

## COMMENTS

### LET THE PUNISHMENT FIT THE CRIME: SHOULD COURTS EXERCISE THE POWER OF APPELLATE SENTENCE REVIEW IN CASES INVOLVING NARCOTICS AND OTHER STIGMATIZED CRIMES?

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*Traditionally, appellate courts defer to criminal sentences within the statutory range established by the legislature for a particular offense. Throughout most of U.S. history, this deferral reflected the fact-finding role played by the trial judge who crafted the sentence. However, the legislature's role in determining sentence ranges requires rethinking the issue of substantive appellate sentence review. In a political climate that is "tough on crime," legislatures continue to ramp up criminal penalties for newsworthy crimes such as narcotics violations, with the result that prison populations, and the taxpayer's bill, have skyrocketed. Appellate courts should exercise greater review powers in a democratically responsible way in order to curtail certain excessive sentences. To this end, this Comment recommends a framework to identify suitable cases for substantive sentence review. First, the appellate court should determine whether the crime has been politicized, such that the crime can be described as stigmatic. If so, the appellate court should then inquire as to whether the sentence is excessive. Under this proposal, a sentence is excessive if it is more severe than that imposed for crimes of similar moral gravity. Finally, if a sentence is excessive, it should be judicially edited to reflect culpability, grounded by a desire to match the sentence to those imposed for morally equivalent offenses in the jurisdiction.*

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## I. INTRODUCTION

The traditional rule under the common law is that an appellate court may not review a sentence that the trial court has imposed if it is within statutory guidelines.<sup>1</sup> Since the legislature establishes narcotics laws, this rule effectively leaves the question of proportionate punishment for narcotics violations within the purview of politicians.<sup>2</sup> In the context of the War on Drugs and a political climate bent on being “tough on crime,” which incentivizes greater penalties for certain criminal offenses, the political element removes the query as to whether a penalty is proportionate and replaces it with an imperative to ramp up penalties.<sup>3</sup>

However, there is a small but growing trend to move away from strict application of the common law rule, even where the statute does not authorize appellate sentence review.<sup>4</sup> Nor is this a new trend, as the case law demonstrates. A generation ago, in *People v. Thomas*, an appellate court held that a state statute prescribing a sentence of fifteen years without the possibility of parole for a third felony drug conviction violated California’s constitutional right to be free from cruel and unusual punishment.<sup>5</sup> Courts that depart from the common law rule discuss amorphous standards such as “shockingly disproportionate” and “clear abuse of discretion,” and may resort to comparing the penalties for offences of similar gravity in making their determination.<sup>6</sup>

There has been much professional and academic discussion about sentencing guidelines fueled by the strong concern that drug sentences may

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<sup>1</sup> Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1443 (1997).

<sup>2</sup> See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1030 (2005) (“The New Jersey Supreme Court recognized that such prosecutorial power [as granted by statute] over mandatory minimum sentences, combined with statutory restrictions on judicial sentencing power, created a regulatory imbalance.”).

<sup>3</sup> See, e.g., Greg Rogers, *Criminal Sentencing in Colorado: Ripe for Reform*, 65 U. COLO. L. REV. 685, 690 (1994) (attributing the rise in prison expenditures and populations to a “tough on crime” attitude). Rogers argues that the rise in prison populations in the state between the early 1980s and 1995 was directly caused by an increase in the average stay of an inmate from twenty-two months to an estimated fifty-three months. *Id.*

<sup>4</sup> Reitz, *supra* note 1, at 1447. Reitz highlights the fact that between 1972 and 1997, the number of sentencing commissions increased from zero to twenty.

<sup>5</sup> 119 Cal. Rptr. 739, 745 (Cal. Ct. App. 1975).

<sup>6</sup> See, e.g., *State v. Fischer*, 498 P.2d 147, 148 (Ariz. 1972) (defining the standard as “clear abuse of discretion”); *In re Foss*, 519 P.2d 1073, 1078 (Cal. 1974) (comparing and contrasting penalties for similar or graver crimes); *Ruhm v. State*, 496 P.2d 809, 816 (Okla. Crim. App. 1972) (characterizing the standard as “shocks the conscience of the Court”).

be overly harsh.<sup>7</sup> The conflict may be characterized as majoritarian (legislatures passing popular crime laws) versus counter-majoritarian (judges challenging legislative power to achieve what they consider fairer results).<sup>8</sup> In short, this Comment argues that the movement away from the common law in sentencing for narcotics and other stigmatic crimes signals judicial dissatisfaction with legislative decision-making, and represents a form of institutional protest, the continued and expanded efforts of which may play a major role in achieving a rational drug criminal policy.

This discussion also concerns itself with the implications of expanding the role of appellate sentence review. Insofar as a greater role for the courts comes at the expense of a lesser role for the legislatures, certain separation of powers questions arise that must be addressed in a government of checks and balances, namely: (1) Is legislative power weakened unconstitutionally?; (2) Do the courts possess manageable standards by which to assess the appropriateness of sentences?; (3) Does a greater role for the courts in this area cause legitimate concern about a slippery slope in criminal cases where sentences have not generally been thought excessive?; and (4) Given the importance of criminal sentences as a badge of societal opprobrium, does appellate sentence review unfairly deprive the citizenry of its voice in making public its disapproval of conduct?

These difficult questions rarely square up with easy solutions in the form of bright-line rules. For those who subscribe to a formal understanding of the separation of powers, the practice of appellate sentence review may be fairly characterized as a usurpation of democratic power.<sup>9</sup> For others, more concerned with the functional aspects of a government of checks and balances, the current lack of incentive for the legislature to act highlights a breach in effective government, calling for an effective solution or at least a means to such a solution.<sup>10</sup>

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<sup>7</sup> David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 458 (2001) (noting that no other Western nation regularly imposes sentences of more than two years, and that “[t]he disparities between the United States and other industrialized nations are greatest with respect to . . . drug crimes”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 269 (2007) (arguing that the growth of both the prison population overall, and its racial disparity, are significantly attributable to aggressive street-level enforcement of drug laws and harsh sentencing of drug offenders).

<sup>8</sup> See, e.g., Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. INT’L L. & POL. 555, 555 (2005) (“[T]he global war on drugs is now causing more harm than drug abuse itself.”).

<sup>9</sup> Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (observing that the mechanism of judicial review is at odds with the republican ideas permeating the founding of the United States).

<sup>10</sup> Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 986 (1991) (defining functional

This Comment would place appellate sentence review as a tool that lies permissibly within the judiciary's power, one that serves the tandem purposes of communicating dissatisfaction to the affected branch and correcting for circumstances not foreseen by this branch. Such review must be selectively employed in a category of cases sharing certain specific characteristics, namely, so-called stigmatic crimes.<sup>11</sup> Stigmatic crimes are certain politicized crimes that a legislature compromised by a "tough on crime" culture is ill-suited to address in a rational and cost-effective manner.

This Comment is divided into three parts. Part II discusses the role of the common law in limiting the historic use of appellate sentence review and situates such review powers as judicial in nature. Part III assesses narcotic sentencing in the United States, including the history, costs, attitudes of different constituencies, and reasons why legislative solutions are unlikely. Part IV advocates a framework for the application of sentence review powers as the most workable solution and responds to certain anticipated arguments against review powers, including the view that such powers impermissibly conflict with the role of the legislature.

## II. APPELLATE REVIEW

### A. THE COMMON LAW RULE FORBIDDING APPELLATE SENTENCE REVIEW

The common law rule holds that an appellate court should not review a sentence where the governing statute specifies that sentence for the relevant offense.<sup>12</sup> What are the rationales behind the adoption of this rule? In what order of importance do courts view them? How can they be logically organized? The discussion to follow addresses these questions in an attempt to frame the common law rule in terms of its costs and benefits. Though utility should rarely be the sole basis for evaluation, it provides us

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separation of powers doctrine as "call[ing] for a system of practical checks and balances so as to maintain a continuing and evolving separation of powers").

<sup>11</sup> See, e.g., Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 180-81 (2004) (observing that the stigmatic effect of conviction affects other individuals in the offender's life, including children); Nora V. Demleitner, *"Collateral Damage": No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1033-34 (2002) (noting that criminal and secondary sanctions, such as de jure disqualification for government benefits or disenfranchisement, marginalize drug offenders, hampering their reintegration efforts and increasing the likelihood of recidivism).

<sup>12</sup> See, e.g., *Ruhm v. State*, 496 P.2d 809, 816 (Okla. Crim. App. 1972) (citing well-settled law that "where the verdict imposed is within the limits of punishment fixed by the Legislature . . . the jury verdict should not be disturbed").

with a starting point for better understanding the normative principles and values at stake.

Administrative convenience may be the consequence that justifies the common law rule in fact.<sup>13</sup> The judiciary in the United States has long adhered to a strong doctrine of finality, one that emphasizes the firmness of decisions and reveals institutional discomfort with revisiting issues where a trial judge had to make a decision on the spot or on the basis of conflicting or inadequate evidence.<sup>14</sup> Great deference to the findings of juries and the discretion of trial judges embodies the rule.

In the common law system, where judges consistently applied considerable discretion in the sentencing of defendants, the refusal to apply appellate review to criminal sentences made sense as a reflection of the trial court's fact-finding role and the discretion available to judges to adjust sentences to the facts of the case at hand. There can be little doubt that nearly every defendant would appeal their sentence under a countervailing system and consume great resources in the process, often with little prospect of a different result. From this perspective, the common law rule is an efficiency restraint that the judiciary imposed on itself.

