

NOTE

SECOND STEP NEEDED: ADDRESSING AN UNJUST INCONSISTENCY IN THE FIRST STEP ACT

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The First Step Act was enacted on December 21, 2018 as a bipartisan reform aimed at addressing systemic issues in the U.S. criminal justice system. Emerging from a legacy of punitive sentencing during the War on Drugs era, the Act sought to reduce recidivism, promote rehabilitation, and moderate excessive sentences through a series of reforms, including changes to mandatory minimums, earned and good-time credits, and judicial discretion. Despite its achievements, critical oversights in the Act's statutory language have raised significant concerns. This Note focuses on Congress's failure to amend the "felony drug offense" language in 21 U.S.C. § 841(b)(1)(C) to "serious drug felony," as was done in related provisions 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 841(b)(1)(B). The unamended language creates a troubling inconsistency in sentencing outcomes, where lesser drug offenses can result in harsher penalties than more severe offenses, undermining the Act's intent to ensure proportionality and fairness. The Note examines this issue through a detailed analysis of the statutory framework, legislative intent, and limited case law. It also explores public policy implications, including the ethical, historical, and social costs of such sentencing disparities. The persistence of these inconsistencies raises questions about congressional oversight and intent, suggesting that the omission was likely a result of legislative oversight during the chaotic passage of the Act. To rectify this injustice, this Note argues to replace "felony drug offense" with "serious drug felony" in 21 U.S.C. § 841(b)(1)(C). This change aligns with the First Step Act's objectives and addresses the disproportionate consequences of the current statutory language. Ultimately, failing to resolve this issue perpetuates unnecessary and severe deprivations of liberty, contravening fundamental constitutional values of justice and fairness.

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INTRODUCTION

On December 21, 2018, President Donald Trump signed into law the “Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act,” better known as the “First Step Act.”¹ The Bill passed the House of Representatives by a vote of 360–59,² was amended and passed by the Senate in an 87–12 vote,³ and then this amended version was accepted and passed by the House, 358–36.⁴ The Bill was a bipartisan success; it was introduced by a Republican (Representative Doug Collins from Georgia) and received unanimous support from Senate Democrats.⁵ The Bill was celebrated widely and by a broad array of individuals and groups.⁶ However, despite its support, issues with the Bill have emerged in the years since its enactment.⁷ This Note will address one such issue—Congress’ failure to amend the “felony drug offense” language in § 841(b)(1)(C)⁸—and question whether the unamended language is a “loophole” resulting from Congressional negligence in amending the criminal sentencing codes, or whether it serves some purpose never articulated by Congress. However, before addressing the issue, this Note situates the First Step Act within its larger historical context.

¹ First Step Act of 2018, Pub. L. No.115-391, 132 Stat. 5194.

² H.R. 5682, 115th Cong. (2018).

³ S. Res. 756, 115th Cong. (2018) (enacted).

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, AM. CIV. LIBERTIES UNION (Dec. 3, 2018), <https://www.aclu.org/news/smart-justice/how-first-step-act-moves-criminal-justice-reform-forward>, [<https://perma.cc/44XE-3CZG>] (“It’s not often that you’ll find the ACLU on the same side of an issue as President Donald Trump.”).

⁷ See Jessie Brenner & Stephanie Wylie, *Analyzing the First Step Act’s Impact on Criminal Justice*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/analyzing-first-step-acts-impact-criminal-justice> [<https://perma.cc/2XSW-RATK>].

⁸ 21 U.S.C. § 841(b)(1)(C) (2018).

During the 1980s and 1990s, the federal government moved toward a more punitive determinative sentencing scheme as a part of the so-called “War on Drugs.”⁹ Decades later, the flaws of such an approach became clear. Incarceration rates skyrocketed and heavy social costs followed.¹⁰ While the sheer cost of maintaining such a prison population is, tremendous,¹¹ the social cost of having such a large population struggling to reintegrate into society upon release—indeed, recidivism rates were and are alarmingly high¹²—contributed to public consciousness of the flaws of the American justice system.¹³ Furthermore, the disproportionate effects of the decades-long approach to crime on minority communities—particularly the Black community—became more and more obvious.¹⁴ The sentiment that the system needed major reform eventually contributed to the birth of the First Step Act.¹⁵ The First Step Act was “designed to promote rehabilitation, lower recidivism, and reduce excessive sentences in the federal prison system.”¹⁶ The Act furthers these objectives through an impressive variety of initiatives and sentencing reforms, such as “enhanced judicial discretion, [the creation of] earned time credits, [an increase to] good time credits, [the reduction of] certain mandatory minimum sentences, and [the expansion of] the safety valve that allows persons with minor prior

⁹ See Jamila Hodge & Nazish Dholakia, *Fifty Years Ago Today, President Nixon Declared the War on Drugs*, VERA INST. OF JUST. (June 17, 2021), <https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs> [<https://perma.cc/F23N-QJN5>] (discussing briefly the War on Drugs and its long-term effects).

¹⁰ *Id.*

¹¹ See Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* (Inst. for Just. Rsch. & Dev., Working Paper No. IJRD-072016, 2016), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Economic_Burden_of_Incarceration_IJRD072016_0_0.pdf [<https://perma.cc/2DLE-65R5>].

