ON DISPENSING INJUSTICE

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"The greatest of faults is to be conscious of none."

—Thomas Carlyle[2]

I. INTRODUCTION

Twenty-two years as an Arizona trial and appellate judge include not just shoveling smoke or wading with alligators but some regret about our justice itself. At one recent lunchtime gathering, my seasoned judicial colleagues all somberly agreed that despite our oaths and best intents, we Arizona judges do considerable injustice, much of which, worse still, is unavoidable. Another memory recalls three colleagues agreeing that they would prefer to be tried in any European court than in the present Arizona court system. Hence this discordant swan song to acknowledge causing injustice in the name of judging, by trying to unearth the hidden messages buried in this system of two faces.

That well intentioned judges admit to doing harm probably strikes a sour note. After all, this is the American judiciary, not that of the former Soviet Union or of Hitler's Germany, and one might expect its judges to sing its praises. But history is no friend here. We Arizona judges mechanically apply some criminal laws and procedures that teach the wrong lessons to those who need to learn the opposite. To some of this mis-education we are blind or silent. Our judicial robes hinder frank evaluation of the policies that create these harms. While many Arizona judges privately are critical of our justice system, their public silence is profound.

When judges allow mechanical tinkering to squelch critical thinking, we diminish a view of the justice we invoke. As we oil the wheels of the justice system, we often find it easier to apply more oil than to replace squeaky wheels. It

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2. THOMAS CARLYLE, SARTOR RESARTUS. ON HEROES AND HERO-WORSHIP AND THE HEROIC IN HISTORY (1921).

need not be so. The English common law allowed its judges an inner moral compass to assess the justice of their rulings, using equity to correct statutory excesses. In our state, unlike England, that moral compass has been deflected by unsophisticated "tough" solutions to crime that discourage honest queries about cost-benefits, tax results, effect on crime rates, deterrence, and ultimately basic fairness. Ill-advised criminal policies eventually breed public disrespect when they teach contradictory lessons. Here, in the following pages, lie some of these harms masquerading as justice, beginning with mandatory sentences and plea bargains, moving on to the felony murder rule, the war against hard and soft drugs, the death penalty, and our prison myopia, and ending with some suggestions for change.

II. MANDATORY SENTENCING

Prior to the late 1970s, Arizona judges set a minimum and maximum sentence and allowed a parole board to determine when prison release should take place.[3] Although this indeterminate system provided incentives for inmates to improve, too much discretion given to corrections and parole officials generated release disparities based on race, sex, and other factors.[4] The current vogue to counter disparity with determinate sentences generates the opposite problem: too much uniformity. Judges now are to treat all offenders of the same kind as fungible look-alikes despite differing individual circumstances. Uniformity reaches its apogee with mandatory sentencing, where judicial discretion succumbs to *a priori* legislative sentencing by crime category. Mandatory sentencing assumes that all criminals committing the same crime deserve the same punishment. It thereby betrays the ideal of sentences proportioned to individual circumstances and eviscerates the statutory claim to "just desert."[5]

Originally conceived in the 1980s to ensure equal sentences for similar offenders and to avoid supposed judicial leniency, the mandatory-sentencing scheme now dominates felony sentencing in Arizona and causes the following serious injustices: (a) disproportionate severity of sentence to crime; (b) reduction in trials by an increase in plea bargaining; (c) prosecutorial rather than judicial control of sentencing; (d) lack of individualization of sentences; and (e) deterrence fallacies.

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3. Compare the present version of ARS § 13-101 (West Supp. 2000) with former Arizona sentencing philosophy as articulated in *Orme v. Rogers*, 32 Ariz. 502, 260 P. 199 (1927). *See also* ARIZONA CRIMINAL CODE COMMISSION, ARIZONA REVISED CRIMINAL CODE (1975)

4. NATIONAL SYMPOSIUM ON SENTENCING: REPORT AND POLICY GUIDE, AMERICAN JUDICATURE SOC'Y 39–41 (1998).

5. A.R.S. § 13-101(6) (West Supp. 2000) lists "just and deserved punishment" as a public policy goal of this state's criminal law—a retributive concept addressing culpability on an implied individual basis.

A. Disproportionate Severity of Sentence to Crime

In Arizona, as in the United States generally, the law-and-order politics of the last two decades has "produced a penal system of a severity unmatched in the Western world."[6] Our country has the world's highest rate of imprisonment, incarcerating 476 per every 100,000 persons, six to ten times more than other industrialized nations.[7] Even higher than the high national average, Arizona incarcerates 507 per every 100,000 persons, which is the eighth highest incarceration rate in this country and more than twice the national rate of prison growth. The current rate represents an increase of fourteen times since 1974 and 139% over the incarceration rate ten years ago, and an increase of 343% in prison days served, almost all due to mandatory sentences.[8]

In 1993, the National Academy of Sciences Panel on Understanding and Control of Violent Behavior, initiated by the Reagan Administration's Department of Justice, noted that the average prison time per violent crime had tripled between 1975 and 1989.[9] In 1994, James Q. Wilson, America's leading conservative scholar on crime, acknowledged that "[m]any (probably most) criminologists think we use prison too much and at too great a cost and that this excessive use has had little beneficial effect on the crime rate."[10] The cost to taxpayers, averaging about $20,000 per inmate per year,[11] grows even more as we confine inmates into old age, because criminal propensity drops dramatically after the crime-prone years

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6. MICHAEL TONRY, SENTENCING MATTERS 24 (1996). There are 476 prisoners per 100,000 United States residents, according to The Sentencing Project, a nonprofit prison research organization in Washington. *See* MARC MAUER, THE RACE TO INCARCERATE 36–40 (1994).That rate is six times that of Canada and Australia and five times that of any country in the European Union. *See id.*

7. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 1999 (2000) [hereinafter PRISONERS IN 1999]; Cassandra Burrell, *Populations of Prisons, Jails Climb 6%*, ARIZ. REPUBLIC, Jan. 19, 1998, at A3. Arizona's incarceration rate in 1982 was the twelfth highest in the United States. *See* U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin: Prisoners at Midyear 1982, at 2 (1982). Arizona's incarceration rate has moved steadily upward over the past decade to the point that Arizona is now the *eigth* most incarceration-prone state. *See* ARIZONA DEPT. OF CORRECTIONS, ANNUAL REPORT 59 (1999) [hereinafter DOC ANNUAL REPORT].

8. *See* DOC ANNUAL REPORT, *supra* note 7, at 6–7, 59.

9. *See* TONRY, *supra* note 6, at 137.

10. James Q. Wilson, *Crime and Public Policy*, *in* CRIME 489, 499 (James Q. Wilson & Joan Petersilia eds., 1995). As far back as 1790, mandatory penalties had been enacted for capital offenses. In 1956, Congress passed the Narcotic Control Act, creating mandatory penalties for a variety of drug offenses. By 1970, lawmakers had come to question the efficacy of such policies, believing them to be overly punitive and often circumvented by court officials. On the floor of the U. S. House of Representatives in 1970, then Representative George Bush proclaimed that the elimination of mandatory minimum penalties (except for professional criminals) "will result in better justice and more appropriate sentences." Such sentiments paved the way for federal legislation that repealed most mandatory drug sentences that year. *See* M. Mauer, *Why Are Our Tough on Crime Policies So Popular?*, 11 STAN. L. AND POL'Y REV. 9, 10 (Winter 1999).

11. *See* DOC ANNUAL REPORT, *supra* note 7, at 41.

between ages sixteen and twenty-four.[12] Our mandatory sentences inflate living and medical costs for long-term inmates and increase taxes as putative deterrence decreases.[13]

B. Reduction in Trial Rights

Arizona's severe mandatory sentencing has promoted plea bargaining to the point of extinguishing any realistic right to trial. In 1976, the Legislature passed a charge-based mandatory sentence enhancement law[14] that permitted prosecutors to induce guilty pleas by adding a firearm-possession charge and then dismissing the charge in exchange for a plea to the underlying crime.[15] After this law took effect, the guilty plea rate in the Maricopa County Superior Court increased significantly. In 1976, the calendar year immediately preceding the new law, 10.4% of criminal cases proceeded to trial.[16] In the following two years, the trial rate fell to an average of 8.74%.[17] The percentage of cases going to trial dropped to 5.73% during the first three full years of sentencing under the new 1978 Criminal Code.[18]

A 1982 mandatory provision further increased the sentencing of persons convicted of felonies while on probation or parole, requiring life imprisonment without release for twenty-five years.[19] After this law took effect, the percentage of cases going to trial in Maricopa County again declined sharply. In the three years immediately preceding the mandatory 1982 law, the trial rate had been 5.73%.[20] This figure fell to 4.27% during the four years immediately thereafter.[21] Overall, in less than a decade the trial rate fell from 10.40% to 3.77%.[22] Increases in judicial and lawyer resources suggest that this decline in the trial rate cannot be attributed to increasing caseloads but rather to prosecutors using mandatory enhancements to leverage defendants into plea-bargaining away the right to trial.[23] Severe mandatory sentences effectively make the constitutional right to trial too risky to be exercised, even for an innocent defendant. Trial has ceased to be a realistic option precisely because of the mandatory sentencing wedge.

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12. As of June, 2000, the Arizona Department of Corrections had custody of 2129 prisoners over the age of 50. *See* DOC ANNUAL REPORT, *supra* note 7, at 47.

13. ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 75 (1998) ("aging out" of crime)

14. 1976 Ariz. Sess. Laws ch. 111, §§ 1–12 (1976).

15. *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 79–81 (1993) (to which this analysis is indebted); *cf.* 1976 Ariz. Sess. Laws ch. 111, §§ 1–12.

16. *See* Lowenthal, *supra* note 15.

17. *See id.* at 83.

18. *See id*.

19. *See* 1982 Ariz. Sess Laws ch. 322, §1, as reflected in the present version of ARIZ. REV. STAT. ANN. § 13-604.02(A) (West Supp. 1997).

20. Lowenthal, *supra* note 15, at 83.

21. *See id*. at 95.

22. *See id*.

23. *See id*.

C. Prosecutorial Rather Than Judicial Control

Prosecutors now regularly charge defendants with mandatory sentence counts, only to dismiss them later in a plea bargain. In a recent year, Arizona prosecutors dismissed repetitive offender allegations[24] in 76% of all cases in return for a guilty plea.[25] Severe mandatory sentences coerce pleas that in turn, circumvent the mandatories. The result: departure from the statutory mandate, a sophisticated form of lawbreaking. In one study, Professor Tonry reported:

> Mandatory penalties elicit more devious forms of adaptation. When Michigan judges in the 1950s or the 1970s acquit factually guilty defendants, or when Arizona prosecutors…permit people who have committed serious crimes to avoid mandatories by pleading guilty to attempt or conspiracy, or when prosecutors and judges fashion new patterns of plea bargaining solely to sidestep mandatories, important values are being sacrificed.[26]

In shaping a criminal case, Arizona prosecutors now have more clout than judges. The prosecutor decides not only which offenses to charge but also whether to seek enhancement and aggravation, whether to offer a plea, what it will be, and whether a sentence is stipulated. These are the most significant decisions shaping a trial and sentence. No judicial or legislative controls nor procedural rules limit these choices. The office decisions of prosecutors, often recently graduated from law school, are discretionary, disparate, unregulated, hidden from public scrutiny, and judicially unreviewable.[27] Though the visible courtroom rulings of the more experienced judiciary are reviewable, these rulings achieve less penal impact than the hidden discretionary decisions of prosecutors. [28] The shaping of an Arizona criminal case from beginning to end results less from judicial or statutory control and more from the arbitrary whims of prosecutors.

This switch in proper roles divests the public's more scrutinized, more carefully chosen, more experienced, and more impartial judiciary from any comparable role in supervising or standardizing these decisions. This role reversal, which probably does not meet an informed public's expectations nor that of our constitution, also collides with the differing levels of scrutiny we use to choose these role-players in the first place.

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24. *See infra* discussion Part III.

25. *See* Lowenthal, *supra* note 15, at 82.

