


2000

Measuring Culpability by Measuring Drugs? Three Reasons to Re-evaluate the Rockefeller Drug Laws

Susan Herman

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Food and Drug Law Commons](#), and the [Other Law Commons](#)

Recommended Citation

63 Alb. L. Rev. 777 (2000)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

MEASURING CULPABILITY BY MEASURING DRUGS? THREE REASONS TO REEVALUATE THE ROCKEFELLER DRUG LAWS

*Susan N. Herman**

The so-called Rockefeller drug laws,¹ enacted in 1973, have been New York's principal weapon in the war against drugs for the past three decades.

The statutory design, like the reasoning upon which it rests, is simple and straightforward. The legislature chose to impose lengthy and frequently mandatory sentences for possession and distribution of controlled substances, on the assumption that harsh and certain punishment would deter and reduce drug abuse and related crime.² Under this system, drug offenses are graded according to the dangerousness and the quantity of the drug involved.³ Dangerousness of a drug is determined by consulting

* Professor of Law, Brooklyn Law School. B.A., Barnard College, 1968; J.D., New York University, 1974. The author would like to thank Paul Gangsei and David Yassky for their helpful comments, Chris Fowler for his excellent research assistance, Jim Peluso for his extraordinary efforts in coordinating this symposium, and Brooklyn Law School for the continuing support of its research stipend program.

¹ See N.Y. PENAL LAW §§ 220.00–.65 (McKinney 2000) (describing offenses involving controlled substances); *id.* §§ 221.00–.55 (McKinney 2000) (outlining offenses involving marijuana); *infra* notes 92-103 and accompanying text (describing major, subsequently enacted revisions to the drug laws).

² See William C. Donnino, Practice Commentary, N.Y. PENAL LAW art. 220, at 6 (McKinney 2000) (noting the structural changes in the Penal Law); STATE OF NEW YORK, PROPOSED NEW YORK STATE CONTROLLED SUBSTANCES ACT AND REVISION OF ARTICLE 220 OF THE PENAL LAW: INTERIM REPORT OF THE TEMPORARY STATE COMMISSION TO EVALUATE THE DRUG LAWS, LEG. DOC. NO. 10, at 59 (1972) [hereinafter INTERIM REPORT] (stating that higher penalties should be imposed on people who possess large quantities of drugs because they “pose a greater threat to the community”); NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEPT OF JUSTICE, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE: FINAL REPORT OF THE JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION 3 (1977) [hereinafter WEBSTER COMMISSION REPORT] (discussing the two objectives of the drug laws: to “frighten” drug users and dealers enough to reduce drug use and sales, and to reduce crimes, as “offenders would be deterred by the threat of ‘get-tough’ laws”).

³ See INTERIM REPORT, *supra* note 2, at 59 (describing the penalty structure of the drug laws according to the “dangerousness” of the drug and the likelihood the drug will be distributed to others).

detailed schedules of controlled substances,⁴ with the drugs considered most harmful listed in schedule I,⁵ and those classified as the least harmful in schedule V.⁶ Dangerousness is also evaluated by criteria described as objectively verifiable: potential for abuse, existence of approved medical uses, and safety.⁷ Grading is according to the quantity of the drug involved: the greater the quantity, the greater the sentence. Possession of half an ounce of methamphetamine, for example, is a class C felony, punishable by a term of imprisonment up to fifteen years.⁸ Possession of two or more ounces of methamphetamine, on the other hand, is a class A-II felony carrying a term of up to life imprisonment.⁹

As a result, the drug laws bear a strong resemblance to a chemistry manifesto. Elaborate tables and charts group drugs with jawbreaking polysyllabic names;¹⁰ each new level of offense recites which drugs, in what quantity, will yield that provision's particular range of tough, frequently mandatory sentences.¹¹ The statutes

⁴ See N.Y. PUB. HEALTH LAW § 3306 (McKinney 1993 & Supp. 1999) (listing the controlled substances by name or chemical designation).

⁵ Schedule I drugs include opiates, opium derivatives (including heroin and morphine), hallucinogenic substances (including marijuana, mescaline and peyote), depressants and stimulants. See *id.*

⁶ Schedule V drugs include narcotic drugs containing non-narcotic active medicinal ingredients, including "[n]ot more than two hundred milligrams of codeine per one hundred milliliters or per one hundred grams" and certain narcotic drugs and stimulants not specifically contained in other schedules. *Id.*

⁷ See INTERIM REPORT, *supra* note 2, at 59.

"Dangerousness" as used here assumes that the drug will be used in the manner and to the extent necessary to achieve the effect commonly associated with the drug. It includes the addictive qualities of the drug, the necessity to escalate dosage to obtain the desired result, the physical and psychological effects upon the user, the user's ability to control the amount or quality of active ingredient which enters his system, the social consequences of such use and the extent to which the drug use creates a danger to others by virtue of the user's reduced ability to conform his behavior to legally acceptable standards.

Id.

⁸ See N.Y. PENAL LAW § 220.09(2) (McKinney 2000) (listing the weight and type of controlled substance necessary for a person to be guilty of criminal possession of a controlled substance in the fourth degree); *id.* § 70.00(2)(c) (McKinney 1998 & Supp. 1999) (outlining the imprisonment sentences for certain class C felonies).

⁹ See N.Y. PENAL LAW § 220.18(2) (McKinney 2000) (listing the weight and type of controlled substance necessary for a person to be guilty of criminal possession of a controlled substance in the second degree); *id.* § 70.00(2)(a) (McKinney 1998) (outlining the imprisonment sentences for class A felonies).

¹⁰ See N.Y. PUBLIC HEALTH LAW § 3306 (including drugs named diethylthiambutene, ethylmethylthiambutene, and levophenacetylmorphan).

¹¹ See N.Y. PENAL LAW §§ 220.03, 220.06, 220.09, 220.16, 220.18, 220.21 (McKinney 2000) (outlining the quantities and types of controlled substances associated with the specific degree of offense involving controlled substances); *id.* §§ 221.10–55 (McKinney 2000) (describing the quantities required for conviction of the varying degrees of marijuana

look, literally, like a war against drugs. People who associate themselves with a particular quantity of a particular drug are punished on the theory that these punishments will prevent the drugs from doing harm.¹²

One key assumption upon which this statutory scheme is based is that there is a tight connection between drugs and harm and between the nature and quantity of a drug and the harm caused.¹³ Some drugs—those “controlled” by the law—cause addiction, social harm (as drug abusers’ lives fall apart), and incidental crime. Of these controlled substances, some are more addictive than others, cause more harm, and engender more crime, and therefore need to be contained by harsher sentences. The greater the quantity of drug possessed or distributed, the greater the harm unleashed, and the greater the punishment.

