

## NOTE

### THE IMPACT OF MANDATORY MINIMUM AND TRUTH-IN-SENTENCING LAWS AND THEIR RELATION TO ENGLISH SENTENCING POLICIES

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#### I. INTRODUCTION

Prisons in countries throughout the world are increasing in population and becoming burdens on governmental budgets. While some attribute this phenomenon to an increase in crime, the sentencing practices of such countries often play an even larger role. For example, with the advent of mandatory minimum sentencing and truth-in-sentencing policies in the United States, prison populations have soared. However, prison population rates in countries, such as England, that employ a very limited number of mandatory minimum sentences pale in comparison. One of the reasons for this discrepancy is that the English criminal justice system focuses on maximum sentences, while the U.S. system focuses on mandatory minimum sentences. Another reason is the innovative way in which the English criminal justice system handles certain groups of offenders, such as drug offenders, elderly inmates, and probation or community sentence violators. English courts can often grant community sentences, reduced sentences, early releases, and can sometimes dismiss cases altogether when dealing with these violators. In the United States, however, judges lack such discretion. In the United States, these offenders are typically subjected to mandatory prison sentences.

The United States would benefit by examining and learning from England's policies in order to address its increasingly significant prison problems. Currently, the United States implements a federal sentencing structure known as "truth-in-sentencing," which requires offenders to serve 85% of their given sentences. Many U.S. states, including Arizona, employ this practice as well. As an example of the potential cost-savings that could be realized through a change in policy, this Note includes a regression analysis of Arizona prison inmates. This analysis demonstrates that if nonviolent drug offenders, technical probation

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violators, and elderly offenders were required to serve only 50%, as opposed to 85% of their sentences, Arizona would be able to stem the heavy burden that overcrowded prisons have placed on its criminal justice system. Additionally, Arizona and other states could adopt other English programs, such as home detention curfews or day reporting centers, as well as take steps to decriminalize soft drugs. Doing so would reduce the population of nonviolent offenders serving time in prisons and occupying space better reserved for violent offenders.

## II. A BRIEF HISTORY OF SENTENCING POLICIES IN THE UNITED STATES AND ENGLAND

### A. Sentencing Trends in the United States

Throughout the twentieth century, sentencing in the United States has seen drastic reform, which has tended to reflect the mood of the country on crime and punishment.<sup>1</sup>

In general, practices have become more restrictive over time in response to “get tough on crime” attitudes.<sup>2</sup> During the 1970s, indeterminate sentencing thrived, and judges were given flexibility with the punishments that they could impose.<sup>3</sup> Convictions rarely resulted in incarceration, and most inmates were relegated to community supervision<sup>4</sup> or parole.<sup>5</sup> Parole boards were responsible for releasing those offenders who were incarcerated.<sup>6</sup> A reliance on indeterminate sentencing coupled with parole allowed discretionary sentences to become a mechanism to control the prison population.<sup>7</sup> However, a major criticism of indeterminate sentencing was that it often resulted in disparate sentencing.<sup>8</sup>

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1. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 1 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

2. Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 66 (2000).

3. TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 13 (1976).

4. Andrew Coyle, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, 50 BRIT. J. CRIMINOLOGY 975, 975–76 (2010) (book review).

5. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 492 (1999).

6. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 811 n.313 (2006).

7. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 739–40 (2005); Petersilia, *supra* note 5, at 492.

8. See, e.g., Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 444 (2000) (noting that indeterminate

Following pressure from the public for offenders to serve longer sentences and for more uniform punishment, many justice systems adopted determinate sentences.<sup>9</sup> These often consisted of short sentences that the offender was required to serve, which could be reduced for good behavior or earned time credits.<sup>10</sup> Once determinate sentencing was in place, mandatory minimums, which required offenders to serve a specified amount of time in prison before they could be considered for early release, became popular.<sup>11</sup> Sentencing guidelines soon followed, but still allowed for some flexibility based on offense and offender characteristics.<sup>12</sup>

The imposition of truth-in-sentencing (TIS), coupled with mandatory minimums and “three strikes” laws, removed what little discretion remained in sentencing.<sup>13</sup> As a part of the sentencing guidelines, TIS mandated that sentences be carried out as ordered and not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities.<sup>14</sup> The first TIS policy was enacted in 1984 in the state of Washington, and was designed to reduce the apparent disparity between court-imposed sentences and the time actually served in prison.<sup>15</sup> Under this sentencing trend, parole was abolished, and good-time credits were restricted or eliminated.<sup>16</sup>

The idea of TIS guidelines received much support from federal legislators before federal action.<sup>17</sup> Members of Congress sensed the need for sentencing reform and expressed concern over the high recidivism rates of violent offenders. Representative William J. Hughes of New Jersey argued that “prisons have become revolving doors and we are not incarcerating violent offenders for as long as we should be,” and thus “it is very important that [Congress] begin[s] to

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sentencing permitted extremes of disparity that cannot be tolerated in a modern system of justice).

9. *Id.* (“indeterminate sentencing . . . violated the public’s desire for truth in sentencing”).

10. Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 193 (2007).

11. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Population, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 79 (1999).

12. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL (2009).

13. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 353 (2011).

14. 2008 *California Criminal Law Ballot Initiatives*, 14 BERKELEY J. CRIM. L. 173, 184 (2009).

15. Katherine J. Rosich & Kamala Mallik Kane, *Truth in Sentencing and State Sentencing Practices*, 252 NAT’L INST. JUST. J. 18, 18 (2005).

16. See, e.g., Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 107–08 (1998).

17. See *infra* notes 18–20.

move [s]tates toward truth-in-sentencing . . . .”<sup>18</sup> Representative Bill McCollum of Florida stated:

[N]othing . . . could possibly be more important in the crime legislation [Congress is] about to [pass] than to provide the resources that are necessary to get this 6 percent of these repeat violent offenders [who commit more than 70% of the violent crimes in this country] off the streets, lock them up, and throw away the keys.<sup>19</sup>

While many politicians supported these sentiments,<sup>20</sup> the guidelines also garnered much opposition.

Legislators opposed to the guidelines were concerned about the effect that TIS would have on already crowded prison populations. Minnesota Senator Dave Durenberger observed that “the increasing incarceration of nonviolent offenders because of mandatory minimum sentences has forced many [s]tates to release more serious offenders.”<sup>21</sup> Frank Wood, the Commissioner of the Minnesota Department of Corrections, noted that the proposed TIS guidelines would “seriously impact state prison crowding” and that “[p]rison systems already over their capacities would become more crowded, far outstripping any benefits realized from the use of new regional prisons.”<sup>22</sup> He further asserted that “[i]ncreasingly harsh policies such as those contained in these requirements frequently result in a distorted use of criminal justice resources and unnecessarily increase costs with no appreciable corresponding impact on crime or fear of crime.”<sup>23</sup> Wood proposed that more revenue be directed to prevent initiatives that would reduce violence and crime rather than to after-the-fact reactions or prisons.<sup>24</sup>

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18. 140 CONG. REC. 14,016 (1994) (statement of Rep. Hughes).

19. 140 CONG. REC. 14,015 (1994) (statement of Rep. McCollum).

20. *E.g.*, 140 CONG. REC. 14,0175 (1994) (statement of Rep. Canady) (“[T]here is no greater problem affecting the criminal justice system today than the problem of early release . . . . [That violent offenders serve only 37% of their sentences] is intolerable, and it must be changed.”).

21. 140 CONG. REC. 11,194 (1994) (statement of Sen. Durenberger); *see also* MaryBeth Lipp, *A New Perspective on the “War on Drugs”*: Comparing the Consequences of Sentencing Policies in the United States and England, 37 LOY. L.A. L. REV. 979, 1019–20 (2004) (noting that the number of nonviolent offenders has tripled in the United States from 1980 to 1999 because U.S. drug sentencing laws continue to incarcerate nonviolent drug offenders to the exclusion of violent offenders).

22. 140 CONG. REC. 11,194 (entering a letter into the record written by Commissioner Wood).

23. *Id.*

24. *Id.*

Despite the controversy, Congress enacted the TIS guidelines, requiring offenders to serve 85% of their prison sentences.<sup>25</sup> To assist states with the costs associated with TIS guidelines, Congress established the Federal Truth-In-Sentencing Incentive Grant Program in order to award grants to states who met certain TIS-related eligibility requirements.<sup>26</sup> Prior to the program's implementation, state offenders served on average 44% of their sentences.<sup>27</sup> To be eligible for TIS grants, however, states had to require either that all offenders accused of a Part I violent crime serve not less than 85% of their sentences or demonstrate that the average time served in prison by these offenders was not less than 85% of their sentences.<sup>28</sup> Many states participated; following the creation of the TIS Grant Program, twenty-seven states and the District of Columbia became eligible to receive federal funding.<sup>29</sup> These numbers represented a sharp increase from the three states that practiced TIS in the 1980s and the seven that had implemented TIS prior to the federal grant program.<sup>30</sup> In addition, fourteen states abolished early release by parole boards for all offenders subsequent to the grant programs implementation.<sup>31</sup> Narrowing the criteria for parole served as a double-edged sword: it reduced sentencing disparities but also increased the severity of sentences.<sup>32</sup> The shift from discriminate sentencing to mandatory minimums marked a dramatic change in sentencing policies in the United States, one that brought on as many problems as it fixed, including increased prison populations as well as increased costs associated with incarceration.

## **B. Sentencing Trends in England**

Like the United States, England is facing problems with prison overcrowding. By contrast, however, England imposes mandatory minimum sentences for only a handful of offenses,<sup>33</sup> preferring to leave discretion in the hands of its judiciary.<sup>34</sup>

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25. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13702–13713 (2006).

26. 42 U.S.C. § 13704 (2006).

27. See DITTON & WILSON, *supra* note 1, at 1.

28. *Id.*

29. *Id.*

30. Josh Guetzkow & Bruce Western, *The Political Consequences of Mass Imprisonment*, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 228, 233 (Joe Soss et al. eds., 2007).

31. See DITTON & WILSON, *supra* note 1, at 3.

32. See Guetzkow & Western, *supra* note 30, at 232.

33. Mandatory minimums were not introduced until the Crime (Sentences) Act 1997, which “introduced automatic life sentences on a second conviction for a violent or sexual offence; seven-year minimum sentences on a third conviction for dealing class A drugs; and three-year minimum sentences for a third conviction on domestic burglary.” S.H.

England operates under the rationale that proportionality should be the guiding criterion for deciding the severity of the sentence.<sup>35</sup> Under proportionality, the seriousness of the offense determines what type of sentence is to be imposed and how long or how restrictive that sentence should be.<sup>36</sup> This differs from deterrence as the primary goal, that the sentence will have a deterrent effect on the individual or society in general.

England adopted proportionality in the early 1990s, moving away from deterrence-based sentencing. In 1991, the government published a white paper calling for proportionality to replace deterrence as the main principle guiding sentencing.<sup>37</sup> In its critique of deterrence-based sanctions, the government argued that the deterrent effects of particular sentences are rarely ascertainable and that such sanctions can easily lead to disproportionate punishments.<sup>38</sup> The government further asserted that only serious cases should result in incarceration.<sup>39</sup> Following the publication of the white paper, the government passed the Criminal Justice Act of 1991, which implemented the views expressed in the paper and sought to make further reforms with respect to the treatment of offenders.<sup>40</sup>

Following the decisive step away from deterrence-based sentencing in 1991, England began reserving custodial sentences for serious crimes. Concerns over prison overcrowding led to a statutory presumption against the imposition of a custodial sentence unless “the offence, or the combination of the offence and one other offence associated with it, was so serious that only such a sentence can

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BAILEY ET AL., SMITH, BAILEY & GUNN ON THE MODERN ENGLISH LEGAL SYSTEM 1200 (4th ed. 2002). These mandatory minimum sentences became the first significant mandatory penalties in modern English history. Aaron J. Rappaport, *Sentencing in England: The Rise of Populist Punishment*, 10 FED. SENT’G REP. 247, 249 (1998). See also Crime (Sentences) Act, 1997, c. 43, §§ 2–4 (U.K.).

34. The Criminal Justice Act 1991 established a broad framework for sentencing but still left significant discretion to the judges. Rappaport, *supra* note 33, at 249. The Crime (Sentences) Act 1997 took away some of this discretion but the Act still permits courts to ignore the mandatory sentences in certain limited circumstances. *Id.*; see also Criminal Justice Act, 1991, c. 53, § 1 (U.K.); J. DAVID HERSCHEL & WILLIAM WAKEFIELD, *CRIMINAL JUSTICE IN ENGLAND AND THE UNITED STATES* 143 (1995) (noting that English tradition has been to leave a great deal of discretion to the sentencer, with statutes setting only the maximum sentences that can be imposed).

35. MARTIN WASIK & RICHARD D. TAYLOR, *BLACKSTONE’S GUIDE TO THE CRIMINAL JUSTICE ACT 1991*, at 1 (2d ed. 1991).

36. Andrew Ashworth, *The New English Sentencing System*, 25 U.C. DAVIS L. REV. 755, 759 (1992).

37. *Id.*

38. *Id.*

39. *Id.* at 764.