26. TONRY, *supra* note 6, at 161.

27. In *State v. Barger*, 167 Ariz. 563, 810 P.2d 191 (App. 1990), the Arizona Court of Appeals observed:

> Suffice it to say that today we express our concern that a junior officer in the executive branch of county government (deputy county attorney) is given great discretion and power to affect sentencing in a state court while denying to the state judicial officer who presides over that court any discretion in what has traditionally and inherently been a function of the court.

Id. at 570, 810 P.2d at 198.

28. *Id.*

D. Lack of Individualized Sentences

Unlike the former rehabilitative goals implied in the pre-1978 Criminal Code,[29] mandatory sentences now require that all those convicted of the same crime receive essentially the same sentence. Judges sentence crimes, not criminals.[30] Individual differences among defendants are largely ignored. Mandatory sentencing assumes that those committing the same crime are generics, e.g., that all first degree murderers resemble each other in culpability. That assumption is false.

> Many…regularly recurring circumstances are situationally relevant to…sentencing but not universally relevant….Excess alcohol consumption may be a mitigating circumstance when a defendant convicted of manslaughter is an alcoholic, [but] an aggravating circumstance when the defendant is a social drinker who refused friends' pleas to drive him home....Age may be a relevant circumstance when the defendant is seventeen and impressionable or when the defendant is seventy-five and infirm but irrelevant for twenty-five- and thirty-five-year olds. Being an employed head of the household may be irrelevant when the charge is stranger rape but relevant when the charge is embezzlement.[31]

Vastly different considerations distinguish an unprovoked, premeditated, gang-motivated murder, on the one hand, from a premeditated murder by an abused spouse driven to kill after years of frightful spousal abuse. Though both have committed first degree murder, differing culpability suggests that the former receive a life sentence and the latter something approaching probation, an impossible distinction because of the mandated sentence for first-degree murder.[32]

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29. *See* R. Gerber, *Culpability, Sentencing and Controversy in the New Criminal Code*, ARIZ. BAR J., 11, 11–27 (Aug. 1978).

30. *See U.S. Judge Refuses to Impose Sentence*, ARIZ. REPUBLIC, Jan. 21, 2000, at A13 (describing how Judge Paul Magnuson refused to impose a mandatory 10-year prison sentence on a first-time drug offender).

31. TONRY, *supra* note 6, at 23.

32. *See* ARIZ. REV. STAT. ANN. § 13-1105 (West Supp. 1997) (requiring a sentence of death or life imprisonment for all first degree murders); State v. Cocio, 147 Ariz. 277, 709 P.2d 1336 (1985) (en banc). *Cocio* vividly illustrated the disparity in sentencing that can result from charge-based mandatory punishment when a defendant exercises his right to trial. Cocio's truck collided with a car driven by Rodriguez, killing a passenger in the Rodriguez vehicle. *Id.* at 277, 1338. Both Cocio and Rodriguez were charged with manslaughter and driving under the influence of alcohol. *See id.* The prosecution also charged both defendants with mandatory punishment allegations because the two vehicles qualified as "dangerous instruments." *See id.* Rodriquez entered into a plea agreement with the prosecution and was sentenced to two days in jail, a fine, and a year of probation. *See* Cocio v. Bramlett, 872 F.2d 889, 890 (9th Cir. 1989) (discussing these facts in the context of a denial of a habeas corpus petition made by Cocio). Cocio, however, rejected an identical plea bargain offer and was convicted. *See id.* Since he had committed a dangerous felony while on probation, Cocio received a mandatory life sentence with no possibility of parole for twenty-five years. *See id.* Ironically, the evidence suggested that Rodriguez was the more culpable of the two drivers. Yet Cocio, because of the mandatory

Mandatory sentences assume that all those committing the same crime resemble each other in culpability and that "one size fits all"—assumptions flatly falsified in any judge's criminal calendar. The venerable ritual of sentencing has become a puppet show where defendants are not individuals but criminal classes and judges' discretion is hamstrung by generic legislative decrees. To speak of this *a priori* sentencing as retributive or individualized ("just and deserved punishment") confuses blanket protection policy with mere lip service to the "just desert" of A.R.S. § 13-101(6).[33]

E. The Deterrence Illusion

Some might say that the foregoing ills are tolerable if mandatory sentences deter crime. The Department of Corrections 1999 Report states as much.[34] Unfortunately, no research supports that illusion; rather, research supports its opposite.

After an exhaustive examination of the question was undertaken, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects concluded, "[W]e cannot assert that the evidence warrants an affirmative conclusion regarding deterrence."[35] The panel's principal consultant on the subject, Professor Nagin, was more candid:

> The evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist….Policymakers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence [regarding mandatory sentence deterrence]…strongly supports the deterrence hypothesis.[36]

A 1993 examination of deterrence by the National Academy of Sciences Panel on Understanding and Control of Violent Behavior reached a similar conclusion about mandatories. "After documenting that the average prison sentence per violent crime tripled between 1975 and 1989, the panel asked, 'What

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sentencing regime, received a punishment vastly harsher than Rodriguez. In effect, Cocio received a life sentence for going to trial.

33. Judge Richard Posner, founder of the law and economics movement, writes:

> Every society softens the rigors of strict legalism….There is no inconsistence in this. It is false that law is not law unless it banishes every human, mitigating, discretionary, or "feminine" characteristic….It is because the strict enforcement of rules is intolerable.…That law is the *art* of governance by rules, not just an automated machinery of enforcement.

RICHARD POSNER, LAW AND LITERATURE 109 (1998).

34. *See* DOC ANNUAL REPORT, *supra* note 7, at 7.

35. *Panel on Research on Deterrent and Incapacitative Effects*, *Summary*, *in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3, 7 (Alfred Blumstein et. al, eds., 1978).

36. Daniel Nagin, *General Deterrence: A Review of the Empirical Evidence, in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES, *supra* note 35, at 8; *see also* TONRY, *supra* note 6, at 137.

effect has increasing the prison population had on violent crime?' and answered, in the context of drug crimes, 'Apparently very little.'"[37]

> Ironically, most mandatory penalty provisions enacted during the 1980s and 1990s concerned drug crimes, behaviors...uniquely insensitive to...deterrent effects....Despite risks of arrest, imprisonment, injury and death, drug trafficking offers economic and other rewards to disadvantaged people that far outweigh any available in the legitimate economy. Market niches created by the arrest of dealers are...often refilled within hours.[38]

Confusing the relationship between incarceration rates and crime rates wastes lives and money. In 1983, the Reagan Justice Department compiled research summarizing the crime control impact of the then-present strategy of "collective incapacitation"—that is, punishing all offenders convicted of a certain offense with the same mandated prison sentence.[39] The research concluded that "the most striking finding is that incapacitation does not appear to achieve large reductions in crime," but that these hard-line policies "cause enormous increases in prison populations."[40]

Other factors provide more compelling explanations for the recent reduction in crime—changes in the drug trade, law enforcement efforts to stem the flow of illegal guns, and especially an improved economy.[41] Crime and incarceration rates are unrelated. In the last nine years, the prison population has gone up and crime has gone down.[42] But in the seven years prior to that, the prison

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37. TONRY, *supra* note 6, at 137 (citing UNDERSTANDING AND CONTROLLING VIOLENCE (Albert J. Reiss, Jr. & Jeffrey Roth eds., 1993)).

38. Alfred Blumstein, *Prisons*, *in* CRIME 47 (James Q. Wilson ed., 1994). *See also* TONRY, *supra* note 6, at 141. Criminologist Alfred Blumstein echoed these sentiments that drug laws do little to deter drug trafficking:

> [T]here is…no evidence that…[harsh drug law enforcement policies] have been at all successful. Of course, that result is not surprising. Anyone who is removed from the street is likely to be replaced by someone drawn from the inevitable queue of replacement dealers ready to join the industry. It may take some time for recruitment and training, but experience shows that replacement is easy and rapid.

TONRY, *supra* note 6, at 141 (quoting Blumstein, *supra* note 38.)

39. MAUER, *supra* note 6, at 64 (quoting JACQUELINE COHEN, INCAPACITATING CRIMINALS: RECENT RESEARCH FINDINGS 3 (Dec. 1983)). In a major study of these policies at the federal level, the U. S. Sentencing Commission reported: "While mandatory minimum sentences may increase severity, the data suggest that uneven application may dramatically reduce certainty. The consequence of this bifurcated pattern is likely to thwart the deterrent value of mandatory minimums." U.S. SENTENCING COM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL SYSTEM 5 (1991).

40. MAUER, *supra* note 6, at 64.

41. *See* B. Herbert, *The Crime Fighter,* NEW YORK TIMES, July 20, 2000, at A25 (citing a 2000 study by Jared Bernstein and Ellen Houston of the Economic Policy Institute, showing, inter alia, crime rates fall as unemployment falls).

42. *See* MAUER, *supra* note 6, at 82–92.

population went up and crime also went up, paralleling the prison buildup.[43] States with the highest incarceration rates are not those with the highest crime reductions.[44] No parallel or consistent relationship exists between crime and imprisonment; the most accurate correlation is really between crime and employment.[45]

Even conservative criminologist James Q. Wilson has observed of drug crime, "[S]ignificant reductions in drug abuse will come only from reducing demand for those drugs….[T]he marginal product of further investment in supply reduction [law enforcement] is likely to be small."[46] He reports: "I know of no serious law enforcement official who disagrees with this conclusion. Typically, police officials tell interviewers that they are fighting a losing war or, at best, a holding action."[47]

One of the largest studies ever undertaken of mandatory penalties on crime rates was an evaluation of New York's 1973 "Rockefeller Drug Laws,"[48] which required severe mandatory minimum sentences for drug crimes and forbade plea bargaining.[49] The study found that these severe mandatories had no discernible effects on drug use or general crime in New York.[50] The same holds true today, with even more counterproductive results and roll-backs.[51]

In an important 1998 study[52] of federal and state prisoners, the National Center on Addiction and Substance Abuse at Columbia University announced that mandatory sentences without mandatory rehabilitation only result in returning

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43. *See id.*

44. *See id.* at 81–92; *see also* Fox Butterfield, *Effect of Prision Building on Crime Weighed*, N.Y. TIMES, Sept. 28, 2000, at A10; Peter Elikann, *Do more Jails Equal Less Crime?*, NAT'L L.J., Sept. 25, 2000, at A20.

45. *See The Sentencing Project Newsletter*, May, 2000, at 1; *see also* MAUER, *supra* note 6, at 82–92. "An examination of unemployment, wages, and crime rates by region shows unemployment and crime rates falling together, and rising wages and crime rates moving apart." B. Herbert, *The Crime Fighter*, N.Y. TIMES, Aug. 20, 2000, at A27 (quoting J. Bernstein and E. Houston, RESEARCH FOR THE ECONOMIC POLICY INSTITUTE, June 2000).

46. James Q. Wilson, *Drugs and Crime, in* 13 CRIME AND JUSTICE: A REVIEW OF RESEARCH 521, 534 (1990).

47. *Id*.

48. *See generally* JOINT COMM. ON N.Y. DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE (1978).

49. *See id.* at 18.

50. *See id.* at 2.

51. TONRY, *supra* note 6, at 141; *see also* JOINT COMM. ON N.Y. DRUG LAW EVALUATION, *supra* note 48. For current nonpartisan research, see generally JONATHAN P. CAULKINS ET.. AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? (Rand, 1997).

