

# *The Criminal Justice Policy Foundation*

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*Eric E. Sterling, President*

SUMMARY OF THE BRIEF OF  
ERIC E. STERLING  
PRESIDENT, THE CRIMINAL JUSTICE POLICY FOUNDATION  
BEFORE THE  
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
SENATE OF CANADA  
HON. JOAN FRASER, CHAIR  
REGARDING  
C-15, AN ACT TO AMEND THE CONTROLLED DRUGS AND SUBSTANCES ACT  
OCTOBER 28, 2009

A. Mandatory minimum sentences:

1. Are denigrating to the Judges of Canada, and to the prosecutors.
2. Lead to unjust sentences.
3. Led to enormous unplanned expenditures for incarceration in the U.S.
4. Are ineffective in reducing the supply of drugs and protecting youth.
5. Are counterproductive in the changes in trafficker behavior they induce.

B. Drug treatment courts:

1. Such courts are effective but very expensive and inefficient.
2. Such courts can never be a scalable approach to the need to control drug use by the offender population.
3. Such courts should not exclude violent offenders.
4. Prosecutors should not be the gate keepers to drug court programs.
5. A cheaper, scalable alternative is the H.O.P.E. program in Honolulu, Hawaii.
6. Drug court expansion should not be in lieu of expanding indigent treatment.

C. Why increase punishment for Cannabis offenses?

1. Cannabis does not appear to be a gateway drug in Canada.
2. There does not appear to be much social harm in Canada as a consequence of Cannabis use.
3. Cannabis is much less addictive than many other drugs.
4. The principles that warrant state punishment of wrongful conduct do not justify punishment of use of Cannabis.

D. Protecting public safety vs. pandering to public fear.

1. The public has a right to live free of the fear of crime.
2. Our cultures are obsessed with crime, and the incidence of crime is exaggerated by the news media.
3. The failings of the justice system can be exaggerated by the news media.
4. Parliament should not engage in simply symbolic acts, but support effective anti-crime strategies.

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C-15, AN ACT TO AMEND THE CONTROLLED DRUGS AND SUBSTANCES ACT

OCTOBER 28, 2009

Madame Chair, members of the Committee, thank you for inviting me to testify before you regarding bill C-15. My name is Eric E. Sterling. I am the President of The Criminal Justice Policy Foundation, in Silver Spring, Maryland.

This brief addresses mandatory minimum sentences, drug courts, the prosecution of cases involving Cannabis, and the political dynamics of crime.

## A. MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences are *deja vu*

Today the Committee is considering a bill to create mandatory minimum sentences for various offenses that violate Canada's drug laws, and to expand drug treatment courts.

I feel a bit of *deja vu*. In 1986 I was counsel to the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime. For the previous six years my responsibilities had been to oversee Federal drug law enforcement and related issues for the House Judiciary Committee. In the summer of 1986 the U.S. Congress hastily adopted mandatory minimum sentences that I helped

write, and those laws have become among the most reviled Acts of Congress in recent years.

Your work is profoundly different from that experience in two important respects, and I want to commend you for those. First, I commend you for very carefully considering this legislation. In 1986, we acted in great haste and had no hearings. We did not take any evidence from the government, from the judiciary, or from any interested parties or criminal justice experts. We wrote the bill in three days in a politically frenzied environment. There were two primary drivers for the anti-drug legislation: First, to respond to the nationwide shock at the death of an extremely well known athlete, Maryland basketball star Len Bias, who died from a seizure from snorting cocaine the night he signed with the championship professional basketball team, the Boston Celtics. Second, to respond to the calculus of the Democratic Party leadership that a Democratic anti-drug initiative could lead to electoral victory in the November elections, a few months hence. Our hasty development of mandatory minimum sentences in drug cases was the result of a Republican Party maneuver in the final days before adjournment to attempt to embarrass the Democrats as insufficiently tough. Mandatory minimum sentences in Federal drug cases in the U.S. were not the result of any careful consideration or conclusions about the harmfulness of various drugs, about the deterrent effects of various sentences, or of the just punishment that various drug crimes deserved.

In 1988, again at the end of the session on a tight time frame, the Congress sought to renew the political climate and advantages of flamboyantly legislating against the drug menace. I had been very satisfied for much of my nine years working as counsel for the House Judiciary Committee on complex issues such as gun control, pornography, money laundering, organized crime, arson, military assistance to law enforcement and drug control. But that satisfaction was overwhelmed by my disappointment at the increasingly cavalier, indeed reckless, manner, in which Congress legislated. Over the past twenty years I have had the opportunity to teach, write and advise the public regarding crime and justice matters, and especially regarding drug control. I am honored that the Standing Committee on Legal and Constitutional Affairs has invited me to provide evidence for it today as part of a very careful consideration of the bill.

Secondly, I want to commend you for the modesty of your proposed mandatory minimum sentences. In the United States, our mandatory minimums are terms of 5, 10, 15, 20 and more years in prison without the possibility of parole. Your proposed mandatory minimum sentences of one, two or three years are not unconscionably long, as ours are.