¹² See LaToshia Butler & Ebonyque Taylor, *A Second Chance: The Impact of Unsuccessful Reentry and the Need for Reintegration Resources in the Community*, CMTY. ORIENTED POLICING SERVICES U.S. DEP’T OF JUST. (Apr. 2022), https://cops.usdoj.gov/html/dispatch/04-2022/reintegration_resources.html [<https://perma.cc/E7JT-TH55>]; see also Liz Benecchi, *Recidivism Imprisons American Progress*, HARV. POL. REV. (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/> [<https://perma.cc/4EJ3-288W>].

¹³ See generally Danny Franklin, *Overwhelming Majority Say War on Drugs Has Failed, Support New Approach*, AM. CIV. LIBERTIES UNION (June 9, 2021), <https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs> [<https://perma.cc/3YBR-BLPV>].

¹⁴ See generally Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs> [<https://perma.cc/Q9LE-9CTF>] (discussing the impact of the War on Drugs on Black Americans).

¹⁵ See Ashley Nellis & Liz Komar, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, THE SENTENCING PROJECT (Aug. 22, 2023), <https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/> [<https://perma.cc/45KN-W43K>] (“Lawmakers and advocates across both political parties supported the bill as a necessary step to address some of the punitive excesses of the 1980s and 1990s.”).

¹⁶ *Id.*

convictions to serve less time than previously mandated.”¹⁷ The Act also introduced a series of measures to aid in the rehabilitation of prisoners to prevent recidivism.¹⁸

Thus, the First Step Act directly addressed issues that were pervasive in the criminal justice system for decades. Naturally, addressing such issues required amending the language of existing statutes.¹⁹ In this technical process of statutory revision, this Note ultimately argues that Congress likely overlooked the language it used in 21 U.S.C. § 841(b)(1)(C), where it retained the language of “felony drug offense,”²⁰ despite amending § 841(b)(1)(A) and (B) to include the language of “serious drug felony.”²¹ This effectively created a situation in which a drug trafficker dealing in less drugs, whose distribution results in death, can get a life sentence whereas, if they had dealt more drugs, they would have received a twenty year sentence.²²

Part I will analyze § 841(b)(1)(A), (B), and (C) and explain how the subparagraphs function and where they “fail.” This Part will examine § 841(b)(1)(C)’s fatal flaw by situating the provision as part of the larger § 841(b)(1) sentencing scheme. Finally, Part I will illustrate this issue through examples.

In Part II, this Note will look at explanations, or the lack thereof, for the statute’s present construction. In doing so, Part II.A will consider congressional intent. This Part will look at the congressional records to attempt to understand why § 841(b)(1)(C)’s “felony drug offense” language was not amended to “serious drug felony” while § 841(b)(1)(A) and (B) were. Part II.B will examine the existing, albeit limited, case law on the issue. It will address the arguments and explanations courts have made for why the statute is constitutional. In doing so, this Part will also address the failure of rational-basis review to offer a *truly* rational explanation for the inconsistency, leaving the issue murkier than the statute alone.

In Part III, this Note will take a more thorough look at the public policy effects of the statute. This Note will consider theories of punishment, the spirit of the First Step Act itself, history, basic notions of morality and ethics, and the social costs relevant to the discussion. This Note will also offer potential paths forward toward remedying the injustice created by the inconsistency in the statute. In other words, this Note will provide

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (2018).

²⁰ 21 U.S.C. § 841(b)(1)(C) (2018).

²¹ 21 U.S.C. § 841(b)(1)(A) (2018); 21 U.S.C. § 841(b)(1)(B) (2018).

²² *Compare* 21 U.S.C. § 841(b)(1)(C) (2018) (articulating the felony drug offense trigger for a mandatory life sentence where the defendant distributed a controlled substance resulting in death), *with* 21 U.S.C. § 841(b)(1)(A) (2018), *and* 21 U.S.C. § 841(b)(1)(B) (2018) (articulating the serious drug felony standard for a mandatory life sentence where the defendant distributed a controlled substance resulting in death). *See also* 21 U.S.C. § 802(44) (2022) (defining “felony drug offense”); 21 U.S.C. § 802(57) (2022) (defining “serious drug felony”).

a thorough public policy analysis of the issue and offer a solution in accordance with the stated public policy objectives of the First Step Act.

Finally, this Note will briefly sum up its arguments, the state of the issue, and a suggested path forward in its Conclusion.

I. ANALYZING THE STATUTE

21 U.S.C. § 841(a) makes it “unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”²³ § 841(b) details the penalties for the offense.²⁴ The structure of the § 841(b) “Penalties” provision is based on volume.²⁵ Moreover, § 841(b)(1)(A) prescribes penalties for offenders who traffic in large quantities of controlled substances, § 841(b)(1)(B) deals with offenders who traffic in lesser quantities, and § 841(b)(1)(C), (D), and (E)—although this Note is not concerned with (D) and (E)—deal with those who traffic in relatively small quantities.²⁶ § 841(b)(1)(A)–(C) appear logical and error-free at first glance; however, there is a small but significant language inconsistency that undermines the overall logic of the § 841(b) “Penalties” provision.