40. Criminal Justice Act, 1991, c. 53 (U.K.).

be justified for the offence.”<sup>41</sup> In addition, there was an increasing awareness amongst scholars that community sentences (such as probation orders, community supervision, and community service orders) were more appropriate than imprisonment for dealing with factors associated with persistence in reoffending.<sup>42</sup> Scholars also noted that a dramatic reduction in the rate and seriousness of offending could best be achieved by improvements to the probation practice combined with opportunities to embrace new developments in sentencing.<sup>43</sup>

In response to the concerns that arose after the 1991 Act, the government passed the Criminal Justice Act of 1993.<sup>44</sup> The 1993 Act imposed custodial sentences in cases where the court found either: (a) that the offense or the combination of the offense and one or more offenses associated with it was so serious that only such a sentence can be justified for the offense; or (b) that the offense is a violent or sexual offense and only such a sentence would be adequate to protect the public from serious harm.<sup>45</sup> Furthermore, under the 1993 Act, the court was to consider only the seriousness of the offense, and the combination of the offense and one or more offenses associated with it, when determining the length of the custodial sentence. The call for incarceration only in extreme cases aligned with the government’s policy stressing bifurcation: dealing with less serious offenses within the community whenever possible, while imposing custodial sentences on those convicted of more serious crimes.<sup>46</sup>

In addition to laws implementing a more flexible sentencing policy, the judiciary in England possessed a great deal of discretion in determining appropriate sentences.<sup>47</sup> While some scholars argue that implementing a maximum without a minimum penalty inevitably produces variations in sentences,<sup>48</sup> not everyone shares this view.<sup>49</sup> At least one academic reasons that regimented sentences “would be most undesirable as [they] would exclude [the] flexibility which the court needs in order to arrive at the most appropriate penalty in the light of any mitigating circumstances.”<sup>50</sup>

Not only do English courts have a great deal of discretion in choosing when to impose a custodial sentence, but they also maintain a variety of

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41. HERSHEL & WAKEFIELD, *supra* note 34, at 145 (quoting Criminal Justice Act, 1993, c. 36, § 66(1)).

42. BAILEY ET AL., *supra* note 33, at 1198.

43. *Id.*

44. Stephen Farrall & Colin Hay, *Not So Tough on Crime?: Why Weren't the Thatcher Governments More Radical in Reforming the Criminal Justice System?*, 50 BRIT. J. CRIMINOLOGY 550, 563 (2010).

45. Criminal Justice Act, 1993, c. 36, § 66(1) (U.K.).

46. *Id.*

47. See TERENCE INGMAN, *THE ENGLISH LEGAL PROCESS* 51, 60 (10th ed. 2004).

48. *Id.* at 60.

49. *See id.*

50. *Id.*

sentencing alternatives. Instead of imposing a custodial sentence, courts can impose a fine, place someone on probation, order attendance at an attendance center (a center in which low level offenders participate in group activities but have restricted leisure time), suspend or partially suspend a sentence of imprisonment, order someone to make payment of a compensation order, impose community punishment, or grant an absolute, conditional, or specific discharge.<sup>51</sup> In addition, even when imprisonment is available as a sentencing option, it is not a given that the judge will sentence the offender to prison.<sup>52</sup> In fact, of the 1.4 million defendants that were found guilty in magistrates' courts and Crown courts in 2009, only 7% were sentenced to immediate custody.<sup>53</sup>

While England reserves discretion for its judiciary, it employs a system of sentencing guidelines.<sup>54</sup> The guidelines were developed in the 1980s by the Sentencing Advisory Panel (SAP) and the Sentencing Guidelines Council (SGC).<sup>55</sup> The aim of the guidelines is to structure, rather than eliminate, proper decision-making by judges.<sup>56</sup> Like the United States, English judges are under a statutory obligation to consider the guidelines<sup>57</sup> but are able to depart from them if they provide reasons for doing so.<sup>58</sup> While both England and the United States experienced sentencing changes, England began focusing on proportionality by implementing maximum sentences instead of focusing on deterrence through minimum sentences.

### **C. The United States and England: A Comparison of Policies and Outcomes**

The United States and England have dramatically different incarceration rates, partly due to differing policies underlying sentencing practices. Indeed, there is a discrepancy between the percentages of offenders sentenced to imprisonment in England and the United States.<sup>59</sup> In 1995, one tenth of offenders

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51. BAILEY ET AL., *supra* note 33, at 1109.

52. *Id.*

53. See MINISTRY OF JUSTICE, SENTENCING STATISTICS: ENGLAND AND WALES 2009, 18 (2010), available at <http://www.justice.gov.uk/downloads/statistics/mojstats/sentencing-stats/sentencing-stats2009.pdf>.

54. Martin Wasik, *Sentencing Guidelines in England and Wales – State of the Art?*, 2008 CRIM. L. REV. 253, 263.

55. *Id.*

56. *Id.* at 255.

57. Criminal Justice Act, 2003, c. 44, § 172 (U.K.).

58. Wasik, *supra* note 54, at 255.

59. KING CNTY. BAR ASS'N, DRUG RELATED CRIME AND DISORDER: PRACTICAL POLICY OPTIONS 13 (2005), available at [http://www.kcba.org/druglaw/pdf/Drug-Related\\_Crime\\_and\\_Disorder.pdf](http://www.kcba.org/druglaw/pdf/Drug-Related_Crime_and_Disorder.pdf) (noting that England makes less use of incarceration



convicted of indictable offenses in England were given immediate prison sentences, compared to two-thirds of convicted felons in state courts and one-half in federal district courts within the United States.<sup>60</sup> Not only are offenders in the United States more likely to receive prison sentences, they are also less likely to receive probation than offenders in England.<sup>61</sup> Furthermore, prison sentences are likely to be shorter in England than in the United States.<sup>62</sup>

Even though both England and the United States implement sentencing guidelines, the differences underlying their policies contribute to the discrepancy in the incarceration rates between the countries. First, England's guidelines generate other factors to be considered such as seriousness, reduction in sentence for a guilty plea,<sup>63</sup> and failure to surrender to bail.<sup>64</sup> England's guidelines also make new sentencing options available to the courts: new versions of the community order, suspended and deferred sentences, and publicity orders in corporate manslaughter.<sup>65</sup> Second, the English and U.S. sentencing guidelines differ in their primary concern: the English guidelines are aimed at achieving a uniform approach to sentencing, while the U.S. guidelines are principally concerned with uniform outcomes.<sup>66</sup> In other words, England is more concerned with the process, and the United States is more concerned with the results. These differences are two of the many reasons the prison population in the United States (750 inmates per 100,000 citizens) is five times as high as in England and Wales (148 inmates per 100,000 citizens).<sup>67</sup>

English judges have also vociferously condemned mandatory minimum sentences as being wholly incompatible with a modern civilized penal system.<sup>68</sup> One judge stated that he opposed Parliament passing laws that forced judges to impose particular sentences.<sup>69</sup> Another opposed mandatory minimums based on

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overall with 72% of the 1.4 million offenders sentenced in 1997 fined and only 7% sentenced to immediate custody).

60. HERSCHEL & WAKEFIELD, *supra* note 34, at 150.

61. *Id.* at 154.

62. *Id.*; see also Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 200 (2008) (stating that the average time served for burglary in the United States in 1995–1996 was thirty-five months as compared to seven months in England and Wales. For assault, offenders served on average forty months in the United States as compared to six months in England and Wales).

63. Julian V. Roberts, *Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application*, 4 CRIM. L. R. 264, 267 (2008).

64. Wasik, *supra* note 54, at 256.

65. *Id.*

66. *Id.* at 261.

67. *Id.* at 263.

68. *Some Murderers in Jail 'Too Long,'* BBC NEWS, Mar. 9, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/6433195.stm](http://news.bbc.co.uk/2/hi/uk_news/6433195.stm).

69. *Id.*

his concerns about prison overcrowding and the need to make greater use of community sentences.<sup>70</sup> Even with the imposition of mandatory minimum sentences in England, only about 10% of the prison population is serving a life or indeterminate sentence.<sup>71</sup>

### III. THE RISING COSTS OF INCARCERATION

The cost of incarceration has increased in all jurisdictions worldwide. Not surprisingly, although England's prison population is significantly lower than that of the United States, both the United States and England have seen the cost of incarceration increase as sentencing policies have changed. The U.S. switch to determinate sentencing policies has caused an increase in federal and state spending for corrections. In turn, England's rising cost of incarceration has led English scholars to begin searching for alternatives to prison that would generate cost savings.

#### A. Incarceration Costs in the United States

Studies have found that determinate policies reduce sentencing disparity.<sup>72</sup> However, they also cause longer prison stays, which increase costs.<sup>73</sup> The result is a national cost of nearly \$25 billion for more than 1.2 million state and federal prisoners (about 100,000 of whom are in the federal system).<sup>74</sup> The U.S. government originally intended to relieve states of these costs through federal grants.<sup>75</sup> While initial costs, such as more beds for violent offenders,<sup>76</sup> were supplanted by the grants, the costs of running a prison over time were not,<sup>77</sup>

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70. *Id.*

71. *Id.*

72. Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J. L. & ECON. 509, 510 (2002).

73. *Id.*

74. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 18 (1999).

75. See 42 U.S.C. § 13704.

76. See DITTON & WILSON, *supra* note 1, at 4.

77. Amelia M. Inman & Millard W. Ramsey, Jr., *Putting Parole Back on the Table: An Efficiency Approach to Georgia's Aging Prison Population*, 1 J. MARSHALL L.J. 239, 249 (2008) (noting that inmates will be incarcerated for the rest of their lives, regardless of any decrease in recidivism, which will dramatically increase medical costs as the inmates continue to age).

and Congress has since ceased to appropriate additional funds.<sup>78</sup>

The cost of longer prison terms can be seen in the increase in state budgets for spending on prison operating and construction costs throughout the past thirty years of sentencing reform: “[I]n 1970, states spent an average of \$23 per capita on corrections, or a little over 1% of all budget outlays; by 2001 they spent an average of \$125, or 3.5% of general expenditures.”<sup>79</sup> Indeed, from 2001 to 2003, the increase in prison expenditures outpaced the growth of all other state expenditures combined.<sup>80</sup> According to scholars, this is a direct result of the approximate \$20,000 per prisoner per year for which individual states are primarily fiscally responsible.<sup>81</sup> These costs displace financial support for other state programs that could benefit from additional funding, such as welfare or health care.

## **B. England’s Incarceration Costs**

England also deals with the high cost of prisoners. It is estimated that the average cost to house one prisoner in England exceeds £40,000 (U.S. equivalent \$62,400) per year.<sup>82</sup> With a prison population in England and Wales of more than 88,000 inmates,<sup>83</sup> that equates to £3.3 billion (U.S. equivalent \$5.1 billion) per year. Particularly troubling is the large percentage of drug offenders incarcerated in England.<sup>84</sup> This population of prisoners costs approximately £500 million (U.S. equivalent about \$800 million) per year.<sup>85</sup>

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78. Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 479 n.54 (2010).

79. See Guetzkow & Western, *supra* note 30, at 237.

80. See *id.*

81. Blumstein & Beck, *supra* note 74, at 18; see also Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 56 (2003) (noting that the spiraling costs of harsh sentencing policies has placed stress on state and local budgets and drained dollars from education, police, fire, sanitation, public assistance, and road repair).

82. Kevin Marsh & Chris Fox, *The Benefit and Cost of Prison in the UK: The Results of a Model of Lifetime Re-Offending*, 4 J. EXPERIMENTAL CRIMINOLOGY 403, 405 (2008).

83. Gavin Berman, *Prison Population Statistics* (SN/SG/4334) 2 (updated May 24, 2012); see Kevin Marsh, *The Real Cost of Prison: Moral, Social and Political Arguments For and Against Prison Are All Very Well. But What About Value for Money?*, GUARDIAN, July 28, 2008, <http://www.guardian.co.uk/commentisfree/2008/jul/28/justice.prisonsandprobation>.

84. Karthik Reddy, *Prison Sentencing Reform and the Cost of Drug Prohibition*, ADAM SMITH INST. (July 1, 2010, 6:00 PM), <http://www.adamsmith.org/blog/politics-and-government/prison-sentencing-reform-and-the-cost-of-drug-prohibition/> (noting that 15.5% of inmates were incarcerated for drug offences in 2009).

85. *Id.*

As a result, English scholars have begun to explore alternatives to custodial sentences, which they believe may deliver a better return on public money.<sup>86</sup> For example, ordering participation in a residential drug treatment program creates a net saving of £200,000 (U.S. equivalent \$310,000) over the lifetime of an offender. Likewise, monitoring an individual through the use of surveillance saves £125,000 (U.S. equivalent \$193,000) per convict as compared to incarceration.<sup>87</sup> These alternatives are cheaper than prison systems, and further, they save money by lowering recidivism rates.<sup>88</sup>

#### IV. PRISON POPULATIONS AND TYPES OF OFFENDERS

##### **A. Prison Populations in General**

Following the implementation of TIS guidelines, the United States saw an increase in its prison population. The United States boasts the highest incarceration rate in the world,<sup>89</sup> and U.S. offenders are now serving longer sentences under its new sentencing practices, in particular drug offenders, technical probation violators, and elderly offenders. This rising population in turn increases the money states are forced to spend on corrections. Subsequently, some view TIS guidelines as a corrections management tool with limited effectiveness. Meanwhile, English scholars have begun exploring methods of reducing the prison population in their country.

##### **1. An Overview of the United States' Prison Population Problem**

As a result of the implementation of TIS guidelines, prison populations increased, resulting in increased costs to states and disproportionate sentences for certain offenders. For example, state prison populations increased 57% from 1990 to 1997, which some attribute to the implementation of TIS guidelines.<sup>90</sup> This explosion has garnered the United States the distinction of having the world's highest incarceration rate,<sup>91</sup> a rate of 748 prisoners per 100,000 citizens.<sup>92</sup> This

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86. Marsh, *supra* note 83.