52. *Behind Bars: Substance Abuse and American's Prison Population*, The Nat'l Center on Addiction and Substance Abuse at Columbia University (1998).

inmates to society with the same crime problems as before their incarceration.[53] Joseph Califano, the Center's director, stated:

> If the objective of our criminal justice and prison system is to protect the public safety by incarcerating incorrigible offenders and rehabilitating as many others as possible, then the prevailing policy of prison only, with no treatment or preparation for return to the community, is insane. It makes absolutely no sense.[54]

Califano's plea to end mandatory sentences has been supported by William Murphy, then president of the National District Attorneys Association, and notably by General Barry McCaffrey, hard-line former White House Drug Policy Director, who stated in a January 2001 interview, "I am unalterably opposed to the system of mandatory sentencing; I think we need to give this authority back to the judges."[55]

Whether one looks at the supposed deterrent effect of criminal sanctions or more specific studies regarding mandatory penalties, no research supports the political belief that our severe mandatory penalties impact rates of serious crime.[56] Professor Tonry's lengthy research on mandatory sentences ought to be especially bracing in Arizona, where he has been a critical sentencing consultant:

> As instruments of public policy, they do little good and much harm. If America does sometime become a 'kinder, gentler place,' there will be little need for mandatory penalties and academics will have no need to propose "reforms" premised on the inability of elected officials to make sensible decisions.[57]

The similar conclusion offered by Assistant Attorney General William Brownsberger about the counterproductivity of mandatory drug sentences applies equally well to all mandatory sentences:

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53. Press Conference, Fed. News Service, Jan. 8, 1998, available in LEXIS News Library.

54. *Id*. Despite their popularity with politicians and the public, most professionals who work with the criminal justice system oppose mandatory minimum sentences. In 1993, for example, a Gallup survey of 350 state and 49 federal judges found only 8 percent in favor, and *90 percent opposed* to federal mandatory minimums for drug offenses. Similarly, both the Judicial Conference of the United States, the congressionally appointed Federal Court Study Committee, and the American Bar Association have called for a repeal of mandatory minimums. To date, however, Congress has taken no action. *See A National Symposium on Sentencing: Report and Policy Guide*, Am. Judicature Society, State Justice Institute, Chicago, 1998.

55. *Behind Bars: Substance Abuse and America's Prison Population*, Nat'l Center on Addiction and Substance Abuse, Columbia U., Jan. 1998 (quote from NY TIMES, Jan. 8, 2001, at A10).

56. MAUER, *supra* note 6, at 44. The most recent book-length research on the effect of mandatory sentences on crime rates shows that at least 75% of the costs and effects of such sentences are wasted. *See* THE CRIME DROP IN AMERICA 143–50 (Alfred Blumstein et al. eds., 2000)

57. TONRY, *supra* note 6, at 163.

> When incarceration becomes routine, it cannot deter crime and may even be seen as a positive rite of passage....Mandatory penalties for drug offenses lead to the inflexible over-application of harsh punishment, further diminishing its deterrence value, misallocating scarce resources and exacerbating high incarceration rates. Our main conclusion from this report is that we need to moderate our mandatory drug sentencing policies.[58]

Arizona's rigid mandatory sentences embody these deterrence illusions and also generate the cookie-cutter inequities of "one size fits all."[59] Much of what legislators expect from severe mandatory sentencing would result from making mandatory sentences less severe and more flexible, with judges authorized to vary them, within broad limits, for individual aggravating or mitigating reasons. Converting all mandatory penalties to less severe presumptive sentences would sacrifice few of the positive values of mandatories and avoid the fungibility of preset, cookie-cutter dispositions.

In a truly flexible presumptive approach, judges could take account of all mitigating or aggravating circumstances without the subterfuge of plea bargaining. Aggravating and mitigating factors would permit an articulated departure from the presumptive norm and, in the process, diminish plea bargaining around mandatories to reach a fair penalty. The gain would be both punishment that fits the individual and fidelity to sentencing statutes. Not least of all, sentencing authority would return to those subject to public scrutiny—judges—rather than remaining in prosecutors.

III. PLEA BARGAINING

Plea bargaining is not just a part of Arizona's justice system; today it *is* the system. More than ninety-five percent of defendants enter guilty pleas.[60] The injustice lies not so much in that fact as in bargaining's dual links to mandatory sentences and loss of the right to trial.

Arizona trial courts routinely now reach condemnation without adjudication. When adjudication appears on the horizon, prosecutors use sentencing mandates to threaten a greater sanction to discourage it. Our court system has become a vice: the system favors a plea and penalizes the constitutional right to a trial instead of vice versa. Leverage pressures realistically extinguish the constitutional right to a trial for most defendants.

Plea bargaining has become necessary in the first place not for policy but for lawyers' caseloads. Most criminal attorneys depend on plea agreements to

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58. W. BROWNSBERGER, MANDATORY DRUG SENTENCES 5 (1997).

59. *See* K. STITH & J. CABRANES, FEAR OF JUDGING, 38 (1999); *see also* TONRY, *supra* note 6, at 24 (stating that "the law and order politics of the past two decades" has achieved only the effect of producing "a penal system of a severity unmatched in the Western world").

60. *See* Lowenthal, *supra* note 15, at 85; *see also supra* note 22 and accompanying text.

move cases. Trials fall like a wrench in this turnstile. More importantly, and more germane to this thesis, a trial becomes illusory when defendants face a draconian mandatory sentence more severe than it would be in a plea agreement.

Plea bargaining negotiations reinforce an attitude of manipulation when defendants discover that our bargaining bazaars operate by threat, bluster, and push-pull gymnastics matching their own criminal wiles. Instead of standing for statutory principle, our courts' bargaining stalls echo manipulative attitudes similar to those of the criminal precisely by sanctioning disregard of mandatories. Rehabilitation is thus seriously compromised from the start, because plea bargaining reinforces in the criminal the very manipulative mentality we seek to eradicate, namely, that the letter of the mandatory law does not need to be followed.

Bargaining regularly circumvents federal sentencing guidelines in at least thirty percent of all cases; deviation from state mandatories is probably higher.[61] Precisely because of their preset severity, rigid sentencing mandates actually increase the impetus for plea bargaining to escape their severity for a more proportional sentence. Bargaining also shifts sentencing from judges to prosecutors and drives prosecutorial discretion more deeply underground. The message: Circumventing mandatory sentences by plea bargains is statutorily dishonest, but the dishonesty and secrecy are caused by statutory severity itself.[62]

Neither attorneys nor judges announce their willful evasion of mandated penalties, of course, so bargaining occurs secretly in the bowels of the court, far from public scrutiny. By far the most important vehicle for statutory evasion is charge bargaining, which leads to the dismissal of readily provable counts. Horizontal charge bargaining and superseding indictments replace offenses with high statutory mandates.

We could alter this surreptitious culture of statutory evasion. One way is to provide a preset discount for defendants who plead guilty. Federal sentencing guidelines do this by allowing a sentence reduction for "acceptance of

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61. *See* TONRY, *supra* note 6, at 37; *see also* A. Alschuler, *An Exchange of Concessions*, 142 NEW L.J. 937, 938 (1992). "The lying to the court that is inevitable with the frequent use of such bargaining is the dirty little secret in the prosecution of…criminal cases." STITH & CABRANES, *supra* note 59, at 104 (quoting T. Garoppolo, federal probation officer).

62. *See* TONRY, *supra* note 6, at 37. A major problem of extremely harsh sentence enhancements is that often they are not enforced; the more severe the enhancement, the more likely that courtroom players will ignore or circumvent it. Moreover, when the weight given in sentencing to enhancement factors is reasonably proportional to the weight of all other circumstances taken into account in guideline or presumptive sentencing schemes, legislative policy is more likely to be uniformly followed. Thus, by reducing the severity of mandatory punishment provisions, a legislature would take a major step toward achieving consistency and proportionality in sentencing. *See* Lowenthal, *supra* note 15, at 123.

responsibility,"[63] but the flip side of this incentive punishes exercise of the right to trial.

A better way to take some manipulation out of the bargaining process is by taking the fixing of the charge away from prosecutors by revitalizing the preliminary hearing with judicial amendment powers. At the preliminary hearing, the prosecutor would propose a charge and present evidence to support it. The magistrate would then conform the charge to the evidence presented. When preliminary hearings produce charges that accurately reflect the evidence, the prosecutor's incentive to overcharge weakens, and a stable basis for bargaining arises. To ensure uniformity, both the prosecution and defense could appeal the magistrate's setting of the charge to an appellate court.

In addition, standards at the charging and sentencing ends of the bargaining process could limit prosecutors' unfettered discretion both to overcharge and overreduce. Legislation could prohibit prosecutors from reducing a charge or a sentence more than one level or class below its original designation. Prohibiting charge and sentence reduction beyond one level would ensure equality of bargaining across the defendant population and reduce the unseemly message that charges can be reduced drastically at the whim of individual prosecutors.

Further, to ensure their impartiality, judges who participate in unsuccessful plea negotiations need to be disqualified by rule from conducting any trial of that defendant. To do so after hearing the defendant's abortive admission of guilt belies any hope of judicial impartiality.

IV. THE FELONY MURDER RULE

Despite contrary recommendations from many sources, the Arizona Legislature has fashioned a felony murder rule that seems to be the broadest and most unprincipled in the United States.[64] The legislature thereby ignored the widespread trend, both in the Model Penal Code[65] and in other states, to abolish or narrow a rule universally viewed as unprincipled.[66]

In the classic formulation of the felony murder rule, a felon is guilty of murder for any death that occurs for any reason during the commission or attempted commission of an inherently lethal felony.[67] Arizona broadly defines felony murder as first degree murder, subject to the death penalty, when anyone

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63. *See* 18 U.S.C. § 3E.1.1.1 (2000) (containing the federal sentencing guidelines).

64. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1997).

65. *See* MODEL PENAL CODE § 210.2, cmt. 6, at 30–31 (1980) (citing modern trend away from traditional rule).

66. *See id.*

67. *See id.*

(including a nonparticipant) dies, even accidentally, during the commission or attempt of any of many listed felonies.[68]

Arizona's list of these underlying felonies has swelled far beyond the common law's longstanding limitation to felonies that are inherently dangerous. Offenses subject to our felony murder rule now include the sale or importation of drugs, including marijuana; sexual conduct with a minor, which includes much consensual conduct; arson of any object; escape; any degree of burglary; transporting drugs; and inducing a minor to violate drug laws.[69] Including these nonviolent felonies in the rule marks a vast departure from the sternest common law felony murder rule, which restricted the underlying felonies to those involving an immediate threat to life.[70] Arizona's listed felonies go far beyond this category of lethal danger.

Our felony murder statute also eliminates causality, another common law requirement, by including the death of any person occurring simply within the time parameters of the underlying felony.[71] Case law reflects this overbreadth of causality: in *State v. Lopez*, defendant Lopez suffered a felony murder conviction despite evidence that he had been arrested, handcuffed, and subdued before police shot and killed his accomplice.[72]

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68. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(2),(B) (West Supp. 1997). ARIZ. REV. STAT. ANN. § 13-1105(A)(2), (B) reads:

> A. A person commits first degree murder if:
>
> ....
>
> 2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, marijuana offenses under § 13-3405, subsection A, ¶ 4, dangerous drug offense under § 13-3407, subsection A, ¶ 7, narcotics offenses under § 13-3408, subsection A, ¶ 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13-3409, kidnapping under § 13-3404, burglary under § 13-1506, 13-1507 or § 13-1508, arson under § 13-1703 or 13-1704, robbery under §§ 13-1902, 24-1093 or 13-1904, escape under §§ 13-2503 or 13-2504, child abuse under § 13-3623, subsection B, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under § 28-622.01 and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.
>
> . . .
>
> B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

69. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(2), (B).

70. *See* MODEL PENAL CODE 210.2, cmt. 6, at 30–31 (1980).

71. *See id.*

72. State v. Lopez, 173 Ariz. 552, 554–56, 845 P.2d 478, 480–82 (Ct. App. 1992).

Legislatures across this country have created a wide variety of felonies that are not inherently dangerous;[73] Arizona has done so liberally. Applying a felony murder charge to such non-lethal felonies yields startling results. Felony murder now can occur in Arizona for an unforeseen heart attack,[74] an unexpected death resulting from a narcotics transaction,[75] and in consensual drug and sexual crimes where the underlying felony is far removed geographically and causally from the fatality.[76]

Arizona's present rule also leads to felony murder culpability, with a potential death sentence, for all the offenders in the following lethal situations, hypothetical only for the present:

(1) the death by heart attack of an uninvolved spectator present at the transportation or sale of a small amount of medicinal marijuana;

(2) the death of an angry parent who trips on a step and falls after finding his minor daughter and her boyfriend engaged in consensual fondling on the front porch;

(3) the death of a cyclist hit by a police car pursuing a misdemeanant escapee from a juvenile detention center;

(4) the vehicular death of a pedestrian dodging an ambulance carrying a person suffering smoke inhalation from an arson fire;

(5) the death of a minor child falling from a playground swing while being induced by an older brother to carry a marijuana cigarette to a nearby friend.