Under § 841(b)(1)(A), a person who traffics in the highest²⁷ volume of controlled substances under the statute, whose trafficking results in the “death or serious bodily injury” of another person, is to be sentenced between a minimum of twenty years imprisonment and a maximum of life imprisonment.²⁸ However, if they have a prior “serious drug felony,” and their trafficking results in death or serious bodily injury, they are to be sentenced to life imprisonment.²⁹ This “serious drug felony” prior conviction is defined as an offense involving trafficking of a controlled substance³⁰ “for which—(A) the offender served a term of imprisonment of more than 12 months; and (B) the offender’s release from any term of imprisonment was within 15 years of the commencement of the instant offense.”³¹

Similarly, under § 841(b)(1)(B), a person who traffics in the second highest volume³² under the statute, whose trafficking results in the “death

²³ 21 U.S.C. § 841(a) (2018).

²⁴ 21 U.S.C. § 841(b) (2018).

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See* 21 U.S.C. § 841(b)(1)(A)(i)–(viii) (2018).

²⁸ 21 U.S.C. § 841(b)(1)(A) (2018).

²⁹ *See id.*

³⁰ *See* 21 U.S.C. § 802(6) (2022) (defining “controlled substance”).

³¹ 21 U.S.C. § 802(57) (2022) (defining “serious drug felony”).

³² *See* 21 U.S.C. § 841(b)(1)(B)(i)–(viii) (2018).

or serious bodily injury” of another person, is to be sentenced between a minimum of twenty years’ imprisonment and a maximum of life imprisonment.³³ However, again, if they have also been convicted of a prior “serious drug felony,” they “shall be sentenced to life imprisonment.”³⁴

While § 841(b)(1)(A) and (B) logically follow, § 841(b)(1)(C) does not. Under § 841(b)(1)(C), a person who traffics in a volume³⁵ of drugs less than both § 841(b)(1)(A) and (B), whose trafficking results in the “death or serious bodily injury” of another person is to be sentenced, just as under § 841(b)(1)(A) and (B), to between a minimum of twenty years imprisonment to a maximum of life imprisonment.³⁶ However, where “death or serious bodily harm” occurs and the defendant has a prior conviction for a “felony drug offense,” they should be sentenced to life imprisonment.³⁷ A “felony drug offense” is defined as “an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”³⁸ This “felony drug offense” standard is much broader than the “serious drug felony” standard set forth in § 841(b)(1)(A) and (B). One can easily see how someone could trigger the “felony drug offense” standard, where they would not have triggered the “serious drug felony” standard, and how the inverse is impossible. An example can help illustrate the practical effect that this lower “felony drug offense” standard can have.

Imagine a case in which the defendant traffics drugs under the lowest volume outlined above, i.e., the amount they traffic falls under § 841(b)(1)(C), and that their activity results in an overdose death. Now, imagine that the defendant has a twenty-year-old conviction for Possession with Intent to Distribute on their record, and that the statutorily-prescribed sentence for this offense *could* have been over a year imprisonment, regardless of whether they served a year or not. Under § 841(b)(1)(C), this defendant is subject to a mandatory sentence of life imprisonment because the prior conviction constitutes a “felony drug offense.”³⁹ However, if they simply dealt more drugs, such that their offense fell under § 841(b)(1)(A) or § 841(b)(1)(B), the prior conviction would not constitute a “serious drug felony,” and, therefore, the judge could exercise discretion and sentence the defendant to as little as twenty years imprisonment.⁴⁰

³³ See 21 U.S.C. § 841(b)(1)(B) (2018).

³⁴ See *id.*

³⁵ See 21 U.S.C. § 841(b)(1)(C) (2018).

³⁶ See 21 U.S.C. § 841(b)(1)(A) (2018); see also 21 U.S.C. § 841(b)(1)(B) (2018).

³⁷ See 21 U.S.C. § 841(b)(1)(C) (2018).

³⁸ 21 U.S.C. § 802(44) (2022) (defining “felony drug offense”).

³⁹ See 21 U.S.C. § 841(b)(1)(C) (2018); 21 U.S.C. § 802(44) (2022).

⁴⁰ See 21 U.S.C. § 841(b)(1)(A) (2018); 21 U.S.C. § 841(b)(1)(B) (2018); see also 21 U.S.C. § 802(57) (2022).

In *United States v. Jackson*, the court sentenced a defendant to life imprisonment under § 841(b)(1)(C) even though the defendant would not necessarily have been subject to life imprisonment under the less “serious drug felony” standard of § 841(b)(1)(A) and (B).⁴¹ Moreover, when a “felony drug offense” is found under § 841(b)(1)(C), the sentencing judge is obligated to enforce the mandatory life sentence. Further, the defense noted a “Department of Justice [DOJ] policy to ‘not seek a mandatory sentence of life imprisonment under Section 841(b)(1)(C) . . . unless a defendant’s prior conviction [met] the statutory definition of a serious drug felony’” and that the prosecutors in this case previously indicated a willingness to follow that policy before they pursued life imprisonment under § 841(b)(1)(C).⁴² The court ruled that “[n]otwithstanding the DOJ policy or the Government’s willingness to follow it, the court is bound by the statutory text and controlling precedent interpreting that text; the DOJ policy in this case does nothing to change the court’s obligation and is in no way binding on the court.”⁴³

Thus, the sentencing issue is not easily remedied by courts and can result in inequitable sentences that neither accord with basic notions of justice nor conform with the stated goals of the First Step Act. Congress must fix their mistake.