87. Marsh & Fox, *supra* note 82, at 417.

88. Marsh, *supra* note 83.

89. *World Prison Population 2011*, HARM REDUCTION INT'L (July 27, 2011), <http://www.ihra.net/contents/1055>.

90. See DITTON & WILSON, *supra* note 1, at 12.

91. See Lipp, *supra* note 21, at 1017 (stating that while the population of the United States comprises only 5% of the entire world population, the United States boasts one-fourth of the world's prison population).

growth is not the result of more offenders entering state prisons, but rather the result of offenders serving longer sentences;<sup>93</sup> in this seven-year period, the number of inmates held in state prisons increased 60%, whereas the number of new inmates admitted increased by only 17%.<sup>94</sup> This outcome is generally more pronounced in states that adopted more of the federally suggested guidelines when implementing TIS.<sup>95</sup> In other words, the prison population in such states tended to increase by a larger proportion.<sup>96</sup> The reverse was also true: states that made little or no federally suggested changes to their sentencing guidelines experienced little or no increase in their prison populations.<sup>97</sup> A larger prison population saddles states with soaring costs that not all can afford. Included are the costs of prison administration, security guards, mental health services, medical services, education of inmates, and every other cost necessary to properly manage and rehabilitate prisoners.<sup>98</sup>

The extreme cost associated with housing a larger population of inmates is further compounded when one examines the inefficiency of TIS laws. Not only does TIS increase the amount of time offenders serve, but it also does nothing to curb recidivism. Scholars have found that extending the time served in prison has a weaker deterrent effect than increasing the probability of commitment to prison.<sup>99</sup> Scholars have also found that TIS tends to increase property crimes<sup>100</sup> since offenders often migrate into these crimes because they carry less severe penalties.<sup>101</sup>

Related to the increase in population, another negative consequence of TIS is the integration of nonviolent offenders into the violent offender population. Prison overcrowding makes effective segregation of hardened criminals from

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92. GAVIN BERMAN, PRISON POPULATION STATISTICS 11 (2010), available at [www.parliament.uk/briefing-papers/SN04334.pdf](http://www.parliament.uk/briefing-papers/SN04334.pdf).

93. See Dhammika Dharmapala, Nuno Garoupa, & Joanna M. Shepherd, *Legislatures, Judges and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037 (2010) (“[T]ruth-in-sentencing laws exacerbate the problem of prison overcrowding by increasing the time served by prison inmates.”).

94. See DITTON & WILSON, *supra* note 1, at 4.

95. WILLIAM J. SABOL ET AL., INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS 11 (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/195163.pdf>.

96. See *id.* at 12.

97. See *id.*

98. Matthew J. Kucharson, *GPS Monitoring: A Viable Alternative to the Incarceration of Nonviolent Criminals in the State of Ohio*, 54 CLEV. ST. L. REV. 637, 648 (2006).

99. Blumstein & Beck, *supra* note 74, at 55.

100. Shepherd, *supra* note 72, at 511.

101. See *id.* at 513.

nonviolent offenders impossible.<sup>102</sup> As a result, the integration of nonviolent offenders into a prison population of violent offenders has had an unfortunate effect; Department of Corrections data shows that about a fourth of those initially imprisoned for nonviolent crimes are sentenced a second time for committing a violent offense.<sup>103</sup> Scholars suggest that prison serves to transmit violent habits and values rather than to reduce them.<sup>104</sup> Scholars believe this is a result of stigmatization of offenders, which limits their future work opportunities and encourages them to return to crime.<sup>105</sup> Others attribute the phenomenon to the prevalence of rape and other violence in American prisons.<sup>106</sup> Increasing incarceration has done little more than create hardened criminals at the taxpayers' expense as the practice of TIS has succeeded in reducing neither crime nor recidivism.<sup>107</sup>

TIS policies also unnecessarily keep nonviolent offenders in prison by preventing judges and officials from adjusting sentences to assure proportionality between crime and punishment,<sup>108</sup> and to account for an offender's age, role in the offense, and prospects for rehabilitation.<sup>109</sup> Frequently, this rigidity forces nonviolent offenders to serve excessive sentences.<sup>110</sup> For example, as offenders'

102. Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1149 n.103 (1960).

103. Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 720 (1998).

104. *Id.*; Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 114–15 (2011).

105. Joel Waldfogel, *The Effect of Criminal Conviction on Income and the Trust "Reposed in the Workmen,"* 29 J. HUM. RESOURCES 62, 62 (1994); ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING* 255 (1993).

106. Kenneth Shuster, *Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods*, 19 NOVA L. REV. 965, 968 (1995) (noting that incarceration does more both to teach inmates more efficient means of committing crime and to transform inmates into more hardened criminals than it does to deter offenders from illegal conduct as a result of the violence that exists in American prisons).

107. 140 CONG. REC. 11,194–95 (1994) (remarks by Sen. Durenberger). *See also* W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 501 (2008) ("Punitive measures do little more than transform many offenders into hardened criminals"); Eugene Arthur Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case*, 41 U. MICH. J.L. REFORM 215, 220 (2007) (noting that the long-term effect of incarceration in the adult criminal system seems to result in more hardened criminals).

108. *See* Shepherd, *supra* note 72, at 510.

109. 140 CONG. REC. 11,195 (1994) (remarks by Sen. Durenberger).

110. Kucharson, *supra* note 98, at 668 (nonviolent offenders have been receiving excessively harsh prison sentences for their crimes). *See also* Kieran Riley, *Trial by*

time served increases, it is more likely that some individuals will remain in jail until after their criminal careers would otherwise have ended.<sup>111</sup> Thus, some believe that TIS as a corrections management tool has limited effectiveness.<sup>112</sup> Indeed, half of the overwhelming prison population in the United States is comprised of nonviolent offenders; it is not necessary to build giant brick-and-mortar edifices to keep offenders who are nonviolent in prison.<sup>113</sup>

## 2. An Overview of England's Prison Population Problem

Meanwhile, England has also seen an increase in its prison population. While England's prison rate remains comparatively low at 151 prisoners per 100,000 people,<sup>114</sup> from 1995 to 2005 the total prison population increased from 51,000 to almost 77,000.<sup>115</sup> The population ballooned to a record high of 84,000 in the summer of 2009 and then decreased to more than 82,000 in 2010.<sup>116</sup> This growth in the prison population did not reflect overall population growth as the prison population increased by 5.1% from 2005 to 2010, while the general population increased by only 1.9%. The England and Wales Statistical Bulletin found that this substantial increase was a result of an increase in the rate of prisoners sentenced to custody as opposed to alternative sanctions.<sup>117</sup> The increase in prison population has resulted in the overcrowding of 62% of the prison establishments in England and Wales.<sup>118</sup>

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*Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. PUB. INT. L.J. 285, 309 (2010) (“[M]andatory minimum sentences are often the least cost-effective way of handling these majority non-violent offenders, and taxpayers are paying the unnecessary price.”).

111. See Beres & Griffith, *supra* note 16, at 138 (noting that lengthy incarceration is highly likely to result in the last years of a long sentence being served by inmates who are no longer active offenders).

112. See SABOL ET AL., *supra* note 95, at 13.

113. See 140 CONG. REC. 11,171 (1994) (statement of Sen. Dorgan). See also Weinstein, *supra* note 62, at 200 (“Most of the prison growth in the last thirty years has been driven by drug and other non-violent offenders.”).

114. BERMAN, *supra* note 92, at 15.

115. NISHA DE SILVA, PAUL COWELL, TERENCE CHOW & PAUL WORTHINGTON, PRISON POPULATION PROJECTIONS 2006–2013, ENGLAND AND WALES 2 (2006), available at <http://rds.homeoffice.gov.uk/rds/pdfs06/hosb1106.pdf>.

116. *Prison Population ‘Should Be Cut’ by Third, Say MPs*, BBC NEWS, Jan. 14, 2010, [http://news.bbc.co.uk/2/hi/uk\\_news/8457554.stm](http://news.bbc.co.uk/2/hi/uk_news/8457554.stm) [hereinafter *Prison Population*].

117. DE SILVA ET AL., *supra* note 115, at 2 (noting that custody rates have increased from 18.1% in 1994 to 27.8% in 2004).

118. BERMAN, *supra* note 92, at 11.

English officials have also noticed that prison overcrowding leads to an increase in recidivism.<sup>119</sup> This trend has not been explained by other variables such as the size of the institution, leading some scholars to recommend addressing prison overcrowding to reduce crime.<sup>120</sup> In addition, prison overcrowding has led to deplorable conditions as groups of two or three offenders are forced to share cells designed for only one person.<sup>121</sup> Police officers are also forced to serve as prison officers because the prison population overflows into holding cells in police stations.<sup>122</sup>

Despite England's low prison rate, many have begun calling for a reduction in its prison population, urging heavier reliance on community sentencing.<sup>123</sup> Not only would this alternative to custodial sentencing keep offenders out of prison, it would also save a substantial amount of money.<sup>124</sup> The English Justice Committee notes that millions of pounds could be diverted from the prison system into improving local public services such as education and drug addiction programs, which more effectively reduce crime.<sup>125</sup> Members of Parliament note that reducing the prison population by about two-thirds would achieve a safe and manageable level.<sup>126</sup>

## **B. Incarcerated Drug Offenders**

Following the adoption of TIS policies, drug offenders became one population of nonviolent inmates that has rapidly grown. Not only is the number of incarcerated drug offenders growing, but the length of time they spend in prison is also growing. Because TIS was intended to target violent offenders, not drug offenders, it is no surprise that excessive sentences for nonviolent drug offenders unnecessarily increases prison expenditures. Statutes only compound this problem by requiring drug offenders to serve excessive mandatory minimum sentences.

Conversely, England's population of drug offenders has only marginally increased, even experiencing a decrease in recent years. Unlike the United States,

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119. *Id.*

120. Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 284 (2006). See also David E. Farrington & Christopher P. Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221, 230 (1980).

121. David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 263 (2003).

122. *Id.*

123. *Prison Population*, *supra* note 116.

124. *Id.*

125. *Id.*

126. *Id.*



England focuses on maximum sentences instead of minimum sentences. England also allows judges to utilize significant discretion when imposing sentences on drug offenders. Finally, British drug statutes are far more lenient on drug offenders than their U.S. counterparts. These differing policies have resulted in very different prison populations for drug offenders in their respective countries.

### 1. Incarcerated Drug Offenders in the United States

A growing population in U.S. prisons is nonviolent drug offenders who are unnecessarily required to serve 85% of their sentences under TIS guidelines. Drug offenders comprise approximately one-third of the population of nonviolent offenders in U.S. prisons.<sup>127</sup> As a result of the TIS guidelines, the population of drug offenders in state prisons has increased significantly:<sup>128</sup> 1,341% between 1979 and 2005.<sup>129</sup> In addition, between 1986 and 1999, sentence lengths for federal drug offenders increased from an average of thirty to sixty-six months.<sup>130</sup> Furthermore, these drug offenders served an increasingly greater percentage of their sentences, rising from 48% in 1986 to 87% in 1999.<sup>131</sup>

As a result of TIS guidelines, nonviolent drug offenders are required to serve longer sentences. Although TIS was intended to target violent offenders, more nonviolent drug and property offenders are being admitted to prison than violent offenders.<sup>132</sup> In fact, most states have a greater percentage of nonviolent drug and property offenders incarcerated than violent offenders, the very population TIS guidelines were intended to target.<sup>133</sup> For example, Minnesota<sup>134</sup>

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127. See DITTON & WILSON, *supra* note 1, at 4.

128. ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 4:4 (2010) (noting that the state prison population of drug offenders mushroomed from 20,000 in 1980 to 200,000 in 2003).

129. MIKE MALES, *CTR. ON JUVENILE & CRIMINAL JUSTICE, ANALYZING U.S. PRISON GROWTH 1* (2007), available at [http://www.cjcj.org/files/Analyzing\\_US\\_Prison\\_Growth.pdf](http://www.cjcj.org/files/Analyzing_US_Prison_Growth.pdf). See also Robert G. Lawson, *Drug Law Reform-Retreating from an Incarceration Addiction*, 98 KY. L.J. 201, 201 (2010) (noting that the population of drug offenders incarcerated in the United States exceeds the total number of people incarcerated for all criminal offenses in Western Europe whose population exceeds that of the United States by about 100 million people).

130. Press Release, Bureau of Justice Statistics, *Federal Drug Law Changes Led to Longer Prison Sentences* (Aug. 19, 2001), available at <http://bjs.ojp.usdoj.gov/content/pub/press/fdo99pr.cfm>.

131. JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *FEDERAL DRUG OFFENDERS, 1999 WITH TRENDS 1984-99* 1, 2 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdo99.pdf>.

132. See Rosich & Kane, *supra* note 15, at 21.

133. Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 76 (1999) (drug and property offenders comprise

employs TIS guidelines, and its prisons hold a large population of minor drug offenders.<sup>135</sup> The Minnesota legislature and the sentencing commission agree that prisons have been overused for drug offenders.<sup>136</sup>

This massive increase of drug inmates in the prison population is a serious problem because a large number of them are serving excessive sentences and imposing unnecessary costs.<sup>137</sup> Further, although drug offenders comprise the largest group in prison, “massive incarceration of drug offenders . . . does little to reduce drug sales through deterrence or incapacitation.”<sup>138</sup> Additionally, imprisoning drug offenders and exposing them to hardened criminals potentially increases the likelihood that they will commit more serious crimes after release.<sup>139</sup> Furthermore, legislation in the United States as it relates to drug offenders is not rationally related to the danger that the illicit drug actually poses. For example, the penalties imposed for crimes involving small amounts of crack cocaine are just as harsh as penalties imposed for crimes involving larger amounts of drugs that are just as dangerous.<sup>140</sup> This stigma-based policy exists even under new sentencing legislation that President Obama signed in 2010.<sup>141</sup> As a result, a

61% of prison bound offenders whereas violent offenders comprise only 26% of prison bound offenders).

