagan administration with the necessary political ammunition it needed to enact groundbreaking sentencing reform legislation throughout the 1980s.

2. Sentencing Reform and the “War on Drugs”

The first of several key pieces of legislation came when Congress enacted the SRA in 1984⁴⁰ as part of the larger Comprehensive Crime Control Act.⁴¹ The SRA sought to “reduce unwarranted sentencing disparity and eliminate the sentencing impact of extralegal factors.”⁴² More specifically, the SRA set out to accomplish three goals. First, it sought to promote certainty and honesty—Congress wanted offenders to actually serve their full sentence.⁴³ Therefore, the SRA abolished the federal parole system in favor of a “real time” sentencing scheme.⁴⁴ That is, judges would sentence defendants to concrete terms of imprisonment that defendants served completely without the opportunity for parole.⁴⁵ Second, the drafters of the SRA wanted to advance uniformity and eliminate the disparities in sentencing that were criticized throughout the 1970s.⁴⁶ Finally, the SRA sought to increase proportionality in sentencing by punishing offenders based on their culpability.⁴⁷ To achieve these goals, the SRA established the U.S. Sentencing Commission (the “Commission”), which was charged with creating guidelines that satisfied the broader themes of “just punishment” or retribution,⁴⁸ specific and general deterrence,⁴⁹ incapacitation of dangerous offenders,⁵⁰ and limited forms of rehabilitation.⁵¹ The Commission is an independent agency of the judicial branch.⁵² After decades of unfettered judicial discretion in sentencing, the SRA transformed the criminal justice system in one swift stroke by implementing a uniform set of sentencing guidelines that every federal judge was required to follow.⁵³

39. See Froyd, *supra* note 20, at 1473–74.

40. Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1837, 1987–2040 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, and 28 U.S.C. §§ 991–998 (2012)).

41. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976–2194 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

42. Nagel & Johnson, *supra* note 35, at 183.

43. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM’N 2016).

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. 18 U.S.C. § 3553(a)(2)(A) (2012).

49. *Id.* § 3553(a)(2)(B).

50. *Id.* § 3553(a)(2)(C).

51. *Id.* § 3553(a)(2)(D).

52. 28 U.S.C. § 994(m) (2012); see also *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding the constitutionality of the SRA’s delegation of powers to the Commission).

53. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006) (commenting on how “sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules”).

Two years after enacting the SRA, President Reagan signed the Anti-Drug Abuse Act of 1986 into law.⁵⁴ In an attempt to address America's drug problem, the Anti-Drug Abuse Act imposed stringent mandatory minimum sentences for manufacturing, transporting, distributing, and possessing illegal narcotics.⁵⁵ Then, in 1988, the Reagan administration passed the Anti-Drug Abuse Act of 1988,⁵⁶ which established, *inter alia*, mandatory minimum penalties for the simple possession of five or more grams of crack cocaine.⁵⁷ By shifting the focus from the offender's role in the conspiracy toward the quantity of drug involved,⁵⁸ these pieces of legislation "increased the likelihood that mandatory minimum penalties would apply equally to major traffickers, mid-level dealers, and low-level participants."⁵⁹

3. The Federal Sentencing Guidelines

The SRA authorized the Commission to establish the Federal Sentencing Guidelines (the "Guidelines") to eliminate the disparate sentencing of similarly situated offenders.⁶⁰ The Commission designed the Guidelines to determine sentences based on both the offense committed and offender's criminal history.⁶¹ First, the Guidelines dictate an appropriate sentence range based on the base level offense.⁶² Then, offenders are eligible to receive a number of upward or downward adjustments based on several factors.⁶³ The Guidelines remained mandatory for decades—judges lacked discretion to

54. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

55. *See, e.g.*, 21 U.S.C. § 960(a)–(b) (2012).

56. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S.C.).

57. "Crack cocaine" is the term used to describe "cocaine that has been processed with baking soda or ammonia, and transformed into a more potent, smokable, 'rock' form." *Crack Cocaine*, CTR. FOR SUBSTANCE ABUSE RES., <http://www.cesar.umd.edu/cesar/drugs/crack.asp> [<https://perma.cc/G8M6-ZP3V>] (last visited Feb. 12, 2019).

58. Schulhofer, *supra* note 23, at 212; *see also* Natasha Bronn, Note, "Unlucky Enough to Be Innocent": *Burden-Shifting and the Fate of the Modern Drug Mule Under the 18 U.S.C. § 3553(f) Statutory Safety Valve*, 46 COLUM. J.L. & SOC. PROBS. 469, 479 (2013).

59. Froyd, *supra* note 20, at 1488; *see also* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9–10 (1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [<http://perma.cc/XN69-W4GT>].

60. 28 U.S.C. § 994(m) (2012).

61. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM'N 2016) ("The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories.")

62. *Id.* § 2D1.1.

63. For example, defendants may obtain a point reduction if they can establish that they played a "minor" or "minimal" role in the offense. *Id.* § 3B1.2. Similarly, defendants who demonstrate an acceptance of responsibility may also obtain a point reduction. *Id.* § 3E1.1. For a comprehensive list of upward or downward adjustments, *see id.* ch. 3.

veer outside the prescribed guidelines range except in extraordinary circumstances.⁶⁴

In *United States v. Booker*,⁶⁵ the U.S. Supreme Court held that the mandatory Guidelines violated a defendant's Sixth Amendment rights and declared the Guidelines merely advisory.⁶⁶ As a result, the Court reinvested judges with some of the discretion that the SRA and subsequent pieces of legislation had taken away.⁶⁷ Yet despite *Booker*, courts, including the Supreme Court, have been reluctant to exercise this discretion.⁶⁸ For example, in *Gall v. United States*,⁶⁹ the Court explained that district courts "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."⁷⁰

Furthermore, the *Booker* decision did not affect the constitutionality of mandatory minimum penalties, which take precedence over Guideline sentences and thus limit judicial discretion in sentencing.⁷¹ Thus, even if a judge wishes to depart from a Guidelines-prescribed sentence, if the crime triggers a statutory mandatory minimum penalty, the judge must impose at least the mandatory minimum.⁷² In order to evade these minimums, the prosecutor must file a motion for departure based on the substantial assistance provision⁷³ or the defendant must qualify for the safety valve departure.⁷⁴ Because of the widespread use of mandatory minimum penalties for enforcing drug-trafficking crimes,⁷⁵ *Booker's* impact has been relatively limited in drug courier prosecutions, and the law continues to promote a more uniform system of sentencing, with little discretion afforded to sentencing judges.

B. Federal Enforcement of Drug-Trafficking Laws

Reagan-era sentencing reforms continue to impact and inform the current state of affairs. This section explores the current statutory scheme. It begins

64. See 18 U.S.C. § 3553(b)(1) (2012) ("[T]he court shall impose a sentence of the kind, and within the range, referred to in [the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" (emphasis added)).

65. 543 U.S. 220 (2005).

66. *Id.* at 245.

67. *See id.*

68. Lerman, *supra* note 19, at 684 (describing how "districts' practices of closely following the Guidelines remain deeply institutionalized"); see also Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 LAW & SOC'Y REV. 411, 419–21 (2014).

69. 552 U.S. 38 (2007).

70. *Id.* at 49.

71. *See Booker*, 543 U.S. at 245.

72. *See* Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1035 (1997).

73. *See infra* Part I.B.2.a (discussing the substantial assistance departure).

74. *See infra* Part I.B.2.b (discussing the safety valve departure).

75. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

by discussing the statutes used to prosecute drug couriers and the mandatory minimum penalties the statutes prescribe. It also discusses the substantial assistance and safety valve provisions—the two main ways defendants can avoid mandatory minimum penalties.

1. The Federal Importation Statute and Corresponding Mandatory Minimum Penalties

When authorities catch a drug courier smuggling drugs into the United States, the courier is typically charged under the federal importation statute.⁷⁶ Offenders convicted of importing “controlled substances”⁷⁷ are sentenced according to 21 U.S.C. § 960, which requires that offenders be given mandatory minimum penalties tied to the weight of the drugs involved.⁷⁸ Where an individual, in contravention of 21 U.S.C. § 952, knowingly or intentionally imports or exports one kilogram or more of heroin⁷⁹ or five kilograms or more of cocaine,⁸⁰ he or she faces a ten-year mandatory minimum penalty.⁸¹ Similarly, offenders are subject to a five-year mandatory minimum penalty if they are found guilty of importing or exporting 100 grams or more of heroin⁸² or 500 grams or more of cocaine.⁸³

Section 952, which makes it a crime to knowingly import drugs into the United States,⁸⁴ arose out of the Comprehensive Drug Abuse Prevention and Control Act of 1970,⁸⁵ which was part of President Nixon’s early effort to address America’s drug problem. The more important legislative development actually came in 1986, when the Anti-Drug Abuse Act amended § 960 (the “1986 Amendments”) to include mandatory minimum penalties tied to the weight of the unlawfully imported drugs.⁸⁶ The legislative history surrounding the 1986 Amendments illustrates Congress’s concern with increased drug use in the United States and its desire to restrict

76. See 21 U.S.C. § 952 (2012).

77. According to the Controlled Substances Act, “There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V.” *Id.* § 812(a). The Attorney General may, by rule, add or remove any substance from a given schedule or transfer substances between schedules. *Id.* § 811(a)(1)–(2). Examples of schedule I drugs include heroin, marijuana, and LSD. *Drug Scheduling*, DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/drug-scheduling> [<https://perma.cc/5YMK-26QP>] (last visited Feb. 12, 2019). Examples of schedule II drugs include cocaine and methamphetamine. *Id.*

78. 21 U.S.C. § 960.

79. *Id.* § 960(b)(1)(A).

80. *Id.* § 960(b)(1)(B)(ii).

81. *Id.* § 960(b)(1). If death or serious bodily injury results from the use of such substance, the mandatory minimum penalty increases to twenty years. *Id.*

82. *Id.* § 960(b)(2)(A).

83. *Id.* § 960(b)(2)(B)(ii).

84. *Id.* § 952(a).

85. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

86. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

the supply of drugs.⁸⁷ To that end, a 1986 House Judiciary Committee report advocated the view that the law should primarily target the high-level traffickers and organizational heads responsible for trafficking large quantities of drugs into the United States.⁸⁸ The same report also noted that Congress's second level of focus should be the street-level dealers.⁸⁹ Operating under the assumption that drug quantity correlates with status within the drug organization and individual culpability,⁹⁰ Congress structured the mandatory minimum penalties to depend on the weight of the drugs involved.⁹¹

Interestingly, the committee report lacks any mention of targeting the low-level couriers who merely transport the drugs from place to place.⁹² While it is impossible to draw inferences about congressional intent from a failure to mention one subset of people in a committee report, the report's discussion about organizational heads and mid-level dealers as the two greatest threats lends support to the notion that the 1986 Amendments were designed to capture the proverbial whales, not the minnows.⁹³ The only committee report specifically mentioning drug couriers refers to more sophisticated, high-level couriers who transport drugs via private aircraft.⁹⁴ In explaining the importance of authorizing appropriations for the U.S. Customs Service and its air interdiction mission, that report emphasizes that, at the time, 62 percent of cocaine entering the United States arrived in small, private aircraft.⁹⁵ Notably, this report does not mention low-level couriers, which further bolsters the argument that lawmakers were much more concerned with higher-level players when enacting the 1986 Amendments.⁹⁶

2. Departing from the Mandatory Minimum Penalties

When a courier is caught with a sufficient quantity of drugs to trigger a mandatory minimum sentence,⁹⁷ the law provides two main avenues of departure: (1) the substantial assistance provision; and (2) the safety valve. Defendants may also find relief if the prosecutor declines to charge the

87. The Select Committee on Narcotics Abuse and Control predicted that an estimated "85 tons of cocaine will enter the U.S. in 1984, compared with 25 tons in 1980," and that between 8 and 20 million people in the United States use cocaine. H.R. REP. NO. 98-1199, at 12 (1985).