The widely respected Model Penal Code's unwavering position on the felony murder rule is that it so violates fundamental mens rea principles that it should be abandoned as an independent basis for homicide.[77] Most legislatures that lack the courage to abolish it have at least limited it.[78] Arizona, to the contrary,

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73. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3408 (narcotics); ARIZ. REV. STAT. ANN. § 13-1506 (burglary); ARIZ. REV. STAT. ANN. § 13-1105(A)(2).

74. *See* State v. Edwards, 136 Ariz. 177, 186, 665 P.2d 59, 68 (1983) (en banc) (applying the felony murder law to a case in which the victim had a heart attack during the robbery).

75. *See* State v. Medina, 172 Ariz. 287, 836 P.2d 997 (Ct. App. 1992) (discussing, in general, felony murder for narcotics transactions); *see also* ARIZ. REV. STAT. ANN. §13-3623 which, as amended in 2000, extends felony murder to deaths during transportation of drugs.

76. In *State v. Dixon*, 109 Ariz. 441, 443, 511 P.2d 623, 625 (1973), the Arizona Supreme Court held that a heroin sale was too far removed for felony murder when the buyer overdosed, but the Legislature reversed this holding by enacting ARIZ. REV. STAT. ANN. § 13-1105(B).

77. MODEL PENAL CODE § 210.1, cmt. 6, at 30 (1980).

78. *See, e.g.*, WIS. STAT. ANN. 940.03 (1996); MONT. CODE ANN. §45-5-102 (1995).

seems to be the only state to have broadened its rule well beyond the most draconian common law eruptions.

Even other legislatures' more enlightened limitations on the rule do not resolve its illogic. In no other area does either the civil or criminal law predicate liability simply on a death apart from the actor's mental state. Punishment for homicide arises only for conduct committed with a homicidal state of mind that makes the death morally reprehensible.[79] Murder is punished as a capital offense precisely for its premeditative forethought, the very mental state lacking in Arizona's capital felony murder.[80]

Criminal liability attaches to individuals, not generalities. It should rest on something more than a generalized probability of guilt fitting only some few actors involved in a fatality. Requiring that the underlying felony create a truly foreseeable lethal risk limits felony murder to crimes of reckless or negligent homicide that adequately cover all felony murder deaths.[81] This harmonious reform would moderate Arizona's extreme rule.

Mental state needs to remain the universal barometer of culpability, just as is required for all other crimes. First-degree murder and negligent homicide are not interchangeable; they carry vastly different sanctions precisely because of differing mental states.[82] Punishment for a greater offense on proof only of a lesser mental state wreaks the same violence to culpability degrees and guilt discernment as does the unqualified rule.[83] The felony murder rule ignores these distinctions.

The typical legislator probably does not perceive the mens rea aberrations in our felony murder rule. An indiscriminate lawmaker views a felon who causes death with negligence as worse than a nonfelon who kills with the same mental state. The culpability of the felon merges with the legislator's disdain for the death. Inconsistency results: lawmakers abolish mental state for lethal felons in criminal law but retain it for lethal tortfeasors in civil law.[84] In the felony murder case, evidence of accident, mistake and mental state is excluded; in the civil tort case, all such evidence is admitted.[85] The penalty difference is money versus a death sentence. So much for the supposedly more careful criminal law standard.

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79. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (stating that the traditional form of the offense requires "premeditation."); *see also* ARIZ. REV. STAT. ANN. § 13-1105(A)(2).

80. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1997) (felony murder).

81. *See* ARIZ. REV. STAT. ANN. §§ 13-1102 and 13-1103 (West 1989).

82. *Compare* ARIZ. REV. STAT. ANN. § 13-1105(A) *with* ARIZ. REV. STAT. ANN. § 13-1102 (premeditation vs. negligence).

83. *See* MODEL PENAL CODE § 210.2, cmt. 6, at 37.

84. *See, e.g.*, Transamerica Ins. Group v. Meere, 143 Ariz. 351, 357, 694 P.2d 181, 187 (1984) (discussing the various mental states recognized in the law of torts); *see also Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1924–25 (1986).

85. *See* ARIZ. REV. STAT. ANN. § 13-1105(B) (excluding the felon's mental state from consideration).

If we care about teaching principles and especially using mens rea as the barometer of degrees of culpability, the only honest remedy is to abolish the rule, just as the more principled English and commonwealth legal systems did long ago.[86] England has not lamented the loss of the rule it impulsively created and bequeathed to us.[87] Nor would any statutory vacuum result. Prosecution under some less inflated degree of homicide such as reckless manslaughter or negligent homicide could still occur, resulting in judgment and sentence matching the felon's true mental state.[88] The law would thereby regain the fairness lost in its descent into the unprincipled fiction that all felons deserve to be treated as first degree murderers just because a concurrent death occurs. Our justice system thereby would teach an insight from the common law lost in our state's politicized penology, namely, that the mens rea principles of culpability apply with equal force to felons as to all other criminals.

V. DRUG POLICY

A. Marijuana

On Christmas Day, 1998, Prince Charles, on a hospital visit, encouraged a multiple sclerosis patient to use marijuana in violation of English law.[89] In this country, President Clinton's pot use escaped the law because he didn't inhale.[90] Al Gore's more extended usage also somehow escaped its reach.[91] Such stories of hypocrisy abound. In contrast, last year the Arizona press carried a story about a Kingman woman, born without arms and legs, who was sentenced to the state prison for eighteen months for using marijuana.[92]

After alcohol and tobacco, pot is now America's number one drug choice,[93] offering a transient, introspective high that at one extreme can cure nausea[94] or, at the other, elevate evening sitcoms to devastating wit. Its prohibition establishes a baseline cultural hypocrisy that we cannot escape, ruining lives to build a penal empire so that politicians can appear tough.

Our marijuana laws reflect the principle that empirical medical data about health effects are irrelevant to legislation. Our marijuana policy has become a

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86. *See* England's Homicide Act of 1957, 5 & 6 Eliz. 2, Ch. 11, § 1 (abolishing felony murder in Great Britain).

87. *See id.*

88. *See* ARIZ. REV. STAT. ANN. §§ 13-1102 and -1103.

89. *See Prince in Medicinal Pot Debate*, ARIZ. REPUBLIC, Dec. 25, 1998, at A14.

90. DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 332, 338 (1996).

91. *See* Hendrick Hertzberg, *Passages*, THE NEW YORKER, Sept. 25, 2000, at 25–26.

92. *See* Mike McCloy, *Health Costs Earn Inmate Ticket Home*, ARIZ. REPUBLIC, May 24, 2000, at B1.

93. *See* THE DRUG LEGALIZATION DEBATE 77 (1999) (J. Inciardi, ed.).

94. *See* L. Grinspoon et. al., *Marijuana As Medicine: A Plea for Reconsideration*, 273 J. AM. MED. ASS'N 1875, 1876 (1996).

prohibition in quest of a rationale, a desperate search to find some medical reason to validate an earlier culturally inspired prohibition. The claims made in the 1970s and 1980s about the effects of marijuana—that it causes brain and chromosome damage, sterility, infertility, and even homosexuality[95]—have never been proven and likely never will. Marijuana may pose dangers still unknown, but criminal law criminalizes *known* harms, not the unknown, and we do not penalize without first knowing what the harm is.[96] Marijuana laws turn this principle on its head.

Although heavy marijuana use does harm the respiratory system, as does tobacco, marijuana remains one of the least toxic therapeutic substances known.[97] No fatal dose of the drug has appeared despite more than 5000 years of recorded use.[98] Pot is less toxic than many common foods and legal drugs.[99] Marinol and Dronabinol, drugs with pot's same active ingredient, THC, have been available by prescription for more than a decade.[100]

A policy that prohibits physicians from alleviating suffering via marijuana becomes more hypocritical when it forbids physicians to prescribe marijuana while permitting them to prescribe more dangerous morphine and meperidine.[101] With both these latter drugs, the difference between the dose that relieves pain and hastens death is very narrow.[102] By contrast, there is no risk at all of death from marijuana.[103] To demand therapeutic purity is equally hypocritical; we certainly don't make this demand for tobacco or alcohol, whose known fatal effects far transcend marijuana's.[104]

When the law is out of step with society's norms and labels ordinary citizens lawbreakers, its ability to shape public behavior erodes across the board. Public scorn results. Not surprisingly, our draconian pot laws have created a subculture of young lawbreakers who disdain all law and disrespect the adult world generally. Assertions that marijuana and alcohol lead to hard drugs get the

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95. *See, e.g.*, M. SCHUCHARD, PARENTS, PEERS, AND POT (1979) (finding marijuana causes panic, impairs the immune system, alters brain hemispheres, changes sex hormones, causes male breasts, etc.).

96. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 265–72 (1968).

97. *See* L. ZIMMER & J. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE 59–60 (1997).

98. *See id.*

99. *See id.*

100. *See id.*

101. In 1999, alcohol was involved in 150,000 deaths; 450,000 people died from smoking tobacco; 100,000 died from legal prescription drugs; no one died from marijuana use. *See* N. Shute, *Science and Ideas: Public Health*, U.S. NEWS AND WORLD REPORT, Sept. 18, 2000; *see also* ANNUAL REPORT, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM (2000).

102. *See* Ellen Goodman, *Anti-Marijuana Hysteria Sends Stupid Message*, THE BOSTON GLOBE, Dec. 18, 1996 at B10.

103. *See supra* note 95.

104. *See id.*

question backward.[105] Lawmakers march out of step with the public as well as with empirical data: polls consistently show that the public favors marijuana for health purposes; indeed, seventy percent of Arizonans think medical pot should be legal.[106]

The human cost of our pot war far exceeds its financial cost. In 1997, 695,201 Americans (double the 1992 figure) were arrested for possession of marijuana, giving these mostly young people a permanent criminal record for using a drug as accepted in their culture as alcohol is in the adult culture; more than four million Americans were arrested and charged during the Clinton Administration before Clinton himself announced in an interview that marijuana should be decriminalized.[107] Thousands of youngsters are serving prison terms for a first time, non-violent pot offense while being guarded by uniformed tobacco and alcohol addicts. Not the least of these excesses in Arizona is felony murder with a possible death penalty for any death associated with marijuana, including medical marijuana.[108]

The illogic of our anti-pot hysteria appears most clearly in a federally funded 250-page report issued in March 1999 by the Institute of Medicine, a branch of the National Academy of Sciences.[109] The White House Office of National Drug Control Policy, headed by drug czar Gen. Barry McCaffrey, commissioned and funded the two-year study after voters in California and Arizona endorsed medical marijuana in 1996 referenda.[110] To ensure its impartiality, the Drug Policy office assigned the research to the independent, government-supported agency whose eleven medical experts would base their findings not on politics or policy but on undiluted medical data.[111]

The conclusions of this latest report could not more fundamentally undermine our nation's present policy on pot. The institute found that marijuana helps patients with pain, nausea, and severe weight loss associated with AIDS and other serious illnesses.[112] Most importantly, the report found no evidence that giving pot to sick people increases illegal usage generally, nor was there any support for the popular notion that marijuana serves as a "gateway" drug to more serious drugs such as cocaine and heroin.[113]

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105. *See, e.g.*, SCHUCHARD, *supra* note 95, at 23.

106. *See 70% of Arizonans Support Medical Marijuana*, ARIZ. REPUBLIC, Jan. 15, 2000, at B4.

107. *See* Jann S. Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE, Dec. 28, 2000, at 84.

108. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1997).

109. *See generally* NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (National Academy Press, Wash. D.C. 1999).

110. *See id*. at i–xii.

111. *See id*.

112. *See id*.