At the Albany Law School Symposium, District Attorney Bruno maintained that “The Rockefeller Drug Laws Fairly and Effectively Combat Drug Crime in New York State.”¹⁴ That result was certainly the hope of the 1973 legislature, and of the Temporary Commission which created the legislation’s architecture.¹⁵ The features of the drug laws just described were expected to deter and prevent drug abuse and related crimes, while the tight control of judicial discretion in sentencing was expected to produce fair and equal punishment.¹⁶

The arguments of three decades ago, explaining the basis of the choices made by these laws, sounded plausible in the Temporary Commission’s report, and may still sound plausible to many people. However, after thirty years, we have little basis for evaluating the design of the Rockefeller drug laws, other than the same speculative reasoning and wishful thinking that led the Commission and the legislature to adopt this structure in the first place. The reasoning

possession and sale); *see also id.* § 70.00 (McKinney 1998 & Supp. 1999) (providing prison sentences for felonies).

¹² *See infra* notes 48-51 and accompanying text (questioning the efficiency of these particular punishments as a means of deterrence).

¹³ *See supra* notes 3-9 and accompanying text (discussing how the dangerousness and quantity of drugs dictates the harshness of the sentence).

¹⁴ The Honorable Joseph Bruno is the District Attorney for Rensselaer County, New York. This was the title of his presentation delivered at Albany Law School on November 12, 1999, a transcription of which has not been reproduced in this issue.

¹⁵ *See* Donnino, *supra* note 2, at 6-7 (providing a history of how the 1965 version was amended by the 1973 laws, which were then amended in 1979 to ameliorate sentence severity to some extent).

¹⁶ Of course, the fact that prosecutors still retain discretion in deciding whom to prosecute means that equality of application is not wholly within the legislature’s control.

may not have been irrational, but was it right? The hope for fairness in application was sincere, but has it been borne out?

In the past thirty years, we have learned little to confirm the fairness or effectiveness of the New York drug laws' strategy.¹⁷ We have, however, learned more about the nature of addiction and drug abuse in ways that should lead us to question some of the assumptions on which the Rockefeller drug laws rest.

There are three questions we should be asking:

1) *Sentence Length*. Is the assumption that the harsh sentences of the Rockefeller drug laws are effective in controlling drug abuse true? If we are not achieving the results we hoped for, should the lengths of the sentences in the overall scheme be modified? This discussion should include utilitarian questions—are the sentence lengths in fact having the deterrent effect expected? Are they worth their cost, in taxpayer dollars and impact on the lives of drug offenders and their families? Would an alternative strategy be more effective? The discussion should also include a normative question—are the sentence lengths prescribed truly proportional to culpability?

2) *Legislative Control of Punishment Level*. The statutes' creators assumed that reducing judicial discretion in sentencing, both through use of mandatory sentencing provisions and through prescribing as elements of each crime virtually all factors determining punishment level, would lead to fair and effective punishment.¹⁸ Are these assumptions true? Do the statutes strike an appropriate balance between individualization of sentences and equal treatment? Should there be more (or less) judicial discretion in drug offense sentencing? Should sentencing be based on factors almost exclusively related to the offense, or should offender-related characteristics play more of a role?

3) *Relative Culpability*. Are drug offenses intelligently graded under the Rockefeller drug laws? Should the factors on which

¹⁷ What we have learned tends to point to the conclusion that the laws have been unfair and ineffective. See *infra* notes 19-51 and accompanying text (suggesting the Rockefeller drug laws' imposition of high sentences has been ineffective in accomplishing the goal of reducing drug abuse and crime); *infra* notes 52-90 and accompanying text (describing how the removal of judicial discretion can result in unfair sentencing because judges may only consider offense-related factors and not offender-related factors).

¹⁸ See INTERIM REPORT, *supra* note 2, at 59 (describing the Commission's attempt to find "a rational basis for defining levels of culpability" rather than relying on judicial discretion); see also Donnino, *supra* note 2, at 6 (describing how the recommendations of the Commission influenced the 1973 Penal Law revision).

grading is based—drug and drug quantity—be virtually exclusive measures of culpability, as current law prescribes?

This question is inextricably linked to the previous question about the desirability of judicial discretion in sentencing. It is indeed rational to minimize judicial discretion in sentencing if the decisions upon which punishment is to be based are objective, offense-related factors—what quantity of which drug was involved in a possession or sale? Judicial discretion would become more appropriate, and indeed critical, if drug offenses were graded differently—for example, in a manner requiring assessment of the culpability of individual offenders.

I. SENTENCE LENGTH

At the time New York's 1973 laws were passed, they were indeed the nation's toughest drug laws. Governor Rockefeller believed that drug pushers were responsible for increases in addiction and in non-drug crime, and declared that the threat of harsh sentences would "establish an effective deterrent to illegal drug use and drug-related crime."¹⁹ His favored sentencing structure, in its magnitude and its rigidity, reflected the opinion of many respondents to contemporaneous polls that the harm caused by drugs was the most serious problem facing the nation.²⁰ Punishment of drug possession and distribution in New York is still severe.²¹ Possession of half an ounce of methamphetamine, a class C felony,²² is treated as the equivalent of third degree arson,²³ or second degree burglary.²⁴ Sale

¹⁹ WEBSTER COMMISSION REPORT, *supra* note 2, at 116.

²⁰ See Arnold D. Hechtman, Practice Commentary, N.Y. PENAL LAW art. 220, at 6 (McKinney 1980) (stating the revisions to the drug laws in 1973 "mirrored many of society's concerns and attitudes about the problems inherent in and created by drug abuse"). One recent study concluded that public concern about street crime and drugs is affected more by definitional activities of state actors and the mass media than by reported incidences of the problems themselves, and thus public perception of the seriousness of the drug problem is itself a political phenomenon. See Katherine Beckett, *Setting the Public Agenda: "Street Crime" and Drug Use in American Politics*, 41 SOC. PROBS. 425, 444 (1994).

²¹ See Donnino, *supra* note 2, at 7 (noting the New York State Legislature did soften some of the penalty provisions in the 1979 amendments). *But see infra* notes 22-25 and accompanying text (comparing drug offenses to serious non-drug offenses).

²² See *id.* § 220.09(2) (McKinney 2000) (defining the possession of one-half ounce or more of "preparations, compounds, mixtures or substances" as "criminal possession of a controlled substance in the fourth degree," which is a class C felony).

²³ See *id.* § 150.10 (McKinney 1999).

²⁴ See *id.* § 140.25 (McKinney 1999).

of two ounces of heroin, a class A-I felony, is treated as the equivalent of murder in the first degree.²⁵

There has been surprisingly little empirical research seeking to determine whether such heavy sentences have a deterrent effect on drug abuse or incidental crime.²⁶ An evaluation of the 1973 New York laws conducted several years after their enactment by a committee of the Association of the Bar of the City of New York and the Drug Abuse Council concluded that neither of Governor Rockefeller's objectives had been met: drug availability did not appear to have been reduced and crime went up, not down.²⁷ The Commission, however, hedged its conclusion that the drug laws had been a failure, noting that the laws had not yet been fully implemented.²⁸

The Commission had no doubt, on the other hand, that the Rockefeller drug laws were very expensive to implement.²⁹ If studies were to support the conclusion that these laws substantially deter or reduce harm, the lengthy sentences might be deemed worth both their cost to taxpayers and their cost to people convicted under the laws and their families.³⁰ If we have no reason to believe that imposing such high sentences accomplishes what the sentences were supposed to accomplish, why not reevaluate whether these laws are worth their costs? It is unclear whether the

²⁵ See *id.* § 220.43(1) (McKinney 2000) (classifying the sale of two or more ounces of a controlled substance in the first degree, which includes heroin, as a class A-I felony); *id.* § 125.27 (McKinney 1998) (categorizing first degree murder as a class A-I felony).