88. H.R. REP. NO. 99-845, at 11-12 (1986) ("[T]he Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs.").

89. *Id.* at 12 (discussing how the law should also target "the person who is filling the bags of heroin, packaging crack into vials or wrapping [PCP] in aluminum foil").

90. *Id.* ("[T]he committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level.").

91. 21 U.S.C. § 960(a), (b)(4) (2012).

92. *See* H.R. REP. NO. 99-845, at 11-12 (1986).

93. *See id.*

94. H.R. REP. NO. 99-734, at 21 (1986).

95. *Id.*

96. *See id.*

97. A courier carrying 500 grams or more of cocaine or 100 grams or more of heroin receives a mandatory sentence of five years. 21 U.S.C. § 960(b)(2)(A)-(B) (2012).

quantity of drugs sufficient to trigger the mandatory minimum sentence, as the U.S. Department of Justice under President Barack Obama did for certain low-level participants between 2013 and 2017.⁹⁸

a. Substantial Assistance Departure

An individual convicted of a drug-trafficking offense can avoid a mandatory minimum penalty by providing “substantial assistance” to law enforcement.⁹⁹ The substantial assistance provision allows the court, upon a motion by the government, to impose a sentence below the statutory mandatory minimum “so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”¹⁰⁰ The Guidelines include a similar provision, which allows judges to depart from the Guideline-determined sentence range if no mandatory minimum exists.¹⁰¹ The Guidelines also specify factors that sentencing judges should consider when determining the extent of the sentence reduction, such as the “significance and usefulness of the defendant’s assistance”;¹⁰² “the truthfulness, completeness, and reliability of any information or testimony provided by the defendant”;¹⁰³ “the nature and extent of the defendant’s assistance”;¹⁰⁴ “any injury suffered, . . . or risk of injury to the defendant or his [or her] family resulting from his [or her] assistance”;¹⁰⁵ and “the timeliness of the defendant’s assistance.”¹⁰⁶ According to the commentary, the government’s evaluation of the defendant’s assistance should be accorded much deference, “particularly where the extent and value of the assistance are difficult to ascertain.”¹⁰⁷

b. The Safety Valve Provision

The second way a defendant can obtain a departure from the mandatory minimum penalty is through the safety valve provision.¹⁰⁸ Congress enacted the safety valve provision in 1994 as part of the Violent Crime Control and Law Enforcement Act¹⁰⁹ in response to low-level drug offenders receiving

98. *See infra* Part I.B.2.c.

99. 18 U.S.C. § 3553(e) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2016).

100. 18 U.S.C. § 3553(e).

101. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2016).

102. *Id.* § 5K1.1(a)(1).

103. *Id.* § 5K1.1(a)(2).

104. *Id.* § 5K1.1(a)(3).

105. *Id.* § 5K1.1(a)(4).

106. *Id.* § 5K1.1(a)(5).

107. *Id.* § 5K1.1 cmt. n.3.

108. *See* 18 U.S.C. § 3553(f) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (U.S. SENTENCING COMM’N 2016).

109. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (amending 18 U.S.C. § 3553). The Commission added this exception to mandatory minimum sentencing in certain drug-related offenses at § 5C1.2 of the Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (U.S. SENTENCING COMM’N 2016).

disproportionately long mandatory sentences.¹¹⁰ The safety valve was designed to serve as a narrow exemption for nonviolent, low-level offenders.¹¹¹ Under the safety valve provision, the court may depart from a statutory mandatory minimum penalty if the following criteria are met:

- (1) the defendant *does not have more than 1 criminal history point*, as determined under the sentencing guidelines;
- (2) the defendant *did not use violence or credible threats of violence or possess a firearm or other dangerous weapon* (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in *death or serious bodily injury* to any person;
- (4) the defendant was not an *organizer, leader, manager, or supervisor* of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has *truthfully provided to the Government all information and evidence the defendant has* concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with the requirement.¹¹²

The safety valve differs from the substantial assistance departure in two key ways. First, the safety valve does not require a motion from the government.¹¹³ Instead, judges have discretion to apply the safety valve provision if the defendant satisfies the five criteria.¹¹⁴ Second, the fifth element of the safety valve provision explicitly states that the information defendants provide to the government need not be new and useful, so long as it is comprehensive and truthful.¹¹⁵

Though not mandatory,¹¹⁶ the Guidelines are instructive in determining how much relief to provide to safety-valve-eligible defendants.¹¹⁷ The Guidelines state that defendants meeting the safety valve criteria “for whom the statutorily required minimum sentence is at least five years, the offense

110. See Froyd, *supra* note 20, at 1472.

111. *Id.*

112. 18 U.S.C. § 3553(f) (2012) (emphasis added). The recently passed First Step Act seeks to expand the protections of the safety valve by including individuals with limited criminal histories. First Step Act of 2018, Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221; see also Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018, 12:45 PM), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [https://perma.cc/PWW8-MEJ9].

113. See Bronn, *supra* note 58, at 482.

114. In this respect, the safety valve is an excusal, rather than a departure, from the mandatory minimum sentence. *Id.*

115. 18 U.S.C. § 3553(f)(5) (“[T]he fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.”).

116. See generally *United States v. Booker*, 543 U.S. 220 (2005).

117. See U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(b) (U.S. SENTENCING COMM’N 2016).

level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be *not less than level 17.*¹¹⁸ According to the sentencing table, a defendant with an offense level of 17 and no criminal history faces a Guideline sentence of twenty-four to thirty months.¹¹⁹ And while judges are free to disregard the Guidelines in imposing a sentence, the Guidelines nonetheless serve as an important starting point and remain influential in sentencing.¹²⁰

c. The Rise and Fall of the Holder Memo

In 2013, then–U.S. Attorney General Eric Holder set forth a policy that sought to avoid charging low-level participants in drug crimes under statutes that triggered mandatory minimum sentences.¹²¹ The Holder Memo, as it became known, instructed Assistant U.S. Attorneys (AUSAs) to conduct an individualized assessment of each defendant prosecuted under a Controlled Substances Act statute with a mandatory minimum sentence to determine whether the defendant was, in fact, a low-level participant.¹²² AUSAs were to weigh several criteria, including whether the conduct involved the use of violence or weapons, whether the crime involved minors, whether death or serious bodily injury resulted, whether the defendant was a leader within the criminal organization, whether he or she had significant ties to large-scale drug-trafficking organizations, and finally, whether the defendant had a criminal history.¹²³ If, based on those factors, the AUSA was satisfied that the defendant was indeed a low-level participant, the Holder Memo instructed the AUSA to decline to charge the quantity of drugs sufficient to trigger the mandatory minimum sentence.¹²⁴ This policy allowed many low-level drug couriers, like Chevelle Nesbeth,¹²⁵ to escape § 960’s mandatory minimum sentences.¹²⁶

However, the relief provided by the Holder Memo quickly dissipated in 2016 with the election of President Donald Trump and the appointment of Jefferson Sessions as U.S. Attorney General. Shortly into his tenure, Sessions released a memo, commonly known as the Sessions Memo, that effectively overturned the policies laid out in the Holder Memo and

118. *Id.* (emphasis added).

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

120. *See supra* notes 66–70 and accompanying text.

121. Memorandum from Eric Holder, Attorney Gen., to the U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. 2 (Aug. 12, 2013) [hereinafter Holder Memo], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> [<https://perma.cc/F2FR-U3UN>]; *see also* Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), <https://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html> [<https://perma.cc/EMN4-TQMV>].

122. Holder Memo, *supra* note 121, at 2.

123. *Id.*

124. *Id.*

125. *See supra* note 2 and accompanying text.

126. *See* 21 U.S.C. § 960(b) (2012).

instructed AUSAs to resume charging all drug offenders to the fullest extent of the law.¹²⁷ The Sessions Memo states: “Any inconsistent previous policy of the Department of Justice relating to these matters is rescinded, effective today.”¹²⁸ Although it is possible that the Trump administration changes course in light of the bipartisan First Step Act,¹²⁹ the Sessions Memo continues to govern the approach of the nation’s ninety-three U.S. Attorney’s Offices toward low-level drug couriers.¹³⁰

II. BECOMING A DRUG COURIER: UNDERSTANDING THE EXPERIENCES AND MOTIVATIONS OF INDIVIDUALS WHO SMUGGLE DRUGS

This Part introduces the group of individuals predominately affected by the laws discussed in Part I. Part II.A describes the role of drug couriers in larger drug-trafficking schemes, distinguishes between experienced and low-level drug couriers, and provides a more in-depth analysis of low-level couriers as a particular group of interest. Part II.B assesses the circumstances that push individuals toward low-level drug smuggling. First, Part II.B highlights the high-risk, low-reward reality of being a low-level drug courier, and then it seeks to explain why individuals choose to become couriers by analyzing the widespread fear and poverty prevalent in communities affected by the drug trade.

A. *The Role of the Drug Courier and the Rise of Low-Level Drug Couriers*

Drug couriers are responsible for smuggling drugs from one point to another, often across international borders.¹³¹ Although many drug couriers occupy the lowest levels of the drug organization’s hierarchy,¹³² not all drug couriers are alike.¹³³ It would be misguided to say that all couriers are simply

127. Memorandum from Jefferson Sessions, Attorney Gen., to All Federal Prosecutors 1 (May 10, 2017) [hereinafter Sessions Memo], <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/4HH5-HAHT>] (“[I]t is a core principle that prosecutors should charge and pursue the most serious, readily provable offense. . . . By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.”); see also Sari Horwitz & Matt Zapotosky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html [<https://perma.cc/7NM4-A668>].

128. Sessions Memo, *supra* note 127, at 2. The Sessions Memo explicitly referred to the Holder Memo in a footnote defining inconsistent previous policies. *Id.* at 2 n.1.

129. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/3F5R-XPCD>].

130. See Sessions Memo, *supra* note 127, at 2.

131. See, e.g., *United States v. Nesbeth*, 188 F. Supp. 3d 179, 189 (E.D.N.Y. 2016) (describing how the defendant smuggled drugs from Jamaica to the United States).

132. See Lerman, *supra* note 19, at 701 (“[O]n average, couriers’ economic positions vis-à-vis the enterprise they work for paint a picture of a uniformly powerless, unskilled labor force.”).

133. See *id.* (“[C]ouriers and mules vary in what types of drugs they cross in what quantity, and in their pay.”).

unwitting agents of the organization's higher-ups; some couriers run sophisticated operations to smuggle drugs across borders.¹³⁴ For example, some drug-trafficking organizations employ trained high-level couriers to fly private aircraft filled with illegal narcotics into the United States.¹³⁵ In fact, the legislative history of the Anti-Drug Abuse Act of 1986 specifically mentions this subset of drug couriers as a particular threat.¹³⁶ Other drug couriers—through experience—have developed effective methods of bypassing law enforcement's detection efforts at the border.¹³⁷

As law enforcement ramped up interdiction efforts and developed new methods to detect and apprehend drug couriers, drug-trafficking organizations responded with innovative ways to insulate high-level members and continue smuggling drugs into the United States, which included recruiting outside individuals to act as drug couriers.¹³⁸ These low-level drug couriers have little to no involvement in the larger drug-trafficking operation and, as a result, possess limited information of value to law enforcement in the event that they are apprehended.¹³⁹ Low-level drug couriers typically know only the name of the person who gave them the drugs (who is usually located in a foreign country)¹⁴⁰ and the person to whom they are supposed to deliver the drugs (who is likely known by an alias or even just by a general description).¹⁴¹ Ultimately, drug-trafficking organizations and their leaders view low-level drug couriers as disposable resources;

134. *See id.*

135. *See, e.g.,* Tristan Kirk, *Drug Smugglers Who Flew £2.5m Cocaine Haul to UK on Light Aircraft Jailed for 40 Years*, EVENING STANDARD (Feb. 3, 2017, 3:46 PM), <https://www.standard.co.uk/news/crime/drug-smugglers-who-flew-25m-cocaine-haul-to-uk-on-light-aircraft-jailed-for-40-years-a3457971.html> [<https://perma.cc/56PT-N8F3>]; David M. Zimmer, *Ringwood Man Convicted of Smuggling Cocaine on Private Planes*, NORTH JERSEY REC. (Oct. 5, 2018, 6:42 PM), <https://www.northjersey.com/story/news/passaic/ringwood/2018/10/05/ringwood-nj-man-convicted-smuggling-cocaine-private-planes/1536415002/> [<https://perma.cc/UEY2-HLG6>].

