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DRUG CONSPIRACY SENTENCING AND SOCIAL INJUSTICE

Emilie Kurth*

The D.C. Circuit in United States v. Stoddard *confronted a landmine of criminal and socioeconomic justice issues when it held that mandatory minimum sentences for drug conspiracy offenses should be imposed based on the amount of drugs attributable to the individual defendant (the individualized approach) as opposed to the amount of drugs attributable to the conspiracy as a whole (the conspiracy-wide approach). This decision reflects a nationwide circuit split implicating the courts and lawmakers' ideological balancing of the issues of justice, liberty, public safety, and equity. This Comment discusses* Stoddard *as well as the circuit split in its current form and argues that the Supreme Court should resolve the circuit split in favor of the individualized approach because the conspiracy-wide approach perpetuates the systemic oppression of poor people of color.*

This argument is premised upon a history of inequity, wherein law enforcement's disproportionate targeting of low-income communities of color in conjunction with the over-criminalization of drug offenses have significantly contributed to an era of mass incarceration for drug conspiracy offenses. The conspiracy doctrine exists as a powerful prosecutorial tool in maximizing sentences for drug offenses, and this Comment asserts that the doctrine has historically been misused, and to greatly unjust results. If any measures can be taken to limit the breadth and socioeconomic distributive effects of the conspiracy doctrine, such as adopting the individualized approach rather than the conspiracy-wide one, then the Supreme Court should do so. The Comment concludes with a pragmatic

*J.D. Candidate, 2020, University of Colorado Law School; Casenote & Comment Editor, *University of Colorado Law Review*. Thank you to my editors Stephen Pepper, Maia Labrie, and Joseph DeAngelis for their invaluable assistance in developing this Comment. I also want to thank Professors Ahmed White and Benjamin Levin for providing insightful direction and scholarship in criminal law. Finally, I want to express my gratitude to all members of the *University of Colorado Law Review* for their helpful contributions throughout this process.

but hopeful outlook that this circuit split will be resolved in a way that ameliorates some of criminal law's most rampant social injustices.

INTRODUCTION

Kemba Smith, a middle-class black woman, was a nineteen-year-old college student when she fell in love with and dated Peter Hall, a drug kingpin.[1] Kemba stayed with Hall despite his drug-dealing behaviors, in part because he had repeatedly

1. Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 468–69 (2006); *see also Kemba Smith*, SENTENCING PROJECT, https://www.sentencingproject.org/stories/kemba-smith/ (last visited Feb. 6, 2020) [https://perma.cc/PFP9-296U].

abused her and she was afraid of facing physical and emotional retribution for leaving him.[2] Though she never sold or distributed drugs herself, Kemba would sometimes provide transportation for Hall and take phone messages from cohorts on his behalf.[3] Kemba was pregnant with Hall's baby when she learned that the FBI planned to arrest him.[4] Out of concern for her unborn child, she agreed to cooperate with the FBI's investigation.[5] But before Kemba could provide the FBI substantial assistance, Hall was murdered.[6] The government, still seeking a conviction, then charged seven-months-pregnant Kemba as one of Hall's coconspirators.[7] The court sentenced Kemba to the mandatory minimum for the amount of drugs attributable to the conspiracy as a whole—255 kilograms of crack cocaine—landing Kemba with a sentence equivalent to that of a drug kingpin.[8] She pleaded guilty and was sentenced to 24.5 years in prison without the possibility of parole.[9] Kemba served six years in federal prison before President Clinton granted her executive clemency.[10]

Kemba's story is emblematic of many individuals' unjust experiences with drug charges under the conspiracy doctrine—especially women who are wives and girlfriends of drug kingpins.[11] Like Kemba, low-ranking individuals charged as