Nevertheless I urge the Committee to reject the temptation of mandatory minimums, and a "crack down" approach to the problem of drug abuse and drug-related crime.

You should be aware that the U.S. Congress now appears to moving away from the harsh, disparate mandatory minimum sentences for crack cocaine offenses. H.R.

3245, the Fairness in Sentencing Act was favorably reported by the House Subcommittee on Crime on July 29, 2009. This month, Senator Richard Durbin, (D-IL), also the Senate Majority Whip, introduced S.1789, a bill to restore fairness to cocaine sentencing.

### The "message" of mandatory sentences

You may have heard arguments about “sending a message.” Perhaps in parliamentary debate it is asserted, “We are sending a tough message to the criminals (or prospective criminals)” by adopting this measure. Perhaps it asserted, “This measure sends a strong message of deterrence to our youth.” These “messages,” even if explicitly articulated in debate in the Senate and the House of Commons, are rarely heard by the audience of criminals and potential criminals. Criminals do not read the reports of your debate. Very few read the newspaper accounts of your debate. They rarely watch the political news.

Young people, most of them in school, are also not reading your speeches or following your debates. Assuredly, the young people who are paying attention to the debates in Parliament are *not* at any risk of becoming drug traffickers.

Most criminals know what they are doing can result in punishment. But they are not deterred because they do not believe they will be caught.

Most offenders are not long range planners. They are not careful analysts of risk. They do not consider the differences between sentences of 1 year or 3 years or 10 years when acting upon the impulses that drive them to crime. In general, they don't believe they will be caught. They may be unrealistic in that belief, but unrealistic ideas characterize the psychology of criminal offenders. Many offenders are learning disabled, many have low levels of intelligence, many of them are emotionally disturbed, and many of them are addicted to drugs. They are often high or desperate to avoid feeling sick if they go into withdrawal. I am not saying that repeat offenders are ignorant of criminal procedure, but they are not deterred by the prospect of mandatory minimum sentences.

This is a population that is not paying close attention to your “messages” and is not paying attention to the details of your laws. Generally they are not able to draw the conclusions you think a reasonable person ought to draw, and they have little capacity to conform their behavior to such good judgment. So don't waste your time thinking about the power of this legislative message to drug users and drug dealers. Don't fool yourselves that you are sending a message to an audience of criminals.

Parenthetically, the criminal audience you are trying to reach has, in many instances, been taught to disregard the law. Often the lesson they learn from their earliest experiences with the criminal justice system is that wrong doing is not punished. When placed on probation, for example, their continued use of drugs – even when revealed by urinalysis – is often ignored. Their disregard of appointments they are ordered to keep with probation officers is ignored. Months after their transgressions when their probation is revoked, they feel that they have been the victim of random and arbitrary injustice. After all, if their drug use and positive drug tests were ignored, where

is the justice in harshly punishing them now? Below, on page 11, I will urge an alternative approach, called H.O.P.E., to controlling drug using offenders that is much more efficient and much less expensive than mandatory minimum sentences.

#### The message to the Judges of Canada

Consider for a moment the message that enactment of mandatory minimum sentences sends to the judges of Canada. Fundamentally, a mandatory minimum sentence enacted by a legislative body is a vote of "no confidence" in the intelligence and responsibility of the judges.

The enactment of mandatory minimum sentences says,

"Judges of Canada, we don't trust you to impose an appropriate sentence upon the criminal who stands convicted before you. Judges of Canada, we don't trust you to weigh adequately the evidence of the seriousness of the crime, and the record of recidivism and impose a punishment that is adequate to the severity of the offense and the guilt of the offender who stands before you. Judges of Canada, we don't trust you to respect the safety of the public as you impose a sentence."

That is a very damning message for this Parliament and the people of Canada to send to the Judges of Canada, and I think you ought to be quite certain that this is a message you want to send.

What is the corollary message sent to the community, to the attorneys who practice in your courts, to the businesses that rely upon your courts to resolve their conflicts, to the police officers who testify before your courts, and to your youth, by enactment of a law such as this? Isn't the message, "For certain common cases, we believe our judges lack the judgment to properly use the traditional discretion of courts to achieve just outcomes in the cases before them"? That is a terrible message to send to your society.

#### The message to the prosecutors

There is another audience and another message that you are sending when you create quantity-based or broad, fact-specific mandatory minimum sentences. You are telling Canada's prosecutors that you do not trust them to persuade the courts which cases deserve longer sentences and which cases do not. You are telling the prosecutors that you do not trust them to exercise their prosecutorial discretion to appropriately select the right cases to concentrate on. You are telling them that you do not trust them to effectively marshal the facts in a convincing manner – that is, that they cannot make the cases that they have been hired to make.

One likely consequence is that, day to day, the prosecutors' challenge will be to convict the offenders who qualify to get over the low bar of the mandatory minimum sentence. This will ultimately distract the prosecutors from an appropriate focus on the high-level offenders who deserve high-level sentences. This has been one of the most egregious consequences of the experience in our Federal courts. In our system, the

Federal courts are historical the locus of the most serious offenders. Our state courts process millions of criminal cases, and more than 1.5 million drug cases a year. The federal courts processed about 25,000 drug cases in FY 2008.

