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## Blood in the Water: Why the First Step Act of 2018 Fails Those Sentenced Under the Maritime Drug Law Enforcement Act

Lauren R. Robertson

Washington and Lee University School of Law, robertson.l22@law.wlu.edu

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# Blood in the Water: Why the First Step Act of 2018 Fails Those Sentenced Under the Maritime Drug Law Enforcement Act

Lauren R. Robertson\*

## *Abstract*

*For some, the open ocean is prison. The Maritime Drug Law Enforcement Act (MDLEA) prohibits individuals from knowingly or intentionally distributing a controlled substance or possessing it with the intent to distribute. Empowered by the MDLEA, the United States Coast Guard arrests and detains foreign nationals hundreds of miles outside of U.S. territorial waters. After months shackled to Coast Guard ships, these individuals face the harsh reality of American mandatory minimum drug sentencing, judged by the kilograms of drugs on their vessels. But the MDLEA conflates kilograms with culpability. More often than not, those sentenced are fishermen-turned-smugglers due to financial desperation or coercion—not the kingpins the statute aspired to target.*

*In the First Step Act of 2018, Congress attempted to grant sentencing reprieve to these defendants by extending the safety valve provision to the MDLEA. When it works, the safety valve provision enables judges to sentence below mandatory minimum*

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\* J.D. Candidate, Class of 2022, Washington and Lee University School of Law; B.A., Class of 2017, Florida State University. Thank you, Professor Jon Shapiro, for serving as my Note advisor and for assisting me throughout the writing process. Thank you, Professor Houck and Professor Hasbrouck, for providing additional guidance. Thank you, Mom and Dad, for shaping me into a curious student, encouraging me to embrace every failure, and applauding every success. Especially my dad, for always knowing I'd love law school.

*penalties. Unfortunately, the unique qualities of international drug couriers preclude them from receiving such relief. Until the legislature and presiding judges recognize this, MDLEA defendants will continue to receive irrationally long prison sentences. This Note argues that including the MDLEA as an offense under the safety valve provision fails to mitigate the MDLEA's harsh mandatory minimum sentences.*

*This Note begins in Part I by discussing the MDLEA's history as well as how the Coast Guard arrests these defendants. It then explains how the statutory mandatory minimum sentence interacts with the Sentencing Guidelines and highlights the flaws of this system. Part II addresses the safety valve provision as well as the previous circuit split regarding its applicability to the MDLEA. Part III introduces the First Step Act of 2018 and describes how it resolved that split. Part III then evaluates the effectiveness of the First Step Act's change and provides a recent case example. Finally, Part IV concentrates on how defendants sentenced under the MDLEA are uniquely incapable of sentencing reprieve. It explores general improvements for the safety valve as well as specific changes for the MDLEA. This Note ultimately argues that Congress must amend the MDLEA's sentencing regime.*

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## INTRODUCTION

“*Mi amor, perdoname* [My love, I’m sorry]. You won’t believe this, but I’m in the United States. In prison.”<sup>1</sup>

Until she received the phone call, the fisherman’s wife assumed he was dead.<sup>2</sup> After their home in Ecuador was flattened by a 7.8 magnitude earthquake, he left to earn money to rebuild.<sup>3</sup> The fisherman’s wife was used to watching him sail away.<sup>4</sup> But this time he didn’t return.<sup>5</sup> She searched for clues to explain his disappearance. Maybe his small boat had succumbed

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1. See Tessie Castillo, *The Ecuador Fishermen Snatched Away by US Drug Warriors*, INSIGHT CRIME (Dec. 23, 2019), <https://perma.cc/G4UB-UZ2J> (quoting Manuel Guerrero on the phone with his wife after she assumed that he was dead for the past eight months).

2. *Id.*

3. See *id.* (reporting that half of the families interviewed had made a *vuelta*, or drug-smuggling trip, after the Ecuadorian earthquake left thousands homeless).

4. See Seth Freed Wessler, *The Coast Guard’s ‘Floating Guantánamos’*, N.Y. TIMES MAG. (Nov. 20, 2017), <https://perma.cc/62D3-QKLA> (“This time [his wife] was certain she would receive a call to collect [Jhonny] Arcentales’s waterlogged body from the docks.”).

5. *Id.*

to rough seas.<sup>6</sup> Maybe pirates stole his motor and left him adrift.<sup>7</sup> A year later, on a crackling prison phone call, she learns that he had agreed to transport cocaine to the United States for the cartel in exchange for \$10,000.<sup>8</sup>

The fisherman had sailed to Colombia to pick up the cocaine with two other men.<sup>9</sup> One man had lost his home in the same devastating earthquake.<sup>10</sup> The other had lost his home in a flood.<sup>11</sup> They were near the coast of Guatemala<sup>12</sup> when the United States Coast Guard (Coast Guard) spotted them.<sup>13</sup> Panicked, the fishermen tried to throw the cargo overboard, but

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6. See Castillo, *supra* note 1 (explaining that Manuel Guerrero's wife wondered if his "small boat had sunk in the rough seas").

7. See *id.* ("Perhaps he had fallen prey to the pirates who prowl the water stealing boat motors, leaving fishermen stranded miles from shore."); see also Wessler, *supra* note 4 (mentioning that pirates are a threat for South American fishermen).

8. See Castillo, *supra* note 1 ("Desperate to find money to rebuild their home, he had agreed to transport cocaine to the US in his boat. Colombian drug smugglers had promised him \$10,000 for the two-week trip.")

9. See Joe Parkin Daniels, *Colombia Continues to Break Records for Cocaine Productions, Report Says*, GUARDIAN (Sept. 19, 2018), <https://perma.cc/E3LD-NRTN> ("[N]ew figures from the United Nations show that it continues to break records for producing cocaine.")

10. See Castillo, *supra* note 1 ("Shirley's husband, Emiliano, took a *vuelta* after the couple lost their home to the earthquake.")

11. See *id.* ("After a flood wiped out Bexy Guerrero Salmiento's home in 2013, her husband disappeared.")

12. Arrests within the territorial waters of other nations frequently occur in the facts of cited cases within this Note. While this Note concentrates on sentencing under the Maritime Drug Law Enforcement Act, the extraterritorial provision granting the U.S. Coast Guard the ability to effectuate arrests in the waters of other nations is contentious. Recently, the Eleventh Circuit held that this provision is unconstitutional. See *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277–78 (11th Cir. 2020). This means the MDLEA should not apply to conduct in foreign waters. *Id.* But the Eleventh Circuit has frequently examined and upheld the constitutionality of the application to conduct that occurred on the high seas, or international waters. *Id.* at 1268 n.2; see also *United States v. Jama*, No. 8:17-cr-128-T-27TGW, 2021 WL 825473, at \*3 (M.D. Fla. Mar. 4, 2021) (distinguishing the holding of *Davila-Mendoza* because *Jama* was on board a vessel in international waters in the Eastern Pacific Ocean). This Note references arrests in territorial waters because the Supreme Court has not ruled on the constitutionality of this provision. As it stands, many incarcerated MDLEA defendants were arrested in the territorial waters of other nations.

13. See Castillo, *supra* note 1.

their efforts were futile.<sup>14</sup> The Coast Guard intercepted and captured them with ease.<sup>15</sup>

They were shackled in small cells aboard the Coast Guard's ship, but the men assumed they'd be transported home.<sup>16</sup> As their bodies shrank from malnourishment and immobility, so did their hopes of ever seeing their families again.<sup>17</sup> By the time they arrived in Florida, they had no idea they had been at sea for five months.<sup>18</sup> They had no idea federal prosecutors in Florida would charge them with attempting to smuggle cocaine into the United States.<sup>19</sup> By the time the fisherman called his wife, he had been sentenced to fourteen years in U.S. federal prison.<sup>20</sup>

One drug-smuggling trip (or *vuelta*) can earn South and Central American fishermen over \$10,000—a life-changing amount in places where the per capita income for fishermen would otherwise be \$132 per month.<sup>21</sup> Many fishermen refuse to take *vueltras*.<sup>22</sup> But circumstances beyond their control often force them to assist the cartels out of desperation.<sup>23</sup> Knowing this, the Coast Guard surveils the coasts of Central and South America,<sup>24</sup> often intercepting fishermen vessels in the territorial waters of other nations or international waters.<sup>25</sup> Once

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14. See, e.g., *United States v. Wilchcombe*, 838 F.3d 1179, 1184 (11th Cir. 2016) (“During the pursuit, two men in addition to Rolle stood on the deck of Rolle’s boat and spent approximately 10 minutes throwing large packages into the water.”).

15. See *infra* Part I.B.

16. See Wessler, *supra* note 4.

17. *Id.*

18. *Id.*

19. See Castillo, *supra* note 1 (“In Florida, federal prosecutors charged Manuel and his co-defendants with attempting to smuggle cocaine into the United States. They sentenced him to 14 years in prison.”).

20. *Id.*

21. See *id.* (“[Earning] \$10,000 or \$30,000 per trip . . . may enable them to move their family to a gated-community home in Manta, put kids in private school, start a business or move to a wealthier region.”).

22. *Id.*

23. *Id.*

24. See Wessler, *supra* note 4 (describing the Coast Guard’s directive to target “low-level smugglers in international waters”).

25. See *id.*; see also Castillo, *supra* note 1 (noting that Guerrero Salmiento was arrested off the coast of Guatemala).

captured, these men are held onboard Coast Guard ships for months at a time without hearing their *Miranda* rights, without attorneys, and without the ability to contact their consulate or families.<sup>26</sup> Eventually, they arrive in the United States for trial, still confounded by their capture and dubious that U.S. officials had the authority to arrest them at all.<sup>27</sup>

These arrests are lauded by American news outlets, congratulating the Coast Guard and emphasizing the volume or value of narcotics seized.<sup>28</sup> But news outlets, and the U.S. criminal justice system, conflate kilograms with culpability.<sup>29</sup> Contrary to popular belief, these drug smugglers are not hardened criminals, but instead work for the cartels out of necessity.<sup>30</sup> They do not speak English and do not understand

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26. See Wessler, *supra* note 4 (“[I]t is the memory of their surreal imprisonment at sea that these men say most torments them. . . . [T]hese detainees paint a grim picture of the conditions of their extended capture on ships deployed in the extraterritorial war on drugs.”).

27. *Id.*

28. To understand how the media depicts drug smuggling operations, see *U.S. Coast Guard Units Nail Drug Smugglers in Go-Fast Vessel in Caribbean Sea, Seize \$8.5M in Cocaine*, SPACE COAST DAILY (Jan. 30, 2021), <https://perma.cc/KC2P-WU56> (reporting on the operation and drug quantity to imply the smugglers’ guilt); Sara Muir, *On Maiden Voyage, USCGC Stone Crew Interdict Narcotics in Caribbean*, DVIDS (Jan. 11, 2021), <https://perma.cc/NB6Y-4GAA> (same); Garfield Hylton, *Coast Guard Offloads More Than 30,000 Pounds of Drugs Worth over \$400 Million at Florida Port*, ORLANDO SENTINEL (Dec. 17, 2020), <https://perma.cc/BY8J-PF93> (same); Carianne Luter, *\$408-Million of Cocaine, Marijuana Seized by U.S. Coast Guard*, NEWS4JAX (June 9, 2020, 3:31 PM), <https://perma.cc/AVE7-5LN9> (same).

29. See *supra* note 28 and accompanying text.

30. See Castillo, *supra* note 1 (“Many fishermen, knowing the risks of smuggling, refuse to take *vueltas*. But catastrophe can push them to reconsider.”); Colleen Long, *Four Jamaican Fisherman Detained on Coast Guard Ships*, AP NEWS (June 12, 2019), <https://perma.cc/4GQA-6QMG> (“[F]ishermen were detained for nearly a month aboard U.S. Coast Guard vessels in the Caribbean Sea, spending much of their time chained to the deck in the blistering sun while their families believed they were dead.”); Dr. David Soud et al., *Hidden in Plain Sight: Fishing Boats as Links in Illicit Supply Chains*, WINDWARD (July 15, 2019), <https://perma.cc/565Z-CDC8> (“If you are an artisanal fisher in northern Ecuador, struggling to make ends meet on account of depleting fish stocks, you have a ready alternative.”).

our criminal justice system.<sup>31</sup> Unbeknownst to them, that will not matter during sentencing.<sup>32</sup>

The Maritime Drug Law Enforcement Act (MDLEA)<sup>33</sup> grants the Coast Guard the authority to arrest these men.<sup>34</sup> It prohibits an individual from knowingly or intentionally distributing a controlled substance or possessing it with intent to distribute,<sup>35</sup> even when hundreds of miles outside the territorial jurisdiction of the United States.<sup>36</sup> The extraterritorial provision remains a point of controversy, especially because it applies U.S. federal criminal law to non-citizens with few connections to the country.<sup>37</sup> Some scholars argue that the jurisdictional grant is well within Congress's authority.<sup>38</sup> Proponents of the jurisdiction claim the broad grant is necessary for the Coast Guard to operate.<sup>39</sup>

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31. See *supra* note 30 and accompanying text.