²⁶ See Michael Tonry, *Research on Drugs and Crime*, in DRUGS AND CRIME 1, 2 (Michael Tonry & James Q. Wilson eds., 1990).

Although the volume of research on these subjects has increased significantly in recent years, in absolute terms, drugs and crime research is a minor scholarly activity and is poorly funded. The literature is scant, much of it is fugitive, the research community is fragmented, and too much of the research is poor in quality and weak in design.

One striking feature of research on drug policy is its scantiness.

Id. at 2; see also Peter Reuter, *Hawks Ascendant: The Punitive Trend of American Drug Policy*, in DRUG USE AND DRUG POLICY 365, 386 (Marilyn McShane & Frank P. Williams III eds., 1997) (deploring the paucity of research in this area).

²⁷ See WEBSTER COMMISSION REPORT, *supra* note 2, at 7-9 (presenting these findings).

²⁸ See *id.* at 5-26. More recent studies, however, have reached the same conclusion. See NEW YORK COUNTY LAWYERS' ASSOCIATION: REPORT & RECOMMENDATIONS OF THE DRUG POLICY TASK FORCE I (1996) (concluding notwithstanding vast expenditure of public resources, the drug laws have been a complete failure in all respects); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, A WISER COURSE: ENDING DRUG PROHIBITION (1994) (concluding "the costs of drug prohibition are simply too high and its benefits too dubious").

²⁹ See *id.* at 11 (estimating that nearly \$32 million was spent in the enforcement and implementation of the 1973 drug laws).

³⁰ See JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 79-80 (1997) (suggesting that legislative reaction to polls favoring elongated sentencing is not an efficient way to deal with drug offenses).

implementation of the drug laws has been effective, and the laws may actually have a negative impact; as Hippocrates said, “[f]irst, do no harm.”³¹

Doctor Steven Belenko’s study³² shows that we might be able to reduce drug abuse and crime more effectively by spending money on drug treatment in prisons, rather than simply on more incarceration. Why continue to impose and pay the price for heavy prison sentences on the untested assumption that this strategy will have an impact?³³ Why not first try to learn whether this strategy actually works?

A related question is whether incarcerating people convicted of possessing or distributing relatively small quantities of drugs for such long periods of time is proportionate to the harm caused.³⁴ One way to frame this question is to ask whether an individual distributing two ounces of heroin is in fact as culpable as murdering someone. This is a difficult question to untangle, because the assumption of the drug laws is that if the quantity of heroin involved is large enough, many lives may indeed be forfeited. How is such “harm” or potential harm to be measured?

One useful way to question the correlation of heavy sentences with possession or distribution of controlled substances is to focus

³¹ RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 163 (Suzy Platt ed., 1989).

³² See Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833 (2000).

³³ Many commentators have argued that alternative strategies might prove more effective in controlling drug abuse.

According to the Justice Policy Institute, U.S. prison populations will have reached two million by February 15, 2000. See JUSTICE POLICY INSTITUTE, *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 3* (1999). Discussing the Rockefeller drug laws, Professor John J. DiIulio, Jr. of Princeton recently wrote, “it appears that at least a quarter of recent admissions to . . . [New York’s] prisons are ‘drug-only offenders,’ meaning felons whose only crimes, detected or undetected, have been low-level, nonviolent drug offenses.” John J. DiIulio Jr., *Two Million Prisoners Are Enough*, WALL ST. J., Mar. 12, 1999, at A14.

Professor DiIulio advocates abandoning mandatory minimum drug sentences, and instead mandating drug treatment programs for offenders. See *id.* This position is not restricted to people who believe in decriminalizing drugs. Recently joining DiIulio in calling for drug treatment as an alternative to incarceration is the White House’s director of national drug policy, Gen. Barry McCaffrey. McCaffrey has commented: “incarcerating offenders without treating underlying substance-abuse problems simply defers the time when they are released back into our communities to start harming themselves and the larger society.” *Drug Treatment Gets a Boost*, N.Y. TIMES, Dec. 13, 1999, at A32.

³⁴ See Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 785-90 (1994) (arguing that governmental decisions to restrict a person’s freedom from incarceration, like the decision to infringe upon any other fundamental right, should be subjected to strict scrutiny, with the government required to justify its use of incarceration by demonstrating a compelling interest).

on drugs that are available by prescription, and are therefore generally believed to be benign under some circumstances. Imagine the following scenario: Two college students are studying for final exams. Both have been diagnosed as suffering from Attention Deficit Disorder and both have prescriptions for Ritalin, an amphetamine currently believed to help many people to focus their attention. Student B, distracted by his studies, has neglected to get his prescription refilled. He asks Student A, who has a prescription for the same drug in the same dosage, to share her Ritalin so that he will be able to concentrate on his studies.³⁵ Depending on the number of milligrams involved, Student A could be guilty of a class B felony,³⁶ and could be sentenced to up to twenty-five years in prison³⁷ because Ritalin is an amphetamine, a schedule II drug.³⁸ At the quantity level probably involved, there is considerable sentencing discretion, so Student A might well receive a relatively lenient sentence.³⁹ More significantly, there is prosecutorial discretion hidden behind the drug laws,⁴⁰ and Student A, if she encounters a sympathetic prosecutor, might not be prosecuted at all, or might receive a favorable plea bargain. But, if Student A encounters a prosecutor and judge who want to send a particularly strong message about drug sharing, the statute would allow a maximum sentence of up to twenty-five years for this offense.⁴¹ Would the latter punishment be proportional to the harm done? Is the mere fact of the distribution of a prescribable drug without a prescription worthy of such a heavy punishment, even if no actual

³⁵ Because the statutes punish sale more heavily than possession, we will assume that Student A has asked to be reimbursed for what she paid for her prescription.

³⁶ See N.Y. PENAL LAW § 220.39 (McKinney 2000) (providing that criminal sale in the third degree includes selling one gram or more of a "stimulant" and is a class B felony); see also *id.* § 220.31 (McKinney 2000) (defining criminal sale in the fifth degree as punishing the sale of any quantity of a controlled substance, including stimulants, as a class D felony).

³⁷ See N.Y. PENAL LAW § 70.00(2)(b) (McKinney 1998) (providing that the maximum sentence for a class B felony is 25 years).

³⁸ See N.Y. PUB. HEALTH LAW § 3306, Schedule II(d)(1) (McKinney 1993). Furthermore, if Student A were at a prep school instead of college, selling even a minimal amount of Ritalin could be treated as a class C felony. See N.Y. PENAL LAW §§ 220.34(8), 220.00(14) (McKinney 2000) (stating the sale of any amount of controlled substance at an "educational facility," the definition of which includes high schools, constitutes criminal sale in the fourth degree).