In the United States, the federal mandatory minimum sentences have resulted in a grave distortion of law enforcement priorities in the federal courts. The quantity minimums have become the targets.

Take cocaine enforcement. According to the May 2007 report to Congress of the U.S. Sentencing Commission, in 2005, 57.1 percent of all federal cocaine prosecutions were of low-level offenders, and only 10.7 percent were high level offenders. This problem was a major criticism of Hon. Asa Hutchinson, Administrator of the U.S. Drug Enforcement Administration from 2001 to 2003, in his testimony on April 29, 2009 to the U.S. Senate Judiciary Committee Subcommittee on Crime and Drugs to reform the crack cocaine mandatory minimum sentences.

<http://judiciary.senate.gov/pdf/09-047-29HutchinsonTestimony.pdf>

Mandatory minimum sentences send the wrong message.

#### The illogic of the proposed sentences

The structure of these sentences seems illogical. On one hand these offenses carry extremely long maximum sentences – in many cases up to life imprisonment – the longest sentences in your law. On the other had, the mandatory minimum portion of the sentences is comparatively minor – mandatory imprisonments of one, two or three years. Isn't this enormous range of sentences for the same offense rather absurd?

#### Mandatory Minimum Sentences Are Bad Policy

##### Injustice

Mandatory minimum sentences forbid judges from considering all the facts of the case and forbid them from imposing the appropriate sentences for persons who are minor offenders, notwithstanding the fact of drug quantity. This is a renunciation of individualized justice. The courts do not need mandatory minimum sentences to encourage drug addicts to enter treatment – almost any threat of incarceration is sufficient.

I have no knowledge about the collective opinion of the judges of Canada regarding mandatory minimum sentences, but I encourage you to find out. In the United States our judges strongly oppose mandatory minimum sentences: Quoting the resolution of the United States District Judges of the Fifth Circuit (Texas, Louisiana and Mississippi) at their judicial conference on May 6, 1991, "The proliferation of mandatory sentences distorts the rationality [of the sentencing system] because such sentences apply regardless of the defendant's role in the offense and of other factors historically found relevant to sentencings. **As a result, they also often require the imposition of sentences which are manifestly unjust.**" (emphasis added)

The U.S. Judges of the Seventh Circuit Judicial Council found that, "mandatory

minimum sentences, however framed, **do not result in advancing the cause of justice and fairness.**" The judges voted unanimously to urge Congress to "repeal all statutes that require the trial judge to impose a mandatory minimum sentence." (Quoted in Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, August 1991, U.S. Sentencing Commission, p. G-19).

What do the Judges think?

Every Federal Judicial Council has adopted a resolution calling upon Congress to reconsider the mandatory minimum sentences that they adopted.

**I urge the Committee to find out what the Judges of Canada think about bill C-15 and mandatory minimum sentences before this bill is enacted.**

Cost

Mandatory minimum sentences are designed to impose longer sentences than are currently imposed. We **completely underestimated the additional costs** that would be created. The Congressional Budget Office reviewed the House of Representatives bill, H.R.5394, and reported its estimate of the costs on September 2, 1986,

"The CBO estimates that H.R. 5394 [Narcotics Penalties and Enforcement Act] would not result in a significant increase in the costs of the Department of Justice's investigations or prosecutions...This bill would result in increased costs to the federal government for incarceration of prisoners because of the bill's mandatory sentencing provisions. The CBO estimates that these increased costs would be \$1.2 million in fiscal year 1987, rising to \$3.3 million in fiscal year 1988, \$7.3 million in fiscal year 1989, \$15.7 million in fiscal year 1990 and to \$27.7 million in fiscal year 1991. Costs would continue to increase in future years." (H.Rept. 99-845, Part1, p.24).

In fact, Federal corrections expenditures rapidly grew much more dramatically. Below is a statement of actual expenditures for corrections by the Federal government.

<u>Fiscal Year</u>	<u>Corrections Expenditure</u>
1986	\$ 862,000,000
1987	994,000,000
1988	1,258,000,000
1989	1,418,000,000
1990	1,734,000,000
1991	2,122,000,000
1992	2,646,000,000
1993	2,690,000,000

(Sourcebook of Criminal Justice Statistics, 1996, p.3)

2010 \$ 6,077,000,000 (Budget request)

**Our analysts' estimates of the increased costs were wrong by several billion dollars over four years.**

The federal prison population was 36,000 when we enacted our mandatory minimum sentences. As of October 22, 2009, the population stood at 208,909. 100,415 of those prisoners are serving drug sentences. Seventy-one percent of the federal prisoners are serving sentences longer than five years.

I urge you to get a very careful estimate of what the bill's real costs are going to be.

*Ineffective*

In 1973 New York State adopted mandatory minimum sentences for drug offenses. The Association of the Bar of the City of New York and the Drug Abuse Council, Inc. established a joint committee to evaluate the mandatory minimum sentences. They found that the 1973 law did not significantly deter prior felony offenders from committing additional crimes. (THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE, Final Report of The Joint Committee on New York Drug Law Evaluation, 1977, p. 9). That report was not considered by the U.S. Congress in our haste.