An alternative rationale for the rule, and probably the more appealing one instinctively, is that it preserves the separation of powers and advances democracy.<sup>15</sup> The separation of powers argument posits that the imposition of criminal sentences in a given case, and the power to define the parameters of such a sentence, are separate functions allocated to different branches of government.<sup>16</sup> Courts impose sentences, but legislatures determine the range of acceptable sentences. Therefore, if an appellate court determines for itself that a sentence is excessive where the statute allowed the sentence, the court's invalidation constitutes an improper taking

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<sup>13</sup> Cf. Reitz, *supra* note 1, at 1445-46 (discussing the administrative convenience rationale for the rule, although placing less emphasis on it in light of other reasons for the rule, such as a lack of substantive sentencing law and the fact that trial courts had no obligation to explain the sentence imposed).

<sup>14</sup> See, e.g., *id.* at 1445.

<sup>15</sup> Pamela L. Bailey, *Harmelin v. Michigan: Is the Eighth Amendment's Proportionality Guarantee Left an Empty Shell?*, 24 PAC. L.J. 221, 232-33 (1992) ("Deference to the judgment of the legislature, and the early absence of clearly defined criteria to guide a review of proportionality contributed to this judicial restraint" in exercising criminal sentence review powers.).

<sup>16</sup> See Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1126-27 (1992). The authors note that "[c]ompeting positions in the sentencing debate often reduce to one writer's preference for one decisionmaker[, legislative versus judicial,] over another . . . [and] legislators often prefer legislatures." *Id.*

of legislative authority.<sup>17</sup> The argument for democracy continues thusly: the legislature represents the will of the people; therefore, any frustration of the legislative will constitutes an affront to democratic decision-making.<sup>18</sup> The legislature here is a proxy for “the people.”

From this angle, the common law rule was generated by the need of the legislature to control the courts, whose counter-majoritarian interests interfere with democracy. But this viewpoint is flawed primarily because it falsely equates the lawmaking function of the legislature with the review power of an appellate court.<sup>19</sup> The legislature creates a law that proscribes prohibited conduct and determines consequences to be applied in a range of anticipated and unanticipated factual scenarios.<sup>20</sup> Appellate sentence review is tied to the facts of a specific case and need not invalidate a statute, short of a constitutional finding that a law is *per se* invalid. That the statute continues to have the same proscriptive effect on future conduct is a testament to the power of the legislature.

A second problem with viewing the rule as a restraint imposed by the legislature is that, after all, the rule is rooted in the common law—judge-made law. The lack of codification by the legislature detracts from the separation of powers argument.<sup>21</sup> That is not to say that courts did not impose the rule on themselves, at least in part, for such reasons. However, the rule may best be understood as judicial in origin, and subject to alteration by that same judiciary. The American Law Institute reached the same conclusion, recommending that criminal sentences be open to appellate review as part of any rational crime policy.<sup>22</sup>

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<sup>17</sup> See, e.g., Corey A. Johanningmeier, Note, *Law & Politics: The Case Against Judicial Review of Direct Democracy*, 82 IND. L.J. 1125, 1126 (2007) (“[L]egal scholars opposing judicial review . . . [distinguish] between unelected courts and more democratic representative legislatures.”).

<sup>18</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (arguing that “judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society”).

<sup>19</sup> See, e.g., Paul E. McGreal, *Ambition’s Playground*, 68 FORDHAM L. REV. 1107, 1111 (2000) (characterizing the pro-legislature attitude as “assum[ing] that the Constitution prefers ordinary law-making by accountable legislatures over prevention of ordinary law-making by judges exercising judicial review” (footnote omitted)).

<sup>20</sup> See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 928 (2004) (“[C]ases involving unusual facts . . . raise questions the legislature likely failed to anticipate. Such disputes are probably inevitable . . . given the limitations of language . . .”).

<sup>21</sup> See Reitz, *supra* note 1, at 1444. Reitz observes that even where the courts recognized the power of appellate sentence review, they largely refrained from exercising it. This fact suggests a custom of deference to the legislature, but not a binding rule.

<sup>22</sup> AM. BAR ASS’N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 3 (Approved Draft 1968) [hereinafter AM. BAR ASS’N PROJECT].

B. INNOVATIONS ON AND DEROGATIONS FROM THE COMMON LAW  
RULE

In the 1970s, the appellate system in California handed down a significant ruling asserting that deference regarding sentencing was not an unassailable obligation of the court. In *People v. Thomas*,<sup>23</sup> the defendant, Melvin Braxton Thomas, was a drug offender whom the court sentenced to fifteen years without the possibility of parole under the terms of the relevant narcotics statute.<sup>24</sup> The issue on appeal was whether the legislature's denial to the defendant of the possibility of parole constituted cruel and unusual punishment under the state constitution.<sup>25</sup>

Though the court's opinion does not identify the state's arguments on the matter, the state likely argued that the legislature's democratic process precluded a finding that the sentence constituted cruel or unusual punishment. Central to this argument is the idea that where standards lack clear objective criteria, such as the line demarcating cruelty from just punishment, the will of the people, rather than executive or judicial bureaucrats, should determine the necessarily arbitrary boundaries.<sup>26</sup> This point further assumes that the legislature represents popular will and the judiciary represents an instrument that frustrates that will.<sup>27</sup> This is an assumption that this Comment will revisit, and challenge, in Part III.

However, criminal sentences are, or can be, subjected to a principled test of proportionality under the cruel and unusual punishment doctrine.<sup>28</sup> Under this approach, the court would be free to find any sentence excessive where the court felt that such a sentence was out of proportion to the nature of the offense.<sup>29</sup> While the *Thomas* opinion kept silent as to the criteria

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<sup>23</sup> 119 Cal. Rptr. 739 (Cal. Ct. App. 1975).

<sup>24</sup> CAL. HEALTH & SAFETY CODE § 11350 (West 1973).

<sup>25</sup> *Thomas*, 119 Cal. Rptr. at 760.

<sup>26</sup> See, e.g., Richard Albert, *The Constitutional Imbalance*, 37 N.M. L. REV. 1, 3 (2007) ("Democratic legitimacy can come only from freely given popular consent expressed through an elected legislature.").

<sup>27</sup> See, e.g., Johanningmeier, *supra* note 17, at 1126 (referring to "judicial review—and . . . the associated concept of a legal aristocracy"); Waldron, *supra* note 18, at 1395 (noting that "[judges'] credentials are not remotely competitive with the democratic credentials of elected legislators").

<sup>28</sup> See Anthony A. Avey, Casenote, *Hudson v. McMillian*, 112 S. Ct. 995 (1992), 24 ST. MARY'S L.J. 539, 546 (1993) (noting the second prong of the test is whether a punishment is "grossly out of proportion to the crime committed" (internal quotation marks omitted)).

<sup>29</sup> Federal courts can expect greater difficulty than state courts in applying proportionality review. See Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 55 (2000) (noting that the Supreme Court "chastised the Fourth Circuit for overturning" on proportionality grounds a forty-year sentence for possession of a "small amount of marijuana").

consulted in measuring the nature of an offense, it strongly implicated normative notions of fairness in ruling for the defendant.

By reference to *In re Foss*, the court compared the penalty to those the legislature had assigned to “more serious crimes,” both in California and in other jurisdictions.<sup>30</sup> In making the leap from this comparison to the conclusion that the sentence was excessive, the court must have assumed that drug offenses are not, in and of themselves, comparable in terms of gravity to these other violent offenses.<sup>31</sup> In Part III, this Comment will debate the issue of whether court determinations of an offense’s gravity always, never, or sometimes violate the principles of limited government.

While decisions similar in result to this California case are rare,<sup>32</sup> many cases do adopt, at least by implication, the *Thomas* court’s reasoning when asserting their authority to review statutory criminal sentences. Freely acknowledging that result-driven cases assert themselves most forcefully, we must not forget the important role played by the assertion of the right to review.<sup>33</sup> The right to review necessarily implicates the authority to apply standards of review. It is a standard of judicial abdication, rather than of review, to defer automatically to the actions of the reviewed parties.

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<sup>30</sup> *Thomas*, 119 Cal. Rptr. at 752 (citing *In re Foss*, 519 P.2d 1073, 1076 n.3 (Cal. 1974)). In *In re Foss*, the court concluded that the lack of parole provision in the California statute constituted cruel and unusual punishment, in part because the penalties exceeded those assigned to more serious offenses in California and other jurisdictions. *Foss*, 519 P.2d at 1078-79.

<sup>31</sup> *Foss*, 519 P.2d at 1081 (“A compulsory prison sentence of 20 years for a non-violent crime imposed without consideration for defendant’s individual personality and history is so excessive that it ‘shocks the conscience.’” (quoting *People v. Lorentzen*, 194 N.W.2d 827, 834 (Mich. 1972))).

<sup>32</sup> See, e.g., *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding that a Los Angeles statute criminalizing narcotics addiction violated the Fourteenth Amendment because the law punished status); *People v. Thomas*, 116 Cal. Rptr. 393, 400-01 (Cal. Ct. App. 1974) (holding that a sentence of six months to life for assault with a deadly weapon constituted cruel and unusual punishment because the maximum sentence for trying to kill the victim would have been fourteen years; other violent crimes also received lower punishments: kidnapping (one to twenty-five years); assault with intent to injure or disfigure (one to fourteen years); dismemberment (one to fourteen years)).