II. POTENTIAL EXPLANATIONS: CONGRESSIONAL INTENT AND CASE LAW

A. *Exploring Congressional Intent*

The First Step Act was first introduced in Congress by Representative Doug Collins (Republican–Georgia) as H.R. 5682 on May 7, 2018.⁴⁴ The bill was voted out of committee on May 22, 2018⁴⁵ and subsequently passed by the House of Representatives on the same day.⁴⁶ H.R. 5682 was accompanied by a companion bill in the Senate, S. 2795, introduced by Senator John Cornyn (Republican–Texas).⁴⁷ The version of the First Step Act passed by the House of Representatives, however, did not include sentencing reform provisions.⁴⁸ Because of the absence of sentencing reform provisions in the bill, conflict over the bill arose in the Senate.⁴⁹

⁴¹ *United States v. Jackson*, No. 3:20-291, 2023 WL 2816853, at *2 (M.D. Pa. Apr. 6, 2023).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ H.R. 5682, 115th Cong. (2018).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ S. 2795, 115th Cong. (2018).

⁴⁸ See H.R. 5682, 115th Cong. (2018).

⁴⁹ See Jamiles Lartey, *Trump’s prison reform: Republicans on side but some progressives hold out*, GUARDIAN (June 5, 2018), <https://www.theguardian.com/us-news/2018/jun/05/trump-prison-reform-first-step-act-tension> [https://perma.cc/5WJE-KY7B].

Democrat senators pushed for sentencing reform to be included in the First Step Act.⁵⁰ Eventually, Senator Chuck Grassley (Republican–Iowa) introduced S. 3649 on November 15, 2018, which included sentencing reform measures.⁵¹ On December 12, 2018, Grassley and co-sponsor Dick Durbin (Democrat–Illinois) introduced a revised version of the bill, S. 3747.⁵² Finally, the next day, on December 13, 2018, Senate Majority Leader Mitch McConnell (Republican–Kentucky) converted S. 3747 into S. 756.⁵³ S. 756 was originally a bill known as the “Save Our Seas Act,” but by replacing the original content of S. 756 with the content from S. 3747, McConnell pushed the legislation forward significantly, prompting a call for final amendments and a vote.⁵⁴ Amendments were quickly proposed by some senators.⁵⁵ Eventually, five days later—on December 18, 2018—the First Step Act, S. 756, passed the Senate by a vote of 87–12.⁵⁶ The House of Representatives then passed the revisions two days later by a vote of 358–36.⁵⁷ Finally, President Donald Trump signed the bill into law—Public Law 115-391—on December 21, 2018.⁵⁸

The incredibly fast nine-day turnaround from the introduction of the revised bill to Senator McConnell’s “amendment in the nature of a substitute pending”⁵⁹ to President Trump signing S. 756 into law could help explain Congress’ failure to identify and remedy the § 841(b)(1)(A)–(C) inconsistency. One must wonder whether the less than a week series of events in the Senate—introduction of a revised bill, substitution by McConnell, call for amendments, and vote—left some senators scrambling. While one would hope for the utmost diligence from every elected official, the reality of the timeline may have prevented the *most* thorough reading of the bill possible. In particular, a provision like § 841(b)(1)(A)–(C) may

⁵⁰ *Id.*

⁵¹ See S. 3649, 115th Cong. (2018).

⁵² See S. 3747, 115th Cong. (2018).

⁵³ S. 756, 115th Cong. (2018) (enacted).

⁵⁴ See Nicholas Fandos, *Criminal Justice Bill Will Go Up For A Vote, McConnell Says*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/criminal-justice-reform-bill.html> [<https://perma.cc/HRA9-RW6W>] (discussing McConnell’s decision to quickly seek a vote on the First Step Act) (the “Save Our Seas Act” aimed to provide funding to remove debris from oceans).

⁵⁵ See, e.g., Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law And What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/7NN6-6CTF>] (“During the amendment process for the FIRST STEP Act, [Sen.] Cotton [Republican–Arkansas] and Sen. Kennedy [Republican–Louisiana] pushed for a series of . . . amendments.”).

⁵⁶ S. 756, 115th Cong. (2018) (enacted).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ CHRISTOPHER M. DAVIS & STANLEY BACH, CONG. RSCH. SERV., RL98853, *THE AMENDING PROCESS IN THE SENATE* (2015) (describing the “amendment in the nature of a substitute pending” that was used by Sen. McConnell).

have been overlooked because it was a particularly technical provision that contained more straightforward and obvious reductions in penalties as well. Senators could have been voting *yes* on a bill that was deemed, in bipartisan fashion, a great success, without the most thorough and technical understanding of the individual provisions contained within. One could understand if this is true. The rush for amendments—which was totally unexpected given McConnell’s previous indications that he would not seek a vote on the First Step Act before the new year⁶⁰—prior to a vote may have prevented the volume or quality of amendments one could expect, had the Senate been given more time to assess the bill prior to vote. This is, of course, all speculation. Perhaps this could explain the error, or perhaps not. It is uncertain, but a logical possibility worth noting. With the bill’s procedural history and the obvious logical question it poses now observed, it is worth examining the congressional record itself. Considering the bill passed by the House of Representatives—H.R. 5682—did not contain sentencing reform provisions,⁶¹ this analysis of the legislative record is, naturally, restricted to Senate proceedings within that narrow late-2018 window.