³⁹ See N.Y. PENAL LAW § 70.00(3)(b) (McKinney 1998 & Supp. 1999) (providing that for non-violent class B felonies the minimum sentence is "fixed by the court" and "shall be not less than one year nor more than one-third of the maximum term imposed").

⁴⁰ See *People v. Bryant*, 398 N.Y.S.2d 216, 221 (N.Y. Sup. Ct. 1977) ("Considerable leeway is accorded the prosecution to determine when proceedings shall be instituted.").

⁴¹ See N.Y. PENAL LAW § 70.00(2)(b) (permitting the judge to fix the sentence, but such sentence shall not exceed 25 years).

harm is done? (We will assume that student B, who had been taking the same drug in the same quantity, and who knows the properties of the drug, does not suffer any harm.)

Because of the narrow focus on type and quantity of drug, the drug laws turn out, upon examination, to define anticipatory offenses. Dissemination of certain drugs is prohibited not because it will cause certain harm, but because it *might* cause harm. Should it matter whether any harm has actually occurred? Should it matter whether Student A was more or less reckless, perhaps sharing Ritalin with someone who has never had a prescription for it, who may not know its properties, and who may suffer side effects?

Some argue that we have proof that our drug sentences are not disproportionate, in that the courts have found heavy sentences meted out under the New York State laws for possession or distribution of a small quantity of drugs not to be unconstitutional.⁴² It is true that the New York State Court of Appeals has found the imposition of a sentence of life imprisonment for a drug offense does not comprise cruel and unusual punishment.⁴³ The courts, however, ask only the most deferential questions in evaluating the constitutionality of legislation under the Eighth Amendment (or parallel state constitutional provisions)—whether the legislation is rational; whether the legislature might reasonably have thought the harsh sentences would deter and reduce crime.⁴⁴ That the courts defer to the legislature does not relieve the legislature of the responsibility to make careful policy decisions. In fact, these judicial opinions demonstrate that it is in the legislature, and not in the courts, that the real policy decisions

⁴² The Honorable Joseph Bruno argued this point in his presentation delivered at Albany Law School on November 12, 1999. See *supra* note 14 and accompanying text.

⁴³ See *People v. Broadie*, 332 N.E.2d 338, 347 (N.Y. 1975) (affirming the convictions of eight defendants for possession and/or sale of controlled substances, all class A felonies with mandatory sentences, ranging from minimums of one or six years to eight and one-third years, and maximum of life imprisonment); see also *Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991) (holding a life sentence without possibility of parole for possession of over 650 grams of cocaine is not cruel and unusual); *Carmona v. Ward*, 576 F.2d 405, 407, 417 (2d Cir. 1978) (upholding as constitutional a sentence of six years to life for a woman convicted, after a plea arrangement, of second degree possession of a controlled substance for possession of 3/8 ounces of cocaine).

⁴⁴ See *Broadie*, 332 N.E.2d at 341, 347 (holding the legislature did not act irrationally in deciding the gravity of drug offenses and the deterrent effect of the sentencing statutes). The court also stated "the narcotics laws are relatively severe, but not irrationally so, given the epidemic dimensions of the problem." *Id.* at 345; see also *Carmona*, 576 F.2d at 410 (stating courts generally defer to the legislature and "assume the penalty's validity" and explaining that "a heavy burden rests upon those who make the constitutional challenge").

must be made.⁴⁵ Courts do not have the social science equipment to measure whether the legislature's assumptions, either about the effectiveness of particular sanctions, or about the properties of particular drugs, are accurate.⁴⁶ Courts do not generally believe that they have the political mandate to formulate drug policy.⁴⁷ It is not the courts, but the legislature, therefore, who will and must reevaluate from time to time whether a law that appeared to be rational at the time of its origination has in fact failed the test of practice.

To fulfill this responsibility, it is time for the New York State Legislature to commission a study to evaluate what the severity of drug sentences under the existing laws buys.⁴⁸ How much impact do these laws actually have on deterrence of drug use/abuse? To what extent is there actually a correlation between length of sentence and deterrence?⁴⁹ We could also use some reliable information about the assumption that reducing drug use will lead to a reduction of incidental crime. The correlation between drug use and crimes of violence, for example, an article of faith to the enactors of the Rockefeller drug laws, has been called into question.⁵⁰ But we still do not have anything resembling an adequate answer to that question.⁵¹

⁴⁵ See *Carmona*, 576 F.2d at 409-10 (emphasizing the propriety of a court deferring to legislative judgment: "[t]he paramount role of determining that the punishment fit the crime is that of the legislature of the state"); *Broadie*, 332 N.E.2d at 346 (noting "[t]he statutes were enacted after thorough investigation" by the legislature).

⁴⁶ See *Broadie*, 332 N.E.2d at 346 (citing to various transcripts and reports to demonstrate the investigative process of the legislature).

⁴⁷ See *id.* (explaining that although "the court does not necessarily approve or concur in the Legislature's judgment in adopting [drug offense] sanctions" they will exercise "judicial restraint" and respect "the separation of powers"); see also *Carmona*, 576 F.2d at 410 (emphasizing the importance of the political process and the role of the legislature in enacting statutes in accordance with the public's standards).

⁴⁸ The legislature previously concluded, in 1979, that the original Rockefeller drug laws were too severe and amended them accordingly. See *Donnino*, *supra* note 2, at 7.

⁴⁹ The drug laws, although essentially anticipatory offenses, may nevertheless be regarded as serving retributive as well as deterrent purposes. It would be helpful, at least, to identify what the purposes of these punishments are.

⁵⁰ In lieu of empirical data, myths about drugs and crime have filled the gap. As Tonry notes, however, from the data that is available, "mythology has been shown to be just that. We have learned that there is no inexorable connection between drug use and criminality." Tonry, *supra* note 26, at 4.

⁵¹ See Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749 (2000) (stating "the nature and extent of systematic violence is still not entirely clear or strong, and it appears to vary across time and different types of drug markets").

II. MANDATORY PUNISHMENTS VS. JUDICIAL DISCRETION

Another central assumption underlying the sentencing structure of the Rockefeller drug laws is that the certainty of punishment will contribute to deterrence.⁵² The statutes therefore attach mandatory minimum sentences to some drug offenses (depending again on type and quantity of drug involved).⁵³ Here, too, we lack the empirical data that might enable us to decide whether that operative assumption is true. How much additional deterrence of drug use/dissemination is there if it is perceived that punishment will be swift and certain, as well as severe? So long as we do not really know the answer to that question, we should look at what we give up in order to guarantee certainty of punishment. Doctor Belenko's studies show, for example, that mandatory minimum sentences make it more difficult to have meaningful drug treatment programs in prison, because the possibility of bargaining and creating incentives is reduced.⁵⁴ If this is true, the current structure of the drug laws might even be compromising more effective crime prevention strategies.

We also sacrifice the judicial discretion that would be necessary to individualize sentencing. The Temporary Commission, in deciding on the sentencing scheme embodied in the 1973 legislation, perceived itself as having to choose between drug laws that would provide maximum penalties and then permit judges to select a sentence within the range allowed, and drug laws graded by the legislature.⁵⁵ Like Congress in the Sentencing Reform Act passed shortly afterwards,⁵⁶ the Temporary Commission decided against judicial discretion, for several reasons. First, the Commission, like Congress, was concerned about the specter of sentencing disparity if judges were afforded substantial discretion.⁵⁷ If the college student

⁵² See INTERIM REPORT, *supra* note 2, at 58 (inferring that since most of the population does not abuse drugs, the threat of criminal sanctions must have some deterrent effect).