113. *See id.*

General McCaffrey's response to his own commissioned research was to call for still "more research."[114] Such dogged aggression pervades the topic of marijuana whenever scientific research, repeated presidential commissions, or voter initiatives contradict official policy. Our pot hysteria reflects one of the great inconsistencies in our drug war, one that directly impairs legitimate drug prohibition. Despite contrary recommendations from government research, our government prohibits a substance repeatedly found to have medical benefits while desperately seeking still more medical research to justify its cultural prohibition. The answer to this backward quest is not hard to find, but it will not be found in the medical laboratory. We continue to penalize marijuana not for any medical or physiological reason but for cultural and ethnic reasons: we dislike the lifestyles of those who use it.

If we cared about penalties being proportionate to harm, we would devise a marijuana policy based on the recommendations of the many repeated but ignored presidential commissions.[115] We could begin a step-by-step process by legalizing medical marijuana across the board and then move gradually to the legalization of small amounts for personal use; in other words, move toward a policy that has worked well in the Netherlands: allowing pot to be bought and used in licensed coffeehouses.[116] If, as expected, no disasters result in any of these stages, outright legalization merely would put pot in the same category with our far more detrimental legal drugs, alcohol and tobacco. In the process we would abandon the upside-down process of first prohibiting a drug and then trying, desperately and after the fact, to discover a plausible reason for doing so.

B. Hard Drugs

In the 2000 electoral campaign, George W. Bush all but admitted extensive use of cocaine.[117] Like Bill Clinton and Al Gore, and unlike less privileged people, his drug use somehow escaped criminal attention.

In the 1980s, conservative parent groups vigorously demanded that something be done about hard drugs such as cocaine and heroin.[118] Politicians, typically, responded by demanding increased punishment.[119] That approach is strikingly effective not in solving the problem but in alleviating political pressure. A naive public passively accepts that approach to almost all crime issues without

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114. *See id.*

115. To take only two of many, see National Commission of Marijuana and Drug Abuse, *Marijuana: A Signal of Misunderstanding* (Gov't Printing Office 1972) and National Academy of Sciences Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base* (National Academy Press, Wash. D.C. 1999), both of which recommended decriminalization explicitly or implicitly.

116. *See* M. GRAY, DRUG CRAZY, 165–67 (2000) (providing a discussion of the Dutch plan).

117. *See* Hertzberg, *supra* note 91, at 25–26.

118. *See* M. MASSING, THE FIX 143–73 (1998) (discussing these parents' groups' demands).

119. *See id.* at 169–73.

questioning whether more punishment really solves the crime problem.[120] This political posturing generates a succession of escalating cycles. Public demand leads to intensified efforts to attack the drug trade. That doesn't have much effect, so the penal efforts are intensified. Some Arizona drug sentences, accordingly, now match sentences for homicide,[121] leading to dramatic growth in the number of drug arrests and augmenting prison populations to over 50% nonviolent drug offenders.[122] The frustration felt by politicians and law enforcement officers over their inability to kill the hydra-headed drug monster makes the imprisonment temptation strong. But slogans like "[p]rison camps for users and gallows for dealers,"[123] which sounds bracing on the campaign trail, neither solves the problem nor sends a justice message.

Between 1985 and 2000, the number of drug offenders in national prisons escalated by eleven times from 39,000 to 450,000, costing taxpayers more than five billion dollars annually.[124] Despite all this, the war on drugs has been ineffective. In 1997, General McCaffrey candidly admitted that "if measured solely in terms of price and purity, cocaine, heroin, and marijuana prove to be more available than they were a decade ago."[125]

Blanket prohibition lies at the core of the drug problem. The diversion of substantial police, judicial, and prison resources to arresting, prosecuting, and incarcerating millions of drug users and dealers, mostly minorities,[126] at an annual national cost of tens of billions of tax dollars and untold human lives, is not simply a drug or racial problem but a drug prohibition problem. When drug dealers kill one another and innocent bystanders, that's a prohibition problem. When drug addicts steal or prostitute themselves to support drug habits made more expensive by the black market, that's also a prohibition problem. When addicts spread the HIV virus because sterile syringes are not legally and readily available, that, too, is a direct result of prohibition.

Our drug war has achieved a self-perpetuating life fueled by the fruits of seizures and forfeitures making drug policing profitable and acquisitive for enforcers.[127] However irrational as a government policy, it is fully rational as a law

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120. *See* Tonry, *supra* note 6, at 68–71.

121. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3410 (West 2000) (requiring life imprisonment for drug offense); *see also infra* note 150.

122. As of June, 2000, 58.7% of the Arizona prison population is "non-violent." DOC ANNUAL REPORT, *supra* note 7, at 49; *see also* MAUER, *supra* note 6, at 32, 34–38.

123. *See* BAUM, *supra* note 90, at 298 (quoting former Drug Czar William Bennett).

124. *See* MAUER, *supra* note 6, at 150–53.

125. *See id.* at 191.

126. Nearly twice as many black people are being imprisoned for drug offenses than are whites, even though there are five times more white drug users than black ones. *See* Human Rights Watch, *Race Analysis Cites Disparity in Sentencing,* N.Y. TIMES, June 8, 2000, at A16.

127. *See generally* Eric Blumenson & Eva Nilsen, *Policy for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998).

enforcement empire-building strategy. The debate about hard drugs goes nowhere if it remains a choice between waging a scorched-earth war as though defeat were impossible or surrendering completely to legalization. So long as the question appears in these bleak extremes, we will continue to reduce our prison empires to expensive but ineffective cold turkey centers. Contrasted to our drug policy, other Western countries follow a principle of harm reduction to minimize drugs' injury rather than stamp them out.[128] They do not expect, as we naively do, to make their countries drug-free, and they do not rely, as we do, on draconian criminal laws as the first line of defense.[129]

Tobacco and alcohol, not heroin or cocaine, are the most widely abused and deadly drugs ingested by our nation's teenagers and young adults as well as by criminals. Eighth graders in America today drink alcohol at least three times as often as they use hard drugs.[130] It is hypocrisy to suggest, falsely, that drug abuse is a worse social problem than alcohol or nicotine addiction.[131]

Drug researcher Joseph Califano has observed that our national drug policy of blanket imprisonment for all drug users wastes public funds, endangers public safety, supports the illegal drug market, defies common sense, and offends compassion.[132] The most common denominator among prison inmates is not race or ethnic background; it is addiction, and alcohol is the addiction far greater than drugs.[133]

Politicians spouting tough but unfounded rhetoric have led us to believe (1) that prisons are full of incorrigible psychopaths, (2) that treatment does not work, and (3) that addiction is a moral weakness that any individual can correct

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128. *See* M. GRAY, DRUG CRAZY 153–93 (2000) (describing the European experience).

129. *See* N. Morris, *Teenage Violence and Drug Use*, 31 VAL. U. L. REV. 547, 549 (1997).

130. *See Alcohol Arrests Soar on College Campuses*, ARIZ. REPUBLIC, June 4, 2000, at A18 ("Alcohol abuse is the No. 1 problem on every college campus in this country.").

131. Excessive drinking causes more than 150,000 deaths a year in the United States. *See* V. KAPPELER ET AL., THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE, (2d ed., 1996). According to an article in the December 1996 *Scientific American,* nearly one-fourth of the deaths are attributable to drunken driving. One in five of the deaths results from alcohol-related homicide or suicide costing us $167 billion annually. *See* SCI., Dec. 1996, as summarized in the ARIZ. REPUBLIC, Mar. 15, 2000, at E1.

132. *See* J. Califano, *A Punishment-Only Prison Policy*, AMERICA, Feb. 21, 1998, at 3.

133. *See supra* note 130. A 1999 survey of 15,349 teenagers in grades nine through 12 found that half had tried alcohol, 35 percent had smoked cigarettes, 27 percent had smoked marijuana and four percent had tried cocaine in the month before the survey. One third of the students had five or more drinks of alcohol at one sitting, according to the confidential survey conducted by the Centers for Disease Control and Prevention, that is, a third of these students are regularly "smashed." *See* K. Zernike, *Study Finds Teenage Drug Use higher in U.S. Than in Europe*, N.Y. TIMES, Feb. 21, 2001, at A10.

simply by willpower.[134] The truth is that our state prisons are, wall-to-wall, more than half full of non-violent minority addicts and abusers;[135] that legal alcohol is far more criminogenic than illegal hard drugs; that treatment works better than many long-shot cancer therapies;[136] and that, like diabetes or hypertension, drug addiction is a chronic disease that requires continuing treatment.[137] It might be less threatening to our expanding narco-military empire if drug policymakers spoke in terms of getting smart instead of merely getting tough.

C. Treatment

A federal study in 1998 found twenty-one percent fewer drug abusers regularly use illicit drugs five years after they leave treatment, a success rate that translates into more than 150,000 fewer drug users on the streets.[138]

The study tracked drug use and criminal behavior of 1799 clients discharged from ninety-nine drug treatment facilities.[139] The percentage using cocaine five years after treatment declined by forty-five percent, marijuana by twenty-eight percent, crack cocaine by seventeen percent, and heroin by fourteen percent.[140] Those who continued using drugs generally used less than before their treatment.[141] Thefts and burglaries committed by former patients declined by as much as thirty-eight percent, prostitution by twenty-three percent, and car thefts by fifty-six percent compared with the five years before treatment.[142] Recent research again shows the efficacy of treatment even in the Nixon era, by comparison with

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134. BAUM, *supra* note 90, at 260–72 (attributing this to Bush Drug Czar William Bennett).

135. 78.2% of the 1999 admittees to the Arizona Department of Corrections were non-violent. See DOC ANNUAL REPORT, *supra* note 7, at 50.

136. In a second study, RAND researchers examined the relative costs and benefits in drug policy of expanding the use of longer sentences for drug offenders compared to providing more drug treatment services. Their conclusion was that treatment reduced drug consumption eight times more than longer prison terms and reduced crime fifteen times as much. *See* JONATHAN P. CAULKINS ET. AL., RAND, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 7 (1997).

137. *See id.* at 8–9.

138. The results are reported in the Lee Bowman & Scripps Howard, *Federal Programs Aid Addicts, Study Finds Help Reduce Drug Use, Arrests*, ARIZ. REPUBLIC, Sept. 21, 1998, at A20. Similar data are presented in DRUG TREATMENT INSTEAD OF AND DURING IMPRISONMENT, SAN FRANCISCO MEDICINE 17–18 (Feb. 2000). The research, conducted for the Substance Abuse and Mental Health Administration by outside experts, found that clients who took part in substance abuse treatment programs had reduced drug use by an average of 50 percent a year after they left treatment. *See* Bowman & Howard, *supra*, at A20.

139. *See* Bauman & Howard, *supra* note 138, at A20.

140. *See id.*

141. *See id.*

142. *See id.*

our present punitive approach.[143] Despite these repeated treatment successes, only seventeen percent of current drug users needing treatment receive it.[144]

Arizona, the first state to begin treating all its nonviolent drug offenders rather than locking them up,[145] reported in April 1999 that its policy of diverting personal drug possessors and users from prison into mandatory treatment saved $2.5 million in tax money otherwise used to put offenders into prison.[146] Of the people on probation diverted into treatment, 77.5 percent tested free of drugs after one year, a rate significantly higher than for offenders on probation in other states.[147] Under Proposition 200,[148] we now sentence drug possessors to mandatory treatment and tailor the treatment regime to the particular drug dependency[149]—a model for the future in a justice system not currently noted for deft distinctions.

Our drug sentences are too punitive, often more so than violent crime penalties.[150] We could mitigate this harshness with little risk of expansion of drug use to give shorter sentences to retail drug sellers; to de-emphasize arrests for simple possession; and to shift drug resources from prison into prevention and treatment. Fairness, penal efficiency, and less plea bargain pressure would result.

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143. *See* MASSING, *supra* note 118, at 271–75. Massing advocates Jaffe's "code," a set of principles that sum up his approach to drug use:

> chronic drug users are at the heart of the nation's drug problem; a diverse array of services is required; Government must assure their availability and efficacy; law enforcement is an adjunct to rehabilitation and, always, reducing demand for drugs through education and treatment must take precedence over law enforcement efforts to reduce the supply of drugs.