<sup>33</sup> See *Marbury v. Madison*, 5 U.S. 137, 173 (1803) (exercising judicial review powers, the Supreme Court invalidated its own jurisdiction under the Judiciary Act of 1793, which the Court determined to be unconstitutional). Marshall asserted review powers in a politically safe way because the result of the case appeased the Jefferson Administration. See, e.g., Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483, 1547 (1997) (discussing “the political circumstances Chief Justice Marshall faced” in the *Marbury* case).

In surveying cases derogating from the common law rule, one frequent theme is the courts' constant, although unstated, hesitancy to contradict the legislature blatantly, or to propose a framework by which criminal sentences would be reconsidered wholesale by the judiciary.<sup>34</sup> This reluctance suggests that advocates for the common law rule overstate the threat of judicial encroachment on legislative turf.<sup>35</sup> Another point of interest is the simple question: why assert the power at all? What reason would a court have to assert the authority of appellate review in a case where such an assertion will not alter the ultimate outcome?

The cynical attitude that all entities seek to aggrandize their power is an inadequate explication, because it fails to address the unique context of these decisions. This Comment proposes that courts in the last generation or so perceive a growing problem—the legislature's proliferation of heavy-handed sentences in the pursuit of reelection—and that courts foresee a future where this problem could become so severe that the power of appellate sentence review will be critical in cases where it has not been thus far.

### III. NARCOTIC SENTENCING

#### A. MODERN HISTORY OF NARCOTIC SENTENCES: THE POLITICAL ANGLE

In the American system, judges enjoyed great latitude in the determination of criminal sentences until the second half of the twentieth century, with its dramatic increase in scope of the federal government's involvement in the daily lives of citizens.<sup>36</sup> The expansion of the federal government coincided with intense social conflict as the nation struggled to

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<sup>34</sup> See *People v. Marshall*, 629 N.E.2d 64, 73 (Ill. App. Ct. 1993) (requiring a showing that the sentence was a clear abuse of discretion); *People v. Alvarado*, 504 N.Y.S.2d 825, 826 (App. Div. 1986) (holding that modifying the sentence is appropriate only in extraordinary circumstances). *But cf.* *McLaughlin v. Minnesota*, 190 N.W.2d 867, 872 (Minn. Ct. App. 1971) (indicating appropriate sentence review where the sentence exceeds bounds of justice and humanity).

<sup>35</sup> *But cf.* Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 AKRON L. REV. 373, 387-89 (2006) (arguing that, at least in the Supreme Court context, the Justices tend to have expanded their power of review beyond the holding of *Marbury*, 5 U.S. at 173). However, as Huhn himself points out, *id.* at 387-89, the Court has pushed review powers into some arenas, such as state legislation, more than others, like state criminal laws. One consequence of the ideological dichotomy between the antagonists and the proponents of judicial review is the oversimplification of the debate. When the issue should be whether judicial review is appropriate and advantageous in a particular context, the argument devolves into whether review powers should exist at all.

<sup>36</sup> Reitz, *supra* note 1, at 1445.

define itself in the midst of the Cold War.<sup>37</sup> Dissidents and protesters became associated in the media with use of narcotics, and the ensuing debate over narcotics then took on a political scope: narcotics did not simply undermine individual lives, they undermined an entire way of life.<sup>38</sup> In this rhetorical framework, with narcotic use tantamount to an issue of national security, state and federal legislation targeted illegal narcotic use and a host of associated activities.<sup>39</sup> The legislation was aimed not so much at curbing detrimental conduct as it was at reassuring a troubled voting public that the government would clamp down on social upheaval.<sup>40</sup>

Political desire to reassure the public quickly grew into a competition that was so completely unrelated to the goal of actual deterrence that it quickly achieved a staggering degree of “overdeterrence.”<sup>41</sup> I refer to overdeterrence not in the sense that politicians eradicated the problem at inefficient cost, but rather in the sense that the incredible penalties were inefficient because they had too little effect on conduct. If increasing narcotics penalties would solve the narcotics issue—by making a rational decision-maker adjust for the increased risk of life-shattering punishment such that the decision to use drugs becomes irrational—then one would expect the incarceration of drug offenders would remain constant (if the amount of deterrence was perfectly efficient), or else decrease until equilibrium.

But the story of the War on Drugs is exactly the opposite—skyrocketing prison populations and skyrocketing black market economies arose, both built around trafficking in and use of narcotics.<sup>42</sup> Two

<sup>37</sup> See, e.g., Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 470 (2007) (noting the aggregate effect on society of the Vietnam War, Civil Rights movement, violent riots, and civil protests).

<sup>38</sup> *Id.* at 470-71 (observing that conservative Americans “thought that defiant displays of civil disobedience threatened social order and were encouraged by the meek response of law enforcement”).

<sup>39</sup> Carole Shapiro, *Law v. Laughter: The War Against the Evil Weed and Big Screen Reefer Sanity*, 29 OKLA. CITY U. L. REV. 795, 817 (2004).

<sup>40</sup> *Id.*

<sup>41</sup> Brooke A. Levy, Comment, *When Cute Acronyms Happen to Bad Legislation: The Reducing Americans’ Vulnerability to Ecstasy “Rave” Act*, 98 NW. U. L. REV. 1251, 1265 (2004) (“[P]eople think that they can [just] stop drug traffic by putting people in jail and by having terribly long sentences. But, of course, it doesn’t do any good.” (quoting Senior Judge Whitman Knapp, J., Southern District of New York)). Evidence further shows no effects in reducing the influx of narcotics or incidences of drug crime. *Id.*

<sup>42</sup> See, e.g., Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a “Tough on Crime” Philosophy*, 93 KY. L.J. 305, 309 (2004) (“America has increased its incarceration rate 500% [between 1973 and 1997], it has 5% of the world’s population but 25% of its prisoners . . . and no one argues that America has made great progress in controlling crime . . .”).

important observations follow. First, the legislative arsenal for combating illegal drugs—increasing criminal sentences—has failed in pragmatic terms, even if its advocates would claim a moral victory. Second, if we recognize that the assessment of government policies needs a reasonable rudder, we can use economic analysis—insofar as it investigates the conduct of rational actors—to ground analysis of legislative measures and to propose principled frameworks for the courts to apply when reviewing criminal sentences in an appellate capacity.

#### B. COST OF NARCOTIC SENTENCES

Understandably, a rational citizen could conclude that drug offenders “deserve” their sentences as a result of their immoral conduct and that complaints about the narcotic sentencing regime are, at best, misdirected sympathy, or, at worst, backdoor legalization efforts.<sup>43</sup> After all, narcotics are the centerpiece of a multi-billion-dollar black market in the United States.<sup>44</sup> That black market regulates itself through networks of crime and violence that destroy lives and undermine communities.<sup>45</sup> These social ills are said to justify hard sentences for even simple possession of narcotics. And if hard sentences effectively combat the drug economy, then this approach would make perfect sense.<sup>46</sup>

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<sup>43</sup> John T. Schuler & Arthur McBride, *Notes from the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893, 931 (1990) (summarizing the view that drug users are punished not so much for their culpability in using drugs, but for their potential culpability in the introduction of non-users to drug culture).

<sup>44</sup> ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* 14 (2004).

<sup>45</sup> Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1233, 1240 (1998) (“Drugs were also said to deplete a neighborhood’s human capital by ruining once-promising lives and forcing productive members of the community to move elsewhere.”).

<sup>46</sup> *But cf.* George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders’ Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1218-19 (1998) (endorsing the “broken windows” metaphor, which posits that aggregate crime increases as a result of police neglect of minor offenses, which the authors contend communicates social apathy to would-be criminals). Kelling and Bratton argue that police efforts in targeting minor or “victimless” crimes rather than economics account for the decline in crime in New York City during the 1990s. *Id.* at 1217. As evidence, Kelling and Bratton cite unemployment statistics to demonstrate that the economy was “hardly . . . booming.” *Id.* However, the unemployment statistics cited must be contrasted with the significantly higher unemployment rate during the preceding recession generated, in part, by a massive rise in taxes. E.J. McMahon, *Tax-and-Spend, Boom-and-Bust: Lessons for Mayor Bloomberg*, 23 CIVIC REP. 1 (2001) (“[In the early 1990s, Mayor] Dinkins . . . tried to close the budget gap primarily with added taxes. He succeeded only in fueling the destruction of 300,000 private sector jobs . . .”). In fact, after recovering from Dinkins’s tax hike, the New York City economy boomed in several boroughs other than Manhattan through the 1990s, including

But they do not work. Instead, the narcotics industry in America follows a “cycle of crime” model. Imagine a community with a well-established drug economy. As the result of a systematic police campaign, the key narcotic traffickers are arrested and subsequently convicted. Their long sentences cost taxpayers billions of dollars per year.<sup>47</sup> In the next stage of the cycle, drug crime drops as the distributors reel. Yet the demand remains high, and an opportunistic new generation steps into the gap, allowing the drug trade to continue to flourish. The cycle then continues with another raid, another round of convictions, and another round of expensive sentences. Since the prison sentences are long, the subsequent generations of prisoners overlap, imposing ever greater costs. And what is achieved?<sup>48</sup> Some culpable persons are punished, but the problem is not eliminated. The more time passes, the more generations imprisoned, the greater the cost to society of maintaining some kind of equilibrium on this insane hamster wheel.

This inefficiency matters because it exposes the nation to greater crime, placing us and our property in intolerable peril. In a world of scarce resources, when we devote resources to enforcing the narcotics criminal regime, we necessarily choose not to apply them to some other end<sup>49</sup> (say, programs designed to prevent domestic violence) that might yield greater returns in terms of reducing the number of crime victims.