136. H.R. REP. NO. 99-734, at 21 (1986); *see also supra* notes 94–95 and accompanying text.

137. *See* Howard Campbell, *Female Drug Smugglers on the U.S.-Mexico Border: Gender, Crime, and Empowerment*, 81 ANTHROPOLOGICAL Q. 233, 254–55 (2008) (describing the methods some “seasoned veteran” couriers employed in driving drugs across the U.S.-Mexico border, which included “dress[ing] like a hooker,” disguising drugs as wrapped Christmas presents during the holiday season, and even stuffing their children’s toys with drugs).

138. *See id.* at 253.

139. Bronn, *supra* note 58, at 479 (“Research into drug operations has demonstrated that, when hiring mules and couriers for their ventures, upper-level organizers often intentionally hire persons who have no information about the distributor in order to protect their organizations should the mules be apprehended.”); *see also* Lerman, *supra* note 19, at 694 (explaining how low-level drug couriers lack information on the larger drug conspiracies).

140. Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 BROOK. L. REV. 643, 643 (1995) (discussing how drug couriers often work for suppliers operating from abroad).

141. Mireya Navarro, *Colombia’s Heroin Couriers: Swallowing and Smuggling*, N.Y. TIMES (Nov. 2, 1995), <https://www.nytimes.com/1995/11/02/us/colombia-s-heroin-couriers-swallowing-and-smuggling.html> [<https://perma.cc/3V9M-TJVX>] (describing how drug couriers do not know the identities of cartel lieutenants but rather know them by descriptions, such as “Gordo” or “Flaco”).

resources that they are willing to sacrifice to the authorities in order to protect themselves and their larger operation.¹⁴²

Large drug-trafficking organizations, in their efforts to evade law enforcement and border agents, have increasingly recruited women to smuggle drugs into the United States¹⁴³ because they believe that women are more effective drug couriers. From the perspective of law enforcement officers, for example, women may appear less dangerous and thus less suspicious.¹⁴⁴ Furthermore, women are perceived to have certain physical advantages when it comes to concealment because they can transport drugs vaginally, between their breasts, in brassieres or other female clothing articles, or in faked pregnancies.¹⁴⁵ Female couriers have even smuggled drugs in breast or buttocks implants.¹⁴⁶ While drug-trafficking organizations do not exclusively use women as drug couriers,¹⁴⁷ the perceived advantages of using women have made female drug couriers a significant subgroup of individuals involved in drug smuggling.¹⁴⁸

B. Motivations of Low-Level Drug Couriers

To design effective criminal justice policies, it is critical to understand why individuals commit crimes. This section describes the risks that low-level drug couriers face and the benefits they derive. It also discusses the factors that frequently drive individuals into these situations.

1. High Risk, Low Reward: The Realities of Being a Low-Level Drug Courier

Low-level drug couriers face significant legal and physical risks.¹⁴⁹ The legal risks stem from the statutory association of quantity of drugs with

142. See Lerman, *supra* note 19, at 694.

143. See Campbell, *supra* note 137, at 253 (“The expansion of female drug smuggling is part of women’s attempts at economic advancement and coincides with the efforts of drug cartels to create new and innovative ways to avoid detection”); Tracy Huling, *Women Drug Couriers: Sentencing Reform Needed for Prisoners of War*, 9 CRIM. JUST., Winter 1995, at 15, 15 (“[W]omen drug couriers should be a population of particular concern to policy experts examining the effects of the global war on drugs.”).

144. Martel, *supra* note 18, at 29 (“[D]rug syndicates use women couriers because it is easier for women to get through entry points.”).

145. See Campbell, *supra* note 137, at 254.

146. See *id.*; Christopher Woody, *Fake Vegetables, Frozen Sharks, and an Xbox—Here Are Some of Drug Smugglers’ Most Bizarre Methods*, BUS. INSIDER (Apr. 2, 2017, 8:05 PM), <https://www.businessinsider.com/drug-smugglers-methods-hiding-places-2017-4> [https://perma.cc/S95H-A6A2].

147. Drug organizations have also exploited other groups of harmless looking, and often vulnerable, people to smuggle drugs, such as the elderly. Ron Nixon, *Drug Traffickers Turn to New Type of Courier: Seniors*, N.Y. TIMES (Feb. 10, 2016), <https://www.nytimes.com/2016/02/11/us/politics/drug-traffickers-turn-to-new-type-of-courier-seniors.html> [https://perma.cc/X62H-B282].

148. See Huling, *supra* note 143, at 15.

149. See Lerman, *supra* note 19, at 682 (describing drug couriers are “those who are recruited—and often exploited—to handle the riskiest part of the enterprise: the transportation”).

organizational status and culpability.¹⁵⁰ Because of the mandatory minimum penalties in place, if they smuggle enough drugs, drug couriers can receive long prison sentences despite their low status within the drug-trafficking organization.¹⁵¹ Furthermore, they are often intentionally kept in the dark about the inner workings of the drug-trafficking organization, so they lose out on a valuable bargaining chip with prosecutors and are deprived of an opportunity to qualify for the substantial assistance departure.¹⁵² In addition to assuming significant legal risk, drug couriers often undertake risks to their health and physical well-being.¹⁵³ In cases where couriers have ingested pellets of drugs—such as cocaine or heroin—the risk of death or serious bodily injury is extremely high if the pellet opens while inside the courier.¹⁵⁴

Despite these risks, low-level couriers rarely stand to benefit from the sale of the drugs they carry.¹⁵⁵ Drug couriers are generally paid a relatively small, flat fee for their services and do not receive a share of the profits like more highly ranked members of the organization do.¹⁵⁶ While a few thousand dollars may be enough to affect the circumstances of those recruited to be low-level drug couriers,¹⁵⁷ it is a rather inconsequential sum compared to the profits generated by the drug-trafficking organization.¹⁵⁸ In 2016, the average retail price for a gram of cocaine in the United States, adjusted for

150. 21 U.S.C. § 960(b) (2012); *see also* H.R. REP. NO. 99-845, at 12 (1986) (discussing how possessing certain quantities of drugs are indicative of high status within the organization).

151. 21 U.S.C. § 960(b); *see also supra* notes 78–83 and accompanying text.

152. *See infra* Part III.B (discussing how many low-level drug couriers are ineligible for the substantial assistance departure because they lack valuable information on the drug-trafficking conspiracy).

153. *See* Maria Florencia Alcaraz, *What It's Like to Be a Female Drug Mule Serving Time in Prison*, BROADLY (May 13, 2016, 9:05 AM), https://broadly.vice.com/en_us/article/vv5949/what-its-like-to-be-a-female-drug-mule-serving-time-in-prison [<https://perma.cc/JR8B-7FKT>]; Navarro, *supra* note 141.

154. *See* Alcaraz, *supra* note 153 (describing drug-filled capsules as “ticking time bombs”); Navarro, *supra* note 141 (discussing how ingesting heroin pellets, while less risky than ingesting cocaine pellets, nonetheless results in many deaths when the pellets open).

155. *See* Wasserman, *supra* note 140, at 651 (“Like a beast of burden, [the courier] was employed to transport another’s goods, ignorant of the heightened risks (mainly to herself) or heightened benefits (entirely to another) . . .”).

156. One empirical study on drug couriers’ pay found that the median compensation for couriers caught at California ports of entry was \$1313 per trip. David Bjerk & Caleb Mason, *The Market for Mules: Risk and Compensation of Cross-Border Drug Couriers*, 39 INT’L REV. L. & ECON. 58, 58 (2014). According to these figures, a courier would need to complete over two trips per month to earn an annual salary of approximately \$35,000. *Id.* at 58–59; *see also* Huling, *supra* note 143, at 59 (“[Drug couriers] are paid anonymously, in insignificant amounts.”).

157. *See* Lerman, *supra* note 19, at 702 (“Courier work offers a temporary income increase that would be unlikely in most other jobs in the border region. In fact, that is very frequently the reason people are willing to accept drug-trafficking organizations’ propositions.”).

158. *See Heroin and Cocaine Prices in Europe and USA*, UNITED NATIONS OFF. DRUGS & CRIME, https://dataunodc.un.org/drugs/heroin_and_cocaine_prices_in_eu_and_usa [<https://perma.cc/P9F7-GH3B>] (last visited Feb. 12, 2019).

purity, was \$165.¹⁵⁹ A courier carrying 900 grams of cocaine,¹⁶⁰ for example, may be paid a few thousand dollars as a flat fee¹⁶¹ despite having delivered a product that could potentially yield over \$148,000 in retail value.¹⁶² Similarly, in 2016, the average street value of heroin was \$491 per gram, adjusted for purity,¹⁶³ so a courier delivering the same amount brings in over \$441,000 for the organization. Considering the legal and health risks that couriers assume, as well as the value they bring to the drug-trafficking organizations that recruit them, low-level drug couriers are paid far less than what their services are worth.

2. Why They Do It: Fear and Poverty Drive Recruitment of Low-Level Drug Couriers

Understanding what drives low-level drug couriers to undertake such high-risk, low-reward assignments is crucial in assessing the effectiveness of the current policies¹⁶⁴ and addressing their flaws.¹⁶⁵ One of the main motivators for low-level drug couriers is fear. This is particularly true for the large numbers of female drug couriers involved in relationships with men who have strong ties to drug-trafficking organizations.¹⁶⁶ As one scholar notes, while the wife or partner of an individual who commits a white collar crime is often shielded from criminal activity, the wife or partner of a drug dealer is much more exposed.¹⁶⁷ Women who are physically and psychologically abused by male drug dealers in their lives are especially susceptible to involvement and participation in the overarching drug-trafficking enterprise.¹⁶⁸ For example, Judge Jack Weinstein of the Eastern District of New York observed that “[m]any women who commit drug crimes do not

159. *Id.* The average price of cocaine, not adjusted for purity, was \$93 per gram in 2016. *Id.*

160. The average internal courier swallows approximately two pounds of drugs, which equals just over 900 grams. Navarro, *supra* note 141. Couriers who hide the drugs in their suitcases are capable of carrying even more.

161. See Bjerk & Mason, *supra* note 156, at 58–59.

162. See *Heroin and Cocaine Prices in Europe and USA*, *supra* note 158.

163. See *id.* The average price of heroin, not adjusted for purity, was \$152 per gram in 2016. *Id.*

164. See *infra* Part III.

165. See *infra* Part IV.

166. See, e.g., Shimica Gaskins, *Women of Circumstance—the Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533 (2004) (“These ‘women of circumstance’ find themselves incarcerated and subject to draconian sentences because the men in their lives persuade, force, or trick them into carrying drugs.”); Phyllis Goldfarb, *Counting the Drug War’s Female Casualties*, 6 J. GENDER RACE & JUST. 277, 280 (2002) (“[A] major way that women have been caught in the crossfire of the drug war has been through heterosexual relationships with men engaged in drug activity.”).

167. Myrna S. Raeder, “Gender Neutral” Sentencing Wreaks Havoc in the Lives of Women Offenders and Their Children, 8 CRIM. JUST., Fall 1993, at 21, 60.