**Have the Federal mandatory minimum sentences adopted in 1986 been effective in deterring drug trafficking or dismantling drug trafficking organizations? No.** Despite a dramatic increase in the number of prosecutions, and a dramatic increase in sentence length, drugs are widely available to American youth according to our annual Monitoring the Future Survey.  
<http://www.drugabuse.gov/PDF/overview2008.pdf>

In 2008, 83.9 percent of high school seniors report that marijuana is “fairly easy” or “very easy” to obtain. In 1979, the figure was at 90.1 percent. In 1986 it was 85.2 percent. In 1992, it was 82.7 percent, the historic low point. By 1998 it had climbed to 90.4 percent, the historic high point. The perception of easy availability has been slowly, but steadily, slipping since.

LSD availability in 2008 was exactly the same as it was in 1986, 28.5 percent.

**Heroin availability for our high school students is higher now, at 25.4 percent than it was in 1986 when it was 22.0 percent.**

Cocaine availability is definitely less now, down to 42.4 percent from 51.5 percent in 1986. But this only means that now 4 out of 10 high school seniors say they can easily obtain cocaine compared with 5 out of 10 high school seniors when the mandatory minimum sentences were enacted.

Unfortunately the price of cocaine and heroin are substantially lower, and the average retail purity is much higher. These are the long-term historical trends, even though there have been short-term deviations. DEA reports that cocaine's price has

increased recently, but that has not been the long-term pattern.

The impact of the long mandatory minimum sentences imposed on hundreds of thousands of drug traffickers has been of no measurable benefit in the marketplace. The principal drugs of abuse are basically as widely available as always, but now generally of higher quality and at lower cost. In that respect the price-quality curves for these drugs look like the price-quality of curves for cell phones, personal computers, digital cameras, or most of the other high tech, high demand consumer products that characterize the modern economy. This drug market resistance to the intended purposes of mandatory minimums reflects their utter ineffectiveness.

### Counterproductive

Some observers have suggested that the mandatory minimum sentences adopted by the Congress in 1986 resulted in drug trafficking organizations increasing their use of youth in the sale of illegal drugs. Drug traffickers adapted, not by quitting the drug business, but by changing their practices.

Persons who hire young people to sell drugs may run greater punishment risks if caught, but after you create across the board mandatory minimums, the increased risk is negligible.

Mandatory minimum sentencing increases the advantage of employing youth for the manager of a drug distribution organization. The youthful employees who are arrested have very limited ability to provide usable information to prosecute a higher-up. Young offenders are less likely to be deployed as informants, they are more easily rattled as witnesses in cross examination, and they are less likely to face the coercive threat of an adult mandatory minimum sentence.

You need to consider carefully the nature of the unintended consequences when legislating in this area.

### Are mandatory sentences warranted by widespread, inappropriate judicial leniency?

Has there been an analysis of the sentences that are imposed by judges for the crimes you are concerned about? Is there a public perception that judges are too lenient? If so, is that perception supported by an analysis of what judges are doing?

## B. DRUG TREATMENT COURTS

### Drug treatment courts are effective

Drug treatment courts have been a very useful innovation in the United States. They address the problem that substance abusing offenders who can be rehabilitated often are not. Such offenders are often incarcerated at great expense, yet their addiction is rarely effectively treated, and they soon recidivate. Or they are released under the supervision of conventional probation and parole, and again fail to be effectively treated. Drug treatment courts are intensive systems of court supervised treatment and probation. The supervising judge typically oversees all of the offenders on a weekly basis. The weekly hearings involve consultation with a team including the

prosecutor, probation, defense counsel, case managers and treatment specialists. Studies of offenders placed in these programs report they have lower recidivism rates than probationers in typical programs.

In the United States, there is a high degree of variety regarding the features of drug treatment courts. Their principal feature is that a judge is directly involved in the supervision of an offender. Offenders get a variety of treatment services. The judge monitors progress along the treatment plan frequently. Because a judge is directly involved, the offender knows that his liberty is always at risk for any non-compliance.

#### Drug treatment courts are an inadequate approach to preventing drug abuse-related recidivism on a large scale

The primary limitation of drug treatment courts is the question of scale. A drug court judge might have a docket of fifty or seventy-five offenders for six months or a year. In any jurisdiction, this is an infinitesimal fraction of the number of substance abusing offenders who come to the attention of the court. Even if every court in the country assigned a judge to serve as a drug court judge, the overwhelming majority of drug addicted offenders would never be subject to drug court supervision.

Last week, on October 22, I attended the second drug court graduation this year of the Adult Drug Treatment Court in Montgomery County, Maryland, a county of one million persons, the largest jurisdiction in the State of Maryland. Each graduation is an elaborate ceremony in the largest court room. This two hour graduation was attended by more than a half dozen judges, the president of the County Bar Association, members of the county council (the county legislature), the State's Attorney (the chief prosecutor), and several assistant prosecutors, the Chief Public Defender and several assistants, many other officials in the criminal justice system including several top police commanders, all of the current participants in the drug court program, some former graduates, the family members of the graduates, and others.