Id. at 271. Massing says the Nixon administration, following the Jaffe prescription, managed to bring a "serious heroin epidemic" under control "in a few short years." *Id.* at 271–75; *see also In Drug War, Treatment Is Back*, CHRISTIAN SCI. MONITOR, July 14, 2000 at 1.

144. *See* KAPPELER, *supra* note 131, at 184–85.

145. *See* Proposition 200, adopted November 1996 (codified as A.R.S. § 13-901.01 (1999)).

146. *See genrally* SUPREME COURT OF ARIZONA, DRUG TREATMENT AND EDUCATION FUND IMPLEMENTATION YEAR END REPORT, FISCAL YEAR 1997–1998 (Mar. 1999).

147. *See id.* at 2–3.

148. *See supra* note 145.

149. *See* A.R.S. §§ 13-901.01(D) and 13-901.01.

150. *Compare* ARIZ. REV. STAT. ANN. § 13-1102 (negligent homicide), a class 4 offense; ARIZ. REV. STAT. ANN. § 13-1204 (aggravated assault, a class 5 or 6 offense); and ARIZ. REV. STAT. ANN. § 13-1903 (aggravated robbery, a class 3 offense), *with* ARIZ. REV. STAT. ANN. § 13-3401.01 (possession of precursor chemicals, a class 2 offense); ARIZ. REV. STAT. ANN. § 13-3405 (possession of a pound of marijuana, a class 2 offense); ARIZ. REV. STAT. ANN. § 13-3411 (possession of marijuana within 300 feet of a school, a class 2 offense); and ARIZ. REV. STAT. ANN. § 13-3410 ("serious drug offender," *life* imprisonment).

D. The Solution

The political fear of appearing soft on drugs has contaminated our public drug debate. Drug crimes are not part and parcel of a univocal category of crime. Drug use differs from other kinds of crime: while locking up a burglar might lessen that crime, locking up one drug dealer simply leaves the same customers for new dealers, just as with prostitution. The prostitution analogy is apt. Do we really want to pursue a policy of targeting replaceable street-level dealers for mandatory sentences that impose great costs on vulnerable minorities[151] and taxpayers while accomplishing little, if any, objective deterrence to drug kingpins and users? That is too high a price to pay to provide politicians with a halo regarding a problem that, at its root, lies largely in the consumption habits of impoverished urban youth.

A less bellicose frame of mind might permit a workable hard-drug strategy of less polarity. Let us tolerate mild drugs such as marijuana, which consumes enormous resources for an evil far less serious than either legal tobacco or alcohol. For hard drugs we need a laser approach sensitive not only to dealers/users but also to relative social harms. For everyone who dies from cocaine poisoning, fifteen die from alcohol and sixty from tobacco-related illnesses.[152] The mortality rate of tobacco users because of tobacco is more than 100 times greater than the death rate for cocaine users.[153] We could begin by ranking these health risks and punishing users proportionate to the social harm of their addiction.

Our law also needs to treat addicts alike. Lower-class addicts, tuxedoed millionaire addicts, and addicts in political campaign trappings and sports uniforms need to be treated in an evenhanded manner without exemptions. An anti-drug commercial from a convicted sport addict—or from users like Bill Clinton, George W. Bush, or Al Gore—might well exceed the credibility of endorsements for tennis shoes, especially if the commercial were delivered from behind bars.

VI. THE DEATH PENALTY

The present sound-bite symbolism of the death penalty serves only vote-hungry politicians. As the slaughter house in Texas shows,[154] the death penalty is the great vote-getter, premised on public demand for an executioner: retribution plus revenge plus retaliation equals re-election. Those who disregard that political chicanery follow former Governors Dukakis, Cuomo, and other principled

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151. Drug convictions are disproportionately of minorities. *See* Human Rights Watch, *supra* note 126. Prisons enable inmates to find greater access to drugs than the streets. *Prisons Are a Hotbed of Drug Use, Survey Finds*, LOS ANGELES TIMES, Aug. 25, 2000, at A3, A13 ("88% of inmates found it easy to obtain their drugs in prison, according to a Phoenix House National Survey.").

152. *See* KAPPELER, *supra* note 131, at 170.

153. *See id.*

154. Texas, the nation's execution leader, executed more than three dozen people in 2000. *See* S. Rimer, *Life After Death Row*, N.Y. TIMES MAG., Dec. 10, 2000, at 100.

politicians down the fatal path of appearing soft on crime.[155] Setting out a crime policy that doesn't include the death penalty today requires unusual patience tied to persistence and courage, the latter difficult in an era of politicized penology. Many prosecutors and judges say privately that they're against the death penalty, yet in the courtroom and city square no one is willing to mount the podium and say that the public executioner wears no clothes.

The state's example of taking life in order to emphasize the value of life teaches the exact opposite of what it intends; it mimics the parent saying to a child, "That'll teach you to hit your brother"—then hitting the child to teach that lesson. Philosopher Michel Foucault observes that the rampant abuse of power in state executions itself creates crime.[156] Excessive and arbitrary executions at the end of the eighteenth century incited people to violence.[157] Moreover, the terror of the public execution created its own illegality. On execution days, work stopped, the taverns were full, the authorities were abused, insults or stones were thrown at the executioner, fights broke out, and no better prey for thieves existed than the curious throng around the scaffold.[158] Why? Because people taught by this example of official lethal violence copied the violence.[159] In our country in the last century, this same modeling phenomenon generated the monastic prison, private executions, and more embarrassing forms of punishment deservedly hidden from public view.[160]

Foucault's observation applies to the transmission of all penal norms. Like any other law but more emphatically, capital punishment shows government teaching a lesson by modeling power. We kill the killer, we say, to show that killing is wrong. Under that logic, we equally should rape the rapist, steal from the thief, and pummel the assaulter. That we don't do so says that, in these instances, we understand the counterproductive modeling lesson that somehow we miss in killing the killer. The positivist teaching of our present death ethic is not subtle: if you have power, you may kill those who threaten it. This axiom exactly matches the attitude of most capital offenders. Recent research amply supports this brutalization lesson: the example of an official execution, instead of deterring killings, actually prompts some marginal persons to follow our state's lethal example.[161]

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155. Massachusetts Governor Michael Dukakis and New York Governor Mario Cuomo lost their recent respective presidential and gubernatorial elections in large part due to their opposition to the death penalty. *See* V. KAPPELER ET. AL., THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE 273 (3d ed. 2000).

156. *See* M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 48–49 (1979).

157. *See id*.

158. *See id*. at 60–61.

159. *See id*.

160. H. BEDAU, THE DEATH PENALTY IN AMERICA 315–16 (3d ed. 1982).

161. Brutalization—encouraging homicide rather than deterring it—has been the effect of this state's death penalty. *See* E. Thomson, *Deterrence vs. Brutalization*, 1 HOMICIDE STUDIES 110–28 (1997). Good economic times is a far greater deterrent than the

Capital punishment offends on both moral and technical grounds even apart from politicians' noxious swooning over it. For those who do not or cannot address the moral issues, there remain the disturbing facts, supported by national and international data, that our capital punishment falls disproportionately on minorities, especially blacks and Hispanics,[162] and sweeps some innocent defendants—at least twenty-three already executed[163]—in its wide nets, such as the eighty-nine wrongfully convicted,[164] wholly innocent death row inmates recently released from the nation's death rows, living testimonials to the high rate of capital error.

The United States sits in awkward international company with capital punishment. While most of the world has either abolished or stopped using the death penalty, this country and this state are among a handful that still use it routinely. As of mid-April 2000, seventy countries had abolished capital punishment completely, including all of Western Europe and most of the former Soviet bloc, including Russia, Poland, and the Ukraine.[165] Another thirteen countries had abolished it for traditional crimes, such as murder and rape.[166]

Besides the United States, eighty-nine countries, mainly in Africa, Asia, the Middle East, and the Caribbean, retain the death penalty.[167] But four countries—China, the Congo, the United States, and Iran—accounted for eighty percent of the 1625 documented executions that took place in 1998, the last year for which those figures are available, according to Amnesty International.[168] The United States, with 68 executions in 1998, ranked third in people executed that year, behind China, with 1067 executions, and the Congo, with 100, and one step ahead of Iran, which had 66—distressing company indeed.[169] In 1999 when the U.N. Commission on Human Rights called for a worldwide moratorium on capital

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death penalty. Data compiled by Richard Fowles of the University of Utah show that the national homicide rate increases 5.6 percent for every one percent increase in the unemployment rate, suggesting that employment is a far greater deterrent to homicide than is the death penalty. In California homicides increased twice as much during execution years. *See* IN BRIEF, CENTER ON JUVENILE AND CRIMINAL JUSTICE 1 (Apr. 1995).

162. *See* Marc Lacey, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 22, 2000, at A1 (commenting on Attorney General Janet Reno's reaction to data compiled by the Justice Department showing that three-fourths of defendants considered for the death penalty were minorities).

163. *See* H. Bedau & M. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD L. REV. 21–179 (1987) (listing 23 innocent persons executed).

164. *See* Rimer, *supra* note 154 (reporting that 88 people were released because of evidence of their innocence). Since that time, another person has been freed.

165. See Mark Hansen, *Holdouts in the Global Village*, A.B.A. J., June 2000, at 47.

166. *See id.*

167. *See id*

168. *See id*.

169. *See id*.

punishment, the United States joined such notorious human rights violators as China, Rwanda, and Sudan in voting against it.[170]

Most of the countries that still use the death penalty have limited its use. Even China, long the world's leading executioner, finally signed in 1998 the International Covenant on Civil and Political Rights, a 1966 treaty prohibiting the execution of juvenile offenders.[171] But not the United States. While it has signed the same treaty that China and 142 other countries have signed,[172] our country remains the only one to reserve the right to execute juvenile offenders—a reservation which itself violates international law.[173] Ours is also one of only two countries—the other being Somalia—that has not ratified the 1989 U.N. Convention on the Rights of the Child, which includes the same prohibition against the execution of juvenile offenders but does not allow signatories to attach any conditions incompatible with its terms.[174] Twenty-three of the thirty-eight states that retain the death penalty permit the execution of juvenile offenders, Arizona included.[175] Since 1973, more than 180 juvenile offenders have been sentenced to death.[176] And thirteen juvenile offenders in this country have been executed since 1985, more than one-third of the total number of juvenile offenders known to have been executed worldwide in the past fifteen years. [177]

In October 1999, the Inter-American Court on Human Rights held, in an advisory opinion, that the United States' failure to inform detained foreigners of their right to consular assistance under the Vienna Convention on Consular Rights violates their due process rights.[178] In December 1999, the U.N. General Assembly endorsed the court's findings by a vote of 121-1, which the United States alone opposed.[179]

Since Arizona's death penalty reappeared in 1976, Arizona has executed three foreign nationals—Jose Villafuerte, a Honduran citizen, and Karl and Walter LaGrand, German citizens—after failing to notify their home country of their arrest.[180] With these failures, Arizona and the United States violated the Vienna Convention on Consular Relations. In the case of Walter LaGrand, Arizona also violated a stay order of the International Court of Justice.[181] Three other foreign

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170. *See id*.
171. *See id*.
172. *See id*.
173. *See id*.
174. *See id*.
175. *See id.*; *see also* State v. Soto-Fong, 187 Ariz. 186, 209–10, 928 P.2d 610, 633–34 (1996).
176. *See* Hansen, *supra* note 165, at 47.
177. *See id*.
178. *See id*.
179. *See id*.
180. C. O'Driscoll, *The Execution of Foreign Nationals in Arizona*, 32 ARIZ. ST. L.J. 323 (2000).
181. See Vienna Convention on Consular Relations (Fed. Rep. of Germany v. United States), 1999 International Court of Justice 104, Order of Mar. 3 and Jan. 13, 2000.

citizens await their execution on Arizona's death row after seeking redress for violations of the Vienna Convention; in each case, Arizona's violations of the Vienna Convention are undisputed.[182]

The most far-reaching study of death penalty error in the United States has found two of every three convictions overturned on appeal, mostly because of serious errors by incompetent defense lawyers or overzealous police and prosecutors who withheld evidence.[183] Arizona appellate courts found serious, reversible error in four out of every ten death-penalty cases.[184] Among the twenty-eight states examined in the study, Arizona ranked tenth highest in overall capital error rates.[185] The nonpartisan report concludes that the nation's capital punishment system is "collapsing under the weight of its own mistakes."[186]

These considerations have prompted the United Nations, Amnesty International, and the American Bar Association to condemn our nation's death machine and to call for a moratorium.[187] Amnesty International's Annual Report for 1999 finds that our death penalty practices justify calling this country "an egregious human rights violator."[188]

A moratorium alone can hardly redress the moral and human shortcomings of our capital punishment. Nor can judicial or legislative control correct untrammeled prosecutorial discretion to charge, to seek the death penalty, and to plea-bargain around it at total whim—an ocean of prosecutorial discretion that still squarely violates the uniformity required by *Furman v. Georgia.*[189]

If politicians lack the courage to confront capital punishment's counter-productivity head-on, we could achieve at least modest departures from the existing demagoguery. Our embarrassing slaughterhouse practices suggest that capital defendants need to have truly expert legal counsel at public expense.