Congress first amended § 841 with the revised version—S. 3649—of the First Step Act introduced by Senator Grassley on November 15, 2018.⁶² In S. 3649, Grassley changed the “felony drug offense” language of § 841(b) (1)(A) and (B) to “serious drug felony” and made no changes to § 841(b) (1)(C).⁶³ Indeed, Grassley’s proposed bill made no *mention* of § 841(b) (1)(C).⁶⁴ The text of the proposal reads: “The Controlled Substances Act (21 U.S.C. § 801 et seq.)—(A) in subparagraph (A) . . . is amended . . . in section 401(b)(1) (21 U.S.C. § 841(b)(1)) . . . by striking . . . felony drug offense . . . and inserting . . . serious drug felony.”⁶⁵ The same textual amendment is made with respect to subparagraph (B).⁶⁶ Following the introduction of this bill, Grassley garnered more than forty cosponsors on the bill,⁶⁷ but the Senate did not make any additional changes or moves on the bill until December 12, 2018 when the amended version of the First Step Act—S. 3747—was introduced in the Senate.⁶⁸ Perhaps, during the month between the two proposals, Grassley garnered broad future support for the First Step Act, but actions taken to further amend the bill were

⁶⁰ See Fandos, *supra* note 54 (“Before Tuesday, Mr. McConnell had repeatedly said that there was most likely not enough time to consider the measure this year.”).

⁶¹ See H.R. 5682, 115th Cong. (2018).

⁶² S. Res. 3649, 115th Cong. (2018).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ S. Res. 3747, 115th Cong. (2018).

not taken by those supporters due to Senate majority leader McConnell's indication that he would not pursue a vote before the new year.⁶⁹

The amended S. 3747 First Step Act introduced by Senators Grassley and Durbin on December 12, 2018, and converted into S. 756 by Senator McConnell the next day, made no changes to the amended § 841(b)(1) sentencing scheme introduced by S. 3649.⁷⁰ Furthermore, no amendment to § 841(b)(1)(C) was made during the expedited amendment call from Senator McConnell prior to the vote. This suggests two possibilities. First, the failure to amend the rather technical but straightforward inconsistency in § 841(b)(1)(C) was simply the result of the Senate, collectively and as individuals, failing to see the flaw. Second, there was some legitimate reason for Congress' failure, or decision, not to amend. The second possibility will be explored below. However, the first possibility seems more likely. Common sense suggests that all one hundred members of the Senate, not to mention the House of Representatives, who approved the amended bill, would not share a consensus view that § 841(b)(1)(C) should not be amended, considering the obvious sentencing inconsistency created by the failure to amend.

B. Case Law Concerning the Provision

The case law concerning the issue is limited. Only a few cases have expressly dealt with the issue. Nevertheless, the existing precedent, even where merely persuasive in nature, is well developed. While the aforementioned *Jackson* case⁷¹ was considered in Part I of this Note, two other cases and their consequences are worth examining.

In *United States v. Hixon*, the United States District Court for the Eastern District of Kentucky applied rational basis review to determine whether the defendant's life sentence triggered by § 841(b)(1)(C)'s "felony drug offense" provision violated the defendant's Fifth Amendment Equal Protection and Due Process rights "because the First Step Act led to unevenly amended portions of 21 U.S.C. § 841."⁷² The defendant, Hixon, argued that "the imposition of a life sentence violate[d] his Due Process and Equal Protection rights because it create[d] criminal penalties based on arbitrary distinctions."⁷³ Further, he "assert[ed] that the statute punishes those who traffic in lower quantities of drugs more harshly than those who traffic in higher quantities of drugs," and that "the statute does not pass constitutional muster because it is not rationally-related to the purpose

⁶⁹ See Fandos, *supra* note 54.

⁷⁰ Compare S. Res. 3649, 115th Cong. (2018), with S. Res. 3747, 115th Cong. (2018).

⁷¹ See generally *United States v. Jackson*, No. 3:20-291, 2023 WL 2816853 (M.D. Pa. Apr. 6, 2023).

⁷² *United States v. Hixon*, No. 5:18-145-DCR, 2019 WL 6617398, at *3 (E.D. Ky. Dec. 5, 2019).

⁷³ *Id.* at 4.

of punishing defendants who distribute larger amounts of drugs to higher sentences.”⁷⁴

The court stated that “the applicable legislative distinction pertains to two classes of individuals: (i) defendants who have been convicted of trafficking higher quantities of controlled substances under § 841(b)(1)(A) and (B) and are subject to a life sentence only if they have prior ‘serious drug felony’ convictions; and (ii) defendants who have been convicted under the lower quantity threshold of § 841(b)(1)(C) and are subject to a life sentence if they have any prior convictions for “felony drug offenses.”⁷⁵ Further, the court ruled that these are not “suspect classifications” and, therefore, that rational basis review applies.⁷⁶ Using rational basis review, the court held that “there is a sufficient rational basis for the distinction because it is conceivable that Congress intends harsher punishments for street-level drug traffickers who *directly* sell smaller quantities to individuals who take them and the drug use results in death” and that it “cannot conclude that Congress’ decision not to amend § 841(b)(1)(C) was irrational.”⁷⁷

The court’s rational basis review, while not legally incorrect, leaves a lot to be desired. The purported congressional interest is neither supported by the congressional record nor does it logically follow. One can easily imagine that dealers trafficking in more drugs could also be selling directly to users. Or, alternatively, one could just as easily imagine that the small-volume drug dealer sells on behalf of a larger drug trafficker or distributor whose prosecution would be of greater social value. In either case, the court’s “conceived” congressional intent is severely lacking from a logical point of view as well as from a public policy perspective.