There were **four graduates** recognized at that ceremony that by itself, consumed over 100 hours of very expensive criminal justice personnel. Over the five years of the program, there have been less than 60 graduates. The local criminal justice system is very proud of the program, but **the scale is utterly inadequate to the need.**

#### Drug treatment courts should not exclude violent offenders

Bill C-15 limits the admission to a drug court treatment program only to non-violent offenses. This is a silly limitation. Should the addicted or substance-abusing spouses of battered wives be excluded from the benefits of such a program? Should abusive parents of children who love their parents but hate their addictions be excluded? Of course not. We should want these families to be healed, and drug court might be an appropriate program.

In the Maryland drug treatment court, persons with histories of assault and other violent crimes are included in the drug court program. Drug courts, with their intense control by a judge, are actually excellent programs to correct the behavior of offenders whose misconduct is grounded in substance abuse and that involves violence.

The provision to disqualify offenders with charges involving violence is an attempt to cosmetically address the political fear that any program that does not provide punishment by imprisonment will not be considered “tough.” This limitation is created to reinforce the political construct that this bill is “tough on crime.” Shouldn’t it be the case that the more effective an intervention is, the more appropriate it is to apply to the most serious, hard core offenders in order to stop them from committing further crimes? This limitation is not based on any principle of justice or corrections and ought to be eliminated.

#### Prosecutors should not be the gate keepers to drug court

Bill C-15 limits the admission to a drug court treatment program only to persons approved by the prosecutor. Such a provision can create greater public support for a program that the public may fear leads to the discounting of the seriousness of an offense. However, there may be value in providing that evaluation of potential drug court participants be conducted outside of the prosecutors office in order to encourage the consideration of psychological and counseling perspectives that could increase the likelihood of program success. The typical drug court is a collaboration. If otherwise qualified for admission, prosecutors should not have a veto on who the drug court team accepts.

#### A cheaper, scalable alternative to drug treatment court: H.O.P.E.

In Honolulu, Hawaii, a highly promising concept for addressing substance abusing offenders is being formally evaluated by researchers at the University of California at Los Angeles. Five years ago, Hawaii Circuit Judge Steven S. Alm created “Hawaii’s Opportunity Probation with Enforcement” (H.O.P.E.) to address the chronic problems of probation failure by many methamphetamine addicted offenders in Hawaii. When Alm, a former state prosecutor and United States Attorney became a judge, he was soon presented with petitions to revoke probation for probationers who had long records of failing to comply with the conditions probation, such as alluded to on page 5, above. He recognized that the offenders were being trained, in effect, not to comply. It makes no sense to impose conditions if there are no consequences for the offender’s failure to comply.

Judge Alm’s innovative program punishes every failure to comply immediately, but not with revocation of probation. Persons on probation are tested for drugs frequently – often several times per week. The test results are known immediately, and if the result is positive, the offender is arrested immediately. Alm has arranged with the police to make warrant service of probationers who fail to appear for drug tests or other appointments a high priority. Persons placed on probation are warned about the rules.

The result has been a very marked decline in positive drug tests and other failures to comply. Having an effectively-carried-out threat of punishment has created a credible deterrent. This program is noted in the current issue of *The Economist*, October 24-30, 2009 (“The velvet glove, pp. 33-34).

[http://www.economist.com/world/unitedstates/displaystory.cfm?story\\_id=14699623](http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=14699623)  
Also see the September 6, 2009 article in the *Honolulu Star-Bulletin* (“Where hope thrives”) for more detail.

[http://www.starbulletin.com/news/20090906\\_Where\\_hope\\_thrives.html](http://www.starbulletin.com/news/20090906_Where_hope_thrives.html)

As Judge Alm has explained in Washington, DC at the UCLA Rosenfeld lecture on October 7, 2009, these offenders with long records know that they could manage a long prison sentence, but they don't want to go to jail *now*, and therefore they won't use drugs tonight knowing they may be tested tomorrow.

[http://www.spa.ucla.edu/main2.cfm?d=xr&f=news.cfm&s=school&news\\_id=25443](http://www.spa.ucla.edu/main2.cfm?d=xr&f=news.cfm&s=school&news_id=25443)

The certainty and immediacy of the punishment works to deter drug use effectively. Many of the addicts are able to desist using drugs *without needing any treatment services*. Those who are unable to desist are referred to treatment. Instead of expensive evaluations and needs assessments, the addicts themselves, through their own behavior, demonstrate whether they need treatment. This has been called "behavioral triage." The probation officers are spending less time in court, and more time assisting their clients with housing, employment, education and other matters that lead to successful conclusions of sentences of probation. This program, and others, is described more fully in Mark A.R. Kleiman's *When Brute Force Fails* (Princeton University Press, 2009).