134. Minnesota serves as a prominent example of one of the first U.S. states to employ TIS. Frase, *supra* note 8, at 425. Additionally, its imposition of TIS has been largely viewed as a success due to the greater uniformity and proportionality that has resulted. *Id.* at 438.

135. Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 *CRIME & JUST.* 131, 207 (2005). Minnesota is used as an example because its sentencing guidelines were among the first established, and are thought to be the best in the United States. Wasik, *supra* note 54, at 268.

136. Frase, *supra* note 135, at 207.

137. Barry R. McCaffrey, *Fight Drugs as You Would a Disease*, CHI. TRIB., Mar. 31, 1996, at C18 (noting that state and local expenditures in 1996 for incarcerating drug offenders were \$33 billion).

138. See Blumstein & Beck, *supra* note 74, at 57.

139. Susan Pace Hamill, *An Argument for Providing Drug Courts in All Alabama Counties Based on Judeo-Christian Ethics*, 59 *ALA. L. REV.* 1305, 1321 n.60 (2008).

140. Lipp, *supra* note 21, at 1016.

141. *Obama Signs Bill Reducing Cocaine Sentencing Gap*, CNN, Aug. 3, 2010, [http://articles.cnn.com/2010-08-03/politics/fair.sentencing\\_1\\_powder-cocaine-cocaine-sentencing-gap-sentencing-disparity?\\_s=PM:POLITICS](http://articles.cnn.com/2010-08-03/politics/fair.sentencing_1_powder-cocaine-cocaine-sentencing-gap-sentencing-disparity?_s=PM:POLITICS) (noting that the disparity between sentences for crack cocaine and powder cocaine was reduced from 100-to-1 to 18-to-1). See also Thomas W. Hutchison, *Highlights of the 2010 Amendments to the Federal Sentencing Guidelines*, in U.S. SENTENCING COMM’N, *FEDERAL SENTENCING GUIDELINES MANUAL*, vol. 1, vii, ix (West 2010) (stating that the Fair Sentencing Act of 2010 “increased the quantity of crack cocaine triggering a mandatory minimum from 5 grams to 28 grams in the case of a 5-year mandatory minimum and from 50 grams to 280 grams in the case of a 10-year mandatory minimum”).

recent U.S. Supreme Court decision gave federal judges permission to depart from the federal sentencing guidelines for crack cocaine because the justices disagreed with such harsh sentencing policy.<sup>142</sup> Policymakers acknowledge that TIS guidelines have forced drug users to occupy a greater than necessary amount of prison space and that alternatives must be pursued.<sup>143</sup>

## 2. Incarcerated Drug Offenders in England

The population of incarcerated drug offenders is dramatically smaller in England than in the United States due to England's focus on maximum sentences, the ability of English judges to exercise discretion in imposing sentences, and the difference in drug statutes. While drug offenders represent a growing portion of offenders incarcerated in England, this population pales in comparison to the number of drug offenders incarcerated in the United States. For instance, in 2006, drug offenders comprised only 15.5% of the prison population in England.<sup>144</sup> Like the United States, however, England has also seen its population of imprisoned drug offenders rise. From 1996 to 2006, for example, the number of sentences imposed for drug offenses increased from 34,044 to 39,478, reaching a high of 51,215 in 2003.<sup>145</sup> In 2006, 19% of drug offenders were given an immediate custodial sentence, and while they only represented 15% of all offenders given such sentences, drug offenders were the second largest population sentenced to immediate jail time (second only to violent offenses against the person).<sup>146</sup> Even though the number of incarcerated drug offenders has increased, their average custodial sentence length has decreased.<sup>147</sup>

Three factors contribute to the relatively small population of drug offenders in England. First, the English system imposes *maximum* incarceration terms instead of mandating *minimum* sentences.<sup>148</sup> Because English statutes include fixed ceilings for sentences, judges can impose a custodial sentence of up

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142. Debra Cassens Weiss, *High Court Allows Judges to Cut Crack Sentences Due to Policy Disagreement*, A.B.A. J. (Jan. 21, 2009, 12:08 PM), [http://www.abajournal.com/news/article/supreme\\_court\\_allows\\_judges\\_to\\_lower\\_crack\\_sentences\\_due\\_to\\_policy\\_disagree/](http://www.abajournal.com/news/article/supreme_court_allows_judges_to_lower_crack_sentences_due_to_policy_disagree/). See also *Spears v. United States*, 555 U.S. 261 (2009).

143. Frase, *supra* note 135, at 207.

144. DAVE BEWLEY-TAYLOR, CHRIS HALLAM & ROB ALLEN, *THE INCARCERATION OF DRUG OFFENDERS: AN OVERVIEW 5* (2009), available at [http://www.beckleyfoundation.org/pdf/BF\\_Report\\_16.pdf](http://www.beckleyfoundation.org/pdf/BF_Report_16.pdf).

145. MINISTRY OF JUSTICE, *SENTENCING STATISTICS 2006, ENGLAND AND WALES 10* (2007), available at [http://www.criminalsolicitor.net/forum/uploads/Gavin/files/2007-12-16\\_043330\\_sentencing-stats2006.pdf](http://www.criminalsolicitor.net/forum/uploads/Gavin/files/2007-12-16_043330_sentencing-stats2006.pdf).

146. *See id.*

147. *See id.*

148. Lipp, *supra* note 21, at 1016.

to the maximum prison term or choose to impose none at all.<sup>149</sup> While mandatory minimums are determined based only on the type and amount of the drug involved,<sup>150</sup> English judges may consider a myriad of factors in selecting an appropriate sentence length or in choosing alternate sanctions.<sup>151</sup> Such considerations include mitigating or aggravating factors, prior convictions or sentence terms, and drug addiction or dependence.<sup>152</sup> By contrast, laws requiring mandatory minimum sentences in the United States constrain judges applying federal law, who may consider only the type and amount of drug involved in the particular offense, and in some cases, the defendant's drug history.<sup>153</sup> Although the sentencing guidelines give U.S. judges some discretion to tinker with a sentence, this discretion is quite narrow.<sup>154</sup>

Second, English law bestows magistrates with considerable leeway when dealing with criminal drug offenders, giving them a spectrum of options including discharging a drug indictment, imposing community service, imposing a sizable fine (drug offenders received 37% of all fines imposed for indictable offenses<sup>155</sup>), compelling a relatively short six-month prison term, or even committing especially troubling cases to the Crown Court for sentencing.<sup>156</sup> In fact, English magistrates typically dispose of most criminal drug cases.<sup>157</sup>

Third, British drug statutes impose sentences based on the perceived danger of the drug, unlike the United States. For example, in England an offender possessing five grams of crack *could* serve zero to six months incarceration, whereas in the United States, the same first-time offender, possessing twenty-eight grams of crack is *required* to serve five years.<sup>158</sup> While five grams is considerably less than twenty-eight grams, the difference in the amount of drugs does not render the U.S. punishment reasonable: for an amount only five times greater, the required minimum sentence in the United States is ten times longer than the discretionary maximum sentence available in England. These three differences between English and U.S. sentencing practices for drug offenders are evidenced by the difference in these countries' respective populations of incarcerated drug offenders.

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149. *Id.* at 1015.

150. *Id.* at 1010.

151. *Id.*

152. *Id.*

153. Lipp, *supra* note 21, at 1010.

154. *Id.*

155. MINISTRY OF JUSTICE, SENTENCING STATISTICS: ENGLAND AND WALES 2009 48 (2010), available at <http://www.justice.gov.uk/downloads/statistics/mojstats/sentencing-stats/sentencing-stats2009.pdf>.

156. *Id.*

157. Lipp, *supra* note 21, at 1011.

158. Fair Sentencing Act of 2010, Pub. L. No. 111-220; Controlled Drugs (Penalties) Act 1985, c. 39, § 1 (N. Ir.).

### **C. Elderly Inmates**

Under TIS guidelines, offenders are serving longer sentences, resulting in a growing population of elderly offenders. Like drug offenders, nonviolent elderly inmates serving 85% of their sentences are serving unnecessarily long prison terms. As the population of elderly offenders in the United States has increased, the cost of caring for them has also grown. An older inmate requires more health care than does a younger, healthy inmate.

English prisons also experience the difficulties of incarcerating an aging prison population. Like the United States, this population of inmates suffers from illness or disability, requiring health care expenditures. However, the English population of elderly offenders is relatively small compared to that of the United States. Nevertheless, English officials are focused on alternative strategies when dealing with elderly inmates.

#### **1. Elderly Inmates in the United States**

Another population draining money from U.S. states is the elderly prison population—inmates aged fifty-five and older.<sup>159</sup> Inmates who enter prison at a young age and serve a long sentence under TIS often remain in prison long after their criminal careers would have otherwise ended.<sup>160</sup> Longer sentences achieve the purpose of retribution when applied to serious offenders; however, with regard to nonviolent offenders, they serve only to keep them incarcerated longer than necessary. Further, longer prison stays are more likely to result in long-term care needs for offenders.<sup>161</sup>

Indeed, the elderly prison population is increasing disproportionately.<sup>162</sup> For example, from 1999 to 2008, the number of elderly inmates in state and

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159. Amy B. Auth, *Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts*, FED. LAW., June 2009, at 79, 80 (book review). See also Robert G. Lawsum, *PFO Law Reform, a Crucial First Step Toward Sentencing Sanity in Kentucky*, 97 KY. L.J. 1 (2009) (noting substantially higher than average costs for aging inmates); Kate Douglas, *Prison Inmates Are Constitutionally Entitled to Organ Transplants – So Now What?*, 49 ST. LOUIS U. L.J. 539, 567–68 (“[P]rison overcrowding and the sky-rocketing cost of prison health care are at least in part attributable to the large number of elderly currently incarcerated.”).

160. Beres & Griffith, *supra* note 16, at 138 (noting that lengthy incarceration is highly likely to result in the last years of a long sentence being served by inmates who are no longer active offenders).

161. Tara Livengood, *The Older Inmate*, AGE IN ACTION, Spring 2009, at 1, 2, available at <http://www.vcu.edu/vcoa/ageaction/agespring09.pdf>.

162. Ashby Jones & Joanna Chung, *Care for Aging Inmates Puts Strain on Prisons*, WALL ST. J., Jan. 27, 2012, <http://online.wsj.com/article/SB100014240529702033635045>

federal prisons increased by 76% while the general prison population grew only 18%.<sup>163</sup> This is likely explained by nonviolent elderly offenders serving longer sentences rather than by more elderly people going to jail. For example, policy analysts and executives predicted that the effect of longer sentences due to TIS would result in a growth in the elderly inmate population of approximately 10% per year.<sup>164</sup> Scholars also attribute a 5% increase in the elderly population in Virginia in the last five years to harsher sentencing practices including TIS laws.<sup>165</sup> One prison in Virginia reported 900 inmates aged fifty-five or over in 1990, a number that grew to 5,000 by 2010.<sup>166</sup>

Further compounding the problem of aging inmates is their associated health care costs.<sup>167</sup> This particular population requires specialized facilities and treatment, representing an enormous cost to the Department of Corrections.<sup>168</sup> For example, inmates who develop conditions that require continuous treatment (hypertension or cancer) will receive a tremendous amount of medical care.<sup>169</sup> Indeed, the cost of care for older inmates can be three times the cost of care for younger, healthy inmates.<sup>170</sup> The amount of incarcerated elderly offenders who

77185362318111898.html (noting that the fastest-growing population in federal and state prisons are those aged fifty-five and older).

163. Renée C. Lee, *Aging Inmates: A Growing Burden*, HOUS. CHRON., May 16, 2011, at A1. See also Jones & Chung, *supra* note 162 (stating that the prison population of state and federal prisoners over fifty-five nearly quadrupled between 1995 and 2010, while the prison population as a whole only grew by 42%).

164. U.S. DEP'T OF JUSTICE, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 137 (2004) [hereinafter CORRECTIONAL HEALTH CARE].

165. Livengood, *supra* note 161, at 24.

166. *Aging Prison Population Imposes Unique Challenges*, NPR (Oct. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=130837434>.

167. See *2008 California Criminal Law Ballot Initiatives*, *supra* note 14, at 186–87 (“Keeping these older inmates incarcerated longer means even higher costs due to their greater use of medical service.”).

168. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES 1996, NCJ 164620 (1998), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pji96.pdf>.

169. WILLIAM RHODES ET AL., UNINTENDED CONSEQUENCES OF SENTENCING POLICY: THE CREATION OF LONG-TERM HEALTHCARE OBLIGATIONS, iv (April 5, 2001), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/187671.pdf>.

170. CYNTHIA MASSIE MARA ET AL., UNINTENDED CONSEQUENCES OF SENTENCING POLICY: KEY ISSUES IN DEVELOPING STRATEGIES TO ADDRESS LONG-TERM CARE NEEDS OF PRISON INMATES viii (2002), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/197030.pdf>. See also Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life At All?*, 43 VAND. L. REV. 529, 563 (1990) (“The needs of the elderly inmates are generally much greater than those of the younger, average inmate population.”).

suffer from a disability or an illness is staggering:<sup>171</sup> 67% of elderly inmates are suffering from at least one disability,<sup>172</sup> and almost 24,000 federal elderly inmates are suffering from a chronic illness.<sup>173</sup> Also, the prevalence of many serious medical conditions, such as heart disease, increase with the age of a population; this in turn increases medical costs even where the total number of medical events per person decreases with age.<sup>174</sup>

In addition to the cost of providing health care, prisons must spend money to ensure their facilities are designed to cater to an impaired inmate population,<sup>175</sup> which includes providing specialized recreation, education, and work programs.<sup>176</sup> They must also train existing staff to deliver health care or hire specialists including nursing aides and social workers.<sup>177</sup> In sum, states are spending exorbitant amounts of money to incarcerate inmates who can be safely released into the general population.