168. See Gaskins, *supra* note 166, at 1534.

act completely under their own volition, but rather out of fear of the dominant, abusive men in their lives.”¹⁶⁹

Even where couriers are not involved in abusive relationships, fear is a powerful force in communities largely dominated by the drug trade.¹⁷⁰ An undercover U.S. Drug Enforcement Administration (DEA) agent identified fear as a key component used by Mexican drug cartels to retain control over the people in their communities.¹⁷¹ This DEA agent lamented that Mexican civilians will not provide law enforcement with information on the Sinaloa Cartel, for example, because “[t]hey know their family back home will be killed.”¹⁷² The agent’s testimony illustrates the immense power that drug-trafficking organizations wield in their communities and the relative ease with which they force ordinary citizens to act on their behalf.

Poverty and lack of economic opportunity are other powerful drivers for the recruitment of low-level drug couriers. Many low-level drug couriers come from backgrounds that afford them little opportunity to obtain prosperous livelihoods.¹⁷³ This is especially true for women in certain cultures, like those in Latin America and the Caribbean, where deep-set gender norms have discouraged women from obtaining an education and gainful employment.¹⁷⁴ For example, one empirical study of the drug trade in Barbados found that poverty was a key motivator for women employed as drug couriers.¹⁷⁵ The situation can be even more dire for women who are the sole caretakers of children. One woman arrested for smuggling drugs explained the situation, saying: “You could face the fact of being in prison—but then again, having four kids, working day and night, you’re a mother on your own, you haven’t got any father Basically you just need a

169. Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 170 (1996).

170. See Guy Lawson, *How the Cartels Work*, ROLLING STONE (Apr. 18, 2011, 1:00 PM), <https://www.rollingstone.com/politics/politics-news/how-the-cartels-work-245912/> [<https://perma.cc/UB3L-2J4H>]; Navarro, *supra* note 141 (describing a low-level drug courier as being “among the increasing numbers of South Americans who, *under threat* or for money, act as human vessels for thousands of pounds of Colombian heroin being smuggled into the United States” (emphasis added)).

171. Lawson, *supra* note 170.

172. *Id.*

173. See Navarro, *supra* note 141 (describing how most Colombian heroin couriers are illiterate and poor).

174. Many of the drugs smuggled into the United States do not come directly from their “source country” as that would likely raise the suspicions of law enforcement. Rather, in an effort to elude authorities, drugs are filtered through a number of “transit countries” in the Caribbean before being smuggled into the United States. Corin Bailey, *Exploring Female Motivations for Drug Smuggling on the Island of Barbados: Evidence From Her Majesty’s Prison, Barbados*, 8 FEMINIST CRIMINOLOGY 117, 123 (2013) (“The location of the Caribbean has made it one of the world’s major drug transshipment points as it is situated between South America—the world’s largest producer of cocaine, and its main markets in the United States of America and Europe.”).

175. *Id.* at 121; see also Huling, *supra* note 143, at 59 (explaining that women often become involved in the drug-trafficking business as a survival strategy in the face of economic necessity).

change—not only for yourself but for your kids.”¹⁷⁶ Moreover, women with sole responsibilities for their children may face greater difficulties in obtaining an education or steady employment.¹⁷⁷ These circumstances likely propel women into a vicious cycle of necessity and desperation where low-level drug smuggling might appear to be the only way to make ends meet.¹⁷⁸ Drug-trafficking organizations also stand to benefit and thus exploit these situations, as widespread poverty increases the pool of potential recruits to smuggle drugs across borders at low cost to the organization.¹⁷⁹ Notwithstanding the realities low-level drug couriers face,¹⁸⁰ they suffer astonishingly severe punishments under the current laws.¹⁸¹

III. FAILURES OF THE CURRENT ENFORCEMENT REGIME

Taking into consideration the current state of the law and the individuals impacted by it, this Part analyzes the costs and benefits of the current drug enforcement regime. Part III.A begins by exploring the costs of current enforcement policies, including the financial costs and the less easily quantifiable collateral costs that the policies impose on innocent third parties and on formerly incarcerated individuals. Next, this Part analyzes purported benefits of the current policies. Part III.B unpacks the common justification that harsh penalties are necessary to induce low-level participants to provide information about higher-level dealers and distributors. Finally, Part III.C evaluates current policies through the lenses of the various theories of punishment: retribution, deterrence, incapacitation, and rehabilitation. This Part ultimately illustrates that the current regime’s costs outweigh its benefits and that reforms are necessary to address these imbalances.

A. High Costs of Current Enforcement Policies

The policy of pursuing harsh sentences for low-level offenders like drug couriers has contributed to a surge in the prison population.¹⁸² The total U.S. prison population¹⁸³ has ballooned from approximately 300,000 in 1980 to nearly 1.5 million in 2016—a 500 percent increase.¹⁸⁴ And for drug crimes alone, the number of individuals incarcerated in federal prison grew from 4700 to nearly 82,000 over the same period.¹⁸⁵ These sharp increases have

176. *Jamaica’s Women Drug Mules Fill UK Jails*, BBC NEWS (Sept. 13, 2003, 6:56 PM), <http://news.bbc.co.uk/2/hi/americas/3097882.stm> [<https://perma.cc/6FKC-PGGM>].

177. Bailey, *supra* note 174, at 128.

178. *Id.*

179. See Lerman, *supra* note 19, at 702 (explaining how drug-trafficking organizations intentionally seek out vulnerable individuals as drug couriers).

180. See *supra* Part II.B.

181. See *supra* Part I.B.

182. See, e.g., *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT 1, <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/FE5U-QFAK>] (last visited Feb. 12, 2019) (detailing various metrics of prison population growth in the United States).

183. This includes both state and federal prisons.

184. *Fact Sheet: Trends in U.S. Corrections*, *supra* note 182, at 1.

185. *Id.* at 3.

led to significant economic costs as the United States spends an average of roughly \$36,000 per federal inmate annually.¹⁸⁶ Perhaps more significant than the financial costs, however, is the collateral damage that incarceration imposes on families of incarcerated individuals and the long-term consequences suffered by individuals after they are released from incarceration.

1. The Effects on Families and Children

When a judge sentences an individual with children to a term of incarceration, the judge inevitably assesses a penalty on the child or children of that individual.¹⁸⁷ Judges should consider this impact on children when calculating the costs of a criminal justice policy.¹⁸⁸ But, despite the well-documented effects that parental incarceration has on children, the Guidelines instruct courts to disregard these effects when crafting an “appropriate” sentence.¹⁸⁹

In general, parental incarceration is correlated with a wide range of detrimental effects on a child’s development.¹⁹⁰ When a parent is sentenced to prison time, children often experience grief, anxiety, and depression, which psychologists have equated to the emotional responses associated with the death of a loved one, abuse, or domestic violence.¹⁹¹ In addition to mental health effects, parental incarceration is also associated with adverse physical health outcomes, like childhood obesity and asthma.¹⁹² The children of incarcerated parents also experience significant long-term effects that may inhibit their educational and occupational achievement.¹⁹³ Even

186. Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863 (Apr. 30, 2018). The federal government operates on the fiscal calendar of October to September. *Id.*

187. See generally Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385 (2018) (describing the many obstacles children of incarcerated parents face both during and after their parent’s period of incarceration).

188. This is not to say that defendants with children are less culpable or deserving of less punishment than defendants without children. It is only intended to convey the reality that incarceration imposes costs on third parties other than the defendant, which must be considered to accurately determine whether the benefits of a criminal justice policy outweigh the costs.

189. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM’N 2016) (“[F]amily ties and responsibilities are *not ordinarily relevant* in determining whether a departure may be warranted.” (emphasis added)).

190. See, e.g., Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919, 923 (2000) (discussing the negative impacts of parental incarceration on children); Cyphert, *supra* note 187, at 390–91 (same). *But see* Cyphert, *supra* note 187, at 390 (“Where an incarcerated parent was abusive . . . their absence may improve a child’s situation, at least temporarily.”).

191. See Bush-Baskette, *supra* note 190, at 923; Cyphert, *supra* note 187, at 390–91.

192. See Cyphert, *supra* note 187, at 391. Cyphert notes that these physical conditions are generally more pronounced in children living in poverty, who also happen to be most affected by parental incarceration. *Id.* at 391 n.24.

193. THE ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 3 (2016),

after a parent's release, these negative impacts often persist and last through adulthood: parental incarceration is a "strong risk factor for antisocial behavior, future offending, . . . drug abuse, school failure, and unemployment."¹⁹⁴ According to one study, children who experience the trauma of losing a parent to the criminal justice system are five times more likely than other children to end up incarcerated as adults.¹⁹⁵

These effects are particularly pronounced for the children of drug couriers because women represent a significant number of the individuals convicted of importing drugs into the United States.¹⁹⁶ This reality is important for two reasons. First, 80 percent of the total number of incarcerated women in the United States are mothers.¹⁹⁷ Second, incarcerated women are more likely than incarcerated men to be the sole caregivers to their children.¹⁹⁸ When a drug courier is sent to prison, there is a high likelihood that her children are losing not only *a* parent, but *the only* parent in their household.¹⁹⁹ The effects can be devastating because these children are likely to experience the aforementioned psychological, physical, and socioeconomic difficulties,²⁰⁰ and to a more severe degree.²⁰¹ As noted by Judge Weinstein, "Removing the mother in such a matriarchal setting destroys the children's main source of stability and guidance and enhances the possibility of their engaging in destructive behavior."²⁰² Additionally, the loss of the sole caregiver may trigger the provisions of the Adoption and Safe Families Act of 1997 (ASFA), which terminates parental rights once a child has been in foster care for fifteen or more of the past twenty-two months.²⁰³

One way to mitigate the effects of parental incarceration is through increased visitation.²⁰⁴ However, several obstacles may inhibit visitation.

<http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> [<https://perma.cc/JK5L-6HF7>] (describing how parental incarceration disrupts educational performance and is associated with higher drop-out rates).

194. Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J.L. & SOC. POL'Y 24, 31 (2013).

195. Bush-Baskette, *supra* note 190, at 923.

196. *See supra* notes 143–48 and accompanying text (describing the expanded role women have played in drug smuggling operations).

197. Wendy Sawyer & Wanda Bertram, *Jail Will Separate 2.3 Million Mothers from Their Children This Year*, PRISON POL'Y INITIATIVE (May 13, 2018), <https://www.prisonpolicy.org/blog/2018/05/13/mothers-day-2018/> [<https://perma.cc/ZUQ4-6833>].

198. *See* Bush-Baskette, *supra* note 190, at 920; Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 297 (2002).

199. *See* Bush-Baskette, *supra* note 190, at 920; Gertner, *supra* note 198, at 297.

200. *See supra* notes 190–95 and accompanying text.

201. *See, e.g.*, THE ANNIE E. CASEY FOUND., *supra* note 193, at 3 (discussing how children of incarcerated mothers are more likely to drop out of school).

202. *United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992).

203. 42 U.S.C. § 675 (2012). One way to avoid the consequences of the ASFA is to place the children with relatives during the period of incarceration. *See* Barbara Bloom, Barbara Owen & Stephanie Covington, *Women Offenders and the Gendered Effects of Public Policy*, 21 REV. POL'Y RES. 31, 41 (2004). However, individuals caring for their relatives' children are entitled to fewer benefits than parents, which makes this solution impractical and challenging for many of limited economic means. *Id.*

204. *See* Cyphert, *supra* note 187, at 394 (discussing the benefits of increased visitation to both the child and the parent); *see also* NANCY G. LA VIGNE ET AL., URBAN INST. JUSTICE

The first and most obvious challenge is the distance that families must travel to see their loved ones in federal correctional facilities. According to the U.S. Bureau of Justice Statistics, 84 percent of parents in the federal prison system are incarcerated more than 100 miles from their last residence.²⁰⁵ This problem is heightened for women because there are only a handful of federal prisons for female inmates.²⁰⁶ To make matters worse, the Federal Bureau of Prisons (BOP) is not obligated to follow a sentencing judge's recommendation that a defendant be placed in a federal prison that is in close proximity to the inmate's family.²⁰⁷ Closely related to the problem of location is the financial burden of travel, lodging, and meals that visitation presents.²⁰⁸ These hardships acutely impact the families of drug couriers, who often already face financial difficulty that served as a—if not *the*—motivation for the courier's criminal activity in the first place.²⁰⁹ Moreover, many drug couriers have family overseas,²¹⁰ which makes visitation prohibitively expensive. Even where families can muster up the funds to visit a loved one in prison, many federal correctional facilities have visitation policies that make it difficult for incarcerated parents to interact with their children.²¹¹ As a result, the innocent children and families of incarcerated parents suffer tremendously both during and after the term of incarceration. These burdens must be considered when assessing the true costs of the current enforcement policies vis-à-vis drug trafficking crimes.