⁵³ Under N.Y. PENAL LAW § 70.00(3)(a) (McKinney 1998), for example, "[i]n the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence." Examples of drug convictions classified as class A felonies include possession of four ounces or more of any narcotic (class A-I felony), carrying a minimum sentence of imprisonment of between 15 and 25 years; and possession of two or more ounces of any narcotic (class A-II felony), carrying a minimum sentence of between three and eight years. See *id.* §§ 70.00(3)(a), 220.18-.21 (McKinney 2000).

⁵⁴ See Belenko, *supra* note 32, at 868.

⁵⁵ See INTERIM REPORT, *supra* note 2, at 59 (explaining the need for a "rational basis" in determining sentences rather than affording "unbridled sentencing discretion" to the courts).

⁵⁶ See 28 U.S.C. §§ 991-998(1994) (seeking, in 1984, to "provide certainty and fairness" in federal sentencing).

⁵⁷ See INTERIM REPORT, *supra* note 2, at 59-60.

sharing her Ritalin receives the same sentence as a person selling amphetamines in a park, simply because both have disseminated the same quantity of the same drug, there is no chance that sentencing judges will impose inconsistent sentences on similar defendants, or that they will impose different sentences for the same conduct because they might feel more sympathetic to the college student. It should be noted, of course, that at the same time Congress decided to reduce judicial discretion in sentencing, Congress also delegated its decision-making power respecting the relative severity of sentences to the quasi-judicial, politically insulated Sentencing Commission.⁵⁸ Evidently fearing that political imperatives could make it impossible for a legislature to produce sound and careful decisions regarding the criminal justice policy, Congress bound itself, like Ulysses, to resist the siren's song.

The New York Commission, and then the legislature, decided that the principal bases for measuring culpability should be drug type and quantity, and not offender-related factors.⁵⁹ Also, like the federal drug laws, the New York law focuses almost exclusively on offense-related factors, combined with prior criminal history, and allows little occasion for individualizing sentences based on the circumstances of the defendant, or the person to whom drugs have been disseminated.⁶⁰

If culpability is to be measured by offense-related factors and a sentence can, in many cases, be calculated once the drug type, quantity, and a few other offense-related circumstances (age of the drug consumer, for instance) are known, then judges have little role to play.⁶¹ In order to decide what drugs are particularly dangerous,

⁵⁸ See generally *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the delegation by Congress to the Sentencing Commission).

⁵⁹ See INTERIM REPORT, *supra* note 2, at 72-78 (setting forth suggested schedules relating to drug type and quantity); see also N.Y. PENAL LAW § 220.18 (McKinney 2000) (classifying drug crimes by these criteria).

⁶⁰ See, e.g., N.Y. PENAL LAW § 220.18 (setting forth factors to be considered, including weight and drug type).

⁶¹ Prior criminal history is one of the few offender-related factors remaining relevant under federal or state drug law sentencing. Unlike federal law, the New York State Legislature built all decisions about drug type and quantity into the statute as elements of each offense. The prosecution must prove to a jury, beyond a reasonable doubt, that the defendant possessed methamphetamine, in the quantity of one-half ounce. If the jury so finds, the sentence will follow. Under the Federal Sentencing Guidelines, by way of contrast, the sentencing judge must often find facts related to drug quantity at sentencing, where the decision is made without a jury, on a lesser standard of proof. I have previously criticized this regime, arguing that there is no good reason for splitting offense-related factors and leaving some to be decided at sentencing. See Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 293 (1992). The bifurcation of fact-finding seems to have

the Temporary Commission heard testimony from a variety of scientists, including psychopharmacologists, as well as former addicts.⁶² On the basis of their overview of the properties of various drugs, the Commission and the legislature set out rules concerning relative culpability.⁶³ Judges at sentencing proceedings are ill-equipped to take such testimony. Similarly, the Commission's and the legislature's decisions about what quantity of methamphetamine is comparable in its harm-producing properties to what quantity of cocaine seem more appropriately legislative than judicial choices. To decide what quantities to plug into their grid, the Commission studied street prices of various drugs, and heard testimony about how long the average addict might take a particular quantity of a drug before wanting to increase quantity.⁶⁴ This is a legislative, not a judicial, inquiry.

Again, the Commission's and the legislature's choices are rational, but only if the assumptions on which those choices were based are not called into question. If type and quantity of drug are not the only meaningful indicators of increased culpability of a drug offender, our conclusions about who is the better decision maker might change, depending on what factors are deemed relevant. Again, the simple connection the statute draws between drug type/quantity and harm turns out to be foundational. Compare Student A, who shared a certain quantity of Ritalin with a student whose prescription had lapsed, with a defendant who has sold the same quantity of an identical amphetamine in the park, not knowing whether the consumer was familiar with the drug and its properties, whether the consumer was about to drive a car, whether the consumer was pregnant, whether the consumer might take too high a dosage, and whether the consumer might suffer serious side effects. It is certainly arguable that the student is less culpable than this latter drug seller, because the connection between

been a product of the procedure by which Congress delegated decisions to the Sentencing Commission, rather than of any reasoning process. *See id.* at 295-99.

Under federal law, a defendant's exposure at sentencing is increased by the fact that under federal conspiracy law, which still adheres to the *Pinkerton* doctrine, a defendant convicted of selling of a small quantity of drugs may receive a heavily enhanced sentence if the small quantity was obtained from a large shipment considered to amount to "relevant conduct." *See, e.g.,* *United States v. Silverman*, 889 F.2d 1531 (6th Cir. 1989) (sentencing defendant for possession of one kilo of cocaine rather than the quarter ounce alleged and proved at trial). New York law avoids these pitfalls.

⁶² *See* INTERIM REPORT, *supra* note 2, at 96-134 (listing and summarizing the testimony of witnesses who testified at the Commission's hearings).

⁶³ *See id.* at 59-68 (proposing incremental penalties for drug offenders based on the type and quantity of drugs involved).

⁶⁴ *See id.* at 80 (presenting, in chart format, its findings regarding drug pricing).

dissemination of the drug and harm seems far weaker in the former setting than in the latter.