In *Hixon*, the district court also addressed the defendant’s Eighth Amendment cruel and unusual punishment claim.⁷⁸ Relying on the Sixth Circuit’s precedent in *United States v. Whyte*,⁷⁹ the court determined that there was no violation of the Eighth Amendment.⁸⁰ In *Whyte*, the court, “[c]onsidering the ‘evolving standards of decency’” with regard to life without parole sentences, ruled that “a life sentence imposed under § 841(b)(1)(C) does not violate the Eighth Amendment because ‘Congress deliberately excluded drug sales ‘resulting in death’ from the First Step Act’s sentencing reforms.”⁸¹ Simply, “standards of decency regarding subsection (C) circumstances have not changed because Congress ‘deliberately’ chose not

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *United States v. Hixon*, No. 5:18-145-DCR, 2019 WL 6617398, at *5 (E.D. Ky. Dec. 5, 2019).

⁷⁹ *United States v. Whyte*, 795 F. App’x 353 (6th Cir. Nov. 12, 2019).

⁸⁰ *Hixon*, 2019 WL 6617398, at *5.

⁸¹ *Whyte*, 795 F. App’x, at 366.

to amend the relevant language of that subsection.”⁸² This determination by the courts is highly deferential to Congress and operates on the premise that Congress did their job thoroughly, an assumption which congressional records neither support nor disprove.

The § 841(b)(1)(C) mandatory life sentence where the defendant would not have received a life sentence had they dealt more drugs issue is not developed much beyond the *Hixon* and *Jackson* cases discussed above. This suggests that either: (i) Department of Justice sentencing policies are preventing the issue from being litigated, (ii) the loophole rarely occurs, (iii) the flaw in the sentencing statute is often overlooked by litigators and courts alike, or (iv) some combination of the three.

Nevertheless, regardless of individual courts’ applications of rational basis review and of Eighth Amendment precedent preventing findings of cruel and unusual punishment, the issue still is not resolved. An average citizen, one might argue, would see the sentencing statute as illogical and a gross miscarriage of justice. Many public policy concerns remain and a just solution is necessary. These considerations will be discussed in the following Part.

III. PUBLIC POLICY CONSIDERATIONS AND IMAGINING A PATH FORWARD

One might argue, citing the lack of case law on the matter as well as the supposed internal DOJ policy,⁸³ that the inconsistency affects very few defendants. However, even if only one defendant were sentenced to life under § 841(b)(1)(C) where they would have been sentenced to less time had they sold more drugs, the law would remain unjust. In this Part, this Note will examine some of the major public policy considerations that arise from the failure to amend § 841(b)(1)(C), considering things such as theories of punishment, historical injustice, basic morality and ethics, and the societal costs of having such a law on the books.

A. *Theories Surrounding Incarceration*

Under 18 U.S.C. § 3553, courts should consider when making a sentencing determination: “(2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the

⁸² *Hixon*, 2019 WL 6617398, at *5.

⁸³ See *United States v. Jackson*, No. 3:20-291, 2023 WL 2816853 (M.D. Pa. Apr. 6, 2023).

most effective manner.”⁸⁴ These four factors can be understood as codifying four theories of punishment—retributivism, deterrence, incapacitation, and rehabilitation.

Starting with § 3553(a)(2)(A), which codifies a retributivist consideration into judges’ decision-making, it is easy to see where the § 841(b)(1)(C) “felony drug offense” provision promotes “respect for the law.”⁸⁵ Indeed, one could rightly argue that *any* Draconian sentence promotes respect for the law, in a sense, if “respect for the law” is taken to mean understanding that the law exists to punish legitimate wrongdoing. However, it is difficult to see how the inconsistency in the sentencing scheme “reflect[s] the seriousness of the offense,”⁸⁶ when a more serious offender, i.e. someone who deals more drugs, could be subject to a lesser sentence under the conditions outlined above. Furthermore, there is no “just punishment”⁸⁷—if we consider relative fairness within the system as a requisite element of “just”—where a less serious offender is given a harsher sentence than they would have received had they been a more serious offender. Thus, the inconsistency in the § 841(b)(1) sentencing scheme does not reflect a retributivist outlook.

The § 841(b)(1) scheme does, however, reflect a deterrence outlook, at least from a plain language view of § 3553(a)(2)(B). The threat of life imprisonment should, in theory,⁸⁸ “afford adequate deterrence to criminal conduct.”⁸⁹ As far as deterrence goes, such a sentence is certainly tailored to such an aim, regardless of the justice and morality concerns that accompany such a sentence.

Similarly, the § 841(b)(1)(C) felony drug offense, life imprisonment scenario adheres to an incapacitation approach to criminal punishment. Certainly, sentencing someone to life imprisonment “protect[s] the public from further crimes of the defendant,”⁹⁰ at least to the fullest extent possible.⁹¹ But, again, this does not necessarily grant legitimacy to an unjust sentencing provision. Rather, it merely demonstrates that there is potentially some logic behind the sentence.

⁸⁴ 18 U.S.C. § 3553(a)(2)(A)–(D) (2018).

⁸⁵ 18 U.S.C. § 3553(a)(2)(A) (2018); 21 U.S.C. § 841(b)(1)(C) (2018).