POLICY CTR., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 10 (2008), <https://www.urban.org/sites/default/files/publication/31486/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF> [<https://perma.cc/B8TW-L4L4>] (“[M]aintaining contact with one’s incarcerated parent appears to be one of the most effective ways to improve a child’s emotional response to the incarceration and reduce the incidence of problematic behavior.”). While not all scholars agree that increased visitation benefits the child, “[n]o studies have shown that visitation in prison destroys the benefits [associated with] parent/child visitation.” Benjamin Guthrie Stewart, Comment, *When Should a Court Order Visitation Between a Child and an Incarcerated Parent?*, 9 U. CHI. L. SCH. ROUNDTABLE 165, 175 (2002).

205. CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 5 (2000), <https://www.bjs.gov/content/pub/pdf/iptc.pdf> [<https://perma.cc/TPV4-JBGG>].

206. Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 231, 231 (2012); see also Gaskins, *supra* note 166, at 1551 (discussing how incarcerated women are often located farther away from their families than incarcerated men).

207. The BOP’s statutory authority dictates only that the BOP must ensure that the facility of its choosing “meets minimum standards of health and habitability.” 18 U.S.C. § 3621(b) (2012); see also *United States v. Jessop*, No. 1:04-CR-159 (GLS), 2006 WL 1877143, at *1 (N.D.N.Y. July 6, 2006) (holding that the “BOP has the exclusive right to designate the place of confinement” and “it has the discretion to consider judicial recommendations concerning such matters as proximity to family” but “the court has *no jurisdiction to supersede the BOP’s authority*” (emphasis added)).

208. See Cyphert, *supra* note 187, at 396.

209. See *supra* notes 173–79 and accompanying text.

210. See *supra* notes 174–75 and accompanying text.

211. See Cyphert, *supra* note 187, at 397 (discussing how inconvenient visitation hours, parking difficulties, a lack of private or child-friendly visitation rooms, and strict visitation eligibility rules can deter families, especially children, from visiting incarcerated parents).

2. Life After Incarceration

Another important consideration in determining the true costs of the current enforcement policies is the impact that incarceration has on the individual's future opportunities. As Professor Michelle Alexander wrote, the current "laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream society and economy."²¹² Alexander added that the restrictions in place "amount to a form of 'civic death' and send the unequivocal message that 'they' are no longer part of 'us.'"²¹³ Formerly incarcerated individuals suffer many consequences that persist long after their sentences end, including, but not limited to, the loss of employment opportunities,²¹⁴ voting rights,²¹⁵ and public benefits.²¹⁶

The data indicate that past incarceration—of any length—negatively impacts an individual's employment prospects upon release.²¹⁷ According to the Prison Policy Initiative, the unemployment rate among formerly incarcerated individuals is 27 percent,²¹⁸ which is approximately five times higher than that of the general population.²¹⁹ It also surpasses the U.S. unemployment rate at the peak of the Great Depression, which was 25 percent.²²⁰ Broken down by gender and race, the data show that formerly incarcerated Black and Hispanic women are in an even worse position, with unemployment rates of 43.6 percent and 39.4 percent, respectively.²²¹ Even where formerly incarcerated individuals do obtain employment, a significant percentage are only able to find part-time or occasional work.²²² Black women and Hispanic women fare the worst, with only 40 percent and 43 percent able to secure full-time employment, respectively.²²³ Because many low-level drug couriers come from Central America, South America, or the

212. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 142 (2012).

213. *Id.*

214. See, e.g., Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/9QC3-NNEG>].

215. See, e.g., *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/S46S-6KBZ>] (last updated Dec. 21, 2018).

216. See, e.g., Molly Born, *In Some States, Drug Felons Still Face Lifetime Ban on SNAP Benefits*, NPR: THE SALT (June 20, 2018, 10:02 AM), <https://www.npr.org/sections/thesalt/2018/06/20/621391895/in-some-states-drug-felons-still-face-lifetime-ban-on-snap-benefits> [<https://perma.cc/Y8H3-T9UK>].

217. See Couloute & Kopf, *supra* note 214.

218. This figure is based off of data from 2008, the most recent year for which data on this topic are available. *Id.*

219. In 2008, the U.S. unemployment rate was just over 5 percent. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. These figures reflect the percentages of the entire population of formerly incarcerated Black and Hispanic women, not the percentages of formerly incarcerated, but employed, Black and Hispanic women. *Id.* Furthermore, 20 percent of Black women and 18 percent of Hispanic women were employed on a part-time or occasional basis. *Id.*

Caribbean²²⁴ and are Black or Hispanic, these figures indicate that the post-incarceration job market looks even less promising for them, which exponentially increases the social costs of incarcerating them.²²⁵

Even where the safety valve provision functions effectively,²²⁶ and a defendant's prison sentence is significantly reduced, the defendant still faces the long-term consequences of being labeled a "convicted felon."²²⁷ Among the vast consequences that individuals who have been convicted of felonies suffer,²²⁸ one that is particularly important for convicted drug couriers is the loss of certain public benefits.²²⁹ In 1996, President Bill Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act,²³⁰ which created the Temporary Assistance for Needy Families (TANF) program.²³¹ TANF also included a number of provisions reining in welfare benefits by imposing strong work requirements²³² and closing out such benefits to individuals with felony convictions.²³³ Section 115 of the Act specifically closes out certain public benefits to "individual[s] convicted . . . of any offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance."²³⁴

224. *See supra* notes 143–48, 173–76 and accompanying text.

225. According to one report, the U.S. economy loses between \$57 and \$65 billion in output of goods and services from formerly incarcerated individuals. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [<https://perma.cc/8BD5-46U2>].

226. Several commentators have noted various flaws within the safety valve provision that prevent it from working effectively. *See generally* Bronn, *supra* note 58; Froyd, *supra* note 20. While this Note will discuss several drawbacks of the safety valve, it will not address these specific critiques. *See infra* Part IV.B. However, for a detailed discussion on the elements of the safety valve provision and a proposal on improving its efficacy, see generally Froyd, *supra* note 20. For specific analysis on the circuit split surrounding the interpretation of the fifth element of the safety valve, see generally Bronn, *supra* note 58.

227. This is also the case for individuals who qualify for the substantial assistance departure. However, because so few low-level drug couriers are able to provide new and useful information to prosecutors, most defendants who qualify for reduced sentences are benefitting from the safety valve provision. *See infra* Part III.B.

228. *See, e.g.,* United States v. Nesbeth, 188 F. Supp. 3d 179, 190–93 (E.D.N.Y. 2016) (describing the lost benefits that result from a felony conviction).

229. This section will focus primarily on individuals who were eligible to receive such benefits prior to their felony convictions. Because eligibility, in certain circumstances, may depend on an individual's citizenship status, not all individuals convicted of low-level drug-trafficking crimes may have been eligible to receive certain public benefits in the first place. This Note will not delve into the nuances of the eligibility rules but rather will explain the consequences of a drug felony conviction on individuals who were previously eligible to receive federal public assistance benefits.

230. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 11 Stat. 2105 (codified as amended in scattered sections of the U.S.C.).

231. *See The 1996 Personal Responsibility and Work Opportunity Reconciliation Act in the US*, CTR. FOR PUB. IMPACT (Oct. 30, 2017), <https://www.centreforpublicimpact.org/case-study/personal-responsibility-and-work-opportunity-reconciliation-act-the-clinton-welfare-reform/> [<https://perma.cc/9PMV-FTKW>].

232. Pub. L. No. 104-193, § 115(a), 110 Stat. at 2180–81.

233. *Id.*

234. *Id.*

Individuals convicted as drug couriers under the importation statute fall squarely within this provision, and may thus suffer the severe consequence of a lifetime ban on receiving certain forms of public assistance.²³⁵ Given the myriad of challenges that formerly incarcerated individuals face in finding employment²³⁶ and the fact that this plight is even worse for Black and Hispanic women,²³⁷ this is a particularly troublesome reality. If formerly incarcerated drug couriers cannot secure employment and are closed out from public assistance benefits, where do they turn? One option might be to return to criminal activity as a way to support themselves and their families. Another option might be to entrench themselves in their relationships with male partners, even if the men are abusive, involved in the drug trade, or both. Interestingly, the current policy of charging low-level drug couriers with felonies and sentencing them to extended periods of incarceration perpetuates the conditions that frequently push such individuals to commit drug-trafficking crimes in the first place.²³⁸

Family disruption, difficulty finding employment, and loss of public benefits are just a few of the many collateral costs of a felony conviction and incarceration. Because these consequences acutely affect the subsets of individuals at the greatest risk of being recruited as drug couriers, like Black and Hispanic women,²³⁹ these consequences are especially important in assessing the true costs of the current enforcement policies as they relate to low-level drug-trafficking crimes.

B. *Going After the Minnows to Catch the . . . Minnows?*

One common justification for pursuing harsh penalties for low-level drug offenders is that such penalties incentivize defendants to cooperate with the government and provide information that aids in prosecuting the more culpable higher-level offenders in the drug-trafficking organization.²⁴⁰ The substantial assistance provision²⁴¹—which offers defendants an avenue of relief from the mandatory sentence on the condition that they provide new and useful information to the government—reflects this consideration.²⁴²

For most drug couriers, however, the substantial assistance provision is not a viable option for relief because drug-trafficking organizations often intentionally keep the couriers uninformed as a way to insulate their high-

235. Currently, states differ in their treatment of individuals convicted of drug-related felonies. In West Virginia, South Carolina, and Mississippi, for example, individuals falling within this category still face a lifetime ban on Supplemental Nutrition Assistance Program (SNAP) benefits, or food stamps, as they are more commonly known. See Born, *supra* note 216.

236. See *supra* notes 217–25 and accompanying text.

237. See *supra* notes 221–23 and accompanying text.

238. See *supra* notes 173–79 and accompanying text.

239. See *supra* notes 143–48, 173–76 and accompanying text.

240. See Lerman, *supra* note 19, at 694 (describing the criminal justice system as a “system built around cooperation”).

241. See *supra* Part I.B.2.a.

242. See 18 U.S.C. § 3553(e) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a)(1) (U.S. SENTENCING COMM’N 2016).

level members.²⁴³ While couriers may have information on the individuals who originally gave them the drugs to import, this intelligence is often of little use to prosecutors because those individuals are typically outside the United States.²⁴⁴ Additionally, the leaders of the drug-distribution conspiracy have every incentive to withhold the true identity of the person to whom the couriers are delivering the drugs and simply provide an alias or general description.²⁴⁵ Because of the circumstances that render the couriers so vulnerable to being recruited in the first place, they often obey their superiors unquestioningly.²⁴⁶

The disparate impact produced by the substantial assistance departure is well-documented and has been referred to as the “cooperation paradox.”²⁴⁷ Under the cooperation paradox, more culpable offenders receive lighter sentences because they possess valuable information, and low-level couriers receive harsher sentences because they have no information with which to bargain.²⁴⁸ In the rare event that couriers possess information that they are willing to provide to the government, couriers are unlikely to benefit from it because it is either unreliable or already known.²⁴⁹ The cooperation paradox demonstrates the flaws in the logic that going after the proverbial minnows is the best way to get the whales—at least in cases involving low-level drug couriers. If pursuing harsh penalties for low-level drug couriers is ineffective as a mechanism for prosecuting the more culpable dealers and distributors, what benefit do these policies actually offer?