#### Expand opportunities for drug treatment

Adoption or expansion of drug courts must not be a substitute for expanding drug treatment capacity for the indigent. In the United States, drug treatment capacity for indigents is utterly inadequate for the demand. According to data compiled by the Office of National Drug Control Policy at The White House (ONDCP), in 2003, only 15 percent of those persons who needed drug treatment received it at a specialized drug treatment facility, and only 8.5 percent of youth aged 12 to 17.

### C. WHY INCREASE PUNISHMENT FOR CANNABIS OFFENSES?

#### Measuring Addictiveness and the harmfulness of drugs

One of the key features of Bill C-15, as I understand it, is to increase penalties for the production and distribution of cannabis. The Legislative Summary to accompany C-15 from the Parliamentary Information and Research Service in describing drug use in Canada does not spell out much social harm as a consequence of cannabis use. It does not associate cannabis use with any particular social pathologies. In Canada, cannabis does not appear to be a "gateway" to the use of other illicit drugs. The finding of the 2004 Canadian Addiction Survey was very striking: merely 2.6 percent of cannabis users used any drug other than cannabis *in the year* prior to the survey. (LS-634E, 23 March 2009, p. 3). This suggests that cannabis could be more properly characterized as a "terminal drug" - the last illegal drug used by the overwhelming majority of illegal drug users.

Potential for abuse of a substance is usually equated with addictiveness or dependence. Experts have compared the addictiveness of common substances. *The New York Times* in 1994 reported the views of two leading scholars, below. I have not seen any more recent analyses or an analysis that challenges these conclusions.

Ratings of Addictiveness  
by Dr. Jack E. Henningfield, National Institute on Drug Abuse and  
Dr. Neal L. Benowitz, University of California at San Francisco

1 = Most Serious    6 = Least Serious    \* equal value

**HENNINGFIELD RATINGS**

<u>Substance</u>	<u>Withdrawal</u>	<u>Reinforcement</u>	<u>Tolerance</u>	<u>Dependence</u>	<u>Intoxication</u>
NICOTINE	3	4	2	1	5
HEROIN	2	2	1	2	2
COCAINE	4	1	4	3	3
ALCOHOL	1	3	3	4	1
CAFFEINE	5	6	5	5	6
MARIJUANA	6	5	6	6	4

**BENOWITZ RATINGS**

<u>Substance</u>	<u>Withdrawal</u>	<u>Reinforcement</u>	<u>Tolerance</u>	<u>Dependence</u>	<u>Intoxication</u>
NICOTINE	3*	4	4*	1	6
HEROIN	2	2	2	2	2
COCAINE	3*	1	1	3	3
ALCOHOL	1	3	4*	4	1
CAFFEINE	4	5	3	5	5
MARIJUANA	5	6	5	6	4

The criteria are defined as follows:

**Withdrawal** – Presence and severity of characteristic withdrawal symptoms.

**Reinforcement** – A measure of the substance's ability, in human and animal tests, to get users to take it again and again, and in preference to other substances.

**Tolerance** – How much of the substance is needed to satisfy increasing cravings for it, and the level of stable need that is eventually reached.

**Dependence** – How difficult it is for the user to quit, the relapse rate, the percentage of people who eventually become dependent, the rating users give their own need for the substance and the degree to which the substance will be used in the face of evidence that it causes harm.

**Intoxication** – Though not usually counted as a measure of addiction in itself, the level of intoxication is associated with addiction and increases the personal and social damage a substance may do.

(Philip J. Hilts, "Is Nicotine Addictive? It Depends on Whose Criteria You Use," *The New York Times*, August 2, 1994, p. C3.)

This data demonstrates that compared to commonly used addictive compounds like coffee, cigarettes and alcohol, cannabis is much less addictive. And compared to hard drugs like cocaine and heroin, cannabis is very much less addictive.

Personal observations regarding cannabis.

Over the past 40 years I have met persons who appear to be heavy users of cannabis, and some of them seemed to me to be impaired or hurt by their cannabis use. However, this non-statistical observation is limited by not knowing much, if anything,

about factors that may be the primary or major cause for their heavy cannabis use or their apparent dysfunction: underlying mental illness or impairments; underlying learning disabilities; family patterns and structures; histories of emotional, physical and psychological abuse; or the impact of other drug use experiences. I have met persons who we could characterize as “burnouts.” They seem immature, and often obsessed with marijuana.

I also know persons who are in no way burnouts, but who have been or are addicted to marijuana. They have tried to quit their use, but could not. I have no doubt that marijuana can be addictive for some people, and that for them, treatment can be difficult. Because the features of marijuana addiction are more subtle and much less disabling than the common features of addiction to opiates or stimulants like cocaine and amphetamines, the addiction may be much harder to recognize, much less disabling and the case for treatment less compelling to the addict.

I also have known persons in Washington, DC who were addicted to work. Their obsession with work interfered in their family relationships and undermined their health with stress, related poor diets, and lack of any exercise. I have known persons addicted to forms of entertainment – watching television or sporting events. Again these addictions often resulted in or were associated with poor diets, undermined health, poor relationships, and lack of exercise. Addiction is sometimes tragic and might be appropriately remedied by a mental health intervention – but it does not require criminal justice attention or intervention.