⁸⁶ 18 U.S.C. § 3553(a)(2)(A).

⁸⁷ *Id.*

⁸⁸ See Nicholas Turner, *Research Shows That Long Prison Sentences Don’t Actually Improve Safety*, VERA INST. OF JUST. (Feb. 13, 2023), <https://www.vera.org/news/research-shows-that-long-prison-sentences-dont-actually-improve-safety> [<https://perma.cc/2HNF-KZFW>] (discussing briefly the ineffectiveness of deterrence policies).

⁸⁹ 18 U.S.C. § 3553(a)(2)(B) (2018).

⁹⁰ 18 U.S.C. § 3553(a)(2)(C) (2018).

⁹¹ Incapacitation cannot entirely prevent a prisoner from committing crime. For example, one can easily imagine an organized crime boss continuing to make decisions related to an organized criminal enterprise from their prison cell.

Finally, it is hard to say whether the life imprisonment provision of § 841(b)(1)(C) fulfills the rehabilitation concerns outlined by § 3553(a)(2)(D). It is difficult to see how *any* sentence of life imprisonment could be handed down without disregarding rehabilitation entirely. Rehabilitation implies, to some extent, the opportunity for return to society or to begin anew, i.e., for redemption. However, life imprisonment by its very nature denies this opportunity. This issue is better suited for a separate discussion. But, for the purposes of this Note, it seems that rehabilitation is not appropriately taken into consideration by the § 841(b)(1) sentencing scheme in light of the inconsistencies within it.

In sum, while deterrence and incapacitation are served by the mandatory life imprisonment “loophole” in § 841(b)(1)(C), where a lesser sentence would potentially result had the defendant simply sold more drugs, retribution and rehabilitation are not. Understanding that § 3553 is a sum of its parts, it is difficult to see how Congress could, in good faith, allow for the sentencing inconsistency, given that it requires a serious bending of the § 3553 factors by a sentencing judge. Frankly, it requires courts to simply disregard factors that they are explicitly instructed to consider.

At best, examining the § 3553 factors offers some clarity as to the legal philosophy behind Congress’ decision—assuming, for the sake of argument, that the failure to amend “felony drug offense” was not a mistake. At worst, it casts more light on the gross injustice of the provision.

B. Basic Notions of Right and Wrong

In addition to the dissonance between the loophole in the § 841(b)(1) sentencing scheme under the First Step Act and the § 3553 factors that guide courts in their sentencing determinations, the failure to amend “felony drug offense” in § 841(b)(1)(C) clashes with basic and fundamental notions of right and wrong. This is obvious and need not be hashed out. However, it is worth examining the issue in § 841(b)(1) in light of the guiding moral and ethical principles at the foundation of the United States.

Motivated by Enlightenment thought and their experiences with a tyrannical British government, the founding fathers of the United States codified in the Bill of Rights the core of criminal defendants’ rights.⁹² While these amendments—the Fifth, Sixth, and Eighth—do not deem unlawful, as it stands, the current unamended § 841(b)(1)(C) inconsistency, they should be kept in mind, in their sum, as guides for navigating the real-world policy implications of Congress’ failure to amend. By leaving the “felony drug offense” language in § 841(b)(1)(C), but not in (b)(1)(A) or (B), Congress diverged from the spiritual foundation of American criminal law. The founders sought to prevent defendants from being unjustly treated

⁹² See U.S. CONST. amend. V; see also U.S. CONST. amend. VI; U.S. CONST. amend. VIII.

by the State. By allowing for an illogical and arguably immoral law that enables the harsher punishment of those who sell fewer drugs than those who sell more drugs to the community, Congress disrespects American heritage and individual defendants.

Remediating the unamended language in § 841(b)(1)(C) should be of top priority for the Congress of the United States, given its foundational history.

C. *Remediating Past Harms*

While staying true to the United States' founding values should motivate action from Congress, the purpose and aims of the First Step Act provide more than enough of a reason for Congress to remedy their mistake. Generally, the central purpose of the First Step Act was criminal justice reform. Such reform was necessitated by decades of ineffective criminal justice laws that resulted in an astonishingly large prison population by global standards,⁹³ scores of non-violent offenders serving lengthy sentences,⁹⁴ an erosion of public trust and support as the effects of such policies became evident,⁹⁵ high government costs stemming from such policies,⁹⁶ and the demonstrable disparate impact of such policies on minority communities.⁹⁷ One particular aim of the First Step Act was, of course, sentencing reform in the wake of these systemic issues.

By creating a sentencing scheme in which small scale drug-dealers can face life imprisonment for an overdose death, while those who sell larger quantities might serve only twenty years, Congress has subverted its own goals. While the First Step Act was, as a whole, a positive step forward toward necessary reform, the § 841(b)(1) scheme is far from reform. Rather, the § 841(b)(1) scheme introduces a new injustice that defies rational explanation.

In the spirit of the First Step Act, Congress should finish their task and amend § 841(b)(1)(C) to contain the “serious drug felony” language

⁹³ See generally Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/Z7TS-2ANR>].

⁹⁴ See The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, PRISON POL'Y INITIATIVE, <https://static.prisonpolicy.org/scans/sp/federalprison.pdf> [<https://perma.cc/SPL8-EWQT>] (“Nearly three-fourths (72.1%) of the [prison] population are non-violent offenders with no history of violence.”).

⁹⁵ See generally Franklin, *supra* note 13.