The victimization of human beings that we could protect with our current level of investment, but fail to because the money is spent inefficiently, is a tragic and unnecessary cost to society as a whole. The

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Queens. Michael L. Dolfman & Solidelle F. Wasser, *9/11 and the New York City Economy: A Borough-by-Borough Analysis*, 127 MONTHLY LAB. REV., June 2004, at 3, 13. The correlation between economic growth and declining rates of crime undercuts Kelling’s and Bratton’s assertion that primarily police factors effected the drop in inner-city crime.

<sup>47</sup> Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 460 n.374 (1997) (referencing Jim Haner, *The War on Drugs: Unwinnable, Profligate, Corrupting*, BALT. SUN, May 19, 1996, at 1E (revealing that since 1981, the United States has spent \$65 billion on the War on Drugs movement—most of it on anti-drug law enforcement—“without making so much as a dent in the supply, price or general availability of illegal drugs”)).

<sup>48</sup> See Levy, *supra* note 41, at 1265 (“After decades of criminal prohibition and intensive law enforcement efforts to rid the country of illegal drugs . . . , violent traffickers still endanger life in our cities, a steady stream of drug offenders still pours into our jails and prisons, and tons of cocaine, heroin and marijuana still cross our borders unimpeded.” (quoting ACLU, Drug Policy, available at <http://www.aclu.org/DrugPolicy/DrugPolicyMain.cfm> (last visited Jan. 25, 2009))).

<sup>49</sup> Schuler & McBride, *supra* note 43, at 932 (“If punishment is needed for robbery, larceny, and child abuse, which we firmly believe that it is, let’s not waste our time with drug buyers. Regardless of whether or not America decides to decriminalize, resources devoted to drug possession cases are wasted and will be wasted, unless we first make serious inroads on violent, white collar and street-level crime.”).

problem is that when the strength of the black market drug economy tells us that our massive investment of resources is netting no results, politicians call out for us to throw even more money at the problem.<sup>50</sup> And this is what longer prison sentences and lofty incarceration rates are—investments of taxpayer money.

This is not to say the government should stop allocating resources to combating drug crime. But the government should be accountable for how it goes about the job. Deterrence via harsh drug sentences has been the principal tool in the arsenal. Common sense tells us that the length of sentences exceeds their deterrent effect, since drug crimes are punished more severely than crimes like assault and sexual abuse, but the drug economy marches on, and society's incarceration costs fly through the roof. Faced with such a nonsensical situation, it cannot be surprising that some courts have reflected on the role they play in perpetuating the crisis.

### C. ACADEMIC ATTITUDES TOWARD NARCOTIC SENTENCES

Scholars have wide-ranging views about the War on Drugs. While some consider it a moral crusade, others consider it a public health and safety issue. To still others, the War on Drugs is probably nothing more than business as usual. Some claim that it may even increase drug trafficking profits.<sup>51</sup> To a growing degree, there is a view that the War on Drugs is a “farce”<sup>52</sup> of “gulag” proportions.<sup>53</sup>

Legal scholars have criticized not only the lack of efficacy, but also the moral consequences of approaching a domestic narcotics problem through the rhetoric of war.<sup>54</sup> In framing the conflict in martial terms, the rhetorical effect is to dehumanize one's enemies, in this case the friends or family

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<sup>50</sup> *Id.* at 919.

<sup>51</sup> *Id.* at 933.

<sup>52</sup> *Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Appropriations Comm.*, 110th Cong. 2d Sess. (forthcoming), available at LexisNexis Federal News Service (statement of Representative Patrick Kennedy) (“And war on drugs is just—it's a farce.”).

<sup>53</sup> Janeen Kerper, *Trial Advocacy Lessons from Latin America*, 74 TEMP. L. REV. 91, 96 (2001) (“Thanks to the War on Drugs and “Three Strikes” legislation, our prison-system now incarcerates more people than at any time in history—rivaling apartheid South Africa and the gulags of the former Soviet Union.”).

<sup>54</sup> See, e.g., Eric Blumenson & Eva Nilssen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 112-13 (1998) (“Our politicians speak casually of enlisting the military, the National Guard, and the CIA to keep drugs away from the Americans who seek them . . . . We routinely deploy . . . massive numbers of federal and state agents [in] military-style raids . . . . All of these changes, mostly unimaginable a generation ago, are largely the products of twenty-five years of trying (and failing) to ‘win’ the War on Drugs.” (footnotes omitted)).

members of a startling number of Americans.<sup>55</sup> The act of dehumanizing concurrently desensitizes the public to what could be wryly described as the natural consequence of war—casualties.<sup>56</sup> Further, half a century of this and similar rhetoric has so entrenched the view that drug offenders are sub-human that politicians can rely on it when building tough-on-crime campaigns.<sup>57</sup>

Critics also attack the War on Drugs because it is selectively waged against minorities.<sup>58</sup> The effects on the African-American community have been well-documented,<sup>59</sup> but the Latino, Pacific-Islander, and recent immigrant communities have been affected as well.<sup>60</sup> Evidence for selective application includes documentation of variable conviction rates and sentence lengths for offenders by race and ethnicity.<sup>61</sup> In addition, there is widespread recognition that money from the middle and upper classes is the true catalyst for the black market economy and its continued

<sup>55</sup> See Kevin Freking, *More Illegal Drug Usage Reported by Ages 50-59*, BOSTON GLOBE, Sept. 8, 2006, [http://www.boston.com/news/nation/washington/articles/2006/09/08/more\\_illegal\\_drug\\_usage\\_reported\\_by\\_ages\\_50\\_59/](http://www.boston.com/news/nation/washington/articles/2006/09/08/more_illegal_drug_usage_reported_by_ages_50_59/) (reporting that twenty million Americans use narcotics in any given month).

<sup>56</sup> See Jill Soffiyah Elijah, *Casualties of the War on Drugs*, BOSTON GLOBE, Oct. 13, 2002, at D12.

<sup>57</sup> See Schuler & McBride, *supra* note 43, at 930-31 (noting that a potential victim of drug abuse ceases to be a sympathetic victim upon using drugs). The attitude these authors discuss is not unlike that prevailing in a zombie film, whereby sympathetic characters lose all humanity upon “infection.” In the rhetoric of war, this wall of separation dividing users from non-users cannot be questioned.

<sup>58</sup> See, e.g., Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381 (2002) (“Throughout the drug war, African Americans have been disproportionately investigated, detained, searched, arrested and charged with the use, possession, and sale of illegal drugs.”).

<sup>59</sup> See Elijah, *supra* note 56 (“African-Americans make up . . . nearly two-thirds of those sent to state prison for drug offenses . . . despite the fact that white drug users outnumber African-Americans by more than 5 to 1.”). Elijah quoted further statistics demonstrating that African-Americans are thirty-three times more likely to receive a prison sentence for a drug offense than whites. *Id.*

<sup>60</sup> See, e.g., Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443, 443 (2001) (“In short, the drug war is ‘just say no’ to drugs by ‘just say yes’ to selective targeting of African Americans and Latino/a Americans by law enforcement officials and the courts.”).

<sup>61</sup> Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 22-23 (1999) (noting that minority convictions disproportionately drove the increase in U.S. prison populations, with African American inmates increasing by 261% and Hispanics increasing by 554%); Stephen Demuth & Darrell Steffensmeier, *Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants*, 85 SOC. SCI. Q. 994, 994 (2004) (“Both black and Hispanic defendants tend to receive harsher sentences than white defendants. Also, ethnicity effects are the largest in the sentencing of drug offenders . . .”).

growth,<sup>62</sup> and yet these demographic groups pay a disproportionately lower penalty.<sup>63</sup>

Another significant criticism of the War on Drugs is the undermining effect that it has on citizens' confidence in government.<sup>64</sup> A racially- and socioeconomically-based crime policy generates conflicts that divide society and erode respect for the rule of law.<sup>65</sup> That makes it more difficult both to discuss reasonable ways of dealing with the problem and to enforce any decisions reached, since the primary vehicle for governmental action, lawmaking, has lost credibility. Critics underscore the irony that the War on Drugs has created greater social ills than it was intended to fight.<sup>66</sup>

#### D. POPULAR ATTITUDES TOWARD NARCOTIC SENTENCES AND CRIME IN GENERAL

Popular attitudes with respect to the War on Drugs are more difficult to decipher, since there are simply more of them and relatively few vehicles for expressing them, short of opinion polls and the polling booth. In fact, a thorough investigation of the various attitudes that different groups hold with regards to narcotics and the War on Drugs would surely require a book-length effort. The aim here is more modest, namely to survey the extant statistics in order to highlight the fact that there is substantial diversity when it comes to popular attitudes. This observation is significant because the electoral game suggests a hegemonic voting trend in favor of tough sentences. If the correlation between public attitudes and political ones is not as compelling as first appears, then perhaps this goes some way

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<sup>62</sup> See SCHLOSSER, *supra* note 44, at 14 (noting that marijuana is the nation's most valuable cash crop, worth perhaps \$25 billion every year, and that most of it is grown in the Midwest). This notable statistic strongly implies the broad appeal of the drug to individuals with disposable income.

<sup>63</sup> See Elijah, *supra* note 56 (noting that only 1% of white males between the ages of twenty and thirty-nine are incarcerated, one-tenth the rate of incarceration for similarly situated African-Americans).

<sup>64</sup> This has occurred in large part because the public perceives broad corruption among the law enforcement officers charged with waging the War on Drugs. See, e.g., David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 709 n.121 (2003) ("[C]onsistent with systematic corrupt enforcement practices," agents target novice rather than experienced smugglers.).