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2. Levy-Pounds, *supra* note 1, at 469.
3. *Id.*
4. *Id.*
5. *Id.* at 470.
6. *Id.*
7. *Id.*
8. *Id.* The court concluded that the 255 kilograms of crack cocaine was the approximate total amount trafficked and distributed during the lifetime of the conspiracy. The "conspiracy as a whole" refers to every individual within the conspiracy, which combine to create the "whole" conspiracy. *Id.*
9. *Id.*
10. *Id.* Executive clemency is defined as "the power of a president or governor to pardon a person convicted of a crime or commute (shorten) the sentence to be served." *Executive Clemency*, NOLO'S PLAIN ENGLISH LAW DICTIONARY, https://www.nolo.com/dictionary/executive-clemency-term.html (last visited Mar. 18, 2020) [https://perma.cc/2TXS-34MY].
11. *See* Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 909–10 (1993); *see also* Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 40–41 (1995) (citing United States Supreme Court Justice Stephen Breyer when he was a circuit judge, who wrote of Congress's goals with the war on drugs). *See generally* Shimica Gaskins, Comment, *"Women of Circumstance"—The Effects of Mandatory Minimum*

conspirators in drug possession and trafficking crimes are often minimally involved with drug circles. Yet they receive the same, or even higher, sentences as the ringleaders who dominate the enterprise.[12] Romantic partners or family members are therefore disproportionately punished, even if their involvement is limited to driving their partners to drug deals, counting money, or being aware of the offenses.[13] Regardless of respective culpability, however, the entire system is orchestrated to egregiously over-penalize *everyone* implicated in drug crimes. Therefore, alleged drug criminals—from the tenuously involved like Kemba, to the drug kingpins like Hall—are all predetermined to be guilty by the criminal justice system.

The intense criminalization, prosecution, and punishment of drug offenses is a well-documented phenomenon that highlights some of the United States' starkest systemic injustices. Overzealous regulation and punishment have created a vast system of incarceration. Prosecution of alleged crimes results in guilty pleas in over 95 percent of drug-related cases, and the racial and economic distributive effects of this prosecution are reflected in both federal and state prison demographics.[14] As of 2015, nearly half of all federal prisoners were serving sentences for drug offenses—49 percent of male inmates and 59 percent of female inmates.[15] Furthermore, 51 percent of black federal prisoners and 58 percent of Hispanic federal prisoners were convicted of drug offenses.[16]

It is well-documented that low-income people of color are policed and prosecuted more frequently and aggressively than their affluent white counterparts, even though both demographics are equally likely to use drugs.[17] This, in turn,

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Sentencing on Women Minimally Involved in Drug Crimes, 41 AM. CRIM. L. REV. 1533 (2004).

12. Johnson, *supra* note 11, at 40–41.

13. Levy-Pounds, *supra* note 1, at 468. *See generally* Mark Schwarz, Book Note, *Jeannie Suk, "At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy" (2009)*, 13 L.J. & FAM. STUD. 345 (2011) (explaining Suk's contention that this system also largely disregards women who act under the direction of their male partner out of fear of abuse or abandonment).

14. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf [https://perma.cc/2THD-64MD] (drug offenses include drug possession, distribution, and intent to distribute).

15. *Id.*

16. *Id.*

17. Sharon Dolovitch & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, *in* THE NEW CRIMINAL JUSTICE THINKING 1, 6 (2017).

creates a toxic stigma that inaccurately labels and punishes a huge percentage of people of color as drug users and distributers.[18] This label ignores the fact that drugs are no more prevalent in low-income minority communities than they are in affluent white ones.[19] This deeply unjust stigma constrains and reduces many poor people of color to a mere stereotype, which makes it nearly insurmountable for them to extricate themselves from a vicious cycle of poverty and oppression.

The sentencing schemes for the majority of drug conspiracy crimes are governed by Title 21 of the United States Code, sections 841 and 846.[20] Section 841 dictates that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."[21] The statute further outlines a sentencing scheme imposing mandatory minimums that correspond to the controlled substance at issue and its quantity.[22] Section 846, commonly known as the "attempt" or "conspiracy" statute, expands the reach of section 841 and incriminates even nominally involved individuals, stating that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[23] Essentially, this statute mandates that all members of a convicted drug conspiracy, regardless of their individual culpabilities, are punished equally.[24]

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18. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 180–82 (2010) (arguing that the war on drugs and mass incarceration have created a racial caste system where a significant segment of subordinated communities is relegated to second class citizenship by social exclusion stemming from criminal convictions).