## 2. Elderly Inmates in England

England has also seen an increase in its elderly prison population and as a result, an increase in expenses. Between 1990 and 2000, the number of prisoners aged sixty and over doubled.<sup>178</sup> As in the United States, elderly English inmates increased health care costs.<sup>179</sup> English scholars have noted many health problems associated with such inmates.<sup>180</sup> For example, older inmates are more likely to show signs or symptoms of psychiatric or physical illness than their younger

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171. See generally RHODES ET AL., *supra* note 169.

172. *Aging Prison Population Imposes Unique Challenges*, *supra* note 166.

173. CORRECTIONAL HEALTH CARE, *supra* note 164, at 12.

174. *Id.* A medical event happens every time an inmate seeks medical attention by visiting a clinic or otherwise consulting with a physician or other medical practitioner. *Id.* at 1.

175. See Wright, Jr., *supra* note 170, at 563 (stating that elderly inmates often require housing that is accessible to the physically handicapped).

176. See *id.* at 563.

177. MARA ET AL., *supra* note 170, at viii.

178. KEN HOWSE, PRISON REFORM TRUST, *GROWING OLD IN PRISON: A SCOPING STUDY ON OLDER PRISONERS* 6–7, available at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Growing%20Old%20in%20Prison%20-%20a%20scoping%20study.pdf>.

179. Pamela J. Taylor & Janet M. Parrott, *Elderly Offenders: A Study of Age-Related Factors Among Custodially Remanded Prisoners*, 152 *BRIT. J. PSYCHIATRY* 340, 341 (1988) (noting a study of a South London prison in which men over the age of sixty-five accounted for just 2% of offenders remanded to custody for a violence charge).

180. *Id.* at 342.

counterparts.<sup>181</sup> Furthermore, a large study of English prisoners demonstrated that 83% of older male prisoners reported an illness or a disability.<sup>182</sup>

While English prisons do include a population of elderly offenders, that population is relatively small<sup>183</sup> (only 6,100 inmates in 2008).<sup>184</sup> This may be a result of England's more lenient sentencing approach toward elderly offenders.<sup>185</sup> For example, older offenders are more likely to receive probation orders instead of custodial sentences or fines than their younger counterparts.<sup>186</sup> English courts have also resorted to releasing elderly offenders from custody for trivial offenses<sup>187</sup> or, at the very least, reducing the length of their custodial sentences.<sup>188</sup>

Although the population of elderly inmates in England remains small, it is nonetheless on the rise.<sup>189</sup> Some suggest that a strategy of probation for older offenders should be implemented in order to combat this problem,<sup>190</sup> although others caution that overusing probation might incur age discrimination complaints.<sup>191</sup> Scholars nonetheless justify disparate treatment because the same

181. *Id.*

182. Francesca Harris & Louise Condon, *Health Needs of Prisoners in England and Wales: The Implications for Prison Healthcare of Gender, Age, and Ethnicity*, 15 HEALTH & SOC. CARE COMMUNITY 56, 62 (2007).

183. Taylor & Parrott, *supra* note 179, at 343 (noting that the contribution of elderly to indictable crime is small).

184. Matthew Davies, *The Reintegration of Prisoners: An Exploration of Services Provided in England and Wales*, INTERNET J. CRIMINOLOGY (2011), available at [http://www.internetjournalofcriminology.com/Davies\\_The\\_Reintegration\\_of\\_Elderly\\_Prisoners.pdf](http://www.internetjournalofcriminology.com/Davies_The_Reintegration_of_Elderly_Prisoners.pdf).

185. *Id.* See also S. Lynch, *Criminality in the Elderly and Psychiatric Disorder: A Review of the Literature*, 28 MED., SCI. & LAW 65 (1988) (postulating that the public's sympathy for the perceived frailty of the elderly is likely to lead to this group being treated more leniently).

186. Graeme Yorston, *Aged and Dangerous: Old Age Forensic Psychiatry*, 174 BRIT. J. PSYCHIATRY 193 (1999).

187. Taylor & Parrott, *supra* note 179, at 346 (describing Mr. A, who was released after a three week remand to custody due to the triviality of the charges and his age). See also Susan Easton, *Dangerous Waters: Taking Account of Impact in Sentencing*, 2008 CRIM. L. REV. 105, 110 (noting that the Court of Appeal is currently more likely to take account of impact in practice if the offences are less serious).

188. R v. NR, [2005] EWCA (Crim) 2221 (reducing a sentence from thirteen years to ten for a sixty-eight-year-old sex offender, solely on the grounds of his age and ill health).

189. Helen Codd & Gaynor Bramhall, *Older Offenders and Probation: A Challenge for the Future?*, 49 PROBATION J. 27, 32 (2002). See HOWSE, *supra* note 178, at 1 (noting that older prisoners are the fastest growing group within the prison population).

190. Codd & Bramhall, *supra* note 189, at 32.

191. Molly Andrews, *The Seductiveness of Agelessness*, 19 AGEING & SOC'Y 301, 309 (1999).



sentence will impact an older offender differently than a younger one.<sup>192</sup> For example, a two-year prison sentence may be perceived as a rite of passage for a young gang member, whereas that same sentence could result in a death sentence for an unhealthy seventy-five-year-old.<sup>193</sup> By considering a sentence's impact on the particular offender, the focus of sentencing becomes the *quality* of the sentence as opposed to the *quantity*.<sup>194</sup> As a result, impact then becomes a factor in considering a sentence reduction. Because of the rising costs associated with elderly inmates, it is important to find alternative methods to treating these elderly inmates.

#### **D. Breach of Probation or Community Order**

In addition to drug offenders and elderly inmates, technical probation violators represent a population of inmates in the United States that is on the rise, and unnecessarily so. Like the other categories of offenders, the population of technical probation violators increased following the adoption of TIS guidelines. Because U.S. judges are fairly restricted in how they deal with probation violators, many of these offenders are returning to prison for violation of a condition of probation, rather than the commission of a new offense. Many problems with this practice have been identified, and several states have begun exploring alternatives to sending technical probation violators back to jail.

Conversely, English judges have far more discretion when dealing with offenders who breach a community order. Because of this discretion, the prison population of community order violators is far smaller than the technical probation violator population in the United States.

##### **1. Probation Violators in the United States**

Nonviolent technical probation violators are another group comprising a large percentage of prison populations and contributing to overcrowding.<sup>195</sup> When a probationer does not comply with the minimal obligations of his or her

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192. See, e.g., Christine Piper, *Should Impact Constitute Mitigation?: Structured Discretion Versus Mercy*, 2007 CRIM. L. REV. 141, 150.

193. MICHAEL TONRY, SENTENCING MATTERS 19 (1996).

194. Piper, *supra* note 192, at 150.

195. Joan Petersilia, *A Crime Control Rationale for Reinvesting in Community Corrections*, 75 PRISON J. 479, 488 (1995) (“[H]igh failure rates of probationers and parolees . . . contribute significantly to prison crowding.”); see also Weinstein, *supra* note 62, at 200 (“Most of the prison growth in the last thirty years in the United States has been driven by . . . the increased imprisonment of offenders on supervised release, probation, or parole who violate conditions of supervision.”).

probation—fails to appear for a scheduled appointment, fails a drug test, or fails to fulfill a special condition—it is likely that he or she will be incarcerated, even though the original charge did not merit a jail sentence and the probationer has not been charged with engaging in new criminal activity.<sup>196</sup> Occasionally, state probation violators are charged with new crimes; however, only 25% of violators are charged with committing a violent crime.<sup>197</sup> As a result, nonviolent probation violators are too frequently incarcerated. The resulting prison stay is often for an extraordinarily long period of time and usually comes at a great cost to the states.<sup>198</sup> For example, the phenomenon of returning parole violators to prison costs the state of California approximately \$43,000 each year per parole violator,<sup>199</sup> or an annual cost of about \$1 billion.<sup>200</sup>

Because probation and parole violators are not immune from TIS guidelines, the prison population of these offenders is growing. From 1980 to 2004, the number of parolees nationally more than tripled.<sup>201</sup> During this same time frame, states began to crack down on technical probation violators.<sup>202</sup> As a result, 1 in 3 prisoners are behind bars because their parole has been revoked, a figure that has risen from 1 in 5 in the 1980s.<sup>203</sup> In 2009, probation and parole violators represented 35% of the state prison population.<sup>204</sup> This percentage represents a drastic increase from the percentage of probation violators in the state prison population in 1980: 17%.<sup>205</sup> For example, California found a 106.7% increase in the number of parole violators returned to prison from 1998 to 2008.<sup>206</sup>

Once a probationer violates the terms of probation, U.S. judges are fairly restricted when imposing punishment.<sup>207</sup> For certain types of violations, including

196. Andrew Horowitz, *The Costs of Abusing Probationary Process: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753 (2010).

197. ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991 at 2 (1995), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/PPVSP91.pdf>.

198. *Id.*

199. Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 71 (2008).

200. Patricia L. Eichar, *Chapter 484: From Home Detention to GPS Monitoring*, 37 MCGEORGE L. REV. 284, 284 (2006).

201. Emily Bazelon, *Catch and Release*, LEGAL AFF., Mar.–Apr. 2004, at 36.

202. *Id.*

203. *Id.*

204. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 1, 5 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

205. Horowitz, *supra* note 196, at 764.

206. CAL. DEP'T OF CORR. & REHAB., CHARACTERISTICS OF FELON NEW ADMISSIONS AND PAROLE VIOLATORS RETURNED WITH A NEW TERM 1 (2009).

207. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 7B1.3 (2009).

felony or violent crimes or possession of a controlled substance, federal judges are required to revoke probation.<sup>208</sup> If the offender commits a lesser violation, such as violating a condition of supervision, the court has discretion to revoke probation or extend or modify the conditions of the probation.<sup>209</sup> However, the U.S. Sentencing Guidelines suggest that probation should be revoked for a second violation of probation conditions.<sup>210</sup> While judges do have discretion for violations, once they decide to revoke probation, they must impose a term of imprisonment.<sup>211</sup> Furthermore, this term of imprisonment is dictated by the Sentencing Guidelines rather than the judge's discretion.<sup>212</sup> The only discretion federal judges have in imposing the term of imprisonment is to choose to combine terms of imprisonment of less than one year with a term of supervised release.<sup>213</sup> Federal judges do not have the ability to resentence the offender, but instead are restricted by the U.S. Sentencing Guidelines.<sup>214</sup> However, states are beginning to take a more lenient stance with technical parole violators and are finding alternatives to an automatic return to custody.<sup>215</sup>

In addition to the costs of incarcerating probation violators, a related problem concerns probation officers; dealing with technical probation violators is a time-consuming task.<sup>216</sup> Probation officers spend a great deal of time monitoring individual compliance with technical probation conditions imposed by courts, and, when violations are discovered, officers spend additional time processing paperwork to revoke an offender's probation status.<sup>217</sup>

Due to the scarcity of prison beds, "policy makers have begun to wonder whether revoking probationers and parolees for technical violations . . . makes sense."<sup>218</sup> They note that while it is important to take some disciplinary action, it is not always obvious that prison is the best response.<sup>219</sup> Because of the associated costs, violators should instead be examined for early release or a sentence reduction. Some wonder whether the deterrence benefit of revoking probationers for technical violations is worth the police overtime, jail costs, and prison costs

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208. *Id.*

209. *Id.* § 7B1.1.

210. *Id.* § 7B1.3 cmt. n.1.

211. *Id.* § 7B1.4.

212. *See* U.S. SENTENCING COMM'N, *supra* note 207, § 7B1.4.

213. *Id.* § 7B1.3.

214. *Id.*

215. *See* Angelyn C. Frazer & Adam R. Diamond, *State Criminal Justice Network Legislative Update*, CHAMPION, Apr. 2011, at 49.

216. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 151 (1997).

217. *Id.*

218. *Id.* at 166.

219. *See id.*

associated with the return to jail.<sup>220</sup> In fact, Kansas and Arizona have enacted legislation that monetarily rewards local governments that decrease the percent of probationers who are returned to prison for technical violations.<sup>221</sup> If these offenders are not criminally dangerous, but returning to prison only for a technical violation, devoting prison resources to them appears unnecessary.<sup>222</sup>

## 2. Community Order Violators in England

While offenders in the United States who violate the terms of their release are often imprisoned, England does not enforce mandatory custodial sentences for breaches of community orders.<sup>223</sup> The breach of a community order does not carry a presumption that a custodial sentence will follow, although if a court decides to impose one, English law does not mandate a particular sentence length.<sup>224</sup> Furthermore, the Court of Appeals has the ability to resentence offenders who breach their initial community order, instead of revoking the order and requiring the offender return to custody.<sup>225</sup>

The English government has recently pushed for greater flexibility in dealing with breaches of a community sentence.<sup>226</sup> The Ministry of Justice has

220. *Id.* at 193; K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 320 (2009).

221. ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, PROBATION AND PAROLE VIOLATIONS: STATE RESPONSES 5 (2008), available at <http://www.ncsl.org/print/cj/violationsreport.pdf>.