32. See *infra* Part I.C.1.

33. 46 U.S.C. §§ 70501–08.

34. See Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 113, 117 (2017) ("Despite the fact that these crimes take place thousands of miles from the United States aboard vessels that are registered in foreign countries and crewed by foreign nationals, these drug traffickers are often successfully prosecuted in U.S. federal courts, receiving lengthy prison sentences for violating . . . the [MDLEA].").

35. 46 U.S.C. §§ 70503(a)(1), 70504(b)(2).

36. § 70504(b)(2).

37. See Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1194 (2009) ("[M]ost or all of the MDLEA's jurisdictional provisions go beyond Congress's Article I powers in several ways."). Interestingly, the Ninth Circuit limits the MDLEA's reach by imposing a "nexus" requirement. See, e.g., *United States v. Zakharov*, 468 F.3d 1171, 1176 (9th Cir. 2006) (applying the nexus requirement); *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006) (same); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256 (9th Cir. 1998) (same).

38. See Casavant, *supra* note 34, at 118.

39. See Justin S. Daniel, *Operational Diplomacy: Jurisdiction Certification and the Maritime Drug Law Enforcement Act*, 29 IND. INT'L & COMPAR. L. REV. 1, 3 (2019) (discussing the Coast Guard's methods of enforcing the MDLEA); see, e.g., BUREAU OF INT'L NARCOTICS & L. ENFT AFFS., U.S. DEPT OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: DRUG & CHEMICAL CONTROL 38 (2020), <https://perma.cc/3TFD-CLH6> (PDF) ("[I]n Fiscal Year 2019, the [Coast Guard] disrupted 236 drug smuggling events, which included the seizure of 153 vessels, detention of 611 suspected smugglers, and removal of 207.9 metric tons (MT) of cocaine and 28.7 MT of marijuana.").



Though the extraterritorial reach of the MDLEA is outside the scope of this Note, the bewilderment and horror these fishermen experience when they learn who regulates their punishment contributes to this Note's broader argument.<sup>40</sup>

Congress justified the MDLEA by declaring that "trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States."<sup>41</sup> This aligns with the international perspective for which the United States is largely responsible.<sup>42</sup> The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, written *after* the MDLEA's enactment, provides for international cooperation regarding measures taken against drug trafficking.<sup>43</sup> The Parties to the Convention emphasized the negative impact of narcotic drugs and psychotropic substances on the wellbeing of the countries.<sup>44</sup> In conjunction with the MDLEA, this effectively empowered the United States to become the police of the seas.<sup>45</sup>

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40. See Wessler, *supra* note 4 ("These fishermen-turned-smugglers are caught in international waters, or in foreign seas, and often have little or no understanding of where the drugs aboard their boats are ultimately bound. Yet nearly all of these boatmen are now carted . . . to the United States.").

41. 46 U.S.C. § 70501.

42. See David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DENV. J. INT'L L. & POL'Y 387, 388 (1990) ("The U.S. participated actively in the negotiation of the Convention, and many of its provisions reflect legal approaches and devices already found in U.S. law.").

43. See UN Economic and Social Council [ECOSOC], *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, U.N. Doc. ST/CND/1/Add.3, at 1 (Dec. 19, 1988) ("Recognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, [coordinated action] within the framework of international [cooperation] is necessary.").

44. See *id.* ("[D]eeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in . . . drugs . . . which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society . . .").

45. See Greg Shelton, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare*, 34 WM. & MARY L. REV. 933, 935 (1993) ("[T]he Coast Guard considers itself the nation's premier maritime law enforcement agency. It is firmly committed to continuing the drug war in the maritime area and, accordingly, drug interdiction is the most significant Coast Guard mission in terms of effort dedicated and money spent." (quotations omitted)).

The fishermen are caught in a net. These men, from places like Ecuador and Guatemala, will be judged in American courts.<sup>46</sup> With American shortcomings.<sup>47</sup> They will serve time in American prisons.<sup>48</sup> The months spent imprisoned on Coast Guard ships will only be a fraction of the sentence they will ultimately serve.<sup>49</sup> Meanwhile, their wives and children will suffer financially and emotionally from their absence.<sup>50</sup> Often, their family members have no idea what became of their loved ones.<sup>51</sup> They will wonder where they are—wonder if they are still alive.<sup>52</sup>

In some ways, the MDLEA is like any other drug crime statute in America.<sup>53</sup> The associated punishment is severe;<sup>54</sup> the legislative history is riddled with flaws.<sup>55</sup> However, Congress recently attempted to grant sentencing reprieve to these

46. See Castillo, *supra* note 1.

47. Cf. Walter I. Gonçalves, Jr., *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 1, 60 (2020) (“The federal system perpetuates racial imbalances, even though it incarcerates only twelve percent of prisoners in the United States. For instance, in 2007, Latinxs constituted forty percent of newly sentenced offenders in federal prisons and accounted for nearly one in three of all federal inmates.”).

48. See *supra* note 46 and accompanying text.

49. 21 U.S.C. § 960(b)(1).

50. See Castillo, *supra* note 1 (noting that the women have created a support group, *Organización de Mujeres de Pescadores en el Extranjero*, with over two hundred members).

51. *Id.* (recounting how Guerrero’s wife frantically searched for clues to his disappearance for months even though neighbors advised her to move on because he was surely dead).

52. *Id.*

53. See *War on Drugs*, HISTORY (May 31, 2017), <https://perma.cc/8JZJ-HYKH> (last updated Dec. 17, 2019) (providing a timeline of the War on Drugs); Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://perma.cc/DX4P-XFLB> (“The penalties for violating U.S. drug law extend beyond prison, and the specter of past drug crimes can haunt individuals for years.”); German Lopez, *The War on Drugs, Explained*, VOX (May 8, 2016), <https://perma.cc/GZ5Q-MLRX> (“[F]ederal programs that encourage local and state police departments to crack down on drugs may create perverse incentives to go after minority communities. Some federal grants, for instance, previously required police to make more drug arrests in order to obtain more funding for anti-drug efforts.”).

54. See *infra* Part I.C.

55. See *infra* Part I.A.

fishermen-turned-smugglers. In the First Step Act of 2018, Congress extended the safety valve provision to the MDLEA, giving it the protection Congress had given to domestic couriers in 1994.<sup>56</sup> Though the intent may be good, this development accomplishes little. The unique qualities of international drug couriers preclude them from receiving relief. Until the legislature and presiding judges recognize this, MDLEA defendants will continue to receive irrationally long prison sentences.<sup>57</sup>

This Note argues that including the MDLEA as an offense under the safety valve provision fails to mitigate the MDLEA's harsh mandatory minimum sentences.<sup>58</sup> This Note begins in Part I by discussing the MDLEA's history as well as how the Coast Guard arrests these defendants. It then explains how the statutory mandatory minimum sentence interacts with the Sentencing Guidelines and highlights the flaws of this system.<sup>59</sup> Part II addresses the safety valve provision as well as the Circuit split regarding its applicability to the MDLEA. Part III introduces the First Step Act of 2018 and describes how it resolved that split. Part III then evaluates the effectiveness of the First Step Act's change and provides a recent case example. Finally, Part IV concentrates on how defendants sentenced under the MDLEA are uniquely incapable of sentencing reprieve. It explores general improvements for the safety valve as well as specific changes for the MDLEA.<sup>60</sup> This Note ultimately argues that Congress must amend the MDLEA's sentencing regime.<sup>61</sup>

## I. THE MARITIME DRUG LAW ENFORCEMENT ACT

### A. *History*

The development of international drug trafficking law reveals the contextual framework within which Congress

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56. *See infra* Part III.A.

57. *See infra* Part I.C.1.

58. *See infra* Part IV.

59. *See infra* Part I.C.

60. *See infra* Part IV.

61. *See infra* Part IV.B.1–2.

enacted the MDLEA.<sup>62</sup> Penalties for drug crimes committed in international waters were historically the same as those committed domestically.<sup>63</sup> In 1914, Congress criminalized opium possession on the high seas and matched the maximum penalty to importing opium into the United States.<sup>64</sup> Eight years later, Congress raised the penalty for each offense equally and simultaneously.<sup>65</sup> Congress followed this pattern when it reduced the maximum penalty for both offenses in 1951.<sup>66</sup>

This changed in 1970 when Congress overhauled the drug code with the Controlled Substances Act (CSA)<sup>67</sup> to replace federal drug laws with a single comprehensive statute.<sup>68</sup> The CSA created the prohibition against importing drugs to or

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62. See *United States v. Mosquera-Murillo*, 902 F.3d 285, 295 (D.C. Cir. 2018) (detailing the historical interaction between international and domestic drug crime penalties).

63. See *id.* (explaining that Congress has a nearly unbroken pattern of setting identical penalties for drug crimes committed in domestic waters and on the high seas).

64. Compare Pub. L. No. 63-46, § 2, 38 Stat. 275, 276 (1914) (“[A]ny person [who] shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium contrary to law . . . shall be fined . . . \$5,000 nor less than \$50 or by imprisonment for any time not exceeding two years, or both.”), *with id.* § 4

That any person subject to the jurisdiction of the United States who shall . . . conceal on board of or transport on any *foreign or domestic vessel* or other water craft . . . destined to or bound from the United States . . . any smoking opium . . . shall be subject to the penalty in section two of this Act. (emphasis added).

65. See Narcotic Drugs Import and Export Act, Pub. L. No. 67-227, § 2(c), 42 Stat. 596, 596 (1922) (“[I]f any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, . . . such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years.”).

66. See Boggs Act, Pub. L. No. 82-255, § 2(c), 65 Stat. 767, 767 (1951) (“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction . . . shall be fined not more than \$2,000 and imprisoned not less than two or more than five years.”).

67. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1007, 84 Stat. 1236, 1288.

68. See LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 5 (2014) (providing a reason for passing the CSA).

exporting drugs from the United States or its customs territory<sup>69</sup> via any vessel, aircraft, or vehicle.<sup>70</sup> The applicable penalties, now codified as 21 U.S.C. § 960(b) (“Controlled Substances Penalties” or “§ 960(b)”), tied sentences to drug type.<sup>71</sup> For example, importing a Schedule I or II narcotic,<sup>72</sup> like heroin or cocaine, warranted a maximum sentence of fifteen years and/or a \$25,000 fine.<sup>73</sup> However, the CSA did not extend to international waters.<sup>74</sup> If the government wished to prosecute violators on the high seas, it would have to prove importation or conspiracy to import beyond a reasonable doubt.<sup>75</sup> According to the Coast Guard, this evidence was “impossible to obtain.”<sup>76</sup> As a result, the CSA inadvertently decriminalized drug smuggling on the high seas.<sup>77</sup> The Coast Guard was still empowered, however, to seize and confiscate illegal drugs.<sup>78</sup> Displeased with the inability to prosecute, the Coast Guard pushed for legislation to facilitate criminal enforcement.<sup>79</sup> Significantly, the proposed bill recommended incorporating the penalty section of the importation statute.<sup>80</sup>

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69. The term “customs territory of the United States,” as used in the tariff schedule, includes only the States, the District of Columbia, and Puerto Rico. See 21 U.S.C. § 951 (providing that the definition is the same as the one listed within the *Harmonized Tariff Schedule of the United States, General Note 2*, U.S. INT’L TRADE COMM’N (2010), <https://perma.cc/4VLD-4N36>).

70. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1005, 84 Stat. 1236, 1287–88 (1970) (codified as 21 U.S.C. § 955).

71. *Id.* § 1010 (codified as 21 U.S.C. § 960).

72. *Id.* § 202 (codified as 21 U.S.C. § 812).

73. *Id.*

74. See S. REP. NO. 96-855, at 1 (1980) (“[The Controlled Substances Act] inadvertently contained a section repealing the criminal provision under which drug smugglers apprehended on the high seas were prosecuted without creating a new provision to replace it.”).

75. *Id.* at 1–2.

76. *Id.*

77. *Id.* at 1.

78. *Id.* at 2.

79. *Id.* at 1 (“The purpose of this legislation is to facilitate enforcement by the Coast Guard of laws relating to the importation of illegal drugs and for other purposes.”).

80. *Id.* at 4 (“The section also specifies the penalties for a violation by incorporating sections 1010 and 1012 of the Comprehensive Act. These

In response, Congress enacted the MDLEA in 1986 during the explosion of drug legislation commonly known as the War on Drugs.<sup>81</sup> At the same time, the Anti-Drug Abuse Act amended § 960 to include mandatory minimum sentences.<sup>82</sup> A House Judiciary Committee report emphasized that the federal government should be primarily concerned with major traffickers, the manufacturers or the heads of organizations.<sup>83</sup> The Committee relied on prosecutors and Drug Enforcement Administration (DEA) agents to choose quantities they thought were indicative of a high place in the processing and distribution chain.<sup>84</sup> Operating on this assumption, Congress tied mandatory minimum sentences to offenses perceived as more egregious due to higher-magnitude drug weight.<sup>85</sup> Members of Congress have since condemned these decisions, stating that “Congress acted hastily, without sufficient hearings, and enacted hard line penalties that targeted low-level drug offenders.”<sup>86</sup>

Congress copy-and-pasted § 960 to the MDLEA.<sup>87</sup> No clear reason exists to explain why these sections are linked.<sup>88</sup> Considering the onslaught of drug legislation that was passed in 1986, the link likely exists because both passed the same year. Congress has not condemned the decision to apply § 960 to

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sections provide penalties of up to 15 years of imprisonment and a fine of \$25,000 for a first offense . . .”).