I want to stress, however, that over the past 40 years, I have met a great many more persons than any in the former categories, persons whose use of marijuana seems to be no more harmful to them or their families than their social use of alcohol. This includes many top students in college and law school, editors of law reviews, judges, top performing attorneys, business persons, teachers and artists. It is not inconsistent to note that while some persons have problems of marijuana, the overwhelming majority in my experience do not, and never have.

#### Justification for State Punishment

As a non-Canadian, I beg your pardon for the temerity in pursuing the following arguments for two reasons. First, because the arguments I am about to make are not seriously considered in the U.S. by any of our legislatures. And second, because I have not had the opportunity to study the history of the adoption of the Canadian Charter of Rights and Liberties, or the opinions of the courts which have interpreted it.

In the context of studying the penalties for trafficking in cannabis, I respectfully ask each Senator to ask herself or himself, “As a person who writes the law, what are the principles that I articulate and follow in deciding what conduct deserves to be punished with imprisonment?” Regarding individual citizens, the Parliament has three major powers: the power to tax various activities, the power to spend those taxes in various ways, and the power to authorize punishment for conduct that is wrongful. Such punishment is most significantly incarceration – the general suspension of liberty.

As a non-Canadian, I beg your pardon for presuming to ask you to consider the meaning of that wonderful phrase, “fundamental justice,” in Clause 7 of the Canadian Charter of Rights and Freedoms. Our cultures permit the state to take away the liberty of a person who has acted wrongfully, that is, one who has injured another, who seriously risks injuring others, or who has failed in an important, universal duty such as paying taxes. These classes of acts pretty much describe the wrongful conduct that underlie the notion of what “fundamental justice” would consider to be punishable acts.

I suggest that there is no permanent duty of sobriety that a concept of “fundamental justice” would recognize. Of course, one cannot drive a vehicle while intoxicated, because the risk of injury to others is so great. But our common concept of liberty permits adults to become intoxicated. We know that there are risks in intoxication, and we use a variety of social controls to discourage frequent intoxication. But our cultures do not condemn intoxication at weddings or wakes, or at certain ball games, in taverns, in one’s home, and in many other circumstances.

Cannabis use is another form of intoxication. It is not openly integrated into any mainstream cultural rituals, but it is used clandestinely in most of them. In the absence of harming others, seriously risking harm to others, or failing in an accepted duty, I question whether, consistent with “fundamental justice,” Parliament has the moral authority to punish with incarceration the use of cannabis,

I am trying to make a different argument than the argument that there is “a right” or “a freedom” to use cannabis as those terms are used in the Canadian Charter of Rights and Freedoms. **I am suggesting that the extent of the Parliament’s power to punish which is implicit in the term, “fundamental justice,” constrains you from punishing the use of cannabis because the conduct is not wrongful.**

It is unwise to drive without a seatbelt, but it is not wrongful. If one is in a collision while driving unprotected by a seatbelt, the injuries could be more extensive than otherwise, and society could incur dramatically increased costs of your medical care. Does the creation of such potential social costs constitute a social harm that is wrongful and therefore, punishable? No. If a person eats an unhealthy diet, fails to exercise, and otherwise increases the likelihood of the premature illness and mortality – and social expense – is this a social harm that fundamental justice would permit to be punished by incarceration? No. Would “fundamental justice” permit imprisoning a person who chronically refuses to wear a seat belt or wear a motorcycle helmet? No. It may be irrational to insist on refusing to comply with such a regulation, but does the society have the moral authority to suspend the liberty of a person who insists on not complying? No.

#### D. PROTECTING PUBLIC SAFETY VS. PANDERING TO PUBLIC FEAR

##### Building the fear of crime

The public is afraid of crime. But the public has a right to live free of that fear. We have a right to feel secure in our homes and going about our business. We have a right not to worry that our loved ones are always at risk of being victimized.

To what extent is the public fear of crime realistic and to what extent is it exaggerated? Are the risks of being the victim of a crime of violence, let's say, greater or less than the risk of being seriously injured in an accident – riding in an airplane, or a car, or while skiing, bicycling, rafting or canoeing or climbing; or playing soccer or hockey?

Our cultures are fascinated, if not obsessed with crime. Our entertainments are permeated with crime in the movies, on television, in novels, and in video games.

Reporting on crime sells advertising and newspapers. Crime news draws viewers. Is it the case in Canada as it is in the United States, that during the evening a 15-second spot teases about the latest horrifying crime story, promising "details at eleven"? In the United States, the decision by advertising directors and programming managers of television stations to highlight news of crime is the leading factor in creating the false impression that America is getting more violent and that the crime rate is increasing, even as the crime rate is steadily falling.

#### The “failings” of the criminal justice system

The news media have a duty to report on the activities of the government services. It may report on misconduct by police officers. But such misconduct is not seen as the kind of crime which the public fears. There is a sense that those subject to police misconduct are likely to be legitimate targets of the police, unlike the general public that is at risk from crime.