222. *Id.*

223. David Thomas, *The Criminal Justice Act 2003: Custodial Sentences*, 2004 CRIM. L. REV. 702, 702 ("Mandatory sentences of imprisonment for breach of community orders . . . [were] abandoned without ever being brought into force.").

224. David A. Thomas, *Sentencing: Suspended Sentence Order – Breach of Community Requirement Order – Powers of Crown Court*, 5 CRIM. L.R. 398, 399 (2008).

225. *R. v. Phipps* (Stephen Donald), [2007] EWCA (Crim) 2923 (reversing the revocation of a community order and resentencing when the offender breached his initial community order). In a similar case, the Court held that the sentencing judge could not have exercised discretion if he had passed a custodial sentence when the original order was made, as the judge based his decision not to allow the remand time on circumstances that did not yet exist. *R. v. Stickley* (Joanna), [2007] EWCA (Crim) 3184. The Court further stated that the sentencing judge should have dealt with the appellant following the breach of the community order as if nothing had happened since the order was made. *Id.*

226. MINISTRY OF JUSTICE, *BREAKING THE CYCLE: EFFECTIVE PUNISHMENT, REHABILITATION AND SENTENCING OF OFFENDERS*, 2010, Cm. 7972 (U.K.) [hereinafter *BREAKING THE CYCLE*]. See also Andrew Ashworth, "*Breaking the Cycle*": *The Coalition Government's Green Paper*, 2011 CRIM. L. REV. 85, 86 (discussing the proposals to return to greater professional discretion for breaches of community sentences including whether to

proposed a mere warning for less serious breaches.<sup>227</sup> Furthermore, the Ministry has avoided mandatory custodial sentences for breaches, instead suggesting that the offenders return to court facing only the *possibility* of custody.<sup>228</sup> This stands in stark contrast to the United States, where, again, defendants who violate probation are generally subjected to mandatory minimum sentences.<sup>229</sup>

### III. REGRESSION ANALYSIS OF THE COST OF TRUTH IN SENTENCING

Arizona is an appropriate example of the costs associated with TIS policies. Following the implementation of the federal grant program in 1994, twenty-eight states and the District of Columbia required that prisoners served at least 85% of their sentence.<sup>230</sup> Because Arizona employs this policy, its prison population can be used to demonstrate the significant problems associated with TIS and mandatory sentencing policies. By applying linear regression analysis to the sample, I will roughly predict the amount of money that would be saved by Arizona if the identified classes of offenders were to serve only 50% of their prison sentences as opposed to the 85%. Linear regression analysis examines how a dependent variable (money saved) is affected by several dependent variables (drug offenders, technical probation violators, elderly offenders). The results of the regression analysis provide a rough figure denoting the sums that could be saved if the proposed policies were implemented. Furthermore, the results of this analysis are helpful predictors of cost savings that can be realized if similar TIS reduction policies are implemented in other jurisdictions. Importantly, England does not face these problems to the same extent, which highlights the need for legislators in the United States to explore applying some of England's sentencing policies.

#### A. Data and Measures

To determine the savings that could result from releasing a nonviolent population of offenders earlier than their minimum sentences require, I analyzed a dataset of inmates admitted into the Arizona State Prison system from 1985 to

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use a reprimand for a young offender, whether to make a referral order on a young offender).

227. BREAKING THE CYCLE, *supra* note 226, at 17.

228. *Id.*

229. *What the Courts May Not Be Telling Defendants*, 47 BOS. BAR J. 10, 12 (2003).

230. DITTON & WILSON, *supra* note 1, at 2.

2004.<sup>231</sup> This sample contains data on more than 172,000 inmates. I identified three populations of nonviolent offenders: drug offenders, technical probation violators, and elderly offenders. I isolated nonviolent offenders<sup>232</sup> by using the type of felony of the most serious crime for which the inmate was convicted and included only inmates who committed a nondangerous crime as indicated in the data sample. From that group, I identified drug offenders, as defined by the Arizona Revised Statutes,<sup>233</sup> using the most serious offense for which the inmate was convicted. I distinguished and isolated technical probation violators by using the commitment type variable in the database, which identified how the offender was committed to prison.<sup>234</sup> Finally, I distinguished the elderly population by isolating individuals admitted into the corrections system after the age of forty-five. Once the three populations were identified, I accounted for double counting of individuals by creating three new variables. There were 3,084 offenders who were both technical probation violators and over age forty-five; 11,355 offenders who were both technical probation violators and drug offenders; and 3,299 drug offenders who were over age forty-five.

After isolating these three groups of nonviolent offenders, I next created time-served variables for the actual expected time of 85% of the sentence and the proposed time of 50%<sup>235</sup> of the imposed sentence.<sup>236</sup> These variables allowed me to determine the cost savings by comparing the differences in time served. To determine the years that would be saved by allowing these individuals to serve 50% as opposed to 85% of their respective sentence terms, I subtracted the proposed TIS variable from the actual TIS variable.<sup>237</sup> To ascertain the amount of money saved, I multiplied the years saved variable by the daily cost of housing

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231. This dataset was acquired from personnel of the Arizona Department of Corrections (ADOC) by Drs. Neil Vance and Jun Peng for a research project regarding the Arizona prison population. However, this study was never completed, and the dataset was given to me for use in the research presented here. Dr. Craig Smith, at the University of Arizona, helped with statistical analysis of the data.

232. Nonviolent offenders must be isolated because violent offenders should not be considered a population that can be safely released into society.

233. ARIZ. REV. STAT. § 13-3401 et seq. (2010).

234. Inmates with a “1” were direct court commitments, inmates with a “2” were technical probation violators, and inmates with a “3” were new offense probation violators.

235. The figure 50% was chosen because it still requires offenders to serve a substantial portion of their sentences, which meets the goal of incapacitation that truth-in-sentencing policies attempt to achieve. The percentage also represents a significant decrease from the current 85% that would not only address the problem of prison overcrowding, but also result in substantial savings of prison costs.

236. I used the sentence imposed for the most serious offense to maintain consistency since the populations were identified based on their most serious offense.

237. This was an average figure based on all offenders in the isolated populations and is not specific to any population; it does not account for extreme values.

one inmate according to the Arizona Department of Corrections (\$61.74),<sup>238</sup> which I then multiplied by 365 days to give a yearly figure. I then calculated the average yearly cost savings over the twenty-year period.<sup>239</sup>

I ran a simple linear regression using the money-saved figure as the dependent variable, drug offenders as the dummy variable (a variable that allows me to see the presence or absence of drug offenders), and technical probation violators as the independent variable.<sup>240</sup> This revealed the average cost savings for each of the individuals in each of the isolated populations. To get the money saved for each category of offender, I multiplied the average cost savings for each of the populations by the number of inmates committed to the Arizona prison system during the twenty-year period. To account for double counting, the individuals who appeared in more than one category were subtracted from the overall populations, which yielded a more accurate representation of the true population.<sup>241</sup> I multiplied these final population figures by their respective monetary values to yield the total money that would have been saved over the twenty-year period for each population and then summed these figures to determine the total figure for the twenty-year period if these offenders had been allowed to serve 50% as opposed to 85% of their respective sentence terms.

## **B. Results**

There were 160,072 nonviolent offenders incarcerated in Arizona from 1985 to 2004. There were 34,599 drug offenders, 14,992 offenders over age forty-five, and 46,587 technical probation violators. After subtracting those

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238. This number was supplied by the same ADOC person who supplied the dataset. *See supra* note 231.

239. This value is an average of all of the individuals in the isolated populations and is not specific for any one population. In addition, it does not account for extreme values. The money saved variable had missing values, which were set to the mean of the money saved to allow for a regression analysis.

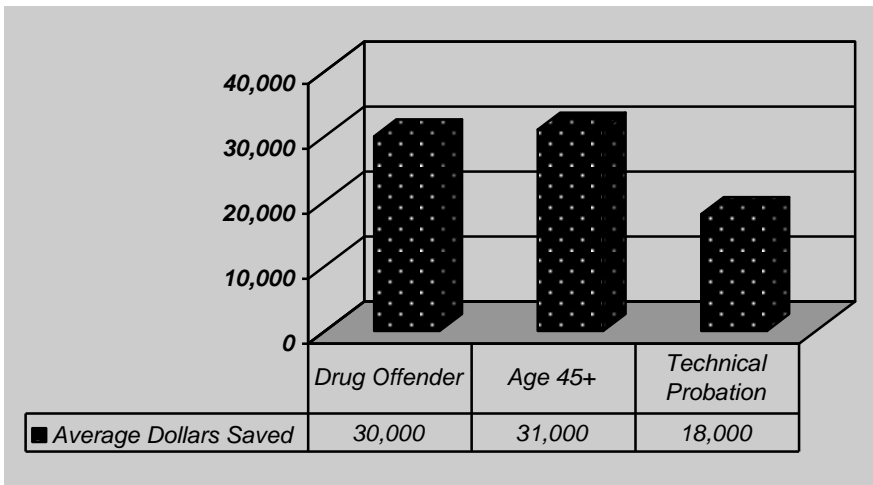
240. The elderly dummy variable was excluded making the elderly variable the base case in the regression analysis.

241. If an individual was a technical probation violator and over the age of forty-five, that individual was subtracted from the elderly population and included in the technical probation violators. If an individual was a technical probation violator and a drug offender, that individual was subtracted from the drug offender population and included in the technical probation violators. If an individual was a drug offender and over the age of forty-five, that individual was subtracted from the elderly population and included in the drug offenders.

offenders who would be double counted, there were 8,609 offenders over age forty-five, 23,264 drug offenders, and 46,587 technical probation violators.<sup>242</sup>

On average, inmates would spend 2.93 years under the 85% TIS guideline but only 1.72 years under the proposed 50% guideline, a difference of 1.21 years. This would result in savings of about \$27,000 per inmate over the twenty-year time span. More specifically, if the 50% guideline were applied to each category of offender, about \$31,000 would have been saved for every inmate over the age of forty-five; about \$30,000 would have been saved for every drug offender; and approximately \$18,000 would have been saved for every technical probation violator.

**Figure 1: Amount Saved Per Offender by Category**

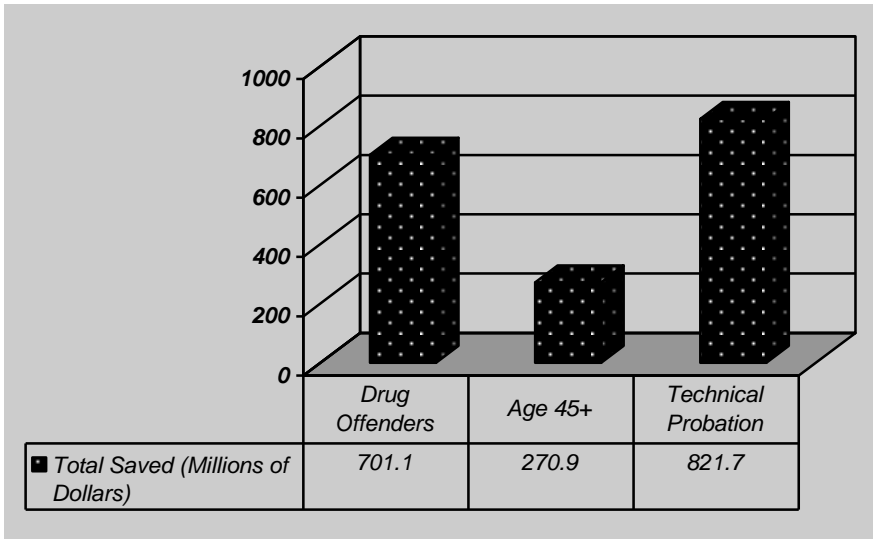


In the aggregate, the total money that would have been saved over the 1985–2004 period for each category was about \$271 million for offenders over age forty-five, about \$701 million for drug offenders, and approximately \$822 million for technical probation violators.

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242. There were 3,084 offenders who were both technical probation violators and over the age of forty-five; 11,355 offenders who were both technical probation violators and drug offenders; and 3,299 drug offenders who were over the age of forty-five.



**Figure 2: Total Amount Saved Per Category of Offender**

The total amount saved would have been about \$1.8 billion over the twenty-year span (or around \$90 million per year) if each of the suggested individuals had been allowed to serve 50% instead of 85% of his or her total sentence.<sup>243</sup>

### **C. Limitations of Study and Future Research**

While the analysis demonstrates that a substantial amount of savings can be generated by applying the 50% guideline, there are limitations to the study. However, even with the limitations, adopting a 50% guideline instead of an 85% guideline for nonviolent drug offenders, technical probation violators, and elderly inmates would generate tens of millions of dollars of savings for states that choose to do so. The limitations of this study fall into two categories: limitations stemming from the computation of the figures themselves and limitations based on the populations of offenders.

Regarding the computations, the figures for years saved and money saved, as stated in the methods section, are strictly averages based on the entire twenty-year period and do not necessarily reflect the particular average years

243. No attempt has been made to adjust these figures for inflation.

spent for each of the populations.<sup>244</sup> Further, these numbers might not be accurate descriptions of the population at large as some sentences are extreme, and this may have led to positive skewing of the data.