81. Wadie E. Said, *Limitless Discretion in the Wars on Drugs and Terror*, 89 UNIV. COLO. L. REV. 93, 100 (2018) (“Passed in 1986 during the initial years of the legislative escalation of the drug war, the law provides the government with the ability to prosecute even mere drug possession by bestowing U.S. jurisdiction over anyone detained on [ships meeting the statutory requirements].”).

82. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-750, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

83. H.R. REP. NO. 99-845, at 11–12 (1986).

84. *Id.*

85. 21 U.S.C. § 960(b).

86. Mandatory Minimum Reform Act of 2020, H.R. 7194, 116th Cong. (2020).

87. 46 U.S.C. § 70506.

88. See *Special Report to the Congress: Report on Cocaine and Federal Sentencing Policy*, U.S. SENT’G COMM’N (1995), <https://perma.cc/ZE25-9MDS> [hereinafter *Report on Cocaine and Federal Sentencing Policy*] (explaining the legislative history of cocaine and federal sentencing schemes).

the MDLEA, even though doing so highlights and intensifies the deficiencies of the sentencing regime.<sup>89</sup>

### B. *Floating Guantanimos*

The United States Coast Guard is the lead federal agency for drug interdiction on the high seas.<sup>90</sup> Because of this, it is largely responsible for enforcing the MDLEA.<sup>91</sup> To do so, the Coast Guard operates a complex system that extends beyond the territorial waters of the United States.<sup>92</sup> The Coast Guard relies on counterdrug bilateral agreements to board suspect vessels and facilitate arrests in the territorial waters of other nations.<sup>93</sup> It gathers and analyzes data collected from a variety of sources, including maritime patrol aircraft, to detect vessels.<sup>94</sup> Once found, the Coast Guard employs a combination of cutters,<sup>95</sup> aircraft, boats, and deployable specialized forces to target the most vulnerable points of a drug smuggler's transit.<sup>96</sup>

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89. See *infra* Part V.

90. BUREAU OF INT'L NARCOTICS & LAW ENF'T AFFS., U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: DRUG AND CHEMICAL CONTROL 33 (Mar. 2021), <https://perma.cc/6FAC-H4VM> (PDF) [hereinafter NARCOTICS CONTROL STRATEGY REPORT].

91. See Daniel, *supra* note 39, at 3 (discussing the Coast Guard's enforcement of the MDLEA).

92. See NARCOTICS CONTROL STRATEGY REPORT, *supra* note 90, at 33.

93. See *id.* (“Working in conjunction with the Department of State and Department of Justice, the [Coast Guard] has negotiated, concluded, and maintained over 40 counterdrug bilateral agreements and operational procedures with partner nations throughout the world, the majority of which are in the Western Hemisphere.”). Worth noting, the recent Eleventh Circuit case, *United States v. Davila-Mendoza*, addressed the 1997 Jamaica Bilateral Agreement and held it was not enough to support the MDLEA's jurisdiction grant. See *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277 (11th Cir. 2020) (“But the MDLEA was enacted long before the Convention against Illicit Traffic Treaty or the Jamaica Bilateral Agreement; therefore, it was not enacted pursuant to the Necessary and Proper Clause to effectuate those international agreements.”).

94. See NARCOTICS CONTROL STRATEGY REPORT, *supra* note 90, at 33 (explaining how the Coast Guard gathers intelligence).

95. For an explanation and visual of a cutter, see U.S. COAST GUARD, THE CUTTERS, BOATS, AND AIRCRAFT OF THE U.S. COAST GUARD 130–37 (2016), <https://perma.cc/2JF2-R6S6> (PDF).

96. See NARCOTICS CONTROL STRATEGY REPORT, *supra* note 90, at 33 (“The [Coast Guard's] most capable interdiction platforms include flight deck-equipped cutters that deploy armed helicopters and pursuit boats, and

The main result is “go-fast” prosecution.<sup>97</sup> This term describes the small foreign vessels going at fast speeds that the Coast Guard apprehends.<sup>98</sup> In reality, the fishermen-turned-smugglers attempt their voyage in either a “go-fast” or a “go-slow.”<sup>99</sup> As stated, a “go-fast” is a small, open hull power boat.<sup>100</sup> A “go-slow,” by contrast, is a fishing boat hull designed to blend in with other fishing vessels that is much safer on rough seas.<sup>101</sup> Neither option provides protection once spotted by the Coast Guard.<sup>102</sup> This incentivizes the drug cartels to send as many boats as possible to increase the likelihood of completed trips.<sup>103</sup> As the Coast Guard has intensified its efforts to arrest smugglers, the cartels have responded by increasing compensation.<sup>104</sup> Desperate to escape poverty and violence, the fishermen go.<sup>105</sup> The heads of the organizations and the manufacturers, the MDLEA’s purported targets,<sup>106</sup> are not foolish enough to smuggle drugs themselves when impoverished fishermen are plentiful and expendable.<sup>107</sup>

Those caught end up in “a prison in the open ocean.”<sup>108</sup> They are detained and shackled to a Coast Guard ship heading for the United States.<sup>109</sup> While sentencing may take place anywhere in

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USCG Law Enforcement Detachments embarked on U.S. Navy and allied ships.”).

97. See *United States v. Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002) (“[G]overnment witness testified that the term ‘go-fast’ was used by the Coast Guard to describe a type of vessel commonly used in smuggling operations.”).

98. *Id.*

99. See H. I. Sutton, *3 Types of Go-Fast Narco Boats the Coast Guard Faces*, *FORBES* (Aug. 21, 2020, 8:30 AM), <https://perma.cc/9X5W-GX73>.

100. *Id.*

101. *Id.*

102. *Id.*

103. See Castillo, *supra* note 1 (“There is simple economic explanation for this. With the increased risk of being caught, traffickers will offer more money to fishermen who attempt a *vuelta*, and thus more fishermen will go.”).

104. *Id.*

105. *Id.*

106. See *supra* note 83 and accompanying text.

107. *Id.*

108. Wessler, *supra* note 4 (quoting Jhonny Arcentales).

109. See *id.* (“A cuff clamped onto [Arcentales’s] ankle kept him shackled to a cable along the deck of the ship but for the occasional trip, guarded by a sailor, to defecate into a bucket.”).



the United States, the majority of these men are sentenced in Florida.<sup>110</sup> This makes little geographical sense, as Florida is further from the Pacific Ocean than western states.<sup>111</sup> But the Ninth Circuit, which courts that portion of the country, limits the MDLEA's reach by imposing a "nexus" requirement.<sup>112</sup> Analogous to minimum contacts, a nexus requires a showing that "an attempted transaction is aimed at the United States" or that "the plan for shipping the drugs was likely to have effects in the United States."<sup>113</sup> The Eleventh Circuit, on the other hand, previously did not require the prosecutor to prove that the defendant was headed towards the United States.<sup>114</sup> Thus, Florida (which sits in the Eleventh Circuit) was an easier jurisdiction in which to prosecute.<sup>115</sup>

### C. Sentencing

#### 1. How § 960 Applies

Those who violate the MDLEA are punished in accordance with the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 960).<sup>116</sup> As a result, the weight of the drug possessed or distributed determines the punishment.<sup>117</sup>

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110. See Castillo, *supra* note 1 (discussing why most foreigners are prosecuted in Florida).

111. *Id.*

112. See, e.g., United States v. Zakharov, 468 F.3d 1171, 1176 (9th Cir. 2006) (applying the nexus requirement); United States v. Perlaza, 439 F.3d 1149, 1160 (9th Cir. 2006) (same); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1256 (9th Cir. 1998) (same).

113. United States v. Medjuck, 156 F.3d 916, 919 (9th Cir. 1998) (citing *Klimavicius-Viloria*, 144 F.3d at 1257).

114. See, e.g., United States v. Wilchcombe, 838 F.3d 1179, 1186 (11th Cir. 2016) ("The text of the MDLEA does not require a nexus between the defendants and the United States; it specifically provides that its prohibitions on drug trafficking are applicable even though the act is committed outside the territorial jurisdiction of the United States." (internal quotations omitted)); *accord* United States v. Campbell, 743 F.3d 802, 812 (11th Cir. 2014) ("And this Circuit and other circuits have not embellished the Act with the requirement of a nexus between a defendant's criminal conduct and the United States.").

115. See cases cited *supra* note 114. *But see supra* note 12.

116. 46 U.S.C. § 70506.

117. 21 U.S.C. § 960(b)(1)(A)–(H).

Penalties also depend on the drug involved.<sup>118</sup> Most of the men sentenced under the MDLEA are caught with cocaine.<sup>119</sup> Under § 960, five or more kilograms<sup>120</sup> of cocaine requires a mandatory minimum sentence of ten years and a maximum of life in prison.<sup>121</sup> As a comparison, it would require 1,000 kilograms<sup>122</sup> of marijuana to warrant the same sentence.<sup>123</sup> These weights are consistently surpassed.<sup>124</sup> As news outlets enjoy highlighting,<sup>125</sup> defendants are often arrested with hundreds, or thousands, of

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118. *Id.*

119. This is presumed from reading MDLEA cases and making note of the reoccurring drug type. *See infra* note 124 and accompanying text.

120. Five kilograms is equivalent to eleven pounds.

121. 21 U.S.C. § 960(b)(1).

122. One thousand kilograms is equivalent to 2,205 pounds.

123. 21 U.S.C. § 960(b)(1).

124. *See* United States v. Amaya, 837 F. App'x 726, 727 (11th Cir. 2020) (stating the drug quantity was 2,200 kilograms of cocaine); United States v. Arboleda Velez, 830 F. App'x 300, 301 (11th Cir. 2020) ("The search revealed 427 kilogram bricks of cocaine on the *Sixoy I* and 384 kilogram bricks of cocaine on the *Posicon*."); United States v. Valencia, 822 F. App'x 942, 943 (11th Cir. 2020) (stating the drug quantity was 2,040 kilograms of cocaine); United States v. Silva-Ortiz, 820 F. App'x 969, 970 (11th Cir. 2020) (1,194.4 kilograms of cocaine); United States v. Tigua, 963 F.3d 1138, 1140 (11th Cir. 2020) (846 kilograms of cocaine); United States v. Napa Moreira, 810 F. App'x 702, 704 (11th Cir. 2020) (1,852 kilograms of cocaine); United States v. Lopez Toala, 799 F. App'x 804, 805 (11th Cir. 2020) (331 kilograms of cocaine); United States v. Mero Munoz, 805 F. App'x 797, 798 (11th Cir. 2020) (477 kilograms of cocaine); United States v. Otero-Pomares, 803 F. App'x 251, 254 (11th Cir. 2020) (640.9 kilograms of cocaine); United States v. Reyes-Garcia, 798 F. App'x 346, 349 (11th Cir. 2019) (930 kilograms of cocaine); United States v. Medina, 793 F. App'x 850, 852 (11th Cir. 2019) (191 kilograms of cocaine).

125. *See, e.g.*, Matt Zarrell, *\$312 Million of Cocaine Seized From "Go-Fast" Vessels, Narco Sub, US Coast Guard Says*, ABC NEWS (Dec. 18, 2019, 2:58 PM), <https://perma.cc/SK4X-XF5J> ("The U.S. Coast Guard has seized over 18,000 pounds of cocaine worth an estimated \$312 million in a series of drug busts in the Eastern Pacific Ocean."); Jillian Olsen, *More Than \$411 Million in Cocaine, Marijuana Offloaded by the Coast Guard in South Florida*, WSTP (Dec. 16, 2020, 10:12 PM), <https://perma.cc/3JCB-2Q6Y> ("Thousands of pounds of drugs are off the open waters thanks to a major drug bust by the U.S. Coast Guard netting more than \$411.3 million in cocaine and marijuana."); *US Coast Guard Seizes More Than \$59 Million in Cocaine*, WSTP (Oct. 11, 2020, 4:38 PM), <https://perma.cc/6YMZ-NFVM> ("Working closely with interagency assets, the crew interdicted and seized approximately 3,500 pounds of cocaine with an estimated street value of over 59 million dollars, according to a release.").

kilograms of cocaine aboard their “go-fast.”<sup>126</sup> Like the sentencing regime, these news outlets fail to critically assess *who* was arrested.<sup>127</sup>

## 2. Sentencing Guidelines

Beyond the assigned statutory penalty, the United States Sentencing Guidelines (the Guidelines) critically impact MDLEA sentencing, as they do any sentencing decision in the federal system.<sup>128</sup> While the statute sets the available minimum and maximum penalties, the Guidelines help determine where within that broad range a defendant should be sentenced.<sup>129</sup> The Guidelines contain a Drug Quantity Table that informs a sentencing judge of the defendant’s base level offense after plugging in the drug type and the quantity.<sup>130</sup> The base offense levels have no empirical grounding and, instead, reinforce the weight-driven scheme of the 1986 Acts.<sup>131</sup>

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126. See *supra* note 124 and accompanying text.