During the past thirty years, there has been considerable discussion about the interrelationship of drugs, addiction, and harm. The apparent assumption of the Temporary Commission that culpability can be determined simply by the psychopharmacological properties of a drug has been undermined by development of a more nuanced picture of how drug addiction works. Doctor Norman Zinberg, for example, studied American veterans who had been addicted, while serving in Vietnam, to heroin or other "hard" drugs, questioning why so many found it easy to kick their habits on returning home.⁶⁵ Zinberg concluded that the nature of a drug being used is only one of several factors affecting addiction.⁶⁶ The other decisive factors he referred to as the "set"—the genetic and psychological features of the individual drug user—and the "setting"—the individual's community and context in which drug use occurs.⁶⁷

Zinberg is far from alone in doubting that the pharmacology of a drug produces addiction in the direct way the Commission assumed thirty years ago.⁶⁸ Many have noted that use of a particular drug in a particular quantity does not affect everyone similarly.⁶⁹ Some people use cocaine recreationally over a period of years and do not radically increase their dosage, do not lose their jobs, and maintain good relationships with their families.⁷⁰ Others, who take the same quantity of the same drug, have radically different experiences—because of their set and their setting—just as people have differing abilities to control their use of alcohol.⁷¹

⁶⁵ See NORMAN E. ZINBERG, *DRUG, SET, AND SETTING: THE BASIS FOR CONTROLLED INTOXICANT USE* 12-15 (1984) (noting that recidivism to addiction was only 12% within three years of returning to the United States from Vietnam).

⁶⁶ See *id.* (stating that social and psychological factors also play a role).

⁶⁷ See *id.* at 5. The three factors to consider in determining what makes a person use illicit drugs and what effect the drugs will have on the user are: "drug (the pharmacological action of the substance itself), set (the attitude of the person at the time of use, including his personality structure), and setting (the influence of the physical and social setting within which the use occurs)." *Id.*

⁶⁸ See, e.g., Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, in *DRUG USE AND DRUG POLICY* 269, 286 (Marilyn McShane & Frank P. Williams III eds., 1997) (agreeing that set and setting are relevant to addiction).

⁶⁹ See RICHARD LAWRENCE MILLER, *THE CASE FOR LEGALIZING DRUGS* 2-4 (1991) (noting the effect of a drug is dependent on several factors such as purity, set, setting, tolerance, and addiction).

⁷⁰ See ZINBERG, *supra* note 65, at 1-3 (describing the example of a twenty-six year old white male who engages in recreational drug use and how such drug use generally has no "significant" impact on his life).

⁷¹ See *id.* at 5.

Some critics of the drug laws take the work of Zinberg and others as one basis for concluding that criminalizing drug use is a poor strategy generally.⁷² Zinberg notes, for example, that as long as substances are subject to strict prohibition, communities are less likely to develop norms about how to use various substances safely.⁷³ He points to the prohibition of alcohol during the 1920s as having delayed the development and enforcement of community norms that can make abuse of alcohol less likely, and use of alcohol safer.⁷⁴ Alcohol harm reduction techniques, like declaring a designated driver or having teenage children sign contracts with their parents for chauffeuring any family member who has had too much to drink, have only recently replaced the societal norm of having "one for the road," as we have moved further beyond Prohibition.⁷⁵

One reason why there has been resistance to reevaluating the assumptions on which drug laws like New York's are based is that relatively little has been written about drug law and policy outside the context of debates on decriminalization,⁷⁶ and discussion of

⁷² See, e.g., DOUGLAS N. HUSAK, DRUGS AND RIGHTS 100-04 (1992) (contending that if drug use is motivated by autonomous choice, rather than by addiction, the regulation of drugs loses its primary justification).

⁷³ See ZINBERG, *supra* note 65, at 193-98 (critiquing the current social policy on drugs).

⁷⁴ See *id.* at 9 (setting forth the chronology of social customs regarding alcohol).

⁷⁵ See *id.* at 9-10 (discussing the creation and internalization of social sanctions).

⁷⁶ For representative writings arguing that drug prohibition, as embodied in the Rockefeller drug laws, is necessarily a failure, and proposing alternatives, see generally: THE CRISIS IN DRUG PROHIBITION (David Boaz ed., 1990) (advocating the decriminalization and legalization of drug use); DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL (Ronald Hamowy ed., 1987) (discussing the harmful effects of drug prohibition and recommending the formulation of new approaches to drug abuse); HUSAK, *supra* note 72 (questioning the government's authority to criminalize recreational drug use); DRUG PROHIBITION AND THE CONSCIENCE OF NATIONS (Arnold S. Trebach & Kevin B. Zeese eds., 1990) (suggesting four considerations necessary in improving drug policy); ERICH GOODE, BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE (1997) (criticizing current drug policies and outlining a variety of alternative approaches); MILLER, *supra* note 69 (1991) (contending that the war on drugs is, in actuality, a war on individual freedom and democracy); SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES (Melvyn B. Krauss & Edward P. Lazear eds., 1991) (presenting economic, social, legal, and medical implications of drug use); ARNOLD S. TREBACH, THE GREAT DRUG WAR: AND RADICAL PROPOSALS THAT COULD MAKE AMERICA SAFE AGAIN (1987) (arguing that the current war on drugs is proceeding in the wrong direction and proposing alternative methods of combating drug use); STEVEN WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS (1986) (demonstrating the failure of the war on drugs and proposing a new solution); Ethan A. Nadelmann, *supra* note 68 (seeking common ground in the drug policy spectrum); Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 SCI. 939 (1989) (questioning the current approach of the criminal justice system); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703 (2000) (contending the greatest damage done by drugs is not the drugs themselves or their pharmacological effects, but by the effects of the laws and policies that have been designed to deal with drugs);

decriminalization is, in many circles, considered anathema. Some of the voices challenging the link between drugs and violent crime, and some of those arguing that drug treatment is more effective than harsh criminal justice policy, conclude that drugs should be decriminalized.⁷⁷ But one need not follow the reasoning all the way to decriminalization. The research of Zinberg and others, teaching us that addiction is a complex phenomenon,⁷⁸ can also help us to decide how to measure culpability when distribution of drugs is being criminalized. We can, for example, use some of this information to ask more nuanced questions about how to grade drug offenses.⁷⁹

There is no reason to disregard widely accepted medical discoveries simply because some people make unpopular or controversial arguments based on that information. If, as it seems impossible to doubt, drug addiction is actually caused by a combination of factors, should drug sentencing be based only on one? Might it be more appropriate to grade drug offenses according to the *mens rea* of a defendant—was the defendant relatively reckless in not learning anything about the “set” and “setting” of a consumer, or relatively careful in finding out that the consumer had a prescription for the same quantity of the same drug? Would it be more appropriate to take into account whether any sort of harm actually occurred? The proposition that culpability might be relative need not go so far as to say that the college student who shared, or sold, her Ritalin should not be punished at all.⁸⁰

Our ideas about the nature and social meaning of drug “abuse” have also been challenged by our developing knowledge about the nature of the human brain. In the past thirty years, the medical use of psychopharmacological drugs has exploded. Hardly a week passes without stories in news magazines and on television

James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607 (1990) (arguing that both the concept of individual liberty and drug prohibition's cost to society warrant the legalization of drugs).

⁷⁷ See *supra* note 76.

⁷⁸ See *supra* notes 66-72 and accompanying text (discussing modern research and the nature of drug addiction).

⁷⁹ When is an additional ten years of incarceration justified because the amount of drugs involved has increased? The statutory calibrations have the air of objectivity, but could be nothing more than educated guesswork. Are these calibrations truly proportional to culpability?