In addition, the news media may report on miscarriages of justice when judges impose sentences that appear to be too low for the offense. Every day thousands of judges hand down sentences in tens of thousands of cases. In the universe of judges, there are always judges of poor judgement. To feed a news media-created narrative that judges are recklessly lenient, and out of control, they need find only one sentence ordered per week, that deviates from the shared sense of just punishment is sufficient, in order to have a nearly continuous stream of outraged and indignant commentary.

#### The response of the people's representatives

Congress, Parliament, a provincial assembly or a state legislature cannot be “philosophical” about the failings of judges or the exaggerated fears about crime. Their job is to act! There is no political downside to fighting crime, to creating new crimes, or to raising penalties for existing crimes. In 1993, a wild fire broke out in Malibu, California, while the U.S. Senate was debating crime legislation. There was speculation that it might have been caused by arson. Almost immediately, U.S. Senator Bob Dole (R-KS) came to the Senate floor and offered an amendment to double the mandatory minimum and the maximum penalty for the crime of arson from five to ten years imprisonment. That the fire may have been the result of arson was still rumor. Arson was the crime *du jour* and to raise the penalty appeared “logical,” and the amendment carried. (139 Congressional Record S15027, Nov. 4, 1993).

## Conclusion

When legislators and parliamentarians vote for mandatory sentencing they are “doing something” when they think the public wants them to “do something” about what it is afraid of.

Members of Parliament can't announce the arrest of feared criminals or the conclusion of a major investigation like the police chief, flanked by the Mayor, or a prosecutor. Members of Parliament can't announce indictments of dangerous criminals like the Attorney General or the Crown Attorney. Members of Parliament can't announce a guilty verdict at a trial, or make a speech upon the imposition of sentence, as a judge can.

Only infrequently can legislators do anything about crime.

If the government and Members of Parliament want to claim they are fighting crime, they can introduce bills and pass laws to create longer sentences -- even if the longer sentences may be unnecessary, ineffective, expensive, unjust, and counter-productive.

If they want to do something to fight crime, there are less expensive and less dramatic approaches. See Mark A.R. Kleiman, *When Brute Force Fails* (Princeton University Press, 2009).

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## BACKGROUND AND QUALIFICATIONS OF ERIC E. STERLING, J.D.

From 1979 to 1989 I served as counsel to the U.S. House of Representatives Committee on the Judiciary, principally responsible for federal controlled substances law. On the staff of the Subcommittee on Criminal Justice, and then the Subcommittee on Crime (now merged), I reviewed almost all of the bills introduced in the House of Representatives to amend the Controlled Substances Act, or to govern the operations of the Drug Enforcement Administration. From the 96<sup>th</sup> through the 100<sup>th</sup> Congress, I directly participated in the drafting of most of the bills enacted with respect to illegal drugs. I was also responsible for Federal laws regarding gun control, organized crime, money laundering, pornography, arson, and other issues. I have traveled to Mexico, Peru, Bolivia, Colombia and Jamaica to examine anti-narcotics programs first hand. I played a major role in drafting the Comprehensive Crime Control Act of 1984, the Firearms Owners Protection Act of 1986, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Act of 1988. I received commendations for my work from two U.S. law enforcement agencies -- the Bureau of Alcohol, Tobacco and Firearms, and the Postal Inspection Service -- for my assistance to their law enforcement missions.

Since 1989, I have been the President of the Criminal Justice Policy Foundation, now based in Silver Spring, MD, a few miles from Capitol Hill. I am regularly consulted by Members of Congress, state legislators, and local governments from around the U.S.

In 2002, I was asked by Canada's Embassy to Washington to arrange a presentation to the House of Commons Special Committee on the Non-Medical Use of Drugs on the situation in the United States. Later I was asked to bring American experts to meet with law enforcement and public health leaders of Canada's anti-drug effort.

Locally, I have an appointment to the Alcohol and Other Drug Abuse Advisory Council by the Montgomery County, Maryland, County Executive. The council oversees the substance abuse problems and programs of our county of about one million persons. Previously, I served on the Washington, D.C. Mayor's Advisory Committee on Drug Abuse and on the Baltimore, Maryland Mayor's Task Force on Drug Policy.

I am a member of the bar of the Supreme Court of the United States. For more than a decade I have been a participant of the Standing Committee on Substance Abuse of the American Bar Association, and one-time chair of the criminal justice committee of the ABA section of individual rights and responsibilities. I am also a member of the Drugs and the Law committee of the New York City Bar Association.

I currently am a part time lecturer in sociology and criminal justice in the Department of Sociology at The George Washington University. In the 1980s, I was an adjunct professorial lecturer in the School of Law, Justice and Society at The American University, Washington, DC, and lectured at the University of Colorado at Boulder every Spring for a decade.

In 1999 I was given the Justice Gerald LeDain Award for Achievement in the Field of Law by the Drug Policy Alliance. I received a Bachelor of Arts degree in 1973 from Haverford College (Pa.) where I majored in religion, and my Juris Doctor from Villanova University School of Law (Pa.) in 1976. For three summers in the early 1970s, I led canoe trips on the St. Croix and St. John Rivers, primarily in Maine, but frequently camping in New Brunswick.

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