127. See *supra* note 125 and accompanying text.

128. See *Nelson v. United States*, 555 U.S. 350, 351 (2009) (“[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the stator sentencing factors.”); see also *United States v. Eberhart*, 797 F. App’x 463, 468 (11th Cir. 2019) (“Even though the Guidelines are advisory, it is still a mandatory function of a sentencing court to calculate the applicable Guidelines range as a benchmark . . .”).

129. See *supra* note 128 and accompanying text.

130. U.S. SENT’G GUIDELINES MANUAL § 2D1.1 (U.S. SENT’G COMM’N 2018).

131. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (“The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act’s weight-driven scheme.”); *United States v. Hubel*, 625 F. Supp. 2d 845, 849 (D. Neb. 2008) (“For policy reasons, and to conform to statutory mandatory minimum sentences, the Commission did not employ its characteristic empirical approach when setting the Guidelines range for drug offenses.”); *United States v. Diaz*, No.11-CR-00821-2-JG, 2013 WL 322243, at \*1 (E.D.N.Y. Jan. 28, 2013) (“[T]he Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or actual culpability of the defendant . . .”). *But see* U.S. SENT’G GUIDELINES MANUAL § 2D1.1 cmt. background (“[F]urther refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners . . .”).

Once the judge has determined the offense level,<sup>132</sup> the judge must assess the defendant's criminal history<sup>133</sup> and a range of other factors set out in the Guidelines, such as "role in the offense,"<sup>134</sup> whether or not the defendant obstructed justice,<sup>135</sup> and whether the defendant has accepted responsibility for the crime.<sup>136</sup> Each factor may raise or lower the final sentence.<sup>137</sup> Offense level and criminal history category are required to determine the defendant's sentence per the Sentencing Table.<sup>138</sup> For example, an individual charged with possession of five kilograms of cocaine has a base offense level of 30.<sup>139</sup> Assuming there are no factors that warrant a downward or upward departure as well as no criminal history (as is often the case for MDLEA defendants), the sentencing table suggests a sentence of 97–121 months.<sup>140</sup> But because § 960 imposes a mandatory minimum, the judge must sentence the defendant to at least 120 months in prison.<sup>141</sup> Even though the Guidelines sentences are non-empirical for drug offenses, the judge is not

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132. See U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b) (providing a list of specific offense characteristics that would require increasing the offense level).

133. See U.S. SENT'G GUIDELINES MANUAL § 4A (claiming that past criminal conduct is indicative of higher culpability while also admitting the "Commission has made no definitive judgment as to the reliability of the existing data").

134. See U.S. SENT'G GUIDELINES MANUAL § 3B (providing adjustments for an aggravating role, a mitigating role, abuse of position of trust or use of a special skill, using a minor to commit a crime, and use of body armor in drug trafficking crimes and crimes of violence).

135. See U.S. SENT'G GUIDELINES MANUAL § 3C (providing adjustments for obstructing or impeding the administration of justice, reckless endangerment during flight, commission of offense while on release, and false registration of domain name).

136. See U.S. SENT'G GUIDELINES MANUAL § 3E (providing a downward adjustment if the defendant clearly demonstrates acceptance of responsibility for the offense).

137. See *supra* notes 133–136 and accompanying text.

138. See U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2018) (providing the most recent sentencing table).

139. U.S. SENT'G GUIDELINES MANUAL § 2D1.1(a)(3).

140. U.S. SENT'G GUIDELINES MANUAL § 5A.

141. 21 U.S.C. § 960(b)(1).

bound by them because the Guidelines are only advisory.<sup>142</sup> Nevertheless, the statutory minimum removes all discretion.<sup>143</sup>

As discussed above, unlike those charged under its domestic counterpart, MDLEA defendants are typically arrested with hundreds or thousands of kilograms of narcotics, predominantly cocaine.<sup>144</sup> The Drug Quantity Table assigns a base offense level of 38 to those arrested with 450 kilograms or more of cocaine.<sup>145</sup> Where the defendant has no countable criminal history, the Sentencing Table recommends incarceration for between 235 and 293 months, or nineteen to twenty-four years.<sup>146</sup> The Guidelines seemingly provide support for the quantity-driven statutory scheme. But it shouldn't, because the Guidelines offense levels are unreliably sourced.<sup>147</sup> In practice, they perpetuate the flaws of mandatory minimum sentencing.<sup>148</sup>

### 3. Mandatory Minimum Sentencing Flaws

Mandatory minimum sentences have not discouraged drug use,<sup>149</sup> nor reduced drug trafficking,<sup>150</sup> nor resulted in uniform sentencing as intended.<sup>151</sup> Instead, they have disproportionately harmed minorities,<sup>152</sup> usurped judicial power,<sup>153</sup> and unleashed unquantifiable costs on the families of defendants.<sup>154</sup> Congress

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142. See *supra* note 131 and accompanying text.

143. 21 U.S.C. § 960(b)(1).

144. See *supra* note 124 and accompanying text.

145. U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N 2018).

146. U.S. SENT'G GUIDELINES MANUAL § 5A.

147. See *supra* note 131 and accompanying text.

148. See *infra* Part I.C.3.

149. See Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT'G REP. 55, 55 (2008) (assessing mandatory minimums' impact after twenty years of existence).

150. *Id.*

151. *Id.*; see CHARLES DOYLE, CONG. RSCH. SERV., RL32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES 6 (2013) ("Driven by concerns that broad discretion had led to rootless sentencing, unjustifiable in its leniency in some instances and in its severity in others, legislative bodies moved to curtail discretionary sentencing on several fronts.").

152. See Gill, *supra* note 149, at 55 (highlighting the negative consequences of statutory minimums).

153. *Id.*

154. *Id.*

linked the ten-year mandatory minimum to drug quantity thinking that it would apply to “major traffickers,” or “manufacturers or the heads of organizations.”<sup>155</sup> This decision was made devoid of substantiating evidence.<sup>156</sup> As a result, this reasoning became, perhaps, the greatest cause of disparity within federal sentencing.<sup>157</sup> For these fishermen-turned-couriers, quantity as a sign of responsibility in drug operations is nonsensical.<sup>158</sup>

As previously described, couriers are often motivated by fear<sup>159</sup> or intense poverty.<sup>160</sup> Mandatory minimums fail to take

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155. See Michael S. Nachmanoff & Amy Baron-Evans, *Booker Five Years Out: Mandatory Minimum Sentences and Department of Justice Charging Policies Continue to Distort the Federal Sentencing Process*, 22 FED. SENT’G REP. 96, 96 (2009) (defining what a major trafficker is and how Congress believed mandatory minimums would apply); see also *Report on Cocaine and Federal Sentencing Policy*, *supra* note 88, at 118–21 (1995); H.R. REP. NO. 99-845, at 11–12 (1986).

156. See Nachmanoff & Baron-Evans, *supra* note 155, at 96 (“This conclusion was reached hastily, without hearings or any empirical research, and without foresight that the statute would ultimately be used to prosecute low-level offenders—that is, street-level dealers and couriers—far more often than high-level offenders.”).

157. See Eric L. Sevigny, *The Tyranny of Quantity: How the Overemphasis on Drug Quantity in Federal Drug Sentencing Leads to Disparate and Anomalous Sentencing Outcomes* (June 30, 2006) (Ph.D. dissertation, University of Pittsburgh), <http://perma.cc/YLB5-XP6M> (PDF) (discussing the overemphasis on quantity as a measure of offense seriousness).

158. See Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT’G REP. 63, 64 (1990) (“[C]ouriers often are unaware of the quantity or value of the drugs they are carrying, or even the type, such as crack rather than cocaine powder.”); Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT’G REP. 121, 121 (1994) (summarizing a case in which a courier was responsible for the entire contents of the luggage even though it contained more paraphernalia than the defendant was aware of).

159. See Adam B. Weber, Note, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1768–71 (2019) (explaining how fear and poverty drive recruitment of low-level drug couriers); Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 702–03 (2017) (“The temptation of short-term financial relief comes at the cost of the extraordinary risk of many years of imprisonment and death by cartel violence.”).

160. See Castillo, *supra* note 1 (“Many fishermen, knowing the risks of smuggling, refuse to take *vueltas*. But catastrophe can push them to reconsider. Nearly half of the families [the author] interviewed said their loved

these motivations into account.<sup>161</sup> As such, the mandatory minimums impede a judge's ability to impose just sentences and critically assess the culpability of the defendant before them.<sup>162</sup> In fact, by 1995, over one hundred federal senior judges recused themselves from the trials of low-level drug offenders out of discomfort with the practice.<sup>163</sup> In the words of one of these judges, "I simply cannot sentence another impoverished person whose destruction has no discernable effect on the drug trade."<sup>164</sup> Scholars argue the only way to eradicate disproportionate sentencing is to remove mandatory minimums entirely.<sup>165</sup> Statutory guidelines cannot appropriately assess an individual's culpability.<sup>166</sup> They are void of mercy and,

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one had made a *vuelta* in 2016—the year a magnitude 7.8 earthquake leveled Ecuador's coast . . .").

161. See *supra* notes 149–158 and accompanying text.

162. See Nachmanoff & Baron-Evans, *supra* note 155, at 98 ("Mandatory minimum sentences . . . continue to frustrate the ability of judges to impose just sentences in a wide variety of cases in which mandatory sentences must be imposed regardless of the culpability of the defendant or the independent judgment of the court.").

163. This is not specific to the MDLEA, but harsh mandatory minimum sentencing practice more generally. Natasha Bronn, "*Unlucky Enough to be Innocent: Burden-Shifting and the Fate of the Modern Drug Mule Under the 18 U.S.C. § 3553(f) Statutory Safety Valve*," 46 COLUM. J.L. & SOC. PROBS. 469, 479–80 (2013).

164. See Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1863 n.108 (1995) (quoting Eric Schlosser, *Marijuana and the Law*, ATL. MONTHLY, Sept. 1994, at 94).

165. See Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, at 4 (Aug. 9, 2003), <https://perma.cc/2U3N-LUXU> [hereinafter Justice Kennedy Speech] ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."); Gill, *supra* note 149, at 62 ("Now is the time for Congress to do as the 1970 Congress did and reform mandatory minimum drug sentences. Reform could be accomplished in several ways . . . Congress could excise all mandatory minimums for drug offenses . . ."); *Mandatory Minimum Repeal*, FAMM, <https://perma.cc/537S-T2HU> ("One way to reform mandatory minimum sentences is simply to get rid of them . . ."); Daniel Israel, *Eliminating Mandatory Minimum Sentences*, HUDSON REP. (Sept. 8, 2020), <https://perma.cc/2KUA-7FT6> ("If we are ever going to reverse the harmful effects of mass incarceration, we must move away from doling out lengthy sentences for minor offenses . . .").

166. See Nachmanoff & Baron-Evans, *supra* note 155, at 96 ("[M]andatory minimum sentences neither account for, nor allow judges to account for, role

consequently, justice.<sup>167</sup> Repealing mandatory minimums would successfully end the presumptive ten-year sentence these defendants face.<sup>168</sup> However, arguing for total eradication is beyond this Note's scope because mandatory minimum sentencing failure affects *all* recipients of statutorily imposed minimum sentences.<sup>169</sup>

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in the offense or any other pertinent measure of culpability, such as *mens rea*, motive, addiction, or the government's role in facilitating the crime or influencing the quantity."); Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <https://perma.cc/Q7ZU-DL5D> ("[Judge] John Coughenour says federal sentencing guidelines are overly punitive, coldly algorithmic measures that strip the courtroom of nuance. Without discretion, what's the judiciary for?"); *Mandatory Minimum Repeal*, *supra* note 165 ("Mandatory minimum sentencing laws require judges to give all offenders convicted of a certain crime the same punishment—regardless of whether it fits the crime or the offender or is necessary to keep the public safe.").

167. See Justice Kennedy Speech, *supra* note 165, at 4 ("[M]andatory minimum sentences are unwise and unjust. . . . One day in prison is longer than almost any day you and I have had to endure."); Nachmanoff & Baron-Evans, *supra* note 155, at 96 ("Mandatory minimum sentences, in conjunction with the charging policies of the Department of Justice, continue to hamstring judges in their ability to impose just and effective sentences in federal court."); Shira A. Scheindlin, *I Sentenced Criminals to Hundreds More Years Than I Wanted To. I Had No Choice*, WASH. POST (Feb. 17, 2017), <https://perma.cc/8KEW-A22Y> ("Mandatory minimums were almost always excessive, and they made me feel unethical, even dirty. . . . While I bore the title 'Honorable Judge,' I felt less than honorable and more like a complicit tool of an unjust system.").