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182. *See generally* Comment, Cara O'Driscoll, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. STATE L.J. 323 (2000).

183. *See* James S. Liebman et.. al, *A Broken System: Death Penalty Error*, N.Y. TIMES, June 12, 2000 at A1. The report indicates that of 247 Arizona capital cases from 1973 to 1995, 82 were reversed by direct appeal in the state Supreme Court and 12 others in post-conviction relief proceedings. Federal courts reversed nine, meaning that 103 cases or 42% were reversed. *Id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See* M. Hansen, *Move for Moratorium*, A.B.A. J., Dec. 2000, 92.

188. *U.S. Prominent on List of Human Rights Abuses*, THE ARIZ. REPUBLIC, June 15, 2000, at A21. The U. S. also was roundly criticized by English lawyers and Solicitor General Ross Cranston at the ABA convention in England in July, 2000, for its "basic denial of human rights." *See* Joan Biskupic, *British Lawyers Blast USA For Maintaining Death Penalty Discourse at American Bar Association Conference Underscores Other Nations' Disdain For the Practice*, USA TODAY, July 20, 2000, at 7A.

189. *See* T. Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 21-52; *see also Furman*, 408 U.S. 238 (mandating standards of uniformity for capital punishment which this magazine article shows to be non-existant in prosecutors' offices).

Politician judges, prosecutors, and lawmakers who campaign on public executioner promises to liberally impose the death penalty ought to be disqualified by law and ethical rule from any involvement in any capital case, simply because their electoral pandering eviscerates any plausible remnant of impartiality.[190]

These measures are stop-gaps at best on the higher road to the position reached, after many years, by Supreme Court Justice Harry Blackman:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulation ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.[191]

VII. A PRISON STATE

The Federal Bureau of Justice Statistics shows that the United States's prison population reached two million inmates late in 1999, setting our incarceration rate as the highest in the world.[192] We lock up people at a higher rate than any country in the world, at five to eight times the rate in most industrialized nations.[193] Our national prison population has quintupled since 1973 and gone up *six* times since 1970.[194] During the same quarter century in which our prison

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190. Justice John Paul Stevens proclaimed to the Opening Assembly at the American Bar Association Annual Meeting in 1996:

> Persons who undertake the task of administering justice impartially should not be required—indeed should not be permitted…to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument….A campaign promise to be "tough on crime" or to "enforce the death penalty" is *evidence of bias that should disqualify [the judge] from sitting in criminal cases.*

Justice Blasts Election of Judges, TAMPA TRIB., Aug. 4, 1996, at 16 (emphasis added).

191. Callins v. Collings, 511 U.S. 127 (1974) (Blackman, J., dissenting from denial of certiorari).

192. *See* Newsletter, The Sentencing Project, Dec. 2000, at 1.

193. *See id*.

194. *See* The Sentencing Project Newsletter, May, 2000, at 1.

populations exploded, the reduction in the crime rate crawled up to only twenty percent by the year 1999.[195]

Arizona's pattern is even more punitive. Over the twenty-five-year period of 1974–1999, the Arizona prison population increased fourteen-fold, ballooning from 1915 inmates on June 30, 1974, to 26,169 inmates on June 30, 1999 (of which over 2000 are women).[196] This rate far exceeds the growth in the nation's overall prison population, which increased six-fold over this same period.[197]

Several factors account for this tremendous growth. The increase in Arizona's general population is one. Over this period, the number of Arizona residents increased by 115%, rising from 2,223,200 in 1974 to 4,784,631 in 1999.[198] There would be no more than 4121 inmates in prison in 1999, however, if our prison population had grown only at the rate of the general population.[199] Other reasons predominate. The number of drug offenders sentenced to prison in Arizona increased from fourteen percent of all admissions in fiscal year 1986 to twenty-six percent in fiscal year 1999.[200] On June 30, 1999, 5452 inmates (twenty-one percent of the prison population) remained incarcerated for drug offenses alone, including 1857 for drug possession and 3595 for drug trafficking.[201] Mandatory and draconian sentences also account for this massive expansion.[202]

The most shocking aspect of our incarceration mania is not the quantity of persons we incarcerate but their quality. While we are putting more hard-core and violent types behind bars than ever before,[203] we are also imprisoning more non-violent offenders than ever before—78.2% of Arizona's 1999 prison admittees were non-violent offenders.[204] The largest segment of Arizona's prison population—58%—now consists of non-violent first time and repeat offenders: 15,019 out of a total 25,836 in 1999.[205] Of all inmates, twenty-one percent are

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195. *See id.; see also* MAUER, *supra* note 6, at 82 (increasing prison populations coincide with both increase and decrease in crime).

196. *See* DOC ANNUAL REPORT, *supra* note 7, at 6.

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.* at 7.

201. DOC ANNUAL REPORT, *supra* note 7, at 6–7.

202. *See id*. at 7.

203. Over 40% of the increase in state prison populations since 1980 is due to an increase in the prisoners convicted of violent offenses. *See* U.S. Dept. of Justice, *Bureau of Justice Statistics* (visited May 4, 2000) <http://www.ojp.usdoj.gov/bjs/glance/corryp.htm>. This means that the increase in non-violent offenders constitutes 60% of the total increase. *See also* E. Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY, 51–54 (Dec. 1998).

204. *See* DOC ANNUAL REPORT, *supra* note 7, at 50.

205. *See id*.

imprisoned only for non-violent drug offenses.[206] Incarceration levels for non-violent drug offenses have mushroomed since 1980.[207]

This blanket incarceration policy is hitting the wrong targets. As criminologists Zimring and Hawkins note, "[T]o the extent that general increases in the severity of penal policy narrow the gap between the punishment for dangerous and non-dangerous offenses, the law's educative and moralizing emphasis on violence is actually diminished by across-the-board increases in penal severity."[208]

When most prisoners are violent offenders, the distinctiveness of violent crime sharpens. But when many non-violent offenders also go to prison, the distinction between the violent and the non-violent blurs. As the absolute severity of many violent offenses increases, the relative severity of the punishments for individual offenses diminishes.[209] If the punishments for both robbery and burglary increase, but the punishments for burglary increase more than those for robbery, the penal gap between robbery and burglary narrows. The utilitarian calculus that arguably animates potential offenders' decisions will produce a higher ratio of robberies to burglaries than under a more discriminating regime.[210]

To the extent that killing during other crime declines by threatening the maximum punishment for lethal acts and lesser punishment for nonlethal acts, the incentive to avoid killing diminishes as punishment for nonlethal crime increases, because the gap between the two punishments closes. If the threatened punishment for robbery is two years and for a robbery-killing is fifty years, the difference between those two offers, arguably, a penal incentive to refrain from killing. But if the punishment for robbery increases to eight years, the difference between the two penalties diminishes. If non-violent behavior receives the maximum penalty in the first instance, no recourse exists to a higher threatened punishment. The analogy is to a building where the ceiling's height cannot be increased: raising the level of the floors merely decreases the distance between the floor and the ceiling. The paradox of our prison mania is that the largest increases in punishment occur not for violent offenses but for offenses of lesser seriousness, like drugs, on the margin between prison and non-prison sanctions.[211]

Differentiating between the penalties for violent and non-violent offenders becomes not only appealing from a philosophical point of view, but it also makes fiscal sense, because unnecessarily harsh prison sentences invest disproportionate taxpayer resources on those less likely to menace us.[212] An aging

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206. *See id*. at 46.

207. *See id*. (depicting dramatic rise in the number of drug offense incarcerations in state prisons since 1980).

208. FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 180–81 (1997).

209. *See id.* at 181.

210. *See id.*

211. *See id.*

212. *See id.*

criminal is progressively less likely to commit crime.[213] The largest age segment of the prison population in Arizona consists of individuals between the ages of 18 and 49, with those aged between 30 and 34 years the most populous group.[214] The over age-39 group is still a significant percentage because of lengthy mandatory sentencing. Our 2000 inmates over 50 years of age are not likely to commit more crime.[215] With annual incarceration costs approaching $20,000 per inmate per year, it makes neither economic nor deterrent sense to keep most non-violent offenders over age 50 in prison.[216] With such diminishing marginal returns, each incarceration dollar spent to keep inmates in prison past age 50 buys progressively less protection. Those tax dollars would be better spent on community programs, other than prison, for such offenders, and an aged release program for elderly inmates.

Each year the Arizona Department of Corrections releases 1900 inmates onto the streets, with $50 spending money, knowing full well that most of these 1900 people will be homeless.[217] If that indifference doesn't speak for itself, the legislature's warped penology appears in two statutes in Chapter 17: arson of an ordinary residence, even if unoccupied, is a class 2 felony; arson of a prison crowded with inmates is two grades less severe, a class 4, reflecting an inconsistent attitude toward imprisoned human beings.[218]

VIII. CONCLUSION

> "It's time we steered by the stars rather than by the lights of each passing ship."
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> —Gen. Omar Bradley

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213. *See* MAUER, *supra* note 6, at 164; *see also* Sheryl Stolberg, *Behind Bars, New Effort to Care for the Dying*, N.Y. TIMES, Apr. 1, 2001, at A1.

214. *See* DOC ANNUAL REPORT, *supra* note 7, at 47.

215. *See* MAUER, *supra* note 6, at 164.

216. This is particularly true because the maintenance cost of inmates aged 50 years or more increases steadily as age takes its toll on health. Conservative analyst James Q. Wilson points out that "very large increases in the prison population can produce only modest reductions in crime rates." Policies that indiscriminately lengthen prison sentences beyond the ten-year period that constitutes the average career of the violent offender will logically produce "diminishing marginal returns." (Reinforcing this point is the fact that few except pathologically violent offenders commit violent crimes after age 35. Consequently, the imposition of life or very long sentences on people in their twenties or thirties is not an efficient means of preventing violence through incapacitation.) Further, Piehl and DiIulio argue that while "prison pays" for most incarcerated criminals, it "does not pay" for the nonviolent drug offenders who constitute 10 to 25 percent of the prison population. *See* A NATIONAL SYMPOSIUM ON SENTENCING: REP. AND POL'Y GUIDE, AM. JUDICATURE SOC'Y, STATE JUSTICE INSTITUTE 42 (1998).

217. *See* William Herman, *Ex Cons Lacking Homes, Money*, ARIZ. REPUBLIC, June 30, 2000, at A1.

218. *Compare* ARIZ. REV. STAT. ANN. § 13-1704 (West 1989) *with* § 13-1705 (West 1989).