<sup>65</sup> The statistics cited above compel the conclusion that the War on Drugs is a racially and socioeconomically "two-faced" crime policy. An important consequence is that whites are insulated from the horrors of the War on Drugs and, thus, feel less compelled to correct the problem. The disproportionate voting power of insulated and affluent whites virtually assures that the democratic process will fail to correct for the discrepancy, at least, unless the policy were to be redirected toward all Americans.

<sup>66</sup> See Schuler & McBride, *supra* note 43, at 895.

toward dispelling the supposed justification for the War on Drugs, namely, that the democratic will demands it.<sup>67</sup>

The first reason to question the correlation between popular attitudes and political reality is the recognition that not everyone votes.<sup>68</sup> Voter turnout has traditionally been closely related to various factors including race, socioeconomic status, education, wealth, and age.<sup>69</sup> Older, wealthier, better-educated persons tend to vote in disproportionate numbers compared to those individuals living in the poor communities most affected by the War on Drugs.<sup>70</sup> The disturbing lack of voter participation surely has less to do with apathy—who could be apathetic when blighted by violence, narcotics, and incarceration?—but with a sense of powerlessness as a voting majority consistently affirms measures that in fact exacerbate the problem.<sup>71</sup>

We can rely on more than common sense to demonstrate the absence of apathy within the affected communities.<sup>72</sup> Statistics show that issues of

<sup>67</sup> Robert J. Blendon & John T. Young, *The Public and the War on Illicit Drugs*, 279 J. AM. MED. ASS'N 827, 827-32 (1998) (describing, among other popular views, the widespread public perception that the War on Drugs has failed).

<sup>68</sup> In fact, not everyone can vote, as many states expressly disenfranchise felons. See Robert R. Preuhs, *State Felon Disenfranchisement Policy*, 82 SOC. SCI. Q. 733, 736 (2001) (arguing generally that disenfranchisement policies serve to weaken minority voices in political life because such policies affect minority communities so disproportionately).

<sup>69</sup> Tony A. Blakely, Bruce P. Kennedy & Ichiro Kawachi, *Socioeconomic Inequality in Voting Participation and Self-Rated Health*, AM. J. PUB. HEALTH, January 2001, at 99 (referring to such categories as “social capital”).

<sup>70</sup> Cf. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1278 (1994) (contending that, under the “urban frustration argument,” urban minority communities welcome disproportionate penalties and greater than usual police latitude in order to more effectively combat the blight of neighborhood crime). The weakness of this argument is its lack of empirical support, as it relies principally on a theory that public services respond to public demand, without addressing the problem that “public demand” reflects some communities’ demands more than others. Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1222 (2000).

<sup>71</sup> See, e.g., Gerald Caplan, *The Ethics of the “Unprofessional Profession,”* 88 MICH. L. REV. 1698, 1704-05 (1990) (reviewing EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING (1998)) (“To a few leaders, anti-drug war rhetoric by whites is not only paternalistic but sinister. It camouflages a subtle campaign for reestablishing white hegemony . . .”).

<sup>72</sup> Empirical evidence suggests that urban minorities distinguish between the police and the legal system as a whole. According to a 2000 survey, African-Americans in the lowest income bracket were twice as likely as higher-earning African-Americans to see the legal system as “fair.” However, in the same survey, lower-earning African-Americans tended to describe the police as “just another gang.” Brooks, *supra* note 70, at 1224. This seeming contradiction may reflect poor urban communities’ “dual frustration” with ubiquitous crime and police misconduct. *Id.* at 1228. Further, these survey results are not necessarily

crime and safety top the list of these citizens' priorities.<sup>73</sup> However, these statistics also manifest a growing consensus that the government policies are pernicious, not merely ineffective.<sup>74</sup> In some communities, this dissatisfaction has been expressed through a revival of the doctrine of jury nullification—whereby a jury refuses to apply the law in a given case where the result would be inequitable.<sup>75</sup>

More common than jury nullification is a general unwillingness to cooperate with law enforcement authorities.<sup>76</sup> As a result, the panoply of investigative techniques available to officers is reduced, often at the expense of a satisfactory resolution of the case. This, in turn, seems likely to yield greater inaccuracy and inequity, leading to greater community mistrust and greater resulting police malfeasance.<sup>77</sup>

Other segments of the public do not regard the War on Drugs as a monolithic battle. These citizens may favor carve-outs for various substances or uses, or may reject incarceration as a solution over medical treatment for drug abusers.<sup>78</sup> Many people feel that medicinal marijuana should be exempted from the overall campaign.<sup>79</sup> Others, including economist Milton Friedman, contend that it is economically backward to criminalize marijuana use.<sup>80</sup> Such a view adopts a cost-benefit mode of analysis that some may find uncomfortable for what one might see as a

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incompatible. It is entirely reasonable to favor greater enforcement of the law, but not by an escalation of police action or expanded police discretion. *Id.* at 1224.

<sup>73</sup> See Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 145-55 (1997) (demonstrating that minority attitudes toward crime and narcotics are often harsher than those of affluent whites).

<sup>74</sup> *Id.* at 165.

<sup>75</sup> Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

<sup>76</sup> *Id.* at 717 n.214.

<sup>77</sup> See Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1617 (2002) (discussing the increased efficiency of police departments where such departments engage in greater outreach to community leaders).

<sup>78</sup> See Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1218 (2002) (“[W]e cannot beat the drug problem in our society by locking up all of the drug offenders. Prevention of drug-related crime through treatment . . . is the most effective means of preventing recidivism.”).

<sup>79</sup> See Shapiro, *supra* note 39, at 799.

<sup>80</sup> Letter from Milton Friedman, Hoover Institute, et al. to George W. Bush, President of the United States, available at <http://www.prohibitioncosts.org/endorsers.html> (last visited Jan. 15, 2009) (arguing that there could be a \$14 billion swing between the present state of affairs and one where marijuana is legal and taxed like tobacco and alcohol); see also Quentin Hardy, *Milton Friedman: Legalize It!*, FORBES.COM, June 2, 2005, [http://www.forbes.com/2005/06/02/cz\\_qh\\_0602pot.html](http://www.forbes.com/2005/06/02/cz_qh_0602pot.html).

moral issue.<sup>81</sup> Very few public voices call for a complete legalization of narcotics, and all demographic groups view substance abuse as cause for legitimate concern. In short, everyone takes the issue seriously.

We are left with a consensus that a narcotics problem exists, but also with a growing view that our current approach to solving the problem requires at least tweaking and perhaps radical reform. The political atmosphere confuses the matter because it suggests one solution only—tougher sentences in tandem with greater efforts at police enforcement. It is not surprising that, in the face of crisis, many rational citizens would prefer doing something to doing nothing. But here our political leaders fail us, since the “something” that they are doing may actually be making us worse off.<sup>82</sup>

#### E. WHY LEGISLATURES ARE UNLIKELY TO REDUCE NARCOTIC SENTENCES

In some ways, perception matters more than reality. And there is a perception in the public at large that we are in the midst of an escalating crime epidemic.<sup>83</sup> While the available data tell a different story, that story does not grab headlines or sell newspapers.<sup>84</sup> The meteoric rise in media attention given to violent crimes generates nightly hysteria until it becomes a trite and unchallenged fact of life.<sup>85</sup> Thus, a new litmus test for politicians has evolved: are you tough on crime?<sup>86</sup>

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<sup>81</sup> See, e.g., Timothy P. Ward, Note, *Needing a Fix: Congress Should Amend the Americans with Disabilities Act of 1990 to Remove a Record of Addiction as a Protected Disability*, 36 RUTGERS L.J. 683, 702 (2005) (advocating condemnation of drug addicts along the typical line that “[i]f addiction is essentially a choice . . . it is appropriate to attach to it a moral judgment”).

<sup>82</sup> See, e.g., Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALASKA L. REV. 665, 665-67 (2003) (citing statistics that indicate that the War on Drugs has been completely ineffective in regulating the supply of narcotics and has in fact targeted mere possessors of narcotics, who represent 81% of drug war arrests).

<sup>83</sup> See, e.g., Dean G. Rojek, Book Review, 31 CONTEMP. SOC. 87 (2002) (reviewing ALFRED BLUMSTEIN & JOEL WALLMAN, *THE CRIME DROP IN AMERICA* (2000)).

<sup>84</sup> Monya M. Bunch, Comment, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 HOW. L.J. 909, 926 (2002) (“In spite of increased media attention, violent crime by juveniles is the lowest it has been in the past two decades.”).

<sup>85</sup> Shawn Monterastelli, *Using Law and Law Enforcement to Prevent Violence and Promote Community Vibrancy Near Bars, Clubs, and Taverns*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239, 241 (2004) (“[R]eporters must choose which crime events to cover. The seriousness of the crime is an important standard . . . . The story may be even more newsworthy because of its rarity . . . . Consequently, violent crimes receive higher ratings [public perceptions of priority] . . . in both perceived seriousness and perceived risk.”).

<sup>86</sup> See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1488 (2001) (“The ever-present need to appear ‘tough on crime’ encourages legislators to

The only permissible answer is *yes*. *Yes* is the only way to avoid becoming an unsalvageable sound-bite. *Yes* is also the only way to remain in the running for police, firemen, and parenting group endorsements, which can often play a decisive role in local and state politics.<sup>87</sup> *Yes* allows a politician to build credibility and to achieve an appealing crusader public image. Who does it hurt, anyway? Not the bulk of likely voters.<sup>88</sup> The politicians need not take account of the cost of saying *yes* precisely because the most affected communities do not turn out to vote in proportionate numbers.<sup>89</sup> There would appear to be no benefit to a politician in responding any differently, short of a supposed benefit for being unorthodox, perhaps—a desperate gamble, to be sure.