168. See Weber, *supra* note 159, at 1759–60 (discussing the mandatory minimum penalty associated with 21 U.S.C. § 960 and its link to drug quantity).

169. See Karl Vick, *Bryan Stevenson: We're Taking the Wrong Approach to Criminal Justice Reform*, TIME (Feb. 20, 2020, 7:32 AM), <https://perma.cc/7CYB-G9KP> (last updated Feb. 24, 2020) ("We've created a whole matrix for imprisoning, arresting, condemning and marginalizing millions of people in this country. We are the most punitive country in the world. It's so important to eliminate mandatory sentencing."); cf. John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 385 (2013) ("[M]andatory minimums place the primary sentencing discretion in the hands of one side of an adversarial process—the prosecution—rather than in the hands of a dispassionate judge.").



## II. THE SAFETY VALVE PROVISION

A. *The History of § 3553(f)*

Fortunately, the flaws of mandatory minimum sentencing regimes have not gone unnoticed. The United States Sentencing Commission conducted a comprehensive analysis that concluded that mandatory minimums led to instances in which “offenders who markedly differed in seriousness nonetheless received similarly severe sentences.”<sup>170</sup> In response, the Subcommittee on Crime and Criminal Justice held a hearing to investigate egregious cases to determine where to ease penalties.<sup>171</sup> The consensus was that the controlled substance mandatory minimums could be improved with a provision that protected the least culpable offenders.<sup>172</sup> Concerned that mandatory minimum sentencing provisions could have resulted in equally severe penalties for both the more- and less-culpable offenders, Congress enacted the safety valve provision (18 U.S.C. § 3553) in 1994.<sup>173</sup>

Congress wrote the “safety valve” as a narrow exemption.<sup>174</sup> It specifies which offenses the safety valve applies to.<sup>175</sup> And though it grants judges the discretion to apply it, it does not mandate application.<sup>176</sup> The court *may* sentence below a statutory mandatory minimum penalty, if it finds: (1) the defendant does not have a disqualifying criminal history point total; (2) the defendant was not violent and did not possess a firearm or other dangerous weapon; (3) the offense did not result in death or serious bodily injury; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense; and (5) the defendant fully disclosed all information and

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170. H.R. REP. NO. 103-460 (1994).

171. *Id.*

172. *Id.*

173. CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 5 (2019) [hereinafter DOYLE, SAFETY VALVE AND SUBSTANTIAL ASSISTANCE].

174. Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1472 (2000).

175. 18 U.S.C. § 3553(f).

176. *Id.*

evidence concerning the offense or offenses that were part of the same common scheme or plan.<sup>177</sup> Unsurprisingly, the U.S. Sentencing Commission reports that the safety valve provision fails to fully ameliorate the consequences of drug mandatory minimum penalties on relatively low-level offenders.<sup>178</sup> This is largely due to the broad interpretation of the supervisor subsection,<sup>179</sup> disqualification due to firearm possession,<sup>180</sup> and

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177. *See id.*

(1) the defendant does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined . . . ; and (C) a prior 2-point offense, as determined . . . ; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

178. U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (2017), <https://perma.cc/69UW-PBSG> (PDF) (“[N]either the statutory safety valve provision at 18 U.S.C. § 3553(f), nor the substantial assistance provision of 18 U.S.C. § 3553(e) fully ameliorate the impact of drug mandatory minimum penalties on relatively low-level offenders.”).

179. *See* DOYLE, SAFETY VALVE AND SUBSTANTIAL ASSISTANCE, *supra* note 173, at 7 (“The term *supervisor* is construed broadly and encompasses anyone who exercises control or authority of another during the commission of the offense.”); *United States v. Gamboa*, 701 F.3d 265, 267 (8th Cir. 2012) (“It is only necessary that the defendant supervise or manage one other participant.” (citing *United States v. Johnson*, 619 F.3d 910, 921 (8th Cir. 2010))).

180. *See* DOYLE, SAFETY VALVE AND SUBSTANTIAL ASSISTANCE, *supra* note 173, at 6 (“In many instances, possession of a firearm in a location where drugs are stored or transported, or where transactions occur, will be enough to support an inference of possession in connection with the drug offense of conviction.”).

the full disclosure requirement.<sup>181</sup> These interpretations often preclude lesser sentences for those who are, in reality, low-level offenders.<sup>182</sup> Thus, the safety valve is capable of ameliorating harsh mandatory sentences.<sup>183</sup> But the current restrictive use impedes its full potential.<sup>184</sup>

### 1. Whether the Safety Valve Applies to the MDLEA

Congress chose to specify which offenses the safety valve provision applied to.<sup>185</sup> The original version applied to five offenses,<sup>186</sup> but the MDLEA was not one of them.<sup>187</sup> The Controlled Substances Penalties (§ 960), however, were.<sup>188</sup> Even though these sections were linked, the majority of courts refused to extend safety valve relief to the MDLEA because of terminology differences.<sup>189</sup> The safety valve extends to *offenses*.<sup>190</sup> Section 960 is one of those offenses.<sup>191</sup> However, the

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181. *See id.* at 8 (“The defendant must provide the government with *all* the relevant information in his possession.”).

182. *See supra* note 177 and accompanying text.

183. *See supra* note 178 and accompanying text.

184. *See supra* note 178 and accompanying text.

185. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1786, 1985

Notwithstanding any other provision of law, in the case of an *offense under* section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence . . . (emphasis added).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Compare* United States v. Gamboa-Cardenas, 508 F.3d 491, 506 (9th Cir. 2007) (holding that defendants were not eligible for safety valve relief), *and* United States v. Pertuz-Pertuz, 679 F.3d 1327, 1329 (11th Cir. 2012) (same), *with* United States v. Mosquera-Murillo, 902 F.3d 285, 296 (D.C. Cir. 2018) (holding that defendants were eligible for relief from mandatory minimum ten-year sentences).

190. *See supra* note 185 and accompanying text (emphasizing the word *offense* within the statute).

191. *See supra* note 185.

MDLEA refers to § 960 as a *penalty*.<sup>192</sup> The following cases explain how the Ninth and Eleventh Circuits used this difference to foreclose safety valve relief.<sup>193</sup> In direct opposition, the D.C. Circuit applied the safety valve.<sup>194</sup>

2. The Ninth Circuit: *United States v. Gamboa-Cardenas*

In *United States v. Gamboa-Cardenas*,<sup>195</sup> the defendants were arrested approximately 480 nautical miles south of Guatemala with 1,303 kilograms of cocaine on their “go-fast” vessel.<sup>196</sup> After considering the safety valve provision, the district court decided it applied and imposed a forty-one month sentence—well below the mandatory minimum of ten years—on each defendant.<sup>197</sup> A panel of the Ninth Circuit disagreed.<sup>198</sup> It stated that the safety valve provision only applies to statutes specifically enumerated within the text.<sup>199</sup> Although the MDLEA invoked § 960, it did not invoke the full text.<sup>200</sup> While § 960 was incorporated as an offense to the safety valve provision, the Ninth Circuit reasoned that it serves only as a penalty provision for the MDLEA.<sup>201</sup> If the safety valve was intended to apply to the MDLEA, the safety valve would have been discussed within the MDLEA’s penalty provision.<sup>202</sup> Thus, the safety valve unambiguously did not apply to the MDLEA because there was no mention of the safety valve anywhere in the Controlled Substances Penalties.<sup>203</sup> Even though the district court had deemed these individuals to be low-level offenders, the

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192. 46 U.S.C. § 70506.

193. *See infra* Part II.B.1–2.

194. *See infra* Part II.B.3.

195. 508 F.3d 491 (9th Cir. 2007).

196. *Id.* at 494.

197. *Id.* at 495.

198. *See id.* at 506 (“We vacate the sentences of appellees Gamboa-Cardenas, Cuero-Aragon and Barahona-Estupinan, and we remand to the district court for resentencing *without* the safety valve.” (emphasis added)).

199. *Id.* at 498.

200. *Id.* at 499.

201. *Id.*

202. *Id.*

203. *See id.* (“These is no mention of the safety valve anywhere in § 960.”).

Ninth Circuit decided, as a matter of law, to add seventy-nine months (or over six years) to the defendants' sentences.<sup>204</sup>

Circuit Judge Fisher pointed out the flaw in this reasoning in his dissent.<sup>205</sup> He acknowledged the majority's reasoning was one possibility, but found that the safety valve was, in fact, ambiguous.<sup>206</sup> The MDLEA derived its punishment from the Controlled Substances Penalties<sup>207</sup> and Congress drafted the safety valve provision to apply to the Controlled Substances Penalties.<sup>208</sup> Accordingly, one could understand the combination of these provisions to mean that the safety valve provision applied to the MDLEA.<sup>209</sup>

### 3. The Eleventh Circuit: *United States v. Pertuz-Pertuz*

In *United States v. Pertuz-Pertuz*,<sup>210</sup> the court considered a crew member aboard a Colombian fishing vessel carrying "70 kilogram packages" of cocaine.<sup>211</sup> The court acknowledged that if not for the ten-year mandatory minimum, the Guidelines sentence was nine to eleven years.<sup>212</sup> The Eleventh Circuit relied on plain-text interpretation and, like the Ninth Circuit, declared that the safety valve statute was unambiguous.<sup>213</sup> It used the

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204. See *id.* at 506 (holding that the safety valve did not apply, inevitably resulting in the application of the mandatory minimum).

205. *United States v. Gamboa-Cardenas*, 508 F.3d 491, 506–07 (9th Cir. 2007) (Fisher, J., concurring in part, dissenting in part)

The majority's reading of the relevant statute is plausible, but it is not the only plausible reading and this demonstrates the statutory language is ambiguous. [MDLEA] required "punish[ment] in accordance with the penalties set forth in section . . . 960." Since 1994, all penalties set forth in § 960 are subject to safety valve relief. One could understand the combination of these provisions to mean that [MDLEA] offenses should be penalized the same as offenses under § 960, which is expressly listed in the safety valve statute, and thus the safety valve applies to [MDLEA] penalties.

206. *Id.* at 507.

207. *Id.*

208. *Id.*

209. *Id.*

210. 679 F.3d 1327 (11th Cir. 2012).

211. See *United States v. Pertuz-Pertuz*, No. 8:10-cr-303-T-23MAP, 2013 WL 12213840, at \*1 (M.D. Fla. Jan. 30, 2013) (describing the facts of the case).

212. See *Pertuz-Pertuz*, 679 F.3d at 1328.

213. *Id.* ("The plain text of a statute controls. The Supreme Court has instructed that 'courts must presume that a legislature says in a statute what

Ninth Circuit’s logic to strengthen its conclusion that the safety valve’s selection of five statutes reflected an intent to exclude other statutes,<sup>214</sup> including the MDLEA.<sup>215</sup> Because the safety valve refers to an “offense under” § 960, not an “offense penalized under” nor a “sentence under” § 960, the MDLEA was not covered by its reach.<sup>216</sup> With this, the court quickly discarded the argument discussing the statutory combination in favor of the so-called unambiguous text.<sup>217</sup> The court affirmed the defendant’s ten-year minimum mandatory sentence.<sup>218</sup>

#### 4. The D.C. Circuit: *United States v. Mosquera-Murillo*

In 2018, the D.C. Circuit rejected this analysis.<sup>219</sup> In *United States v. Mosquera-Murillo*,<sup>220</sup> the Coast Guard arrested the defendants seventy nautical miles off the coast of Panama.<sup>221</sup> Though the crew attempted to dump the cargo, they were caught with more than 220 kilograms of cocaine and more than 120 kilograms of marijuana.<sup>222</sup> The district court held that they were

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it means and means in a statute what it says there.” (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))).

214. *See id.* at 1328 (citing *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496–98 (9th Cir. 2007)).

215. *Id.*

216. *Id.* at 1329 (“The safety valve statute, section 3353(f), refers to an ‘offense under’ section 960—not to an ‘offense penalized under’ section 960 and not to a ‘sentence under’ section 960.”).

217. *See id.* (“[S]ection 960 does not incorporate section 70503 by reference as an ‘offense under’ section 960. Therefore, the plain text of the statutes shows that convictions under Title 46 of the U.S. Code . . . entitle a defendant to no safety-valve relief.”).

218. *See id.* at 1327–29 (“The District Court sentenced Defendant to concurrent imprisonment terms of 120 months . . . . We affirm Defendant’s sentence.”).

219. *See United States v. Mosquera-Murillo*, 902 F.3d 285, 295 (D.C. Cir. 2018) (“Two other circuits have considered whether MDLEA offenses penalized under § 960(b) qualify as ‘offenses under’ § 960 for purposes of the safety-valve provision. Both courts have concluded that such offenses do not qualify. We respectfully reach the opposite conclusion.” (citing *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1329 (11th Cir. 2012)); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496 (9th Cir. 2007))).