In addition, the money saved variable was computed from the years saved variable, so the same problems that arose with the years saved variable apply. The average money saved figure applies to the entire population of nonviolent offenders, not the particular groups.<sup>245</sup> In addition to the problems carried over from the years saved variable, the money saved variable is based on the 2008 daily cost of housing one inmate. This is problematic for two reasons: (1) the daily cost of housing an inmate has not been constant, but has steadily increased since 1985, and (2) the value of the dollar has not remained constant over the past twenty-three years, and thus the total savings over the timeframe of the database is understated, at least in terms of today's money. It must also be noted that the yearly cost savings is a very crude estimate.<sup>246</sup> The analysis merely characterizes how the costs of housing inmates have been affected over time and does not represent the actual cost per year that would be saved based on the cost of housing an inmate during each year.<sup>247</sup>

In addition to the limitations with obtaining exact figures for each year, there are limitations regarding the populations of the offenders. One such limitation of this study is that the drug offender population includes both users and distributors. This is a problem because distributors should not receive the 50% guideline as distributing is a more serious offense than mere possession. Prior to analyzing the data, I intended to identify drug users but not distributors as individuals who should be considered to be released under the hypothetical 50% guideline. This was not possible, however, because Arizona law does not differentiate between users and distributors, making it impossible to identify which drug offenders were committed for possession and which were committed for distribution. Further studies should attempt to distinguish between users and distributors, as this would significantly alter the results.

In addition, while this study examined individuals who entered the prison system at or over age forty-five, it did not distinguish between individuals who were incarcerated before age forty-five but who would have reached age forty-five

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244. Average years spent for each of the populations was not calculated.

245. The reason for using these figures was to simplify the statistical analyses; more complex analyses could have been run to acquire more accurate numbers, and future studies should attempt to do this.

246. The yearly figures are merely an initial basis for future cost analyses to be run using this data and should not be represented as an accurate amount of money that could be saved.

247. In order to calculate the actual savings over the time period of the dataset, I would need to use the actual daily cost of housing an inmate from each year studied.

while in jail.<sup>248</sup> This is a limitation because it does not include all elderly offenders, but only those who were incarcerated over the age of forty-five. Future studies should attempt to incorporate these offenders.<sup>249</sup>

Finally, the study did not examine the effect of releasing ill inmates or inmates with disabilities under the hypothetical 50% guideline because the dataset did not include information regarding inmates' health or disability. Future studies should attempt to identify the amount of money that would be saved for allowing this population of inmates to be released early, as the money saved would likely be significant.

#### IV. POTENTIAL SOLUTIONS

There are many possible ways to curtail the costs associated with increasing prison populations. Home detention curfew (HDC) and electronic monitoring have been implemented with relative success in England. The United States has also adopted a version of a monitoring program with intensive supervision programs (ISP). In addition to monitoring, England has attempted to use day reporting centers (DRC), which allow inmates the freedom to live in their homes but provide them the structure necessary to reduce recidivism. Another option to reduce prison costs is the decriminalization of soft drugs. Not surprisingly, this is a hotly contested topic with many advantages and disadvantages to either side. And, of course, the early release of elderly inmates or technical probation violators can be used to help control prison populations.

##### **A. Home Detention Curfew and Electronic Monitoring**

Both England and the United States employ an intermediate sanction that relies on heavy monitoring. England employs home detention curfew coupled with electronic monitoring, which has received positive reviews. This program has helped alleviate the problem of prison overcrowding, is an effective cost saving alternative, and does not pose a significant risk of serious harm to the public.<sup>250</sup> Similarly, the United States has attempted to use intensive supervision programs to monitor the offenders who have been released from prison. By

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248. For example, offenders who were admitted at age forty-four and were sentenced to a five-year sentence should have been included in the category of elderly offenders as they would qualify for early release.

249. The data transformations necessary to include these individuals infringed on the parsimony of the analysis.

250. See Martin Killias et al., *Community Service Versus Electronic Monitoring – What Works Better?*, 50 BRIT. J. CRIMINOLOGY 1155, 1156 (2010).

allowing a nonviolent population of offenders to serve an alternative punishment, prison costs unnecessarily expended on these populations decrease.

### 1. England

England has implemented the use of home detention curfew, which allows those who might otherwise be imprisoned to be released on curfew.<sup>251</sup> Curfew requires offenders to be at a specific address for up to twelve hours, usually overnight.<sup>252</sup> Theoretically, HDC provides an opportunity for offenders to turn their lives around in a controlled way.<sup>253</sup> It also allows them to access work, education, family life, and society outside of prison, within a structured day.<sup>254</sup>

The HDC scheme was introduced in 1999 across the whole of England.<sup>255</sup> Under HDC, most prisoners who are sentenced to between three months and four years' incarceration<sup>256</sup> are eligible for release sixty days early on an electronically monitored curfew, provided that they pass a risk assessment and have a suitable address.<sup>257</sup> During the first sixteen months of the program, over 21,000 inmates were released on HDC, and only 5% were recalled to prison after a breakdown in their curfew.<sup>258</sup> Notably, of those recalled, only eight (less than 1%) were returned to custody because they represented a risk of serious harm to the public.<sup>259</sup> Not only has HDC had success with regard to the early release of offenders, but many involved with HDC have praised its success.<sup>260</sup>

Like all sentencing alternatives, the use of HDC carries advantages and drawbacks. English officials report an average savings of £70<sup>261</sup> (U.S. equivalent

251. OLIVIER MARIE, KAREN MORETON, & MIGUEL GONCALVES, THE EFFECT OF EARLY RELEASE OF PRISONERS ON HOME DETENTION CURFEW (HDC) ON RECIDIVISM 2 (2011), available at <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/effect-early-release-hdc-recidivism.pdf>.

252. COMM. PUB. ACCOUNTS, THE ELECTRONIC MONITORING OF ADULT OFFENDERS, 2005–2006, H.C. 62, at 4 (U.K.) [hereinafter ELECTRONIC MONITORING], available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpublic/997/997.pdf>.

253. *Id.* at 10.

254. *Id.*

255. KATH DODGSON ET AL., ELECTRONIC MONITORING OF RELEASED PRISONERS: AN EVALUATION OF THE HOME DETENTION CURFEW SCHEME iii (2001), available at <http://library.npia.police.uk/docs/hors/hors222.pdf>.

256. *Id.*

257. *Id.*

258. *Id.* at iii–iv.

259. *Id.* at iv.

260. DODGSON ET AL., *supra* note 255, at v (noting that curfewees, family members, and supervising probation officers have suggested that the scheme has achieved success in easing the transition from custody into the community).

261. ELECTRONIC MONITORING, *supra* note 252, at 3.

of \$108) per offender per day (or roughly £63.4 million per year, U.S. equivalent of \$98.1 million) from using electronic monitoring as opposed to prison.<sup>262</sup> Furthermore, HDC's risk assessment process for determining who would be an appropriate candidate for release has been extremely effective, with only 9.3% of HDC offenders receiving a reconviction after their automatic release date, compared to 40.5% of those who refused to participate in the program.<sup>263</sup> However, while HDC has successfully aided the transition of offenders from custody to the community, it has not drastically reduced recidivism rates for its participants.<sup>264</sup> Even so, many advocate for the use of HDC and electronic tagging, and call for the scheme to be expanded to include a wider range of offenders approaching the end of their custodial sentences.<sup>265</sup> Furthermore, the majority of the public believes that electronic monitoring should be used for nonviolent offenders as an alternative to prison.<sup>266</sup>

## 2. United States

Some states use intensive supervision programs (ISPs), which are community-based criminal sanctions that emphasize close monitoring—such as boot camps, day reporting centers, and electronic monitoring—as an alternative to prison.<sup>267</sup> As an intermediate sanction, ISPs use the same intensive supervision element as HDCs, without confining offenders to their homes for set amounts of time. ISPs have been used for both adult and juvenile low-risk offenders.<sup>268</sup>

There have been mixed findings on the efficacy of ISPs. Some have found that they generally do not alleviate prison crowding and can actually exacerbate the problem.<sup>269</sup> ISPs also generate considerable costs, particularly when agencies incarcerate technical violators. Because of the intense supervision required to implement ISPs, more technical violations are reported, which results

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262. DODGSON ET AL., *supra* note 255, at vii.

263. *Id.* at ix.

264. *Id.* at ix (stating that 30.5% of HDC offenders were reconvicted compared to 30.0% of offenders who did not participate in HDC).

265. *Tagging: A Viable Alternative to Prison?*, BBC NEWS, [http://news.bbc.co.uk/hi/english/static/in\\_depth/uk/2001/life\\_of\\_crime/e\\_tagging.stm](http://news.bbc.co.uk/hi/english/static/in_depth/uk/2001/life_of_crime/e_tagging.stm) (last visited Aug. 15, 2012) (noting that some believe HDC could be used for twice the number of offenders currently tagged).

266. *Id.*

267. Joan Petersilia, *Beyond the Prison Bubble*, 75 FED. PROBATION 2, 4 (2011).

268. Carol A. Schubert et al., *Predicting Outcomes for Youth Transferred to Adult Court*, 34 LAW & HUM. BEHAV. 460, 465 (2010).

269. Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 CRIME & JUST. REV. RES. 281, 311 (1993) (“At the end of the one-year follow-up, about 37% of ISP and 33% of control offenders had been officially arrested . . . . [A]n average of 65% of the ISP clients experience a technical violation compared with 38% of the controls.”).

in more prison commitments.<sup>270</sup> However, statistics from New York drug courts show that since the inception of ISPs there in 2002, the rate of offenders successfully completing the program was estimated at 45% which is extraordinarily high.<sup>271</sup> Further, while they do have some support, most feel that ISPs are no more effective than routine probation in reducing recidivism, despite the fact that the staff has significantly more contact with offenders.<sup>272</sup> In response to the lack of success of ISPs, the United States should adopt England's use of HDCs combined with electronic monitoring, instead of ISPs combined with electronic monitoring.

### **B. Day Reporting Centers**

Day reporting centers are highly structured, nonresidential programs utilizing supervision sanctions and services coordinated from a central focus.<sup>273</sup> At DRCs, offenders are supervised and receive services throughout the day.<sup>274</sup> Participants are allowed to leave the DCR to work and attend school, and spend evenings at home, typically under electronic surveillance.<sup>275</sup> Furthermore, in DRCs, treatment and supervision is less costly and restrictive than incarceration but more secure than ordinary probation.<sup>276</sup>

DRCs started in Great Britain in the early 1970s as an alternative to incarceration for older petty criminals in response to prison overcrowding.<sup>277</sup> A decade later, England and Wales had over eighty DRCs.<sup>278</sup> DRCs continue to operate effectively and have found recognition as an aspect of probation supervision.<sup>279</sup> The success of these centers can be attributed to maintaining community safety by targeting petty criminals in danger of going to prison from the sheer number of nonviolent crimes they have committed, rather than for the heinousness of their crimes.<sup>280</sup>

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270. *Id.*

271. Weinstein, *supra* note 62, at 208 n.1001.

272. Matthew DeMichele & Brian K. Payne, *Probation and Parole Officers Speak Out – Caseload and Workload Allocation*, 71 FED. PROBATION 30, 34 (2007).

273. DAVID W. DIGGS, DAY REPORTING CENTERS AS AN EFFECTIVE CORRECTIONAL SANCTION 1 (2008), available at <http://www.fdle.state.fl.us/Content/getdoc/36d83075-990c-4c75-80c1-71227a823655/Diggs.aspx>.

274. Christine Martin et al., *An Examination of Rearrests and Reincarcerations Among Discharged Day Reporting Center Clients*, 67 FED. PROBATION 24, 24 (2003).

275. *Id.*

276. DIGGS, *supra* note 273, at 3.

277. *Id.* at 2.

278. *Id.*

279. *Id.* at 8.

280. *Id.*

Proponents of DRCs argue that imprisonment is an ineffective sanction for nonserious but chronic offenders who use drugs and alcohol and lack basic living skills.<sup>281</sup> Instead, DRC provides a range of options as it can be imposed as pretrial detention option, a direct sentence, a condition of probation, an intermediate punishment, or a halfway-back sanction for probation or parole violators.<sup>282</sup>

In order to combat the increasing population of drug offenders in American prisons, the United States could rely more heavily on day reporting centers instead of imprisonment. In 1986, the United States implemented DRCs in response to prison overcrowding and was strongly influenced by British day centers.<sup>283</sup> While some report that DRCs are successful,<sup>284</sup> there is less than enthusiastic support for their widespread use.<sup>285</sup> Some caution against the overuse of DRCs,<sup>286</sup> believing this could lead to a loosening of standards, so that programs would be required to accept dangerous clients or clients who do not possess the necessary motivation.<sup>287</sup> Additionally, critics argue that costs will increase and offenders' chances of success are diminished as DRCs impose more supervision, sanctions, and services on the offender.<sup>288</sup> DRCs are another example of an alternative to sentencing, which if properly operated and monitored, could save prison expenses while ensuring offenders receive the rehabilitation necessary to prevent recidivism.

### **C. Decriminalizing Soft Drugs**

Another option that may help address the prison population problem is the decriminalization of soft drugs. By reducing the penalties for crimes involving soft drugs, such as marijuana, states would reduce the number of offenders convicted of drug offenses. Proponents argue that the actual "gateway"

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281. DIGGS, *supra* note 273, at 8.

282. *Id.* at 3.

283. Liz Marie Marciniak, *The Addition of Day Reporting to Intensive Supervision Probation: A Comparison of Recidivism Rates*, 64 FED. PROBATION 34, 34 (2000).

284. Martin et al., *supra* note 274, at 29 (noting that the Cook County DRC program is extremely successful with participants showing dramatic decreases in illegal drug use, low rearrests rates, and high court-appearance rates while participating in the program); DIGGS, *supra* note 273, at 8 (noting that Massachusetts have reported successful completion rates of 66% to 81% and Orange County's DRC reported a success rate of 82% with only one client rearrested while in the program).