Furthermore, because the War on Drugs has been ineffective, the narcotics crisis lingers on in the public mind and so does the temptation for politicians to play on it. The situation has been institutionalized.<sup>90</sup> A legislative body that took action to reduce narcotics penalties could expect first, to be described as “weak on crime,” and second, to be understood to have acknowledged that narcotics are not the problem the media makes them out to be. Either way, the politicians have placed themselves in extremely vulnerable positions when the time for re-election comes around. We are left with a scenario in which the only body that could create a more rational drug policy is completely impotent to do so; this constitutes a critical gap in governance.

#### IV. SOLUTIONS TO SENTENCING PROBLEMS

##### A. A SEMI-CLASSIFICATION OF “UNDULY” STIGMATIZED CRIMES AND CRIMINALS

The discussion of legislative impotence above suggests that some manner of judicial intervention—in the form of appellate sentence review for example—would be appropriate where the courts encounter a significant

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present themselves as supporters of laws that impose swifter, more severe punishment . . .”).

<sup>87</sup> See SCHLOSSER, *supra* note 44, at 23-25 (describing the role of parenting groups in pushing rational drug debate out of the mainstream).

<sup>88</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 153 (2004) (“[T]he vast majority of voters . . . see themselves primarily as prospective victims of crime rather than as potential defendants.”).

<sup>89</sup> See Blakely, Kennedy & Kawachi, *supra* note 69, at 99 (“[S]ocioeconomic inequalities in political participation lead to state policies that harm the poor.”).

<sup>90</sup> Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 850 (2002) (characterizing the War on Drugs as “yet another institutionalized system that condones discrimination”).

gap in the efficacy of government. That is to say, judicial intervention in the context of a particular case may make sense and raise the fewest constitutional concerns where another branch of government lacks a rational motive to address a problem. Such is the definition of an analysis based upon the aptitudes of different governing bodies. When the courts entertain a case, the courts have a rational incentive to address the matter satisfactorily, whereas the legislature is not similarly incentivized.

This raises the question as to which crimes or criminal laws present the judiciary with such a gap. Do all narcotics laws? Do all criminal laws, to the extent that the legislature could be said to lack incentive to reduce any criminal's sentence under the current climate? The subject matter of the crime should be the most important criteria. It makes sense to include narcotics crimes for the reasons enumerated. This Comment does not aim to thoroughly categorize the criminal law to this end. However, the behavior of courts is telling. Some courts have applied appellate sentence review in other contexts, such as to heinous crimes—distinguishable, yes, but also similar in ways that the courts take seriously.

One heinous crime that has been the subject of appellate sentence review is assault with a deadly weapon.<sup>91</sup> In a second California case by the name of *People v. Thomas*, the statute in question imposed a six-months-to-life sentence. The court found that the sentence violated Eighth Amendment protections against cruel and unusual punishment, since other similar or more serious crimes received less serious punishment.<sup>92</sup> In this sense, it is similar to the narcotics cases discussed earlier in that other offenses were consulted in order to make an analogous judgment about proportionality.

The key to unlocking the meaning of this decision is to answer the question as to why the appellate court felt that that particular case warranted rare appellate sentence review. Assault, like narcotics offenses, is a crime that attracts a great deal of media attention. Violent criminals, much like drug offenders, are stigmatized, and laws aimed at curbing their behavior or punishing offenders more harshly are very common. In short, it is the stigma attached to the crime, and the vulnerable position it leaves offenders in, the evidence of which was the sentence itself relative to other sentences, that made the court feel an intervention was appropriate.<sup>93</sup> Would courts be wise to get involved under such a “stigmatized crime” doctrine?

This is a tempting approach because it connotes well-known and widely-discussed crimes, of which there could be no more than a handful.

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<sup>91</sup> *People v. Thomas*, 116 Cal. Rptr. 393 (Ct. App. 1974).

<sup>92</sup> *Id.* at 400-01.

<sup>93</sup> *Id.*

Also, there appears to be a semi-quantitative rudder to ground appellate courts' analysis—penalties assigned to other offenses of similar moral gravity. However, therein lies the seed of discontent. Courts have the responsibility to determine which crimes are of a similar moral gravity. Taking the narcotics case and the violent assault case above,<sup>94</sup> one would not be surprised to find individuals in favor of the lighter sentencing result in the drug case, but seriously disapproving of the result in the assault case. The balancing of crimes is a metaphysical endeavor with few or no guiding principles we can agree on. Seen in this light, it would appear that such judgments belong in the hands of the legislature. However, this conclusion is too easily reached and dismisses much of reality.

In this situation, courts are asked to decide how to weigh the gravity of a particular, individualized offense—not the category of offense generally, which is the appropriate function of the legislature. This distinction is in keeping with the general principal that the legislative body first enacts the laws, and then the court seeks to apply the law to cases as they arise. Typically, the legislature relies on the courts to fill in meaning as needed where the general text of the statute does not appear to apply to the case at hand. This complementary process relieves the legislature from the need to unceasingly pass legislation that corrects for unforeseen circumstances.<sup>95</sup>

By analogy, in a criminal statute, might not the general provisions fail the principle of proportionality in a variety of circumstances? The court could tailor the sentence in a given case to meet requirements of proportionality. If so, then it is somewhat difficult to imagine why appellate sentence review is so controversial. The answer may be found in the unusual relationship between the notion of an independent judiciary and a democratic government.<sup>96</sup>

#### B. A FRAMEWORK FOR JUDICIAL ACTION: APPELLATE SENTENCE REVIEW SERVES A COUNTER-MAJORITARIAN FUNCTION

The gap discussed above, arising from the lack of incentives for legislatures to implement a rational narcotics policy, suggests a problem in governmental organization recognized since the founding of the nation—the

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<sup>94</sup> *Id.* at 393 (dealing with assault); *People v. Thomas*, 119 Cal. Rptr. 739 (Ct. App. 1975) (dealing with narcotics).

<sup>95</sup> Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 554 (2004) (describing judicial lawmaking powers as “functional” in application, as distinguished from the “literal” lawmaking power of the legislature).

<sup>96</sup> *See, e.g.*, Johannigmeier, *supra* note 17, at 1126 (expressing disapproval of judicial review powers over a legislature with democratic credentials).

“tyranny of the majority.”<sup>97</sup> The creation of an independent judiciary represents the United States’ attempt to check “tyrannical” popular impulses. At a fundamental level, then, the courts exist to exert a counter-majoritarian influence on representative government.

Appellate sentence review falls into the category of counter-majoritarian tools that the court possesses within its arsenal, but has not elected to exercise extensively. As a result of the common law doctrine of non-reviewability and the tendency of courts not to practice appellate sentence review, few of the policy considerations that such review would implicate have been adequately addressed.<sup>98</sup> A short list of policy questions may include the following: (1) When is appellate sentence review appropriate?; (2) How should a court determine that a sentence is excessive or that it constitutes cruel and unusual punishment?; and (3) How should invalid sentences be remedied?

Appellate sentence review could be justified in any case whatsoever under the recommendation of the American Bar Association, which came to the conclusion that appellate sentence review was an essential part of any rational crime policy.<sup>99</sup> Should the scope of appellate review be as broad as this? The answer is probably not. Appellate sentence review represents a break with the traditional way of doing things, even if this federal tradition does not bind the state courts. In consideration of this fact, the resort to appellate sentence review should occur only when several factors are present.

First, the crime itself should be stigmatized. The court should adopt a holistic balancing test to determine whether a crime meets the standard of stigma. This is so because a great many factors can make a particular crime stigmatic and formulaic approaches are likely to let a few worthy crimes, or crimes not yet considered stigmatic, slip through the net. However, the principle factor for defining a stigmatic crime is the amount of media and popular attention devoted to it.

Imagine a continuum. On the one end lies little or no discussion of the crime in the relevant media or political spheres. On the other end lies an explosion of media attention, such as that paid to illegal immigration in many border states.<sup>100</sup> The latter situation warrants an approach under a

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<sup>97</sup> See Waldron, *supra* note 18, at 1395 (acknowledging that fear of the tyranny of the majority pervades American political culture).

<sup>98</sup> See Reitz, *supra* note 1, at 1445 (citing the lack of guiding principles due to courts’ lack of experience with meaningful sentence review).

<sup>99</sup> AM. BAR ASS’N PROJECT, *supra* note 22, at 3.

<sup>100</sup> See, e.g., Susan Bibler Coutin, *Contesting Criminality: Illegal Immigration and the Spatialization of Legality*, 9 THEORETICAL CRIMINOLOGY 5, 6-7 (2005) (looking at the way public perceptions of illegal immigrants shape the immigrants’ behavior).

stigmatic framework given the potential for hysteria; conversely, the former scenario does not. Making determinations somewhere in the middle is the challenge to courts. However, great political weight is rarely attached to the larger number of criminal offenses, and courts should be able to readily assess whether a given crime has been used to galvanize voter support or undergird a tough on crime posturing to the point of rendering the legislature ineffective on point.

Second, the sentence should be excessive to the point of being shocking. That is to say, appellate courts should set cases of *de minimis* excessiveness aside and focus on instances where, for example, a sentence is excessive by a year or more rather than by a number of months. It is unfortunate that no bright-line tests readily present themselves to guide analysis, but it is important to stay clear of the unnecessary constitutional problems inherent in declaring invalid as a whole a state's overall approach to combating a category of debilitating crime. That is to say, courts should restrict themselves to the marginal cases. Doing so will also focus more attention on the harshness of the penalties imposed, rather than the culpability of defendants.