C. Insufficient and Greater Than Necessary: Failures of the Current Policies Under the Various Theories of Punishment

In addition to failing to aid law enforcement in prosecuting high-level drug distributors,²⁵⁰ the current enforcement policies of harshly penalizing low-level couriers fall short under the various punishment objectives set forth in the SRA.²⁵¹ Under 18 U.S.C. § 3553, courts must “impose a sentence sufficient, but not greater than necessary”²⁵² to promote retributive principles,²⁵³ to deter future criminal conduct,²⁵⁴ to protect the public by

243. See Schulhofer, *supra* note 23, at 211–13 (discussing the ways in which the substantial assistance provision benefits more culpable drug offenders, but not lower-level offenders); Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT’G REP. 63, 64 (1990) (same).

244. See *supra* notes 140, 173–75 and accompanying text.

245. See *supra* notes 139–42 and accompanying text.

246. See *supra* notes 166–79 and accompanying text.

247. See Schulhofer, *supra* note 23, at 211–13.

248. See *id.* at 213 (“Instead of a pyramid of liability with long sentences for leaders at the top of the organizational ladder, the mandatory system can become an inverted pyramid with stiff sentences for minor players and modest punishments for knowledgeable insiders . . .”).

249. *Id.* at 211–13.

250. See *supra* Part III.B.

251. See 18 U.S.C. § 3553(a) (2012).

252. *Id.*

253. *Id.* § 3553(a)(2)(A).

254. *Id.* § 3553(a)(2)(B).

incapacitating the offender,²⁵⁵ and to rehabilitate the defendant.²⁵⁶ This section explores how the current policies fare in achieving each of these objectives.

1. Retribution

Advocates of retributivism or “just deserts”—unlike the forward-looking utilitarian theories of deterrence, incapacitation, and rehabilitation—seek to impose on a defendant a “morally just” sanction that is commensurate with the degree of harm suffered by society.²⁵⁷ One straightforward application of retribution as a theory of punishment is the death penalty.²⁵⁸ By inflicting upon a defendant the same degree of harm that he or she has caused to his or her victim, capital punishment comports with the idea of *lex talionis* (“an eye for an eye”) and illustrates retributive principles in their purest form.²⁵⁹ Yet, with the exception of capital punishment, *lex talionis* is often too extreme in its practical application to be a guiding principle for advocates of the retributivist theory.²⁶⁰ It also provides very little direction for punishing victimless crimes—including many of the drug crimes the federal government prosecutes.²⁶¹ A more workable application of retributivism focuses on the individual’s moral blameworthiness and seeks an accordant punishment.²⁶² From this principle, it follows that more serious crimes (i.e., those that involve a higher degree of moral blameworthiness) should be punished more severely.²⁶³

Weight-based enforcement policies for drug crimes find their justification in retributivist principles.²⁶⁴ To illustrate, if one measures the harm inflicted upon society by the quantity of drugs that end up on the street, then a retributivist would likely support a weight-based sentence by associating the quantity of drugs with the quantity of harm perpetuated.²⁶⁵ However,

255. *Id.* § 3553(a)(2)(C).

256. *Id.* § 3553(a)(2)(D).

257. JOHN F. PFAFF, SENTENCING LAW AND POLICY 57 (Robert C. Clark et al. eds., 2016).

258. *Id.* at 58.

259. *Id.*

260. Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 415 (“[N]o retributivist would embrace the claim that the state ought generally to be in the business of perpetrating the horrors on offenders that match in kind the horrors that they perpetrated on their innocent victims.”); see also David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1657 (2010) (“[T]he explicit task of retributivism as a theory of justice is to resist slavery to emotions like anger and bloodlust in favor of cool reason.”).

261. PFAFF, *supra* note 257, at 58.

262. *Id.* at 58–59. One difficulty in applying retributivist principles to sentencing policies is reconciling conflicting views on moral blameworthiness and justice. See *id.* However, this Note will not explore the merits of retributivism as a theory of punishment. Rather, it will analyze the current enforcement of low-level drug couriers through a retributivist lens. For a more detailed discussion on the merits of retributivism, see John Kleining, *What Does Wrongdoing Deserve?*, in RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 46, 47–48 (Michael Tonry ed., 2011).

263. See PFAFF, *supra* note 257, at 58–59.

264. See *supra* notes 78–83 and accompanying text.

265. See PFAFF, *supra* note 257, at 58.

retributivism looks not only at the harm society suffers but also the moral blameworthiness of the defendant.²⁶⁶ To equate societal harm with moral blameworthiness would be to take an overly simplistic view of retributivism.²⁶⁷ Drug couriers, despite the quantity of drugs they import (and the risk they assume), occupy the lowest levels of the drug-trafficking organization's hierarchy and derive very little benefit from their actions.²⁶⁸ This reality must be considered in assessing their moral blameworthiness through a retributivist lens.²⁶⁹

Couriers agree to undertake these high-risk, low-reward trips because of the difficult circumstances they face.²⁷⁰ Poverty, extreme deprivation, and fear all limit the choices that individuals have and increase the likelihood that they will resort to crime.²⁷¹ It follows that individuals from these backgrounds are less culpable and less morally blameworthy than others who have a wider range of choices.²⁷² Because the current weight-based enforcement policies for drug-trafficking crimes fail to account for the defendant's role in the organization and his or her overall moral culpability,²⁷³ they fail to satisfy the objectives of retribution as a theory of punishment.

2. Deterrence

The second factor that district courts should consider under § 3553 is whether the punishment will “afford adequate deterrence to criminal conduct.”²⁷⁴ Deterrence, as a normative goal of punishment, comes in two forms: general deterrence and specific deterrence.²⁷⁵ General deterrence seeks to structure punishments in a way that will discourage all potential lawbreakers from committing crimes.²⁷⁶ Specific deterrence shifts the focus to the specific offender, asking whether the punishment he or she currently suffers will prevent him or her from committing crimes in the future.²⁷⁷ Specific deterrence is only a consideration once general deterrence has failed

266. See Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1, 10–13 (2015).

267. See *id.*

268. See *supra* notes 132, 138–42, 155–63 and accompanying text.

269. U.S. SENTENCING COMM'N, *supra* note 5, at 168 (“The Commission’s analysis also revealed that the quantity of drugs involved in an offense is *not closely related* to the offender’s function in the offense.” (emphasis added)).

270. See *supra* notes 166–79 and accompanying text.

271. See Bagaric, *supra* note 266, at 10–13.

272. See *id.* at 13 (“The disadvantaged are less morally blameworthy for criminal acts because, relatively speaking, well-off individuals find it easier to comply with the criminal law and have a greater motivation to do so.”).

273. See U.S. SENTENCING COMM'N, *supra* note 5, at 168.

274. 18 U.S.C. § 3553(a)(2)(B) (2012).

275. PFAFF, *supra* note 257, at 39.

276. *Id.*

277. *Id.*

and the threat of punishment was not enough to prevent the individual from committing the crime.²⁷⁸

From a general deterrence perspective, the current policy of pursuing harsh penalties for low-level drug couriers is unlikely to have a measurable impact on drug-trafficking crimes.²⁷⁹ In general, the value of severe criminal penalties as a deterrent is questionable.²⁸⁰ While there is evidence to support the value of punishment as an important mechanism for deterring crime,²⁸¹ the evidence fails to support the conclusion that the deterrent effect becomes more powerful as the severity of the punishment increases.²⁸² Instead, increasing punishment severity produces diminishing marginal returns in terms of crime control and deterrence.²⁸³

Deterrence theory is also premised on the assumption that individuals are self-interested, rational actors who evaluate the costs and benefits of their actions.²⁸⁴ It is questionable whether people actually conform their behavior

278. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *CRIME & JUST.* 199, 200 (2013) (“Specific deterrence concerns the aftermath of the failure of general deterrence—the effect on reoffending, if any, that results from the experience of actually being punished.”). Because this Note’s ultimate resolution focuses mainly on low-level couriers with little to no experience with the criminal justice system, this section will focus almost exclusively on general deterrence. However, for more information on specific deterrence as a theory of punishment, see Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 *SAN DIEGO L. REV.* 343, 385–88 (2014).

279. While the existing research and literature does not directly address the deterrent value of incarceration on low-level drug couriers as a specific subset of criminals, there is much evidence to support the notion that severe punishments do not effectively deter individuals that share many of the same characteristics and sociological profiles of the individuals this Note addresses. See Bagaric, *supra* note 266, at 43–44.

280. See *id.*

281. See *id.* (“[I]n the absence of the threat of punishment for criminal conduct, the social fabric of society would readily dissipate; crime would escalate and overwhelmingly frustrate the capacity of people to lead happy and fulfilled lives.”); see also Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 *ANN. REV. ECON.* 83, 85 (2013) (discussing how certainty of punishment functions as an effective deterrent); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 *J. CRIM. L. & CRIMINOLOGY* 765, 766 n.1 (2010) (“It is easy enough to see that criminal deterrence frequently and effectively influences our actions. We all ‘throw out the anchor’ on the highway when we spot a patrol car. We generally do not park in handicapped-only parking spots. We do not light up a joint at the movies.”).

282. See, e.g., Bagaric, *supra* note 266, at 44; Gary Kleck, Brion Sever, Spencer Li & Marc Gertz, *The Missing Link in General Deterrence Research*, 43 *CRIMINOLOGY* 623, 626 (2005); Nagin, *supra* note 281, at 85.

283. See Will Kenton, *Law of Diminishing Marginal Returns*, *INVESTOPEDIA*, <http://www.investopedia.com/terms/l/lawofdiminishingmarginalreturn.asp> [<http://perma.cc/S9FL-EFPK>] (last updated May 22, 2018) (“The law of diminishing marginal returns states that, at some point, adding an additional factor of production results in smaller increases in output.”). Applied to punishment and deterrence, this concept means that adding an additional unit of punishment, measured in prison time, results in smaller increases in the deterrent effect. See *id.*

284. See Paternoster, *supra* note 281, at 782 (“[T]he decision to commit crime is no different than the decision to go to college or to get married—it is made by reasonable, rational agents who are self-interested and select behaviors that provide more rewards than costs.”).

to this model.²⁸⁵ It is true that human beings are rational in that they understand costs and benefits and respond to them accordingly.²⁸⁶ But there are a number of factors that impact the extent of human rationality and thus the predictive capabilities of the deterrence model.²⁸⁷ One important factor that affects this internal cost-benefit analysis is the immediacy of those costs or benefits.²⁸⁸ Because punishments are usually not suffered until long into the future, as compared to gains, which are generally immediate, the cost-benefit calculus becomes skewed and the punishment's deterrent effect more limited.²⁸⁹

Harsh sentences are particularly ineffective in deterring most low-level drug couriers, whose circumstances make it even less likely that they will be able to rationally assess the costs and benefits of their actions.²⁹⁰ A substantial number of low-level drug couriers resort to criminal conduct as a result of grave economic difficulties.²⁹¹ The circumstances these couriers face are likely to skew the cost-benefit calculation underlying the theory of deterrence.²⁹² First and foremost, individuals coming from economic disadvantage have less to lose than those coming from privilege.²⁹³ Furthermore, evidence indicates that poverty negatively impacts the development of children, which leads to poor impulse control.²⁹⁴ Lawmakers should take these observations into account in evaluating the deterrent value of harsh criminal punishments for drug couriers, many of whom have lived their entire lives in dire economic circumstances.²⁹⁵ The same logic applies to couriers who are victims of abuse or who are under other forms of threat.²⁹⁶ To the extent that the courier calculates the costs and benefits of her decision to smuggle drugs, at the forefront of her mind is inevitably the immediate abuse that she will suffer if she does not

285. *See id.* at 819–21.