⁹⁶ See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/33GF-NC24>] (“[M]ass incarceration costs the government and families of justice-involved people at least \$182 billion every year.”).

⁹⁷ See generally Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/RJ4S-TVUH>].

of § 841(b)(1)(A) and (B), rather than the current and outdated “felony drug offense” language. In doing so, they would perhaps also mend some of the broken trust relationships they created with decades of Draconian criminal justice laws. By failing to remedy the issue addressed by this Note, Congress opens itself up to the accusation that the content of the First Step Act does not matter so much as the positive press coverage that passing criminal justice reform garners.

D. *Social Costs*

The heavy social costs that derive from laws such as the § 841(b) (1) sentencing scheme could and should motivate Congress to take action to amend the broken provision. Simply, society bears the cost of all punitive state actions. Some are necessary. Some are not. Such social costs include the literal financial (i.e., tax) cost of a large prison population,⁹⁸ the familial⁹⁹ and community¹⁰⁰ effects of imprisonment, and the large-scale economic costs of individuals losing their capacity to meaningfully contribute to society and to the economy.¹⁰¹ In allowing an illogical element of a sentencing scheme to continue, Congress forces society to bear larger social costs than are necessary.¹⁰²

While this provision may not affect many individual defendants, the mere fact that an individual may be locked away for life impacting not only the individual, but also their family, community, etc.—and that society at large must deal with the social costs without it being *necessary*—is a grim and disappointing reality. Simply, there is no good reason why so many

⁹⁸ See Wagner & Rabuy, *supra* note 96.

⁹⁹ See generally Jane Addams College of Social Work, *Mass Incarceration: Punishing the Families*, UNIV. OF ILL. CHI. (Jan. 15, 2020), <https://socialwork.uic.edu/news-stories/mass-incarceration-punishing-the-families> [<https://perma.cc/6MK7-UV9Y>] (discussing the effects of incarceration on families).

¹⁰⁰ *Id.* (discussing the community effects of incarceration); see also *End Mass Incarceration: Social & Economic Harm*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/end-mass-incarceration/social-economic-harm> [<https://perma.cc/KY6V-Z89E>].

¹⁰¹ See Ames Grawert & Terry-Ann Craigle, *Mass Incarceration Has Been a Driving Force of Economic Inequality*, BRENNAN CTR. FOR JUST. (Nov. 4, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/mass-incarceration-has-been-driving-force-economic-inequality> [<https://perma.cc/NLK5-FVWC>] (“Involvement in the criminal justice system—specifically time in prison or conviction of a crime—casts a shadow over someone’s life, limiting their ability to earn a living wage in the short term and long term. The effect of prison is especially pronounced: a 52% reduction in annual earnings and little earnings growth for the rest of their lives, amounting to a loss of over \$500,000 over several decades Due to lower earnings, the total amount of money lost each year by people who have a criminal conviction or who have spent time in prison is at least \$370 billion. These lost earnings could be spent on pursuing educational opportunities or buying a first home, which for many families have helped break the cycle of poverty.”).

¹⁰² “Necessary” understood as a sentence logically making sense. Since having sold more drugs would result in a lesser sentence, the life sentence and accompanying social costs are understood, in this sense, as beyond what is necessary.

individuals and society at-large should bear the burden of imprisoning a small-scale drug dealer for life, where had they sold more drugs, they could have a chance at redemption twenty years down the road. Congress should lighten the arbitrary burden they have created for society.

CONCLUSION

Ultimately, it seems from the record that the chaos of the late December 2018 Senate proceedings coupled with the technical nature of the § 841(b)(1) sentencing scheme and the rarity of the unjust life sentence scenario actually occurring collectively prevented Congress from amending the language of § 841(b)(1)(C). Given the fact that Congress' failure to amend is perplexing in light of the lack of satisfying rational explanations, it is tremendously difficult to imagine that every "yea"-voting member of the House and the Senate would have approved of the bill without an amendment to § 841(b)(1)(C) had they simply been aware of the injustice the unamended language created. Furthermore, the lack of evidence that anyone objected to the amended § 841 sentencing scheme or sought to amend it further suggests that the provision was largely overlooked. This is supported by the simple fact that a surface-level reading of the amended statute, without a more technical exploration of its implications, lends itself to the conclusion that Congress was reducing harsh sentences with the amendments to § 841(b)(1)(A) and (B), especially considering that § 841(b)(1)(C) was never mentioned in the First Step Act. So, the problems created in § 841(b)(1)(C) might not have ever been considered by Congress, considering the absence of the provision in the bill. Further, such a reading is not faulty. Reducing harsh sentences is precisely what Congress sought to do, which makes the injustice created by *not* amending § 841(b)(1)(C) seem a likely mistake, rather than a deliberate choice.

In the end, it perhaps does not matter so much whether the failure to amend § 841(b)(1)(C) was a purposeful decision by Congress or the result of a lack of attention to detail. Either way, the inconsistency created by failing to change "felony drug offense" to "serious drug felony" permanently strips individuals of not just their liberty, but any hope of liberty, for no good reason. The mere potentiality for one to permanently lose their freedom because of a statutory construction mistake, let alone the fact that it does happen, betrays core constitutional values and should be enough of a reason for Congress to quickly remedy their mistake. Simply, Congress should replace "felony drug offense" with "serious drug felony" in § 841(b)(1)(C).