285. Marciniak, *supra* note 283, at 37; Michael Tonry & Mary Lynch, *Intermediate Sanctions*, in CRIME & JUSTICE 99 (Michael Tonry ed., 1996).

286. R. Corbett, Jr., *Day Centers and the Advent of a Mixed Model in Corrections*, 4 INT'L ASS'N RESIDENTIAL COMMUNITY ALTERNATIVES J. 26, 26 (1992).

287. *Id.*

288. DIGGS, *supra* note 273, at 8.

to the abuse of hard drugs is not soft drugs, but participation in the illegal drug market.<sup>289</sup> Therefore, by taking control of marijuana (the most popular illicit drug) from organized crime groups, drug users' exposure to other, hard drugs will be reduced.<sup>290</sup> A majority of European Union countries have already taken this approach.<sup>291</sup>

England has also considered taking this route.<sup>292</sup> In late October of 2001, it was announced that England would no longer arrest or caution people for marijuana possession.<sup>293</sup> Home Secretary David Blunkett suggested that the Labour Party was ready to discuss allowing the legal distribution of heroin to addicts and reclassifying ecstasy as a soft drug, while also reducing penalties for its manufacture, sale, and possession.<sup>294</sup> Paul Flynn, a Labour Member of Parliament from Wales, indicated that the British were the last people of the European Union to move away from criminally enforced prohibition as front-line drug-abuse prevention.<sup>295</sup> Flynn noted that the Dutch were the first Europeans to back away from the U.S.-led drug war with positive results.<sup>296</sup> Twenty-five years after the Netherlands' change of policy, officials on the Health Committee of the Council of Europe noticed that drugs in the Netherlands seem to cause the least harm to individuals and society in Europe, while Britain's drug problem is among the worst in Europe.<sup>297</sup>

There have been many attempts to legalize marijuana in the United States and tax its sale.<sup>298</sup> Seventeen states and Washington, D.C., have legalized its use

289. *Effective Arguments for Advocates of Taxing and Regulating Marijuana*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/assets/pdfs/library/Effective-Arguments-for-T-R.pdf> (last visited Aug. 15, 2012).

290. DIGGS, *supra* note 273.

291. Robert Sharpe, *U.S. Should Follow Europe's Lead in Drug-Law Reform*, NEWSDAY (Jan. 2, 2002, 7:00PM), <http://www.newsday.com/u-s-should-follow-europe-s-lead-in-drug-law-reform-1.461487>.

292. Adam J. Smith, *Drug War Retreat: England Moves to Decriminalize Narcotics*, IN THESE TIMES, Dec. 7, 2001, <http://www.inthesetimes.com/issue/26/03/news1.shtml>.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*; see also Ed Leuw, *Drugs and Drug Policy in the Netherlands*, 14 CRIME & JUST. 229, 230 (1991) (noting that the Netherlands first legalized cannabis and hashish in the Opium Act of 1976 in an attempt to reduce risks of drug addiction, rather than at the wholesale eradication of drug use, and that the Dutch rejected wholesale eradication as unrealistic because it was considered inevitably futile and because repressive attempts to eradicate drug use were believed likely to produce social damage, rather than to prevent it or cure it).

297. Smith, *supra* note 292.

298. See, e.g., John Stang, *Poulsbo Legislator Again Backing Marijuana Legalization Bill*, KITSAP SUN, Jan. 25, 2011, <http://www.kitsapsun.com/news/2011/jan/25/poulsbo-legislator-again-backing-marijuana-bill/> (reporting on a marijuana-legalizing bill



for medical purposes.<sup>299</sup> Further, support for the reform of the legal treatment of marijuana appears to be growing.<sup>300</sup> A recent California ballot initiative proposing to completely legalize marijuana was only narrowly voted down, drew worldwide media attention, and stimulated vigorous debate over the nation's drug policies.<sup>301</sup> Furthermore, polls have shown growing support for marijuana legalization nationwide; post-election polls even suggest that the proposition might have passed if proponents had had the money for a campaign to reach swing voters.<sup>302</sup>

Much of the support for the decriminalization of marijuana in the United States stems from budget pressures and limits on prison capacity.<sup>303</sup> The drug war in Mexico is another factor in considering the legalization of marijuana.<sup>304</sup> The prohibition of drugs in the United States drives the drug market underground, which means that buyers and sellers cannot resolve their disputes through lawsuits, arbitration, or advertising; instead, they resort to violence.<sup>305</sup> Finally, the public is beginning to support the legalization of marijuana, representing a change in public sentiment.<sup>306</sup>

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introduced in the Washington state legislature); *State Senator Wants to Look at Legalizing Marijuana*, Fox 59, Jan. 25, 2011, <http://www.fox59.com/news/wxin-state-senator-wants-to-look-at-01252011,0,6451332.story> (stating that Indiana Senator Karen Tallian had asked a Senate committee to recommend legalizing marijuana); *NORML's Weekly Legislative Round Up*, IDAHO NORML, Jan. 28, 2011, <http://idahonorml.org/norml's-weekly-legislative-round-up> (noting that Idaho, Oregon, and Massachusetts are among states that have or are considering legalizing marijuana).

299. Those states are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, plus the District of Columbia. MEDICAL MARIJUANA, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Sept. 7, 2012).

300. Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 981 (2010).

301. John Hoefel, *Marijuana Legalization Advocates Organize to Put New Measure on California Ballot*, L.A. NOW BLOG (Mar. 18, 2011, 12:34 AM), <http://latimesblogs.latimes.com/lanow/2011/03/new-medical-marijuana-initiative-in-california.html> (noting that Proposition lost 46% to 54%).

302. *Id.*

303. *Id.*

304. David Crary, *Bad Times May Be Good for Pot Legalization Push*, S.F. CHRON., June 21, 2009, at A8.

305. Jeffrey A. Miron, *Commentary: Legalize Drugs to Stop Violence*, CNN, Mar. 24, 2009, [http://articles.cnn.com/2009-03-24/politics/miron.legalization.drugs\\_1\\_prohibition-drug-traffickers-violence?\\_s=PM:POLITICS](http://articles.cnn.com/2009-03-24/politics/miron.legalization.drugs_1_prohibition-drug-traffickers-violence?_s=PM:POLITICS)

306. National polls show close to half of American adults are not open to legalizing marijuana. *Id.*

While there is growing support for the legalization of soft drugs, many still oppose this strategy.<sup>307</sup> Opponents think that the increased availability of drugs would inevitably lead to the increased use of drugs.<sup>308</sup> Moreover, critics argue that legalization would fail to eliminate the black market for drugs.<sup>309</sup> Legal marijuana, they argue, will always be more expensive than street marijuana because legal marijuana will always carry a surcharge.<sup>310</sup> Opponents also believe that there will be neither significant reduction in prison costs nor any significant increases in revenue.<sup>311</sup> These opponents argue that the only marijuana offenders in prison are those involved in drug trafficking, not those convicted of possession of marijuana.<sup>312</sup> Because these opponents believe that drug trafficking will not be curtailed by the legalization of marijuana, they also believe that prisons will maintain their levels of marijuana offenders.<sup>313</sup> Although decriminalizing soft drugs may carry some inherent risks, it provides an alternative to imposing unnecessary sentences for those convicted of minor drug offenses.

#### **D. Early Release of Certain Populations**

Another way to reduce prison populations and costs is to release certain nonviolent populations of offenders early. For example, technical probation violators serving prolonged sentences occupy valuable prison space and contribute to higher prisons costs. Pennsylvania implemented such a program in 1998.<sup>314</sup> Instead of serving their entire sentence in prison, the violators served six months in prison, followed by six months in a Community Corrections Center (CCC) or a halfway house, and finally six months on parole.<sup>315</sup> CCCs present an advantage over prison because they provide nonviolent offenders an opportunity to serve their punishment outside of prison walls, thereby saving the state the cost of housing them. Accordingly, these practices reduce incarceration costs because participants are incarcerated for significantly shorter periods of time than those

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307. Symposium, *Alternatives to Current Sentencing and Traditional Parole*, 23 S. ILL. U. L.J. 319, 321 (1999).

308. *Id.*

309. *Id.*

310. Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 2009 WIS. L. REV. 1349, 1350 (2009).

311. *Id.*

312. *Id.* at 1369.

313. *Id.*

314. RACHEL PORTER, *BREAKING THE CYCLE: OUTCOMES FROM PENNSYLVANIA'S ALTERNATIVE TO PRISON FOR TECHNICAL PAROLE VIOLATORS 2* (2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/197056.pdf>.

315. *Id.*

who do not participate in the community corrections program.<sup>316</sup> In addition, of those released under the program less than 1% were incarcerated for new offenses.<sup>317</sup> Further, the completion rate under community corrections programs is significantly higher than national U.S. averages for parolees, with 32% of offenders completing the program compared to 20% of second-time parolees.<sup>318</sup> Further, some believe that this program poses little threat to public safety, despite allowing violent and repeat offenders to participate.<sup>319</sup>

Another population that should be released early is elderly offenders because these individuals are unlikely to recidivate based on their health conditions.<sup>320</sup> Also, evidence shows that less than 2% of elderly inmates will recidivate if released early.<sup>321</sup> Many believe that the early release of these inmates is not only more humane, but also more cost-effective.<sup>322</sup> Most states allow medical parole or compassionate release for inmates, which essentially releases a prisoner to die, although few medical paroles are granted.<sup>323</sup> These inmates typically must be diagnosed with a terminal illness with a prognosis of less than six months to one year to live and appear to be incapable of committing another crime.<sup>324</sup> Medical release is generally not available to inmates convicted of violent crimes or felonies.<sup>325</sup> Proponents point to the savings from the cost of care during the most expensive months in terms of health care.<sup>326</sup> Georgia is one of the states that employs medical parole and has attested to having achieved cost-

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316. *Id.*

317. *Id.* at 9.

318. *Id.* at 8.

319. PORTER, *supra* note 314, at 9.

320. Alison Bo Andolena, *Can They Lock You Up and Charge You For It?: How Pay-to-Stay Corrections Programs May Provide a Financial Solution for New York and New Jersey*, 35 SETON HALL LEGIS. J. 94, 117 (2010) (noting that Alabama and North Carolina have approved the release of terminally ill inmates whose health care while incarcerated costs taxpayers millions of dollars and they pose little threat to the public). *See also* William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 (2009) (noting that states benefit by saving “both the cost of imprisonment and the cost of medical care by releasing a terminally ill inmate” while not “unduly compromis[ing] the utilitarian goals of incapacitation, deterrence, and rehabilitation”).

321. Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 CONTEMP. HEALTH L. & POL’Y 687, 687–88 (2001).

322. Bridget B. Romero et al., *The Missouri Battered Women’s Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193, 223 (2004) (“Medical parole is the decent, humane, and most cost-effective approach available to deal with . . . terminally ill prisoners.”).

323. Stacy L. Gavin, *What Happens to the Correctional System when a Right to Health Care Meets Sentencing Reform*, 7 NAELA J. 249, 258 (2011).

324. *Id.*

325. *Id.* at 259.

326. *Id.*

savings benefits.<sup>327</sup> North Carolina and California also grant medical parole, with California granting the highest proportion of medical parole requests.<sup>328</sup>

Another form of early release for elderly offenders involves parole before their sentence ends, similar to the traditional parole model, but limited to those prisoners serving long sentences and growing old in prison.<sup>329</sup> For example, in Virginia, elderly prisoners who have served five to ten years of their sentence can be paroled, even with truth-in-sentencing policies.<sup>330</sup> As a result, Virginia had one of the lowest increases of geriatric inmates among southern states between 1997 and 2006.<sup>331</sup> Unlike the United States, England does not have a specific policy geared toward the early release of offenders because its sentencing policies allow for judges to release offenders from a sentence early, or choose not to impose such a long sentence to begin with.

Nonviolent technical probation violators are prime candidates to enter intermediate sanctions such as CCCs and with the demonstrated success of these programs; it can be an effective alternative to imprisonment. Nonviolent elderly offenders can be offered medical parole or an early release in order to keep the cost of health care down and allow these offenders to live out their last days in a more humane fashion. By releasing these populations of offenders from prison before they have served their minimum sentences, states will be able to save expenses associated with housing these offenders as well as providing health care for elderly inmates.

## V. CONCLUSION

While there may be numerous reasons England's prison population is smaller than that of the United States, a major contributing factor is the sentencing policies implemented throughout these nations. Indeed, in the United States, the imposition of mandatory sentencing policies such as TIS has caused prison populations to skyrocket. By contrast, English sentencing policies focus on maximum, not minimum sentences, and English judges have far more discretion to sentence offenders than U.S. judges. Additionally, England has noted the rising prison population and implemented policies geared toward releasing nonviolent offenders much earlier than their American counterparts. Finally, England employs community sentencing in order to save costs on incarceration while still ensuring that offenders receive punishment.

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327. *Id.*

328. Gavin, *supra* note 323, at 259.

329. *Id.*

330. *Id.*

331. JEREMY L. WILLIAMS, THE AGING INMATE POPULATION 4 (2006), *available at* [http://www.sclatlanta.org/Publications/HSPS/aging\\_inmates\\_2006\\_lo.pdf](http://www.sclatlanta.org/Publications/HSPS/aging_inmates_2006_lo.pdf).

If the United States were to release certain populations of offenders earlier, it would drastically decrease the size of the prison population and generate billions of dollars in savings. Furthermore, adopting certain practices that England employs, such as home detention curfews, day reporting centers, and the decriminalization of soft drugs, would further reduce prison populations.