220. 902 F.3d 285 (D.C. Cir. 2018).

221. *Id.* at 287.

222. *Id.*

ineligible for safety valve relief.<sup>223</sup> The D.C. Circuit disagreed.<sup>224</sup> The court emphasized that one of the enumerated provisions within the safety valve provision is § 960.<sup>225</sup> The MDLEA states that this section supplies the penalties for a first-time offender.<sup>226</sup> Accordingly, the defendant's violation of the MDLEA also violated § 960.<sup>227</sup> Specifically, the MDLEA supplies the elements that make the conduct unlawful,<sup>228</sup> but § 960 supplies the offense elements of drug-type and drug-quantity.<sup>229</sup> Both the government's indictment and plea agreements supported this conclusion by describing the defendants as having violated § 960.<sup>230</sup> The government still argued they were not convicted of "an offense under" § 960 by claiming only one subsection of the statute applied, not its entirety.<sup>231</sup> The court was not persuaded.<sup>232</sup>

The court stressed that granting safety valve relief aligned with Congress's pattern of setting identical penalties for drug crimes committed in domestic waters and the high seas.<sup>233</sup> After highlighting that history, the D.C. Circuit refused to believe Congress would have broken its 100-year pattern of penalty parity.<sup>234</sup> Acknowledging that the decision was in direct

223. *Id.* at 292.

224. *Id.* at 295–96.

225. *Id.*

226. *Id.*

227. *Id.* at 293 (“[E]ven if the precise meaning of the phrase, ‘an offense under provision X’ could be subject to some debate at the margins, there is no doubt: a defendant’s case involves ‘an offense under’ provision X if the defendant has been convicted of *violating* provision X.”).

228. *Id.*; *see also* 46 U.S.C. §§ 70503(a)(1), 70506(b) (providing that conspiring to intentionally or knowingly distribute or possess with intent to distribute a controlled substance while on board a vessel is prohibited).

229. *Mosquera-Murillo*, 902 F.3d at 293 (“As further confirmation that § 960 supplies elements of the defendants’ offense, the government’s indictment charged the defendants with violating both the MDLEA and § 960, not just the former.”).

230. *Id.*

231. *Id.*

232. *Id.* at 294 (“The government’s reading of the safety-valve provision is unpersuasive. The statute speaks in terms of an offense under § 960 without limitation—not an offense under only § 960(a).”).

233. *Id.* at 295.

234. *Id.*

opposition to the Ninth and Eleventh Circuits,<sup>235</sup> the court vacated the defendants' sentences and remanded for sentencing, requiring consideration of the safety valve requirements.<sup>236</sup>

B. *Petition for Certiorari: United States v. Castillo*

In *United States v. Castillo*,<sup>237</sup> the defendant was arrested 105 nautical miles off the coast of Guatemala as he, and four others, attempted to jettison cocaine bales off the vessel.<sup>238</sup> After being held by the government for twenty days, the defendant was charged with drug-trafficking crimes under the MDLEA in Florida.<sup>239</sup> The district court sentenced him to 132 months in prison after ruling that relief from the statutory mandatory minimum under the safety valve was not available.<sup>240</sup> On appeal, the Eleventh Circuit refused to apply the safety valve.<sup>241</sup>

The United State Supreme Court could have resolved the circuit split by granting certiorari in *Castillo*.<sup>242</sup> Castillo noted the Circuit split in his petition for a writ of certiorari.<sup>243</sup> But almost three months later, Congress enacted the First Step Act (discussed below) and resolved the split.<sup>244</sup> Nonetheless, the petitioner argued that a Supreme Court decision would still affect a substantial number of cases, including those pending in any federal district court, any other circuit, and, of course, those in the Eleventh Circuit that had not been briefed.<sup>245</sup> In the

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235. *Id.* at 296 (“Neither of those decisions expressly assesses whether the drug-type and drug-quantity facts supplied by § 960(b) constitute offense elements, such that an MDLEA offender penalized under § 960(b) should be considered someone who has violated both the MDLEA and § 960.”).

236. *Id.*

237. 899 F.3d 1208 (11th Cir. 2018).

238. *Id.* at 1211.

239. *Id.*

240. *Id.*

241. *Id.* at 1212–14.

242. *United States v. Castillo*, 899 F.3d 1208 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019).

243. Petition for Writ of Certiorari, *filed*, No. 18-374, 2018 WL 4564803, at \*10–14 (Sept. 21, 2018).

244. See NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019) (mentioning the date of enactment).

245. Petitioner’s Supplemental Brief, *filed*, No. 18-374, 2018 WL 7051883, at \*3 (Dec. 28, 2018).



Eleventh Circuit alone, it would impact nine cases recently decided or awaiting decision.<sup>246</sup> Unlike a Supreme Court decision, new legislation does not explicitly reject the Ninth and Eleventh Circuits reasoning.<sup>247</sup> The precedent of using pedantic arguments to deny sentencing relief remains. And the philosophy bleeds into all other MDLEA cases.<sup>248</sup>

### III. THE FIRST STEP ACT OF 2018

#### A. *Tentative Steps Towards Criminal Justice Reform*

The First Step Act of 2018 was a bipartisan approach to criminal justice reform.<sup>249</sup> As the Act's name suggests, it is only a tentative step towards substantial sentencing reform.<sup>250</sup> The ultimate goal was to reduce the prison population while still protecting public safety.<sup>251</sup> To do so, the Act is broken down into three components. The first component requires the DOJ to develop risk and needs assessment systems at the Bureau of Prisons (BOP).<sup>252</sup> The second component implements several changes to federal sentencing law.<sup>253</sup> The third component reauthorizes many of the grant programs within the Second Chance Act of 2007.<sup>254</sup>

While all three components effectuate needed change, the second part of the First Step Act is the most important for the

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246. *United States v. Valois*, 915 F.3d 717 (11th Cir. 2019); *United States v. Cabezas-Montano*, 949 F.3d 567 (11th Cir. 2020); *United States v. Guerro*, 789 F. App'x 742 (11th Cir. 2019); *United States v. Quijije-Napa*, 776 F. App'x 583 (11th Cir. 2019); *United States v. Mastarreno*, 748 F. App'x 291 (11th Cir. 2019); *United States v. Vargas*, 781 F. App'x 815 (11th Cir. 2019); *United States v. Diaz*, 745 F. App'x 148 (11th Cir. 2018); *United States v. Jimenez*, 756 F. App'x 933 (11th Cir. 2018); *United States v. Torres*, 742 F. App'x 493 (11th Cir. 2018).

247. *See infra* Part III.A.

248. *See supra* note 246 and accompanying text.

249. JAMES, *supra* note 244, at 1.

250. *See* Jalila Jefferson-Bullock, *Consensus, Compassion, and Compromise? The First Step Act and Aging Out of Crime*, 32 FED. SENT'G REP. 70, 70 (2019) (“[The First Step Act of 2018] is, in practice, simply one meager stride in a required marathon to effect true change.”).

251. *Id.*

252. *Id.* at 1–8 (listing the requirements of the assessment system).

253. *Id.* at 8–9

254. *Id.* at 9.

purposes of this Note. The changes to federal sentencing law include mandatory minimum sentence reduction,<sup>255</sup> elimination of the stacking provision,<sup>256</sup> retroactivity of the Fair Sentencing Act of 2010,<sup>257</sup> and expansion of the safety valve.<sup>258</sup> Among the changes to the safety valve, the Act included the MDLEA in the provision's list of applicable offenses.<sup>259</sup>

### B. *Appending the MDLEA to the Safety Valve*

As stated, Congress resolved the safety valve circuit split via the First Step Act, removing the need for action by the Supreme Court.<sup>260</sup> Now, the safety valve provision explicitly lists the MDLEA as an offense protected by the safety valve provision.<sup>261</sup> Though it resolved frustration over the semantics of “offense” versus “penalty,”<sup>262</sup> it doesn't do much else for

255. *See id.* at 8–9 (“The act reduces the 20-year mandatory minimum (applicable where the offender has one prior qualifying conviction) to a 15-year mandatory minimum and reduces the life sentence mandatory minimum (applicable where the offender has two or more prior qualifying convictions) to a 25-year mandatory minimum.”).

256. *See id.* at 9 (“The act eliminates stacking by providing that the 25-year mandatory minimum for a second or subsequent conviction for use of a firearm in furtherance of a drug trafficking crime or a violent crime applies only where the offender has a prior [final] conviction for use of a firearm.”).

257. *See id.* (“[T]he Fair Sentencing Act of 2010 . . . increased the threshold quantities of crack cocaine sufficient to trigger mandatory minimum sentences. The retroactive application . . . is not automatic.”).

258. *See id.* (“The act makes drug offenders with minimal criminal records eligible for the safety valve provision, which previously applied only to offenders with virtually spotless criminal records.”).

259. *Id.*

260. *See* First Step Act of 2018, Pub. L. No. 115-391, § 402(a)(1)(A)(ii), 132 Stat. 5194, 5221 (adding 46 U.S.C. §§ 70503, 70506 to 18 U.S.C. § 3553(f)).

261. *See* 18 U.S.C. § 3553(f) (“[I]n the case of an offense under . . . *section 70503 or 70506 of title 46*, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence . . .” (emphasis added)).

262. *Compare* United States v. Pertuz-Pertuz, 679 F.3d 1327, 1329 (11th Cir. 2012) (“The safety valve statute . . . refers to an ‘offense under’ section 960—not to an ‘offense penalized under’ section 960 and not to a ‘sentence under’ section 960.”), *with* United States v. Mosquera-Murillo, 902 F.3d 285, 293 (D.C. Cir. 2018) (“[E]ven if the precise meaning of the phrase, ‘an offense under provision X’ could be subject to some debate at the margins,

MDLEA defendants. To begin broadly, the First Step Act does not apply the safety valve retroactively.<sup>263</sup> This means those previously convicted under the MDLEA will continue to age in prison.<sup>264</sup> Future defendants are not much better off because, as previously discussed,<sup>265</sup> the safety valve provision is a narrow exception.<sup>266</sup> By including § 70503 within the safety valve provision, the First Step Act merely applied the safety valve's overly restrictive precedent.<sup>267</sup>

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there is no doubt: a defendant's case involves 'an offense under' provision X if the defendant has been convicted of *violating* provision X.”).

263. See Keith Wattley, *Trump's Criminal Justice Reform Is a Step in the Wrong Direction*, N.Y. TIMES (Dec. 4, 2018), <https://perma.cc/D7C9-MP5Y>

But any would-be reform effort that begins by denying the benefits of therapeutic, educational and vocational programs to the people who could benefit most is not a “first step”—it's a step in the wrong direction. For example, it will reduce mandatory minimum sentences . . . however, this part is not retroactive, so no one currently serving such a sentence will have it shortened.

264. See *United States v. Cabezas-Montano*, 949 F.3d 567, 604 (11th Cir. 2020) (“They concede . . . that they are not eligible for safety-valve relief because, at the time of their MDLEA convictions under Title 46, no Title 46 offense was covered by the safety valve in § 3553(f) or § 5C1.2.” (citations omitted)); *United States v. Quijije-Napa*, 776 F. App'x 583, 585 (11th Cir. 2019) (“Congress made the amendment applicable to convictions entered only on and after the date of enactment, however, which means that Quijije-Napa may not benefit from the amendment.”); *United States v. Vargas*, 781 F. App'x 815, 821 (11th Cir. 2019) (“While Vargas's appeal was pending, Congress added MDLEA offenses to the safety valve statute. However, Congress made the amendment applicable to convictions entered only on and after the date of enactment, which means that Vargas may not benefit from the amendment.” (citations omitted)).

265. See *supra* Part II.

266. See Weber, *supra* note 159, at 1787 (“Although the safety valve also functions to spare low-level drug offenders from harsh mandatory minimum sentences, it has a number of flaws that an amendment of the importation statute could address.” (footnote omitted)); *Safety Valves*, FAMM, <https://perma.cc/86NZ-2F75> (“But it is a very narrow exception: in FY 2015, only 13 percent of all drug offenders qualified for the exception.”).

267. See U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 4 (2020) (“Most drug trafficking offenders who received safety-valve relief in First Step Year One (80.8%; n=5,758) were 'already eligible' for relief under the *old* safety valve criteria.”); Julie Samuels et al., *Next Steps in Federal Corrections Reform: Implementing and Building on the First Step Act*, 32 FED. SENT'G REP. 92, 96 (2019) (“[M]any [provisions] do not go as far as the [Colson] Task Force and some recommendations are not addressed at all . . .”).