286. *See id.* at 819.

287. *Id.* at 821.

288. *Id.* (“For deterrence to work well, the would-be offender, tempted by the immediate gains of committing the crime, must be able to quickly conjure up in her mind the anticipated pain of punishment.”).

289. *Id.* (“Think for a moment of the predicament of the dieter tempted by a delicious slice of chocolate cake. The pleasures are powerful and immediate, and the pain of added pounds is down the road, removed in time.”); *see also* Hans von Hentig, *The Limits of Deterrence*, 29 J. AM. INST. CRIM. L. & CRIMINOLOGY 555, 559 (1938) (“[T]he criminal seems to be in part a human specimen, whose appetites and desires are irresistibly attracted by a *near* object.”).

290. *See supra* Part II.B.2.

291. *See supra* Part II.B.2.

292. *See supra* Part II.B.2.

293. *See* Bagaric, *supra* note 266, at 13 (“The reason that financially prosperous people often do not commit crime is because they have too much to lose from the incidental adverse consequences of a conviction, including the negative impact on their employment, reputation, and resource base.”).

294. *See* Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 865–66 (2008) (discussing that where traumas are experienced early in life, whether in the form of poverty, abuse, racial discrimination, or otherwise, individuals are more prone to engage in criminal activity).

295. *See supra* notes 173–79 and accompanying text.

296. *See supra* notes 166–72 and accompanying text.

participate.²⁹⁷ The legal punishment she may suffer in the future is likely to play a lesser role in her calculation compared to the more immediate costs or benefits that tend to weigh more heavily in the decision-making process.²⁹⁸

It would exceed the bounds of logic to conclude that harsh criminal penalties could deter individuals who are already risking their lives for a relatively small monetary gain.²⁹⁹ In the case of couriers who ingest dozens of heroin- or cocaine-filled pellets, the risk of death or serious bodily injury is significant.³⁰⁰ If the individual rationally assesses the decision to smuggle drugs and decides that risking her life is worth a few thousand dollars, then her current circumstances are likely so dire that a harsh criminal penalty is unlikely to have any deterrent effect. If the individual is not rationally calculating the costs and benefits of her decision to smuggle, it undercuts the very foundation on which deterrence theory rests. Whichever it is, increasing the severity of criminal penalties is unlikely to impact their deterrent value vis-à-vis low-level drug couriers.

3. Incapacitation

Much like deterrence, incapacitation is a consequentialist theory of punishment, which seeks to impose penalties as a means of preventing future crime.³⁰¹ However, incapacitation theory is more narrowly focused in that punishments are designed to prevent individuals from committing future offenses.³⁰² The most common way to incapacitate an individual, and prevent her from committing future crimes, is through incarceration.³⁰³ In its simplest terms, incapacitation seems to provide an adequate justification for the current enforcement of low-level drug couriers. By sentencing couriers to long terms of incarceration, the justice system prevents them from importing more drugs into the United States during their sentence and effectively satisfies the objective of incapacitation.³⁰⁴

However, incapacitation theory is much more nuanced, and it is important to analyze those intricacies before fairly assessing whether it justifies long prison sentences for low-level drug couriers. Proponents of incapacitation theory emphasize the importance of optimal incapacitation, which involves arriving at a sentence for which the benefits of incapacitation outweigh the costs of incarceration.³⁰⁵ In this respect, incapacitation theory involves a cost-benefit analysis, where the benefits are the social improvements that

297. See Paternoster, *supra* note 281, at 821; von Hentig, *supra* note 289, at 558–59.

298. See Paternoster, *supra* note 281, at 821; von Hentig, *supra* note 289, at 558–59.

299. See *supra* notes 149–63 and accompanying text.

300. See *supra* note 154 and accompanying text.

301. PFAFF, *supra* note 257, at 44–45.

302. *Id.*

303. *Id.* Incarceration, however, is not the only way to incapacitate an individual to restrict future criminal activity. A rather extreme example is chemically castrating a rapist to prevent him from raping again. *Id.*

304. See *id.*

305. *Id.* at 45.

result from having individuals incarcerated³⁰⁶ and the costs are not only the financial costs of incarceration, but also the collateral damage resulting from incarceration.³⁰⁷ Thus, if the sentence is excessive and its costs outweigh its benefits, it does not provide optimal incapacitation.

Crucial to measuring the benefit derived from incapacitating an individual who has committed an offense is the replacement effect of an arrest and subsequent incarceration of a defendant.³⁰⁸ That is, incapacitation is only effective at reducing crime insofar as new individuals are not willing to replace incarcerated individuals.³⁰⁹ Many of the shortcomings of the War on Drugs may be due in some part to the replacement effects of incarcerating individuals involved in drug crimes,³¹⁰ which are particularly apparent in the case of low-level drug couriers. A review of the legislative history of the 1986 Amendments reveals that Congress did not consider the possible replacement effects of implementing harsh mandatory sentences for low-level offenders.³¹¹ Moreover, the circumstances surrounding the criminal acts of many low-level drug couriers strongly support the conclusion that they are disposable and easily replaceable resources in the scheme of the larger drug operation.³¹² Because the socioeconomic circumstances that render so many individuals vulnerable to recruitment as couriers broadly affect communities, compared to specific individuals, it is likely very easy for drug organizations to choose from an abundant supply of potential couriers.³¹³ The fact that many couriers are kept uninformed of the details of the importation conspiracy—as a way to insulate the higher-ups in the event that the couriers are apprehended—further supports this conclusion.³¹⁴ Drug organizations need not provide couriers with any potentially valuable information, because of the ease with which they can find new recruits whose circumstances render them desperate enough to accept the high-risk, low-reward role of a courier.³¹⁵ The Commission corroborates these conclusions, finding that 77 percent of cocaine couriers are engaged in a single transaction.³¹⁶

306. Thomas J. Miles & Jens Ludwig, *The Silence of the Lambdas: Detering Incapacitation Research*, 23 J. QUANTITATIVE CRIMINOLOGY 287, 290 (2007).

307. *See supra* Part III.A.

308. *See* PFAFF, *supra* note 257, at 47.

309. *Id.*; *see also* Miles & Ludwig, *supra* note 306, at 290 (“Incapacitation provides a social benefit of reduced crime when the incarcerated person would commit additional offenses if not confined (*and if replacement effects are not complete*).” (emphasis added)).

310. PFAFF, *supra* note 257, at 47.

311. *See* H.R. REP. NO. 98-1199, at 10 (1985) (describing how stronger penalties will reduce the supply of drugs entering the United States by incarcerating the individual traffickers).

312. *See supra* Part II.B.2.

313. *See supra* Part II.B.2.

314. *See supra* notes 139–42 and accompanying text.

315. *See supra* notes 166–79 and accompanying text.

316. U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY 46 n.117 (2002), https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf [<https://perma.cc/CC3F-6W67>].

To achieve true incapacitation and crime control, resources would be better spent addressing the circumstances that make drug couriership such an attractive option for vulnerable individuals in impoverished communities. Efforts to increase economic opportunities and to provide actual relief to victims of domestic violence might be more effective in preventing individuals from acting as drug couriers than would incarcerating them.

Incapacitation need not come in the form of incarceration; in fact, it need not come in the form of punishment at all.³¹⁷ For example, helping a person find gainful employment may very well stop her from dealing drugs because it provides her with a steady income and takes up time that she might otherwise spend fraternizing with drug organizations.³¹⁸ Similarly, providing someone with an opportunity to become a prosperous member of her community might incapacitate her motivation to become a drug courier.³¹⁹ Such efforts would also reduce the replacement effect of individuals who do commit crimes and are caught because they would lower the supply of vulnerable recruits.³²⁰ However, the current regime focuses on incarceration as the proper way to incapacitate drug couriers and restrict future crime. In doing so, it fails to recognize the circumstances of the people whom they are prosecuting and, as a result, fails to achieve real reform.³²¹

4. Rehabilitation

The final factor that § 3553(a)(2) instructs courts to consider focuses on the rehabilitation of the defendant.³²² Incarceration may be a useful mechanism for achieving rehabilitation to the extent that it can provide incarcerated individuals with the tools and training they need to succeed when their sentence ends and they return to society.³²³ But the current policies, which have resulted in tremendous growth in the prison population,³²⁴ have made rehabilitation very difficult to achieve in the federal correctional system. Prison overcrowding is a well-documented obstacle to effective rehabilitation because it threatens the prison's ability to provide basic human needs, like healthcare and food, let alone effective educational and training programs.³²⁵ If the current policy of pursuing long prison

317. See PFAFF, *supra* note 257, at 47.

318. See *id.*

319. See *id.*

320. See *supra* Part II.B.2.

321. See *supra* Part II.B.2. While much more could be said about efforts to bring about substantive socioeconomic reform in these communities, this Note does not focus on them.

322. 18 U.S.C. § 3553(a)(2)(D) (2012) (instructing courts to consider the need for the sentence “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

323. See PFAFF, *supra* note 257, at 48.

324. See *supra* notes 182–86 and accompanying text.

325. *Overcrowding*, PENAL REFORM INT'L, <https://www.penalreform.org/priorities/prison-conditions/key-facts/overcrowding/> [<https://perma.cc/HJ9P-ZAU4>] (last visited Feb. 12, 2019).

sentences for low-level drug couriers continues and prison populations continue to grow, rehabilitation efforts will inevitably suffer.³²⁶

Because women are often recruited as low-level drug couriers and subsequently incarcerated,³²⁷ the correctional system should recognize the differences between men and women, including their pathways to crime and how the criminal justice system should address them.³²⁸ However, it was not until relatively recently that these differences were even acknowledged in the field of criminology,³²⁹ and the male-centric criminal justice system has been slow to respond with efforts to effectively rehabilitate women.³³⁰ Approximately 90 percent of women suffer from some form of trauma when entering the correctional system,³³¹ which may be the result of physical or sexual abuse or separation from their children.³³² However, female correctional facilities have been ill-equipped to address these issues.³³³ A September 2018 Office of the Inspector General report reviewing the BOP's management of female inmates identified a number of flaws in the BOP's trauma treatment program, including inadequate staffing, which render the program ineffective.³³⁴ Until the BOP implements the necessary changes to ensure that all inmates in need of trauma-related services receive them, effective rehabilitation cannot be achieved for a substantial number of drug couriers in the federal correctional system.

IV. THE COURIER CARVEOUT: A LEGISLATIVE RESOLUTION TO THE HIGH COSTS OF PROSECUTING LOW-LEVEL DRUG COURIERS

The current enforcement policy of pursuing harsh punishments for low-level drug couriers is costly, both monetarily and in terms of the collateral damage it imposes on the defendants and innocent third parties.³³⁵ Furthermore, the benefits of these policies fail to outweigh their costs. Because low-level drug couriers often possess little to no information on the larger operation, harsh enforcement policies are not effective mechanisms for

326. *See id.*

327. *See supra* notes 143–48 and accompanying text.

328. *See* Bloom et al., *supra* note 203, at 36–37.

329. *See id.* at 36. It was not until 1997 that the BOP developed a formal policy (or program statement) on how to manage its female offenders. OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 4 (2018), <https://oig.justice.gov/reports/2018/e1805.pdf> [<https://perma.cc/4ETF-EX2S>].

330. *See* Bloom et al., *supra* note 203, at 41.

331. OFFICE OF THE INSPECTOR GEN., *supra* note 329, at 19.

332. *See* Bloom et al., *supra* note 203, at 35 (describing how PTSD is common in women who have experienced physical or sexual abuse); Goldfarb, *supra* note 166, at 295–96 (describing how female offenders are more prone to major traumas related to the separation from their children).