⁸⁰ One classic problem of criminal law is how far to go in encouraging people committing crimes to do so more carefully, rather than holding them strictly liable for all consequences of their actions, no matter how unforeseen. See, e.g., *Regina v. Faulkner*, [1877] 11 I.R. 8 (holding that a sailor who was stealing rum from the hold of a ship was not guilty of arson when he accidentally started a fire by lighting a match during his theft).

discussing the latest research on brain chemistry and on how certain undesirable behavior can be corrected by ingestion of some chemical or herb, sometimes requiring prescriptions, and sometimes not.⁸¹ When the Temporary Commission looked at abuse of amphetamines over thirty-five years ago, the idea of using Ritalin to address "hyperkinesis" was new and strange.⁸² The authors of the report seemed confounded by the notion that Ritalin might have an ameliorative effect on what they pronounced an organic brain defect which disappears at the onset of puberty.⁸³ Our current knowledge and beliefs about Attention Deficit Disorders, in children and adults, lead us to conclude that many people have chemical deficits of one sort or another, to one degree or another, and that many people self-medicate—some with prescription amphetamines, others with non-prescription amphetamines, some with herbs like Ginkgo Biloba, and some with caffeine. Some of those people have more side effects from heavy doses of caffeine than they would have from Ritalin.

How should our developing picture of the relationship of drugs and the brain affect our view of the Rockefeller drug laws? First, we may need to reexamine some of the earlier characterizations of which drugs are "dangerous." Many critics have questioned why the schedules criminalize some substances, like amphetamines or cocaine, and not others, like alcohol and tobacco, that are at least as closely linked with the types of harm the drug laws target.⁸⁴ Some of those critics do arrive at the conclusion that drugs should be decriminalized. However, should that be a reason to resolutely ignore the questions they raise, at least as they pertain to the grading and calibration of punishment for drug offenses?

⁸¹ See, e.g., Hyla Cass, *Women and Depression: Choosing Complementary Care*, TOTAL HEALTH, Sept. 1, 1999, at 38 (reporting on the differences in treating women for depression with holistic medicines, as compared to anti-depressant prescription drugs); Geoffrey Cowley & Anne Underwood, *What Is SAME*, NEWSWEEK, July 5, 1999, at 46 (reporting on the uses and effects of the SAME, a molecule present in all living things, recently introduced as a supplement, that has been used to treat both arthritis and depression); Jenny Deam, *Problem or Solution? Medical Professionals Debate the Safety of Supplements*, DENVER ROCKY MOUNTAIN NEWS, Aug. 24, 1999, at 3D (reporting on the medical community's divergent response to the boom in "herb" dietary supplements, including ginkgo biloba and St. John's wort); Judy Foreman, *Researchers Look Beyond Prozac*, STAR-TRIBUNE NEWSPAPER OF THE TWIN CITIES, Mar. 21, 1999, at 3E (discussing modern anti-depressant drugs).

⁸² See INTERIM REPORT, *supra* note 2, at 81 (discussing how Ritalin was first used in 1959 to treat hyperkinesis).

⁸³ See *id.* (stating hyperactivity is spontaneously corrected upon the onset of puberty and that Ritalin reduces hyperactivity, thereby enabling a child to "function more effectively in school").

⁸⁴ See, e.g., GOODE, *supra* note 76, at 24-32 (suggesting that the definition of drug abuse should not be based on notions of "abuse," but instead on "harm").

One could also reexamine the earlier decisions to include and exclude particular substances. One of the factors affecting where drugs were placed on the schedules was whether there was an accepted medical use for a particular drug.⁸⁵ Ritalin has a place on its schedule as a controlled substance because it must be prescribed, while caffeine is not on the schedule because it does not have to be prescribed. Ritalin is considered less dangerous than some other controlled substances, however, because there is an accepted medical use for it.⁸⁶ Conversely, marijuana is on the schedule because it has no accepted medical use, is a controlled substance and, therefore, may not be prescribed.⁸⁷ The State of California may not authorize the medical use of marijuana because it is on the federal list of controlled substances and is therefore not available to be used medically.⁸⁸ How much circularity is there in the seemingly objective conclusions underlying the very scientific looking drug schedules?⁸⁹

To what extent do we also need to reexamine our conclusions about the objectivity of the connection between drug quantity and culpability? The recent federal fiasco with assessing the relative dangerousness of crack and powder cocaine⁹⁰ should lead us to be

⁸⁵ See INTERIM REPORT, *supra* note 2, at 81-88 (describing the medical uses of various classes of drugs).

⁸⁶ See *id.* at 81-83 (discussing amphetamines such as Ritalin and their extensive medical use to treat such conditions as narcolepsy, hyperactivity, and obesity).

⁸⁷ See *id.* at 87-88 (stating there is no medical use for hashish, which is the resin of the cannabis plant from which marijuana is derived).

⁸⁸ See 21 U.S.C. § 812 (1994) (federal controlled substance schedule). California's new law—the Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1991 & Supp. 2000)—“exempts medical marijuana users and their primary caregivers from criminal prosecution for possession or cultivation of marijuana.” Suzanne D. McGuire, Comment, *Medical Marijuana: State Law Undermines Federal Marijuana Policy—Is the Establishment Going to Pot?*, 7 SAN JOAQUIN AGRIC. L. REV. 73, 92 (1997) (footnote omitted). In response to this California initiative, however, the Office of National Drug Control Policy and the Drug Enforcement Administration (DEA) issued a statement maintaining the possibility of federal criminal prosecutions, as well as a threat of DEA registration revocation and the denial of Medicare reimbursement for doctors who “prescribe” marijuana usage. See Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 167 (1997) (citing the Drug Enforcement Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200, 62 Fed. Reg. 6164 (1997)). Of course, some of this battle is about federal supremacy and whether a state legislature has power to redefine what substances are to be controlled in the face of federal law.

⁸⁹ See GOODE, *supra* note 76, at 23-24 (discussing the circularity of legalistic definitions of drug abuse, for example, defining drug abuse as “any and all *illegal* drug use”).

⁹⁰ The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) was passed “in a climate in the Congress that some have characterized as frenzied.” William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1250 (1996) (quoting Eric E. Sterling, *Hearings Before the United States Sentencing Commission on Proposed Guideline Amendments* (Mar. 22, 1993)). One of the law's main

cautious in assuming the validity of the lines we have drawn. Is sentencing really fair and equal if it is based on chemical measurements? Not if the assumptions behind the measurements are unreliable.

III. MEASURING HARM VS. MEASURING DRUGS

Significant variations on the current drug laws might well enhance the fairness of sentencing. We might pay more attention to actual harm, rather than to the anticipatory harm of disseminating drugs, or to the *mens rea* of defendants rather than simply the quantity and chemical properties of the drugs involved. However, individualizing sentences might lead to sentencing disparities with middle-class college students possibly receiving relatively lenient sentences, perhaps for the wrong reasons. It may be that the current myopic focus on drug type and quantity, even if crude, will ultimately seem preferable to a harm-based drug punishment scheme, because it at least does have the virtue of treating people equally, while discriminating among drugs.⁹¹ But after three decades, is it not worth reexamining whether this grading concept has been successful?