The recent *United States v. Valoy*<sup>268</sup> decision demonstrates the impact of this precedent.<sup>269</sup> The Coast Guard intercepted and apprehended the defendant and two others as they attempted to transport cocaine from Colombia to Costa Rica.<sup>270</sup> Following his arrest, the defendant provided conflicting information regarding his compensation.<sup>271</sup> Though his attorney argued that he merited both a minor-role reduction and safety valve relief, the district court sentenced him to the 120-month mandatory minimum because of the volume of cocaine on the “go-fast” vessel.<sup>272</sup> The court recognized that prior to the First Step Act defendants convicted under the MDLEA were not eligible for safety valve relief.<sup>273</sup> Here, safety valve analysis was warranted because the defendant’s conviction followed the Act’s enactment.<sup>274</sup> Both parties agreed that the defendant satisfied the first four factors.<sup>275</sup> Only the fifth factor—truthfully providing the Government with *all information* and evidence the defendant has concerning the offense—was at issue.<sup>276</sup>

The court acknowledged that a defendant who previously lied or withheld information from the government was not automatically disqualified from safety valve relief.<sup>277</sup> However, the district court found that the defendant “had not truthfully provided to the government *all* the information that he possessed concerning the offense” because of his prior inconsistent statements combined with his failure to identify

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268. 830 F. App’x 601 (11th Cir. 2020).

269. *See id.* at 605 (finding that the district court was correct to deny the defendant’s request for safety valve relief).

270. *Id.* at 603.

271. *Id.*

272. *Id.*

273. *See id.* at 604 n.1 (explaining why the court assessed Valoy’s eligibility for safety valve relief).

274. *Id.*

275. *Id.* at 604.

276. *Id.*

277. *See id.* at 605 (“[A] defendant who previously lied or withheld information from the government is not automatically disqualified from safety-valve relief as long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing.” (internal quotations omitted) (quoting *United States v. Brownlee*, 204 F.3d 1302, 1304–05 (11th Cir. 2000))).

who hired him.<sup>278</sup> The Eleventh Circuit affirmed that this precluded the defendant from safety valve relief.<sup>279</sup> In other words, both courts held that providing unsatisfactory information to the government justifies a decade-long prison sentence.<sup>280</sup> This creates a formidable challenge for a fisherman that has no worthwhile intelligence to provide, precisely because of his low status.<sup>281</sup>

#### IV. THROW THEM A LIFELINE

##### A. *Improve the Safety Valve Provision*

Currently, the safety valve's ultimate goal to safeguard less culpable offenders has not been realized.<sup>282</sup> Improving the safety valve provision could eventually safeguard these individuals from decade-long prison sentences.<sup>283</sup> One way of doing this would be to eliminate the five-factor assessment that the safety valve provision contains or make it discretionary.<sup>284</sup> This would give courts the discretion to look at an individual holistically.<sup>285</sup> The judge could review relevant facts and circumstances of the case as well as consider the purposes of punishment.<sup>286</sup> Scholars

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278. *Id.*

279. *United States v. Valoy*, 830 F. App'x 601, 605 (11th Cir. 2020).

280. *Id.*

281. *Id.* at 604–05 (providing safety valve analysis without considering statutory intent).

282. *See Froyd*, *supra* note 174, at 1500 (“The current safety valve provision fails to produce these sorts of equitable sentences.”).

283. *See id.* (“Congress could easily remedy the problem of disparity in sentencing between high-level and low-level offenders by amending the safety valve provision . . .”); *Safety Valves*, *supra* note 266 (“The Solution: Create a broader safety valve that applies to all mandatory minimum sentences, and expand the existing drug safety valve to cover more low-level offenders.”); Gill, *supra* note 149, at 62 (“Congress could maintain the current mandatory minimum sentences, but provide courts an opportunity to opt out of them in certain cases by expanding the existing statutory safety valve.”).

284. Gill, *supra* note 149, at 63 (“Congress could expand the safety valve by permitting courts to invoke it when, after looking at all the relevant facts and circumstances of the case and considering the purposes of punishment, imposing the mandatory minimum sentence would violate the parsimony mandate in [the safety valve provision].”).

285. *Id.*

286. *Id.*

have proposed alternative safety valve considerations,<sup>287</sup> which more aptly depict a low-level participant in a drug trafficking enterprise.<sup>288</sup> Others have argued to standardize interpretation regarding application of the burden of proof.<sup>289</sup> However, these versions inherently have limitations.<sup>290</sup> The desire to broaden the safety valve is a result of its limited applicability in deserving cases.<sup>291</sup> While broadening the safety valve provision may increase the number of those receiving reduced sentences generally, this will not be realized by MDLEA defendants

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287. See Froyd, *supra* note 174, at 1501

The following is a non-exhaustive list of factors a court may consider when determining whether a defendant is a low-level participant: (1) The Defendant received a small, flat fee payment for a drug delivery (rather than a percentage of the profits after the drugs were sold); (2) The Defendant only delivered drugs one way, and did not deliver the money in return; (3) The Defendant received a pre-packaged bag; (4) The Defendant delivered to an individual not previously known to the Defendant; (5) The Defendant did not sell or negotiate the terms of the sale of the drugs; (6) The Defendant had no ownership of any portion of the drugs; (7) The Defendant did not finance any aspect of the criminal activity; (8) The Defendant lacked knowledge as to the type, quantity, or value of the drugs the Defendant was carrying; (9) The Defendant lacked knowledge or understanding of the scope and structure of the conspiracy; (10) The Defendant lacked knowledge regarding the activities of others involved in the conspiracy; (11) The Defendant did not supervise others; or (12) The Defendant was closely supervised by the supplier or distributor.

288. See U.S. SENT'G COMM'N, REPORT OF THE DRUGS/ROLE/HARMONIZATION WORKING GROUP 62 (1992) (including a non-exhaustive list of characteristics that ordinarily are associated with a minor role); Young, *supra* note 158, at 63 (listing other characteristics to consider when measuring a drug defendant's culpability).

289. See Bronn, *supra* note 163, at 496 ("Using the allocation adopted by the Fifth and Ninth Circuits will achieve greater sentencing fairness and also correct a misunderstanding of a number of circuits that the safety valve is not a departure from the Federal Sentencing Guidelines, but is rather an excusal from them . . .").

290. See Froyd, *supra* note 174, at 1505–06 (discussing potential criticism of the proposed safety valve); Bronn, *supra* note 163, at 504 ("Some may argue that the burden of proof to the government in safety-valve hearings when the government challenges the credibility of the defendant's disclosure will undermine the integrity of the safety-valve statute.").

291. See Froyd, *supra* note 174, at 1498–1500 (cataloging the flaws of the safety valve provision).

because of the distinctively large number of drugs they are captured with.<sup>292</sup>

### B. *Change the Penalty Provision*

Defendants charged with drug crimes receive unduly harsh mandatory minimum sentences.<sup>293</sup> Though criticism of this punitive sentencing regime is widespread,<sup>294</sup> victims of the MDLEA sentencing regime are recurrently forgotten.<sup>295</sup> But after years of political resistance to reform,<sup>296</sup> the First Step Act serves as some display of building potential energy for change.<sup>297</sup> Congress initially created the safety valve provision to reduce

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292. See *infra* Part V.

293. See *United States v. Dossie*, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012) (“[M]andatory minimum sentences in drug cases distort the sentencing process and mandate unjust sentences. . . . [T]oo many nonviolent, low-level, substance-abusing defendants like Jamel Dossie ‘lose their claim to a future’ . . . .”); Gonçlaves, Jr., *supra* note 47, at 19 (“Low-level drug couriers as a whole are more likely to face imprisonment compared to those higher in the drug pyramid. . . . [T]hey face mandatory punishments that vastly exceed their culpability.” (footnote omitted)); Paul Cassell, *Too Severe: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1045 (2004) (“[I]t is striking how many of these ‘horror stories’ stem from mandatory minimums in general and from narcotics mandatory minimums in particular.”); Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6, 8 (2010), <https://perma.cc/3VL4-9F9G> (PDF) (“First, and most critical, is the fact that mandatory penalties in the federal system have most often been applied to the prosecution of drug offenses.”).

294. See Mauer, *supra* note 293, at 40 (“In regard to mandatory sentencing, there is a broad consensus among legal organizations, scholars, and many practitioners that such policies are counterproductive to a fair and effective system of justice.”); see also Sandeep Dhaliwal, *How Mandatory Minimums Are Weaponized*, N.Y. TIMES (July 1, 2020), <https://perma.cc/SCX5-3ZYK> (“Though the First Step Act brought an increment of progress, most mandatory minimums remain on the books, despite consistent criticism that these penalties have contributed to over-incarceration.”).

295. This is likely because Congress focuses on those charged under the federal importation statute. 21 U.S.C. § 952.

296. See Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. (Feb. 25, 2019), <https://perma.cc/5FH7-RY7R> (“The federal justice system is unique in both its punitiveness and its resistance to political reform.”).

297. See *id.* (“Three years ago, those of us in the criminal justice reform community would have been shocked to hear about a bill like the First Step Act passing.”).

severe sentencing that the federal mandatory minimums imposed on low-level offenders.<sup>298</sup> The First Step Act illustrates that, in contradiction with Eleventh and Ninth Circuit precedent, this intent extends to noncitizens arrested under the MDLEA.<sup>299</sup> However, beyond the safety valve's inherent flaws, MDLEA defendants are uniquely incapable of experiencing its reprieve because their sentences are so extreme.<sup>300</sup>

### 1. Amend the Statute

The MDLEA's sentencing scheme is derived from the Controlled Substances Penalties.<sup>301</sup> When Congress linked drug quantities to culpability, it did so without any serious substantiating evidence.<sup>302</sup> According to the United States Sentencing Commission, "[t]aken as a whole, the abbreviated, somewhat murky legislative history simply does not provide a single, consistently cited rationale" for the penalty structure."<sup>303</sup> Even worse, incorporating this penalty within the MDLEA reads like an afterthought. The House Judiciary Subcommittee on Crime relied on the insights of DEA agents and prosecutors to create the drug quantities.<sup>304</sup> This data could not have included drug seizures on the high seas because, at this point, drug trafficking on the high seas had been decriminalized for

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298. See DOYLE, SAFETY VALVE AND SUBSTANTIAL ASSISTANCE, *supra* note 173, at 2 (explaining the background of the safety valve provision); H.R. REP. NO. 103-460, at 4 (1994) ("Ironically, however, for the very offenders who most warrant proportionally lower sentences . . . mandatory minimums generally operate to block the sentence from reflecting mitigating factors."); *United States v. Carillo-Ayala*, 713 F.3d 82, 88 (11th Cir. 2013) ("[A] first-time offender with a relatively small role . . . might find himself sentenced to a five- or ten-year prison term even though his advisory Guideline range suggests a significantly lower sentence . . . . In 1994, Congress addressed this 'irony.'").

299. See DOYLE, SAFETY VALVE AND SUBSTANTIAL ASSISTANCE, *supra* note 173, at 1 ("The First Step Act authorized safety-valve relief for convictions under the Maritime Drug Law Enforcement Act and for defendants with slightly more extensive prior criminal records.").

300. See *infra* Part IV.B.1–2.

301. See *supra* Part I.C.1.

302. See *supra* Part I.A.

303. This source discusses the crack-cocaine ratio explicitly, but this is the same punitive penalty structure applied to MDLEA defendants. *Report on Cocaine and Federal Sentencing Policy*, *supra* note 88.

304. *Id.*



sixteen years.<sup>305</sup> Unfortunately, drug cartels utilize fishermen because larger volumes of narcotics can be transported via boat.<sup>306</sup> Recent data depicts this reality.

In Fiscal Year (FY) 2018, United States Customs and Border Protection seized 58,160 pounds of cocaine and had 3,395 drug seizure events—resulting in an average of seven kilograms (or seventeen pounds) of cocaine confiscated per seizure.<sup>307</sup> By comparison, the Coast Guard confiscated 416,000 pounds of cocaine in FY 2018.<sup>308</sup> While the Coast Guard seized significantly more in drug weight, they had significantly fewer seizures, averaging a greater volume of drugs per seizure.<sup>309</sup>

Congress compiled the intelligence of the DEA and prosecutors to create a drug quantity that indicated whether or not a defendant was a major trafficker.<sup>310</sup> The MDLEA exposes why that is bad logic. These fishermen-turned-smugglers are not sophisticated criminals.<sup>311</sup> They are fathers and husbands trying to make money to support their families or avoid the

305. See *supra* Part I.A.

306. See Joshua Rapp Learn, *The Number of Small Fishing Vessels Smuggling Illegal Drugs Has Tripled*, SMITHSONIAN MAG. (Nov. 12, 2020), <https://perma.cc/WT5L-GHD3>

[T]he use of small fishing vessels to smuggle illegal drugs is on the rise across the world as traffickers seek to take advantage of porous borders . . . . The use of small vessels has tripled in the past eight years to represent about 15 percent of the total global retail value of illegal drugs.

307. See *Drug Seizure Statistics*, U.S. CUSTOMS & BORDER PROT. (last modified Aug. 12, 2021), <https://perma.cc/UCY9-37H3> (providing an interactive chart).