If the law is a teacher, Arizona's criminal justice system, as described above, teaches lessons such as the following:

- people who do bad acts do not deserve to be treated by principle
- people who invoke justice are allowed to mistreat criminals
- our criminal law, supposedly more careful, abandons principles enshrined in civil law regarding mental state, individual culpability, and admission of mental state evidence
- we will correct non-violent criminals by incarcerating them with violent criminals
- we penalize the drugs preferred by youngsters and minorities while ignoring the more harmful drugs (alcohol, tobacco) of the adult world
- people committing the same crime are indistinguishable in culpability
- manipulative plea bargaining will extinguish an offender's manipulative attitudes
- we create sentences so severe and so mandatory as to generate plea bargaining to escape them
- we laud the constitutional right to trial while generating guilty plea pressures to deny it
- we kill to teach that killing is wrong

This state has adopted gulag policies that reflective people who care for the obverse of the lessons above should abhor. This state's crime policy has been driven over the past quarter-century by exaggerated fears, political ideology, and electoral opportunism rather than by criminological data. Indeed, no other field of government endeavor shows such a chasm between government policy and scholarly research.[219]

Our political debate on crime in this state rarely addresses real crime-cutting measures like gun control, jobs, and mandatory education or government service during the juvenile crime-prone years. Our lawmakers instead model the politics of image, of getting and staying elected. A naive public misconstrues slogans like the "War on Drugs" as solutions. But, like war, justice itself is not self-justifying—Hitler and Stalin, after all, also invoked it. As Karl Jaspers reminded the German people in *The Question of German Guilt* after World War II, passive acquiescence is a greater danger than questioning policy, especially when lawmakers regularly give the public what they think it wants—tough talk and

219. ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 43–44 (1998).

tough symbols without any empirical research on their lessons and effects.[220] Toughness occurs at the expense of justice.

A. The Role of Judges and Legislators: Assessing the Blame

Acknowledging that those who help poison the well should hardly become water commissioner, the fact remains that the judiciary cannot escape responsibility for these harms. Our robes, formalities, and discreet silences mask criminogenic problems that we both perpetuate and ignore. In *Justice Accused*, Robert Cover studied judicial approval of slavery in several nineteenth-century cases where conscientious judges, all personally troubled by slavery, faced a "moral-formal" dilemma that they thought required them to uphold slavery despite serious moral reservations.[221] The judges thought that responsibility for slavery lay elsewhere and wrote decisions with pleas of distress, helplessness, and regret.[222] Cover found that the robe deadened critical thinking outside the lines of formal subservience, leaving the anti-slavery judges mired in the dilemma of four unsettling choices: (1) apply slavery laws against conscience, (2) follow conscience and be faithless to the law, (3) cheat, or (4) resign.[223]

Why did the anti-slavery judges almost uniformly bolster the very institution they rightly abhorred? Cover sees them hiding behind strict constructionism, groping blindly in a forest of formalities and shrinking from even modest statutory criticism, and ending by opting unhappily for the "justice"—if it can be called that—of the status quo.[224] In place of this model Cover suggests that the ideal judge ought to be questioning both the moral content and efficacy of the law: Does it work? Is it fair? What are we teaching?[225]

Legislators are the greater source of the gross injustices in our penal system.[226] Arizona's present criminal code shows the folly of drafting criminal statutes without regard for the Model Penal Code.[227] Legislators who draft on the fly, independent of scholarly models, risk creating statutes fashioned for the crisis of the moment. Repeated "drive-by" legislation based on newspaper headlines is not a principled approach to something as enduring and sensitive as the criminal law. The Model Penal Code has blazed the path of criminal codification in this

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220. As one of many examples, ARIZ. REV. STAT. ANN. § 13-3410 (West Supp. 2000) imposes a penalty of life imprisonment on a serious drug offender, matching or exceeding the sentence—and cost—for first-degree murder. *Id.*

221. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

222. *See id*.

223. *See id.*

224. *See id*. at 303.

225. *See id*.

226. Former attorney general Grant Woods has said "Arizona should seriously consider abolishing the Legislature." Chris Moeser, *Initiatives Crowd November Ballot Direct Democracy Thrives* , ARIZ. REPUBLIC, July 5, 2000, at A1.

227. *See, e.g.*, R. Gerber, *Arizona's Criminal Code Revision: 20 Years Later*, 40 ARIZ. L. REV. 143 (1998) (ignoring Model Penal Code and undoing the revision of 1978).

country traced earlier by Sir James Stephen in England and Lord Macauley in India,[228] showing how statutory deadwood can be chopped away and sanctions kept standardized and principled over time. The Model Penal Code has been the standard for criminal law drafting for the past quarter century, carefully followed by many principled states.[229] Arizona lawmakers are almost alone in ignoring it.

Contrary to our legislative habits, throwing a law at conduct rarely eliminates it. This thunderbolt tendency reveals two kinds of triviality: triviality of object and triviality of intention.[230] Triviality of object refers to selecting behavior for which punishment is disproportionate, such as making consensual sex and marijuana predicates for felony murder.[231] Triviality of intent means an attitude of legislative indifference toward actual enforcement of their decrees, as in the case of our archaic morals statutes.[232] A conscientious legislator would not vote to penalize conduct without knowing both that law enforcement had the resources to apprehend violators and, more fundamentally, that society truly needed such protection as a priority.[233]

Instead of these legislative patterns, responsible criminal enactments require a cost-benefit analysis, particularly for ever-increasing sentence lengths. With prison beds costing $20,000 per year in present dollars, and about fifty-eight percent of inmates imprisoned only for nonviolent offenses,[234] it makes financial sense to ask whether more nonviolent and older criminals need to be housed and fed in prison at the public's expense and whether so many aged offenders need to be incarcerated long beyond the crime-prone years between ages sixteen and twenty-two.

A complex relationship exists between the vigorous enforcement of a criminal prohibition and its public acceptance. As demonstrated by voter support for Proposition 200 that legalized medical marijuana,[235] and did so in face of legislative and law enforcement opposition, it is by no means clear that legislators and courts can persuade the public to view conduct as criminal simply by declaring it to be so. The criminal law is not that potent a weapon of indoctrination. Drug and alcohol prohibition and Proposition 200 suggest the reverse: the indiscriminate application of overbroad criminal sanctions to broad

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228. ZIMRING & HAWKINS, *supra* note 208, at 180–83.

229. *Id*.; *see also* MODEL PENAL CODE, FOREWARD, PART I, §§ 1.01 to 2.13 at xi. (1985).

230. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 272 (1968).

231. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(2).

232. *See* ARIZ. REV. STAT. ANN. §§ 13-1409, 1141, 1412 (penalizing all sexual acts other than procreative conduct by spouses).

233. *See* PACKER, *supra* note 230, at 272.

234. 57.8% of Arizona prisoners are classified as nonviolent. The Department of Corrections has acknowledged releasing violent offenders early in order to make room for nonviolent drug offenders serving mandatory sentences. *See* Lowenthal, *supra* note 15, at 102.

235. *See e.g.*, Proposition 200, The Drug Medicalization, Prevention and Control Act (Ariz. 1996).

social ills devalues mainstream prohibitions by diminishing government credibility. If we make criminal what the public regards as acceptable or otherwise solvable, either nullification occurs or people's attitudes towards all law move toward disrespect, as has already occurred with behaviors ranging from consensual sex to speed limit laws.[236] Ultimately, the legislative contribution to criminal injustice resides in our lawmakers' steady politicization of crime issues over the past quarter century as they have discovered votes in unnuanced toughness on crime. Toughness may generate more votes than smartness but, in the process, it eventually also generates injustice and incredulity.

Calls for reform fall on deaf ears. That crime approaches the number one public concern virtually guarantees that nothing principled or empirically significant will be legislated to make our court system just, simply because the goal of most legislative crime policy is not really justice but only to polish halos and to avoid any perception of softness. Politicians thus vie with each other to talk toughest, good slogans take the place of good policy, toughness replaces smartness, and dramatic but unprincipled sound bites become laws with little debate, discussion, or dissent. The same regrettable political opportunism that generates these penalexcesses makes it unlikely lawmakers can repeal or correct them. Paralysis results. Like defendants, justice has no constituency; only tough image does.

B. The Solution

There was once a medieval monk who said the word "mumpsimus" in the Mass instead of the correct "sumpsimus" ("we consume"). When his superiors corrected him, he responded by saying, "I don't care what is correct; you take your sumpsimus, and I will stick to my mumpsimus no matter what is right." The medieval monk and today's politician have "mumpsimus" in common: a preference for doing things their own way coupled with dogged disregard of contrary empirical data.

In the past twenty-five years, this state's lawmakers have linked political success to polishing a tough-on-crime image that translates, first and foremost, into the emphasis on unprincipled legal procedures and draconian severity of punishment that in turn translates into prison as the paradigm of severity. This penchant for severe prison sentences at all costs, including taxes and human lives, obstructs more realistic, less expensive, more effective, and more just crime policies. A companion folly of current crime policies is lawmakers' rampant ignorance of or indifference to empirical crime data. Lawmakers either cannot or will not respond to scholarly criminological research or even anecdotal reports from experienced workers in the trenches.

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236. Speed prohibitions in Arizona are widely ignored and the law is ridiculed in private. *See* Judi Villa, *More Freeway, Less Enforcement*. ARIZ. REPUBLIC, July 7, 2000, at A1.

The statutory result is a vast chasm between what lawmakers enact and what criminological data require. The political and empirical positions are rarely consonant and seldom the subject of dialogue. The prime culprit is the political "mumpsimus" mentality that panders to the electorate with hysteria about toughness on crime in order to seduce votes. Pandering to public fear usurps leadership and education on effective penal policy. When "mumpsimus" judges and lawmakers consider relevant empirical research, they usually turn their backs on such data because it may tarnish their image of toughness. Paralysis and continuing injustices result.

The prospect of turning "mumpsimus" politicians into careful followers of social science data is bleak; espousing the topics in these pages might, after all, ruin careers. Some justice-related decisions present such excruciating demands for courage from elected officials that it is better to eliminate their need to make them. This state needs another forum to manage our penal system, a professional group above political image, to bring empirical research to bear on justice and to highlight where current policies behave irrationally. Ultimately, the best interests of lawmakers themselves suggest that they shed control over the justice system. We need to remove criminal policy from lawmakers, perhaps by voter initiative or by constitutional amendment and turn it over to nonpartisan experts like a sentencing commission or an independent board of criminologists with empirical skills and a sense of principle. If lawmakers retain any control, however small, their votes need to be compelled not by self-aggrandizement but by sound empirical data and consistent principle, traits not prevalent today.

The best interests of principle—and tax dollars—dictate establishing, by a voter initiative if necessary, a continuing non-political criminal justice commission of professional researchers to act as continuing critics of existing laws and a censor for any new ones. As a first agenda, our criminal laws require a wholesale revision matching that of the 1972-1975 revision, to eliminate deadwood, redundancy, inconsistency, and to restore principle. Practicing what is preached would be one immediate benefit. As a second agenda item, law enforcement officials and judges at all levels need to be appointed rather than elected, so the public gets well-informed, career professional administrators instead of vote-pandering demogogues who use the justice system as a tool for votes.

We also need empirical research on the crime system as the lawmaking guide. Without the research guidance of leading scholars like Norval Morris, Michael Tonry, Frank Zimring, and James Q. Wilson, and statutory guidance from the Model Penal Code, the effort to strike a balance among social protection, expenditures, and politics becomes guesswork. The crime-fighting hyperbole of still more statutes, more police, more courts, more prisons, and ever-longer sentences teaches much about injustice to those who need to learn the opposite.

As the sociologist George Simmel once observed, a reciprocity exists between government and the citizenry regarding the observance of law.[237] Government says to the citizenry, in effect, "These are the rules we expect you to follow. If you follow them, and they are fair, you have our assurance that they are the same rules that will be applied to your conduct." When government ruptures this bond of reciprocity, nothing is left on which to model the citizen's duty to observe the rules—or to prevent its judicial enforcers from apologizing for them.

237. THE SOCIOLOGY OF GEORG SIMMEL 186–89 (Wolff, trans., 1950); *see also id.* at 250–67; T. TYLER, WHY PEOPLE OBEY THE LAW 22–23 (1990) (noting that people obey the law when they see it is fair).