333. *See* Goldfarb, *supra* note 166, at 295–96 (describing how “a lesser degree of economies of scale in women’s prisons means that women often receive fewer prison services to address [trauma-related] issues than do male inmates”).

334. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 329, at 16–18. The Office also reported a lack of access to the BOP’s residential programs for pregnant inmates, as well as flaws in the distribution methods for feminine hygiene products. *Id.*

335. *See supra* Part III.A.

incentivizing cooperation or obtaining important information on more culpable players within the drug enterprise.³³⁶ Moreover, the current sentencing schemes fail to satisfy the objectives of the punishment laid out in the SRA.³³⁷ This Note proposes a legislative amendment to the federal importation statute,³³⁸ which would create a carveout for low-level drug couriers who meet certain criteria. The provision would require that defendants meeting the criteria be charged with a separate misdemeanor falling outside the realm of the Guidelines and the mandatory minimum sentences currently in place under § 960.³³⁹

A. Proposed Criteria

The criteria used to determine whether a defendant qualifies for the misdemeanor carveout would correlate to certain factors that indicate an individual's position within the hierarchy of a drug organization. Fortunately, one need not look far for suitable models because the Holder Memo laid out a set of criteria for AUSAs to use to determine whether a defendant was a low-level participant.³⁴⁰ The Holder Memo criteria focused on the use of weapons or violence, the involvement of minors, whether the defendant was a leader in or had ties to the drug-trafficking organization, and whether the defendant had a criminal history.³⁴¹ These criteria serve as a useful starting point, but they fail to address the specific factors that make an individual a leader, a high-ranking member, or a low-level participant in the drug-trafficking enterprise.

The safety valve provision represents another effort to identify low-level participants and provide relief from the mandatory minimum sentences in place.³⁴² The safety valve criteria do not differ much from the Holder Memo criteria as they also focus on, *inter alia*, criminal history,³⁴³ the use of violence or weapons,³⁴⁴ and whether the defendant was a leader or organizer.³⁴⁵ However, the safety valve criteria also fail to specify the characteristics common to low-ranking members in a drug-trafficking organization. However, an article critiquing the safety valve criteria listed specific factors that could serve as a useful starting point for a statutory carveout.³⁴⁶ The critique proposed an amendment to the safety valve provision, which would direct courts to consider the following criteria:

336. *See supra* Part III.B.

337. *See supra* Part III.C.

338. This resolution would likely require amending two statutes. The first amendment would affect 21 U.S.C. § 952, which defines the crime of importation. The second change would impact 21 U.S.C. § 960, which prescribes the mandatory minimum sentences that drug couriers face.

339. *See id.*

340. Holder Memo, *supra* note 121, at 2.

341. *Id.*

342. *See supra* Part I.B.2.b.

343. *See* 18 U.S.C. § 3553(f)(1) (2012).

344. *See id.* § 3553(f)(2).

345. *See id.* § 3553(f)(4).

346. Froyd, *supra* note 20, at 1500–01.

whether the defendant received a small, flat fee payment versus a percentage of profits; whether the defendant simply delivered drugs one way and did not deliver money in return; whether the defendant received a prepackaged bag; whether the defendant delivered the package to a previously unknown individual; whether the defendant negotiated the terms of the sale; and whether the defendant owned or financed the drugs involved.³⁴⁷ These factors directly address many of the experiences common to low-level drug couriers³⁴⁸ and would thus effectively filter them out while still maintaining harsher penalties for those occupying more senior roles in the drug organization.

B. Advantages of the Carveout

A statutory carveout specifically targeting low-level couriers has several important advantages over the current policies. First, the amendment would move the law away from the current quantity-based model.³⁴⁹ It would charge and punish individuals based not on the weight of drugs they possess, but on their actual culpability, as derived from their status in the drug-trafficking enterprise. It was the goal of the drafters of the 1986 Anti-Drug Abuse Act to punish high-level players more severely,³⁵⁰ but those drafters wrongly assumed that the quantity of drugs in one's possession was the best indicator of status.³⁵¹ A carveout exempting qualifying low-level couriers from mandatory minimum sentences, but maintaining such punishments for high-level players, is consistent with the goals of the drafters of the 1986 Amendments. This proposal also recognizes that not all drug couriers are alike, and thus the criteria would effectively distinguish between experienced couriers and low-level couriers. By more accurately assessing and punishing based on culpability, this legislative amendment also satisfies retributivist goals of punishment.³⁵²

Although the safety valve also functions to spare low-level drug offenders from harsh mandatory minimum sentences,³⁵³ it has a number of flaws that an amendment to the importation statute could address. First, even where the safety valve functions effectively, defendants can still face substantial prison sentences under the Guidelines.³⁵⁴ If judges choose to disregard the

347. *Id.*

348. *See supra* notes 139–42, 155–63 and accompanying text.

349. *See supra* notes 78–83 and accompanying text.

350. *See supra* notes 88–89 and accompanying text.

351. *Compare* H.R. REP. NO. 99-845, at 12 (1986) (illustrating how the drafters of the 1986 Amendments equated drug quantity with status), *with* U.S. SENTENCING COMM'N, *supra* note 5, at 168 (articulating how the quantity of drugs involved in an offense is *not* an indicator of one's role in the offense).

352. *See supra* notes 266–72 and accompanying text (explaining how retributivist goals are best served by punishing according to one's moral blameworthiness).

353. *See supra* Part I.B.2.b.

354. According to the Guidelines, a defendant with no criminal history whose conduct triggers a five-year mandatory minimum sentence and who qualifies for the safety valve is still subject to a twenty-four month sentence, on the low end. *See supra* note 119 and accompanying text.

Guidelines, the problem of excessive judicial discretion arises. Certain low-level defendants may receive leniency, while others still face harsh punishments. This problem is precisely what sparked the massive transformation of sentencing law in the early 1980s.³⁵⁵ By amending the importation statute, all defendants meeting the criteria would be charged with a newly created misdemeanor offense, which only carries a maximum sentence of one year.³⁵⁶ This amendment would significantly narrow the range of possible sentences available to the judge and would promote uniformity among similarly situated offenders without sacrificing the ability of the law to distinguish between offenders demonstrating different levels of culpability.

Additionally, the safety valve does not address the long-term consequences that accompany a felony conviction, such as the inability to secure employment³⁵⁷ and the loss of certain public benefits,³⁵⁸ even in cases where its application spares the defendant of prison entirely. By charging a qualifying defendant with a misdemeanor rather than a felony, this proposed amendment would significantly reduce the collateral costs incurred by society under the current system. Charging low-level couriers with a misdemeanor would also result in monetary cost savings because it would reduce the number of people in the prison system overall and may further preserve resources by inducing more defendants to accept plea deals rather than going to trial. This would not only give defendants the ability to move forward with their lives, but it would also free up prosecutors to use their resources to pursue more dangerous offenders.

Finally, a legislative amendment has certain advantages over executive action like the Holder Memo. While executive action is easier to implement, it is also easier to overturn, as was the case when former Attorney General Sessions revoked the Holder Memo.³⁵⁹ Although this proposal would require approval in both houses of Congress and the president's signature, its effects would endure. A legislative solution—if passed—would also more accurately reflect the democratic preferences of the American people than would executive action.

C. Potential Limitations

One of the main limitations of this proposal is that it still leaves prosecutors with considerable discretion to charge low-level drug couriers under other statutes that trigger mandatory minimum sentences. For example, a prosecutor could charge a low-level courier under 21 U.S.C. § 841, which makes it unlawful to knowingly or intentionally possess with the intent to

355. *See supra* notes 31–39 and accompanying text.

356. 18 U.S.C. § 3559(a)(6) (2012).

357. *See supra* notes 217–25 and accompanying text.

358. *See supra* notes 229–35 and accompanying text.

359. *See generally* Sessions Memo, *supra* note 127.

distribute a controlled substance.³⁶⁰ Alternatively, a prosecutor could achieve the same result by charging a low-level courier who transported drugs via airplane under 21 U.S.C. § 959.³⁶¹ One way to address this issue would be to simply trust prosecutors to charge low-level drug couriers under the newly created misdemeanor carveout.³⁶² A more effective, albeit more difficult, resolution would involve amending each and every felony provision under which prosecutors could plausibly charge low-level drug couriers to include this carveout for qualifying defendants. While this would require significantly more congressional action, it would effectively remove the possibility that low-level drug couriers are charged with felonies that trigger mandatory minimum penalties.

Critics of this proposal may argue that it is unlikely to produce any direct benefits—other than a reduction in costs—distinct from those currently provided by enacted laws and policies. For example, it may be argued that creating a misdemeanor carveout would be unlikely to serve as a more effective deterrent than the current policies³⁶³ or induce more cooperation of low-level players than the current policies do.³⁶⁴ But, as discussed above, empirical evidence does not support a correlation between punishment severity and deterrence.³⁶⁵ Moreover, low-level drug couriers are unlikely to possess any helpful information for government investigators.³⁶⁶ Thus, while these justifications may have been rationally employed to undergird prior criminal justice reforms, their subsequent repudiation renders them ineffective as critiques of this proposal.

In addition, this proposal may give rise to indirect long-term benefits. From a rehabilitation perspective, for example, incarcerating fewer people, and reducing the sentences of those who are incarcerated, may allow the correctional system to more adequately utilize its resources for the individuals in the system.³⁶⁷ Similarly, this proposal would reduce the collateral effects of long-term incarceration on children and families, which include reduced educational achievement and an increased likelihood of future criminal activity.³⁶⁸ From an incapacitation perspective, this proposal would shrink the pool of potential recruits for drug-trafficking organizations by opening doors that would otherwise remain closed.³⁶⁹

360. 21 U.S.C. § 841(a)(1) (2012). An individual convicted under this statute can face a five- or ten-year mandatory minimum sentence, depending on the quantity of drugs involved. *Id.* § 841(b)(1)(A)–(B).

361. *Id.* § 959(c)(2). Defendants convicted under this statute may also face a five- or ten-year mandatory minimum sentence, depending on the quantity of drugs involved. *Id.* § 960(b).

362. If the resolution indeed results in significant cost savings for U.S. Attorney's Offices, prosecutors might be more inclined to charge low-level couriers under the misdemeanor statute.

363. *See supra* Part III.C.2.

364. *See supra* Part III.B.

365. *See supra* Part III.C.2.

366. *See supra* Part III.B.

367. *See supra* note 325 and accompanying text.

368. *See supra* notes 190–95 and accompanying text.

369. *See supra* notes 308–20 and accompanying text.

CONCLUSION

The United States has a difficult task ahead; it has a strong interest in curbing the importation of drugs, but current methods are ineffective and costly. Low-level drug couriers face disproportionately harsh punishments, while the leaders of drug-trafficking organizations remain insulated from and largely untouched by law enforcement. In order to achieve real reform that effectively thwarts the inflow of drugs into the United States, policies should seek to address the underlying circumstances that make individuals vulnerable to recruitment as drug couriers. Doing so would likely reduce the supply of willing and able drug couriers, thus making it more expensive for drug-trafficking organizations to import their product. One solution may be to increase investment in communities disproportionately affected by the drug trade. It may also involve addressing wealth disparities and increasing educational and employment opportunities, especially for women.³⁷⁰ One notable challenge would involve overcoming the deeply entrenched gender norms that relegate women to subordinate roles and make them particularly prone to recruitment by drug-trafficking organizations, both within the United States and abroad. While there are many practical obstacles to overcome, and real reform would likely take decades, such challenges should not deter these large-scale transformative efforts.

It is also prudent, however, to enact more immediate and more easily achievable reforms to address some of the injustices perpetuated by current policies. This Note proposes a solution that would do just that. By drafting a legislative amendment to identify low-level drug couriers and charge them under a separate misdemeanor statute, Congress could significantly ameliorate the harms suffered by both individual offenders and society at large as a result of the current ineffectual—and discriminatory—laws.

370. *See supra* Part II.B.2.