308. See Christopher Woody, *The Coast Guard Seized 208 Tons of Cocaine Last Year and Started This Year with Another Narco Sub Bust*, INSIDER (Nov 21, 2019, 9:23 AM), <https://perma.cc/XHJ7-KA53> (“During the 2018 fiscal year, Coast Guard personnel removed . . . just under 208 metric tons of cocaine worth an estimated \$6.14 billion . . .”).

309. This is assumed because of rough calculation. For example, in FY 2018 the Coast Guard advertised that *one* mission “contributed to the removal of 27,073 kilos of cocaine valued at nearly \$900 million and the arrest or detention of 63 suspected traffickers.” USCG, U.S. COAST GUARD ANNUAL PERFORMANCE REPORT: FISCAL YEAR 2018, at 43 (2019), <https://perma.cc/L4J3-R9JM> (PDF).

310. *Report on Cocaine and Federal Sentencing Policy*, *supra* note 88.

311. Weber, *supra* note 159, at 1767–68 (detailing the realities of being a low-level drug courier); see Guy Lawson, *How the Cartels Work*, ROLLING STONE (Apr. 18, 2011, 1:00 PM), <https://perma.cc/8FEN-F59A>.

wrath of the cartel.<sup>312</sup> However, they are interdicted with hundreds, sometimes thousands, of kilograms of cocaine.<sup>313</sup> Because of their low status within the organization and the likelihood of their capture, they are often intentionally uninformed of the organization's inner workings to safeguard the drug supplier.<sup>314</sup> Unlike those who attempt to smuggle drugs via methods that trigger the Controlled Substances Act, the volume of drugs seized per defendant under the MDLEA is notably greater.<sup>315</sup> For instance, a woman who smuggled 0.6 kilograms of cocaine within her luggage was sentenced according to § 960.<sup>316</sup> The judge in her case was able to show leniency.<sup>317</sup> By the nature of her crime, it would be absurd if she had tried to smuggle much more in suitcases.<sup>318</sup> In the same way, it would be absurd if the cartel sent fishermen with nominal amounts of narcotics.<sup>319</sup> Their boats merely have a

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312. Lerman, *supra* note 159, at 702–03 (“The temptation of short-term financial relief comes at the cost of the extraordinary risk of many years of imprisonment and death by cartel violence.”)

313. See *supra* note 124 and accompanying text (providing examples of the drug quantities these defendants are normally arrested with).

314. See Young, *supra* note 158, at 64 (“For self-protection, drug suppliers and distributors intentionally hire individuals who have no ongoing connection with the supplier or distributor.”).

315. See *supra* notes 307–309 and accompanying text (listing the statistical difference between Customs and Coast Guard drug seizures).

316. See *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016) (“Chevelle Nesbeth was convicted by a jury of importation of cocaine with intent to distribute. Her advisory guidelines sentencing range was 33–41 months.”); see also Benjamin Weiser, *U.S. Judge’s Striking Move in Felony Drug Case: Probation, Not Prison*, N.Y. TIMES (May 25, 2016), <https://perma.cc/QT3K-PNN5> (reporting on the humane sentence the female drug courier received).

317. See Weiser, *supra* note 316 (“Judge Block sentenced Ms. Nesbeth to one year of probation, to include six months of home confinement and 100 hours of community service . . .”).

318. See *Nesbeth*, 188 F. Supp. 3d at 189 (“While visiting Jamaica at the behest of a boyfriend, she was given two suitcases by friends, who had purchased her return airline ticket, and was asked to bring them to an individual upon her arrival to the United States.”).

319. See, e.g., Kieran Corcoran, *Drug Cartels Using New ‘Go-Fast’ Boats that Are Almost INVISIBLE to Radar on Central American Smuggling Missions*, DAILY MAIL (Jan. 16, 2015, 3:17 PM), <https://perma.cc/ZA3L-4N2D> (last updated Jan. 19, 2015) (“The criminals have replaced older, slow boats with sleek Picuda models that are long, thin and can confound detection

greater capacity.<sup>320</sup> But when that capacity is one thousand times the amount of cocaine the female courier transported, that same judge would be hard-pressed to validate a low sentence when the statutory requirement is ten years, and the Guidelines suggest more.<sup>321</sup> Even though neither defendant qualifies as the major trafficker Congress thought it would imprison by setting drug quantities, no place in our law considers the factual reality of an MDLEA defendant.<sup>322</sup> Certainly, there are domestic couriers seized with large volumes of narcotics who would face similar harsh sentencing.<sup>323</sup> The difference is that MDLEA defendants *always* face this harsh sentencing because of the nature of the crime.<sup>324</sup>

Congress should incorporate a multiplier to § 960 to increase the drug quantity requiring a mandatory minimum sentence. For example, instead of five kilograms, a multiplier could increase the quantity to five hundred or more kilograms. This way the drug quantity reflects the MDLEA's reality. Determining this number would require further empirical analysis and closer scrutiny than Congress previously relied upon.<sup>325</sup> Changing the statutory scheme would result in a Guidelines change.<sup>326</sup> Presumably, the offense level equal to the

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methods . . . Picudas can go as much as twice as fast as traditional smuggling vessels while carrying around a [sic] one ton of illegal drugs each.”).

320. *Id.*

321. *Compare Nesbeth*, 188 F. Supp. 3d at 180 (including the guidelines sentence of 33–41 months), *with* *United States v. Trinidad*, 839 F.3d 112, 114 (1st Cir. 2016) (including the guidelines sentence of 135 months of imprisonment).

322. *See* H.R. REP. NO. 845, 99th Cong., 2d Sess. Pt. 1, at 16–17 (1986) (defining major traffickers as “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities”).

323. *See, e.g.,* Stella Chan & Amanda Jackson, *DEA Announces Biggest Domestic Seizure of Meth in Agency History*, CNN, <https://perma.cc/2LFR-MFBB> (last updated Oct. 14, 2020) (“Drug Enforcement Administration agents seized more than 2,200 pounds of methamphetamine earlier this month, the largest haul in the agency’s history domestically, according to officials.”).

324. *See supra* note 124 and accompanying text.

325. *See supra* Part I.A.

326. *See* U.S. SENT’G GUIDELINES MANUAL § 2D1.1 cmt. background (U.S. SENT’G COMM’N 2018) (“Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.”); *see also* U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 22 (2018), <https://perma.cc/26GE-Q7VZ> (PDF) (“Congress envisioned that the Commission would regularly amend the guidelines to reflect various changes

mandatory minimum sentence would include the matching drug weight.<sup>327</sup> However, the Commission sets base offense levels for drug quantities above and below the mandatory minimum.<sup>328</sup> These numbers were “extrapolated upward and downward to set guideline sentencing ranges for all drug quantities.”<sup>329</sup> Increasing the quantity within the statute would cause the Guidelines quantity to increase, as well as all other drug ranges above and below the mandatory minimum sentence.<sup>330</sup> The Guidelines change would help ameliorate harsh sentences imposed by judges who closely follow the Guidelines.

## 2. Judicial Impact

Striking differences in sentence length between domestic drug couriers and the MDLEA defendants demonstrate current judicial perception. In FY 2019, the average sentence length for powder cocaine trafficking offenses was seventy months.<sup>331</sup> Of the 3,581 individuals sentenced, only 20.8 percent received sentences ten years or greater.<sup>332</sup> Though there is no calculated average sentence for the MDLEA, judges consistently exceed the statutory requirement.<sup>333</sup> The mandatory minimum may be 120

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in circumstances.”); *Rita v. United States*, 551 U.S. 338, 350 (2007) (“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”).

327. See *supra* note 326 and accompanying text.

328. U.S. SENT’G GUIDELINES MANUAL § 2D1.1 amend. 782.

329. *Id.*

330. *Id.*

331. U.S. SENT’G COMM’N, QUICK FACTS: POWDER COCAINE TRAFFICKING OFFENSES 1 (2019), <https://perma.cc/J95Q-5XEK> (PDF).

332. *Id.*

333. See, e.g., *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (stating that the court sentenced one defendant to 120 months of imprisonment and another to 135 months); *United States v. Trinidad*, 839 F.3d 112, 114 (1st Cir. 2016) (setting the defendant’s offense level to 33, resulting in a minimum of 135 months of imprisonment); *United States v. Peña-Santo*, 809 F.3d 686, 691–92 (1st Cir. 2015) (“The district court sentenced Peña-Santo to 120 months in prison, Vicente-Arias to 130 months, Gil-Martínez to 192 months, and Liriano to 240 months.”). *United States v. Castillo-Romero*, No. 8:09-cr-571-T-60MAP, 2020 WL 6203531, at \*1 (M.D. Fla. Oct. 22, 2020) (stating the court sentenced the defendant to a term of imprisonment of 168 months); *United States v. Cuero Cuero*, No. 8:18-cr-213-T-60AAS, 2020 WL 6203532, at \*1 (M.D. Fla. Oct. 22, 2020) (stating that the court sentenced the defendant to a term of imprisonment of 135 months).

months, or ten years, but sentences upwards of 180 months, or over fifteen years, are not rare.<sup>334</sup>

This is unsurprising considering the relevant statute and the Guidelines. Rationalizing culpability with drug quantity is an easy argument to make. For example, an MDLEA defendant moved for compassionate release in response to the COVID-19 pandemic.<sup>335</sup> The judge denied it, reasoning, “Defendant cannot satisfy his burden of demonstrating that he is not a danger to the community—he was sentenced as part of a venture aimed at transporting 920 kilograms of cocaine to the United States, *an enormous quantity of narcotics*.”<sup>336</sup> In one sentence, the court inferred that an enormous quantity of narcotics is tantamount to being a danger to the community.<sup>337</sup>

What is surprising is the use of factors that suggest leniency used against the MDLEA defendants. In the same case, the judge continued:

When the United States Coast Guard intercepted the vessel, he and his co-conspirators jettisoned the cocaine and attempted to flee. *As motives for agreeing to participate in the venture*, Defendant cited *financial need* and his *family’s healthcare concerns*—motivations that would likely remain upon his release.<sup>338</sup>

Another case, in line with this rhetoric, characterized a fifty-nine-year old defendant’s desire to return home to Columbia as seeking “to be returned to the area where he was first recruited to engage in the criminal conduct.”<sup>339</sup> When a judge faces a defendant charged with the intention to distribute

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334. See, e.g., *United States v. Mosquera*, No. 8:14-cr-379-T-36TGW, 2020 WL 7861372, at \*1 (M.D. Fla. Dec. 31, 2020) (stating a jury sentenced the defendant to a term of imprisonment of 235 months); *Varela v. United States*, 8:14-cr-379-T-36TGW, 2020 WL 4339353, at \*1 (M.D. Fla. July 28, 2020) (term of imprisonment of 235 months); *United States v. Suarez*, No. 16-cr-453, 2020 WL 7646888, at \*2 (S.D.N.Y. Dec. 23, 2020) (term of imprisonment of 292 months); *United States v. Rodriguez-Begerano*, No. 8:12-cr-558-T-33AEP, 2020 WL 3000737, at \*1 (M.D. Fla. June 4, 2020) (term of imprisonment of 235 months).

335. *United States v. Salazar*, No. 8:18-cr-160-TPB-SPF, 2021 WL 390702 (M.D. Fla. Feb. 4, 2021).

336. *Id.* at \*2 (emphasis added).

337. *Id.*

338. *Id.* (emphasis added).

339. *Id.* at \*5.

a large quantity of drugs and an extreme sentence, classifying that individual as a “danger to society” is simple. With an amended quantity and adjusted Guidelines, a judicial approach could accommodate the idea that even hundreds of kilograms of cocaine fail to prove that these fishermen are the true threat to the wellness of the United States.

#### CONCLUSION

The fisherman’s wife joins a local organization of over two hundred women whose loved ones are incarcerated in the United States.<sup>340</sup> With their husbands gone and children to care for, these women struggle to survive.<sup>341</sup> The fisherman ages in federal prison, worlds away from his family. Meanwhile, the cartel flourishes. The drugs confiscated in the fisherman’s capture are the cost of doing business. The cost of the fisherman’s life is not a part of the cartel’s calculus, nor is it seriously considered by the United States.

The United States is the “world’s largest per capita consumer of illicit drugs, yet we punish others for satisfying our appetite.”<sup>342</sup> Under the MDLEA, fishermen from South and Central America are treated like they’re solely responsible for the so-called drug crisis in America.<sup>343</sup> These men become collateral damage to a war the United States fails to wage against the heads of the cartels. Congress’s attempt to extend safety valve reprieve via the First Step Act of 2018 was a halfhearted attempt at justice.<sup>344</sup> In order to actualize that intent, Congress must reevaluate the absurdity of assigning drug weight to culpability and acknowledge the reality of MDLEA defendants.<sup>345</sup> The Maritime Drug Law Enforcement Act’s sentencing regime must be changed.

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340. Castillo, *supra* note 1 (explaining the *Organization de Mujeres de Pescadores en el Extranjero* has over two hundred members).

341. *Id.*

342. Castillo, *supra* note 1.

343. *See supra* INTRODUCTION.

344. *See supra* Part III.A–B.

345. *See supra* Part IV.