The legislature has recently made significant decisions modifying the drug laws, cutting in two different directions. One veered away from a *mens rea*-based approach. The New York Court of Appeals, in *People v. Ryan*,⁹² held the prosecution is required to prove the

features was the creation of a penalty ratio of 100 to 1 for crack cocaine and powder cocaine, respectively. *See id.* at 1252. The legislative history, however, "contains no [policy] discussion of the 100:1 crack/powder cocaine ratio." *Id.* The bill's development bypassed much of the traditional deliberative congressional process where these issues might have been debated: the bill was not submitted to a subcommittee, nor based on hearings. *See id.* "Read as a whole, the abbreviated legislative history of the 1986 Act does not provide a single, consistently cited rationale for the crack-powder penalty structure." *Id.* at 1254-55. In practice, the 100:1 ratio produced disparate penalties, primarily with respect to African-Americans, prompting angry criticism of Congress's motivation. *See id.* at 1255. Both houses of Congress subsequently rejected a recommendation by the Sentencing Commission to end the 100:1 ratio and substitute a 1:1 ratio. *See Amendments to the Sentencing Guidelines for United States Courts*, 60 Fed. Reg. 25074 (1995) (setting forth the Commission's arguments for amending the sentencing guidelines to control the growing gap between sentences imposed on whites and minorities by adopting a harm-specific sentence structure); Pub. L. No. 104-38, 109 Stat. 334 (1995) (rejecting the Sentencing Commission's recommendations for changing the sentence structure guidelines for cocaine offenses).

⁹¹ The federal crack/cocaine experience also suggests that it would be useful to study the impact of the seemingly objective categorization of drugs, to determine whether disparities in application run along fault lines of race, etc. In addition, study of prosecutorial discretion in applying the drug laws would be a necessary prerequisite to concluding that the laws are being administered fairly.

⁹² 626 N.E.2d 51 (N.Y. 1993).

defendant knew the quantity of drug involved was prohibited by the statutes penalizing distribution of particular quantities of a drug.⁹³ Ryan's offense involved, what Ryan believed to be, a package of hallucinogenic mushrooms and resulted in an indictment for "attempted criminal possession of a controlled substance in the second degree."⁹⁴ The legislature promptly reacted to this decision by rewriting the statutes to make it clear the defendant's *mens rea* did not matter.⁹⁵ The drug laws took another step in the direction of strict liability.

The other recent legislative decision moved in the direction of individualizing sentences, even at the price of making conviction of a greater offense somewhat more difficult.⁹⁶ The Commission's original scheme, in measuring quantity, looked at the aggregate weight of compounds containing a controlled substance.⁹⁷ This approach did not require substantial lab time to analyze the composition of a substance, just a scale to weigh the aggregate substance. Of course, basing punishment on the combined weight of a controlled substance and its medium can lead to incongruous results. In *Chapman v. United States*,⁹⁸ the Supreme Court reviewed a case in which a defendant had received a minimum sentence of five years for distributing a quantity of LSD on a piece of blotter paper,⁹⁹ when that same defendant would have received a sentence of only fourteen months for distributing that same quantity of LSD in its pure form, without the blotter paper.¹⁰⁰ The Court, using the same deferential lens it did in reviewing the issue

⁹³ See *id.* at 52 (noting that "knowingly" applies to the amount of the drug); see also NEW YORK PENAL LAW § 220.18(5) (McKinney 2000) (noting it is a felony to "knowingly and unlawfully possess[] . . . six hundred twenty-five milligrams" of a hallucinogen).

⁹⁴ See *Ryan*, 626 N.E.2d at 52-53 (noting that what Ryan believed to be hallucinogens was actually a substitute package stuffed with newspaper).

⁹⁵ See N.Y. PENAL LAW § 15.20(4) (McKinney 1998).

Notwithstanding the use of the term "knowingly" in any provision of this chapter defining an offense in which the aggregate weight of a controlled substance or marihuana is an element, knowledge by the defendant of the aggregate weight of such controlled substance or marihuana is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the aggregate weight of the controlled substance or marihuana.

Id.

⁹⁶ By requiring the pure weight of the drug to be determined, there are greater laboratory costs since the separation of the drug from its medium is often a time-consuming process. See INTERIM REPORT, *supra* note 2, at 60 (discussing a situation where drug seizures would require 25 hours of laboratory procedures to obtain evidence for a conviction).

⁹⁷ See *id.* at 60 n.* (noting "a superficial inequity in this" measurement scheme).

⁹⁸ 500 U.S. 453 (1991).

⁹⁹ See *id.* at 455-56 (noting the pure weight of the drug was only 50 milligrams).

¹⁰⁰ See *id.* at 474 (Stevens, J., dissenting).

of cruel and unusual punishment, held that the legislative treatment of the issue of purity versus aggregation was not irrational.¹⁰¹ Fortunately, the New York legislature was willing to go beyond this form of “rationality” and make its own policy decision about how to measure culpability in this instance.¹⁰² The revised law focuses more on the weight of controlled substance involved, rather than basing punishment on the weight of the medium; therefore, differences in sentence level will not depend on whether the same quantity of LSD is distributed in a cup, on a sugar cube, or a piece of paper.¹⁰³ Unfortunately, there have not been many other significant revisions.

CONCLUSION

Three decades is a long time to have such starkly dramatic legislative decisions go, for the most part, unexamined. The deferential courts will not second-guess decisions regarding what sentence length is appropriate, any more than they will second guess legislative decisions on what should be treated as an element of a crime and what should be treated as a sentencing factor.¹⁰⁴ Consequently, the courts are not having discussions that would help a responsible legislature review its own work. Neither are the social scientists who, for whatever reasons, have not frequently been inspired to study the effectiveness of various drug strategies. Most of the talking heads interested in discussing drug policy are debating decriminalization, an option the New York legislature is unlikely to find interesting any time soon. But many of these discussions contain valuable information and ideas useful in recalibrating decisions about how drug laws should be graded. These sources of information should not be shunned just because they are associated with conclusions that may be viewed as radical.

Legislators who want to know whether the assumptions underlying the Rockefeller drug laws are actually true have several options. One is to commission some new, pointed studies. Another is to review the critiques, arguments, and information in the

¹⁰¹ See *id.* at 465 (“We find that Congress had a rational basis for its choice of penalties . . .”).

¹⁰² See generally N.Y. PENAL LAW art. 220 (McKinney 2000) (setting the level of crime for most drug offenses on the basis of pure weights).

¹⁰³ See *id.* §§ 220.09(6), 220.16(10), 220.18(5) (McKinney 2000) (providing the degree of criminal possession depends solely on the weight of the hallucinogen).

¹⁰⁴ See *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (“[T]he state legislature’s definition of the elements of the offense is usually dispositive.”).

existing literature, even if the authors of those works ultimately take controversial or unpopular positions. The most important course of action is to reopen the debate. Perhaps the existing drug laws appear, on their surface, to be rational, but that may only remain true if we are careful not to ask too many questions about the assumptions on which those laws are based. Our knowledge about drug abuse, addiction, and the human brain has grown remarkably in the past three decades, but our criminal solution to the problems engendered by drugs has hardly moved at all. In the next millennium, can drug laws move beyond presumed rationality?