The need to measure the excessiveness of a sentence arises only once the offense in a case has been determined stigmatic, the legislature has been found to be impotent due to political realities, and the penalty imposed has been found shocking. The thought of measuring excessiveness will likely raise many hackles about the courts' suitability to make this decision. However, the courts in the cases surveyed above both utilized a similar technique—comparing the penalty imposed with that of equivalent or greater crimes in terms of moral gravity.<sup>101</sup>

This comparative approach has the benefit of supplementing subjective analysis (determination of the moral gravity of a crime) with objective standards (consideration of how other similarly situated individuals being treated). The presence of an objective standard, while not essential for the court, is welcome for the credibility it supplies. Appellate sentence review would come under heavy fire indeed if it were thought merely to impose the subjective valuations of the judges themselves.<sup>102</sup> In the scenario where the appellate court is unable to demonstrate through comparative analysis that a sentence is excessive, that failure should result in an extremely strong presumption that the sentence was fair within the jurisdiction. Thus, the objective criterion also serves to ground the judiciary in the local or state

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<sup>101</sup> *In re Foss*, 519 P.2d 1073, 1078 (Cal. 1974).

<sup>102</sup> See Waldron, *supra* note 18 (arguing that judicial review already permits an unacceptable amount of judicial subjectivity).

context to ensure the decision appropriately reflects those local and state concerns.

A finding of no excessiveness should conclude the court's inquiry. But what if excessiveness is found? The appellate court could amend the sentence. This was the route chosen by the courts in the cases surveyed above.<sup>103</sup> The appellate court could also remand for a sentencing hearing in keeping with the tenor of its finding of excessiveness. It would be nonsense for the appellate court to throw out the conviction; the sentencing concerns are unrelated to the finding of a guilty verdict.

Remanding the decision to lower courts may appeal to some observers because it does not bog down the appellate court with lengthy proceedings. But there is the significant problem that the lower court may feel rudderless in trying to determine the appropriate sentence. This is an obstacle, but not necessarily a critical one. Presumably, in practice, appellate courts would delineate the contours of an appropriate sentence in their decisions to remand.

Guidance of this sort to a lower court would probably suffice to ensure some conformity of decision-making. That said, if remanding cases were the way to go, why bother making the appellate court go to the trouble of outlining a sentence and delegating the authority to impose the sentence to a lower court? Such could be described accurately as a ministerial function for the lower court. It would appear to be more efficient to have the appellate court simply edit the sentence itself and resolve of the matter. The cases surveyed above offer some guidance here, as the courts edited the sentences themselves.<sup>104</sup>

#### C. POTENTIAL AND AUTHORITY FOR GREATER APPLICATION OF APPELLATE SENTENCE REVIEW

While this Comment emphasizes appellate sentence review in the context of narcotics sentences, which are especially prone to be excessive for reasons already discussed, a Georgia case dealing with a sex statute perhaps best exemplifies the latent power and present day state of appellate sentence review.<sup>105</sup> In *Humphrey v. Wilson*, defendant Genarlow Wilson engaged in consensual oral sex in a hotel room with a fifteen-year-old girl

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<sup>103</sup> See *Foss*, 519 P.2d 1074, 1076 (setting aside the provision that precluded the offender from eligibility for parole); *People v. Thomas*, 119 Cal. Rptr. 739, 745 (Ct. App. 1975) (amending a sentence enhancement for past narcotics felonies that precluded eligibility for parole during the first fifteen years of a sentence); *People v. Thomas*, 116 Cal. Rptr. 393, 400-01 (Ct. App. 1974).

<sup>104</sup> See *supra* note 103.

<sup>105</sup> *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007).

in violation of Georgia's child molestation law.<sup>106</sup> The jury found the defendant guilty; he was sentenced to ten years' imprisonment.<sup>107</sup> The defendant was seventeen years old at the time of the offense.<sup>108</sup>

The Georgia law reflects the desire of the legislature to severely punish sex offenders. After Wilson began serving his sentence, the legislature did in fact reduce the crime of which Wilson was convicted to a misdemeanor.<sup>109</sup> However, many people would consider even consensual sex between minors to be undesirable and worthy of legislation. The interesting thing to note here is that, as in narcotics cases, the behaviors proscribed in the Georgia law do in fact receive broad condemnation, but of a different kind and a different nature.

Sexual predators commit crimes that damage the development of others and leave scars for years, if not a lifetime, to come.<sup>110</sup> Incarceration for such a crime is hardly shocking. Teen sexual activity is a social problem that may lead to unwanted pregnancies and frustrated lives that fall short of potential. A great deal of rhetoric is aimed at this social problem, but incarceration of the consenting teens is rarely one of the plausible solutions put forward. In the case of the Georgia statute, the legislature made a decision to pass a bill that incorporated punishment of teen sex within the framework of an assault on sexual predators. Why? Is it likely that state voters simply elected individuals completely out of tune with contemporary attitudes about teen sex? No—it is practically certain that many, if not most, of the representatives have confronted teen sex with their own children, and few probably wished that their child, the “offender,” had been incarcerated.

More likely, the representatives saw the political ease of supporting the bill, in contrast to the risk of speaking up for proportionate punishment, and made the decision as a pragmatic no-brainer. The political truth is that persons who engage in culpable conduct that attracts media attention are subject to any punishment the legislature finds convenient—speaking up merely comes with a label of being “soft on crime.”<sup>111</sup>

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<sup>106</sup> *Id.* at 501.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 504. This point would seem to distinguish Wilson's case from other stigmatic cases, since the legislature demonstrated its capability to revise the law on a more rational basis. However, Georgia's resistance to retroactively applying the 2006 amendment to Wilson's sentence reveals the stigmatic rhetoric at play by focusing on Wilson's culpability.

<sup>110</sup> Michael Christianson, Statute Note, *Pushing the Limits with Statutes of Limitation: Helping Utah Adult Survivors of Child Sexual Abuse After Stogner v. California*, 6 J.L. & FAM. STUD. 181, 191-92 (2004).

<sup>111</sup> Gerald F. Uelmen, *Victims' Rights in California*, 8 ST. JOHN'S J. LEGAL COMMENT. 197, 199 (1992) (describing “tough on crime” and “soft on crime” as “simplistic

However, media attention is not always consistent, and can vary substantially between the vague discussion of a crime in the abstract to the specifics of a particular case. As word of Wilson's conviction spread in the national media, the defendant became a victim. The Georgia Supreme Court heard his case in 2007, after the defendant had spent two years behind bars. The Georgia Supreme Court found that his sentence violated the Eighth Amendment prohibition on cruel and unusual punishment, and the defendant was released.<sup>112</sup>

I propose that the Georgia Supreme Court resolved this case under the framework of appellate sentence review for stigmatic crimes outlined in this Comment. For that framework to apply, the subject of the crime itself must be stigmatized. In the case of Genarlow Wilson, the sex crime of child molestation was the subject offense. The Supreme Court could rationally conclude that sex crimes were a stigmatic offense based on the state's stubbornness despite the recent timing of the bill's amendment<sup>113</sup> and the administration's controversial emphasis on abstinence, the relatively large amount of media attention given sex crimes involving children and abduction, and the pervasive culture wars between vocal special interests in the contemporary political climate that often turn sex-related issues into wedge issues.<sup>114</sup>

After the Georgia Supreme Court recognizes sex crimes as stigmatic, the framework established above asks the Court to then consider whether the sentence is shocking.<sup>115</sup> The Supreme Court had little difficulty with

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labels . . . creating a political climate where real reform is impossible, because political leaders are obsessed with the fear that any rational considerations of alternatives will result in their being labeled 'soft on crime'").

<sup>112</sup> *Wilson*, 652 S.E.2d at 502.

<sup>113</sup> *Id.* at 503 (noting that Georgia had since changed the offense of which Wilson was convicted from a felony to a misdemeanor).

<sup>114</sup> See Lydia S. Antoncic, *A New Era in Humane Education: How Troubling Youth Trends and a Call for Character Education Are Breathing New Life into Efforts to Educate Our Youth About the Value of All Life*, 9 ANIMAL L. 183, 193 (2003) ("The [Bush administration's] abstinence issue is becoming . . . controversial . . . as it continues to gain national attention."); Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1153 (2006) ("[T]here is a persistent perception that every child is a potential victim to the stranger lurking around the corner. The array of media attention directed toward sex crimes and their perpetrators, in the form of news reports and television programming, has propelled this perception forward and generated a climate of intolerance toward sex offenders."). For a consideration of the view that controversial sexual matters play a role as wedge issues and will continue to be used to polarize the voting public, see, e.g., Carolyn Lochhead, *Gay Marriage: Did Issue Help Re-Elect Bush?*, S.F. CHRON., Nov. 4, 2004, at A1 (noting that the issue galvanized conservative voters in the national election).

<sup>115</sup> The court characterized its analysis thusly:

this inquiry. The ten-year sentence caused a national outcry. Given the public reaction, the Court could have little doubt that a large section of the public found the sentence wildly disproportionate. That the sentence received so much third-party attention for its shocking nature is an important point to keep in mind.

The framework's final stage asks the Court to consider how best to amend the sentence. In this case the Court found the shocking test met to such a degree that the defendant's two years' of incarceration were enough and he was set free.<sup>116</sup> The reaction to the Court's decision was popular and well-received.<sup>117</sup> The reaction should intrigue us because the Court was able to exercise its appellate sentence review without compromising its integrity in the public eye. From this encouraging perspective, the case makes it clear that appellate sentence review is not always controversial and need not upset the balance of government power. But the more discouraging point that has to be made is that the case was easy. How much can we glean from it?

Describing the case as *easy* is simplistic. Given the popular outcry, the Court faced a situation where reviewing the sentence promised more for the Court's posture than deciding not to review. In effect, the Supreme Court was charged with a mission—correct the injustice! In so doing, the media characterized the Court's function as institutional correction, not as institutional protest. As a result, facing scant resistance, the justices did not have to make important separation of powers arguments in support of appellate sentence review, to which arguments we now turn.

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If a sentence does not further a legitimate penological goal, it does not 'reflect a rational legislative judgment' . . . and a threshold showing of disproportionality has been made. If this threshold analysis reveals an inference of gross disproportionality, a court must proceed to the second step and determine whether the initial judgment of disproportionality is confirmed by a comparison of the defendant's sentence to sentences imposed for other crimes within the jurisdiction and for the same crime in other jurisdictions.

*Wilson*, 652 S.E.2d at 506. I propose that this framework parallels the stigmatic framework nicely. In the first case, a determination of legislative non-functionality is made. Next, the court applies the shocking standards and, finally, resolves the sentence's excessiveness in comparison with penalties assigned to other offenses of similar or greater gravity.

<sup>116</sup> *Id.* at 501.

<sup>117</sup> CNN dedicated a webpage to Genarlow Wilson's case. After the decision was handed down, headlines on the page focused on Wilson's resolution to study in college and to be "more conservative, more alert and more appreciative." *Genarlow Wilson: Plea Deal Would Have Left Me Without a Home*, CNN.COM, <http://edition.cnn.com/2007/US/law/10/29/wilson.released/> (last visited Jan. 15, 2009).

## D. SEPARATION OF POWERS

The notion that greater use of appellate sentence review would violate principles of the separation of powers is a significant obstacle to the proposal, because it touches on sensitive issues concerning the limits that can and should be placed on democratic will.<sup>118</sup> It is appealing to suggest that the legislature is the branch of government best suited to gauge the public's attitude toward criminal offenses, and to leave it at that. However, this argument is vulnerable because it assumes an overlap of sentencing and lawmaking that does not exist. Sentencing is a judicial function, not a legislative one; laws are general policy, while sentences are bound to the facts of a particular case. Appellate sentence review does not hamper the legislature's ability to set rational and effective crime-fighting policy; the unavailability of sentence review does much to hamper the judicial branch's ability to fulfill the sentencing function in a rational and efficient way.<sup>119</sup>

The counter-argument would posit that judges are no better situated than legislators to make determinations about the gravity of an offense, and might in fact be adversely situated due to independence from the voting public. One retort is that judges are better situated than either the legislature or the voting public to weigh the culpability of the individual offenders that come before him or her relative to one another.

Furthermore, the distinction between the legislator's ability to set policy and the judicial exercise of appellate sentence review can be made on an *ex ante* versus *ex post* basis. Policy decisions, such as the sentence due for an offense, are made prior to the fact and will bind a type of conduct based on distinguishing characteristics of a general nature. The aim of the legislature is to penalize and deter unwanted conduct; it is not the ambition of the legislature to generate a bill that will fit every possible scenario and yield the appropriate result. The marginal case is most likely to produce an excessive or cruel sentence, not the typical case.<sup>120</sup> Since the legislature addresses the typical case, does it diminish the power of the legislature if

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<sup>118</sup> Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1102 (2006) (observing that state elected judges are the equivalent of politicians and that they respond to an outraged public by producing the desired result—longer sentences—thereby raising the question of an inappropriate intrusion of popular will into the courtroom).

<sup>119</sup> See AM. BAR ASS'N PROJECT, *supra* note 22, at 3 (requiring sentence review as a part of any rational criminal policy). The implication of the ABA's recommendation is that the United States' criminal policy is irrational in its present form, since it lacks meaningful sentence review.

<sup>120</sup> See James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1656-57 (2006) (noting that Texas joined other states in passing legislation that gives jurors the option to select a life sentence without parole in capital cases, thereby applying their own brand of sentence review).

the courts tailor sentences to reach appropriate results in the unanticipated, marginal cases? Perhaps that is simply the most efficient way to allocate power between the branches.

#### V. CONCLUSION

This Comment advocates greater use of appellate sentence review in cases involving narcotics or other stigmatic crimes, or crimes for which the perpetrator is especially susceptible to the “tyranny of the majority.” Such tyranny is especially prevalent in a jurisdiction where the popular but false dichotomy of policy-makers as being tough on crime or soft on crime prevails. This is so because politicians become invested in a public image of tough law-and-order stances to the exclusion of considering interesting and practical alternatives, out of fear that doing so will lead to a labeling that they are weak and soft on crime. In other words, the legislators lack an incentive to effectively legislate on this matter. The resulting gap in effective governance is a classic example of a counter-majoritarian dilemma, precisely the type of problem for which the courts’ nature as independent from democratic processes render them best suited to handle.

To that end, it is proposed that the courts apply a framework by which it is first assessed whether the legislative ability to function effectively on a given crime has been compromised. If not, then ordinary rules of sentencing review apply. If the legislature is not functioning, however, the court may ask whether the sentence is disproportionate to the offense. If so, then the appellate court may measure the excessiveness of the penalty by comparing it to the penalty imposed for other offenses and editing the sentence accordingly.

As to the separation of powers arguments raised, this Comment suggests that the power to edit a sentence that was statutorily arrived at is quite distinct from the legislator’s power to set policy. From this vantage point, appellate sentence review is complementary to the legislative process. Appellate sentence review also improves the efficiency of the legislature, which need spend less time tailoring bills to every conceivable scenario—a lengthy and tedious endeavor unworthy of our policy-makers.

The introduction to this Comment identified four issues that a move to greater appellate sentence review would have to address in order to be effective and principled. The first of these asked whether such appellate review takes power from the legislature in an unconstitutional way. The answer is *no*, for two important reasons. The first reason is that the decision whether or not to practice appellate sentence review is within the discretion and competency of the courts. The common law doctrine of non-

reviewability is judge-made law, not statutory law.<sup>121</sup> The second reason is that the judicial function of appellate review is distinguishable from the lawmaking power of the legislature. As noted above, the key to understanding this distinction is to observe that an appellate sentencing decision applies only to the facts at hand in a given case, and not to the conduct generally proscribed. This Comment has taken care to show that appellate sentence review in fact complements and facilitates the legislative function by addressing marginal circumstances that would dramatically increase the transaction costs of completing a bill. Appellate review of criminal sentences functions in an identical way, consistent with the judicial purpose.

The second issue concerned the degree to which courts possess manageable standards by which to conduct appellate sentence review. One point of difficulty here is that appellate sentence review necessarily requires that judges make subjective decisions. Judges must evaluate the magnitude of a given offense and then decide upon a sentence that is proportionate.<sup>122</sup> In response to this cause for concern, this Comment recommends a framework for judicial decision-making that blends subjective and objective criteria. Highlighting the objective trigger feature, judges would have to determine that a crime category was stigmatic vis-à-vis the citizens of the jurisdiction before sentencing review. Objective criteria will also guide judges in arriving at an appropriate sentence, by requiring a sentence in line with other offenses of similar gravity. The assessment of an offender's culpability in an individual case remains within the subjective scope of the judge. However, judges are better situated than legislators to make such calls, by the nature of their profession and expertise.

The third issue is the slippery-slope fear that courts will abuse the power of appellate review by editing sentences that are not properly excessive. Undoubtedly, an unprincipled expansion of appellate sentence review would undercut uniformity and consistency in the law.<sup>123</sup> The chaos inherent in the approach would likely drive some neighboring local jurisdictions into fairly different approaches to common problems, which could raise issues regarding an individual's ability to know their conduct

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<sup>121</sup> See Reitz, *supra* note 1.

<sup>122</sup> The extent to which this exercise of discretion parallels the exercise of judicial power in the common law era, where the doctrine of non-reviewability prevailed, complicates the argument that appellate sentence review aggrandizes judicial power at the expense of the legislative branch of government.

<sup>123</sup> See Adam Lamparello, *Introducing the "Heartland Departure,"* 27 HARV. J.L. & PUB. POL'Y 643, 687 (2004) (describing the novel and well-regarded Minnesota appellate sentence review system, which tempers great appellate discretion against narrow and principled grounds for departure at the trial court level).

was criminal.<sup>124</sup> First of all, that is the very nature of judicial federalism. Secondly, however, no reason exists to think that the judiciary would expand appellate sentence review in an unprincipled fashion. The historical pattern of judicial restraint regarding appellate review indicates strongly that it is not a power judges will rush to utilize and abuse.

Finally, there remains the issue of whether appellate sentence review unfairly deprives the citizenry of its ability to voice disapproval of conduct. The citizenry's ability to do this relies on its ability to elect the policy-makers who write the laws. Appellate sentence review is irrelevant to this process. Under such review, legislators still write the laws that proscribe conduct, not judges. In conclusion, the effect of greater appellate review will not be that judges will turn some criminals into non-criminals by virtue of idiosyncratic processes, but rather it will, to at least some extent, ensure that punishment in marginal cases is proportionate to the offender's culpability.

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<sup>124</sup> *But see* Christina N. Davilas, Note, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259, 1283 (2002) (“[T]he overriding emphasis . . . on uniformity is often at the expense of individual fairness.”).