19. Dolovitch & Natapoff, *supra* note 17, at 6.

20. 21 U.S.C. §§ 841, 846 (2018).

21. 21 U.S.C. § 841(a)(1) (2018).

22. *Id.*; *see* Elizabeth McKinley, *The Importance of Drug Quantity in Federal Sentencing: How Circuit Courts Should Determine the Mandatory Minimum Sentence for Conspiracy to Distribute Controlled Substances in Light of* United States v. Stoddard, 87 U. CIN. L. REV. 1145, 1147 (2018).

23. 21 U.S.C. § 846.

24. As a hypothetical example, say there was a conspiracy of twenty people—of various levels of involvement—who distributed a cumulative one hundred grams or more of a substance containing a detectable amount of heroin during the lifespan of the conspiracy. Under both sections 841 and 846, all twenty individuals would be subject to "a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such

Currently, the circuit courts disagree on how to apply sections 841 and 846 when determining the quantity of drugs used to establish the mandatory minimum for an individual convicted of conspiracy to distribute a controlled substance.[25] The dispute is whether the mandatory minimum for conspiracy to distribute should be based on the amount of drugs attributable to the conspiracy as a whole (the conspiracy-wide approach) or based on the amount of drugs attributable to, or that could have reasonably been foreseen to be attributable to, the defendant himself (the individualized approach).[26] As of publication, the Third and Seventh Circuits have explicitly adopted the conspiracy-wide approach.[27] Conversely, the First, Fourth, and Ninth Circuits have adopted the individualized approach.[28]

In *United States v. Stoddard*, the D.C. Circuit addressed this question and opted for the individualized approach.[29] This Comment uses *Stoddard* as a framework to contend that, because the severity and unjustness of mandatory minimums and the conspiracy doctrine in drug sentences are well-established in criminal law, the individualized approach is a more just alternative to the conspiracy-wide approach. Relative to the conspiracy-wide approach, the individualized approach reduces the wide-reaching effects of the conspiracy doctrine and lessens harsh distributive effects and systemic oppression of low-income people of color. Thus, the individualized approach should be adopted in lieu of the conspiracy-wide one.

This Comment proceeds as follows: Part I provides a historical background for this sociological problem of inequality—how the war on drugs, in conjunction with the conspiracy doctrine, has disproportionately targeted and punished low-income people of color for drug use and distribution. Part II examines the *Stoddard* opinion and its adoption of the individualized sentenc-

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substance shall not be less than 20 years or more than life." 21 U.S.C. § 841; *see* 21 U.S.C. § 846.

25. United States v. Stoddard, 892 F.3d 1203, 1211 (D.C. Cir. 2018); McKinley, *supra* note 22, at 1145.

26. *Stoddard*, 892 F.3d at 1211.

27. *See, e.g.*, United States v. Phillips, 349 F.3d 138, 141–43 (3d Cir. 2003), *vacated on other grounds*; *see also* United States v. Knight, 342 F.3d 697, 710–12 (7th Cir. 2003).

28. *See* States v. Haines, 803 F.3d 713, 740–42 (5th Cir. 2015); United States v. Pizarro, 772 F.3d 284, 292 (1st Cir. 2014); United States v. Banuelos, 322 F.3d 700, 704 (9th Cir. 2003); *see also* United States v. Rangel 781 F.3d 736, 742–43 (4th Cir. 2015) (citing United States v. Collins, 415 F.3d 304, 314 (4th Cir. 2005)).

29. *Stoddard*, 892 F.3d at 1221.

ing approach. Part III addresses the disagreements in the circuit split. Finally, Part IV argues that the individualized approach should be adopted because it better serves to reduce the systemic oppression of low-income people of color whose communities and opportunities are thwarted by mass convictions in drug conspiracies.

I. THE RACIAL AND SOCIOECONOMIC DISTRIBUTIVE EFFECTS CAUSED BY PROSECUTORIAL DISCRETION, THE WAR ON DRUGS, AND THE CONSPIRACY DOCTRINE

Many scholars attribute the massive numbers of people convicted of drug crimes to the weaponization of the conspiracy doctrine in the context of the war on drugs.[30] This Comment discusses the conspiracy doctrine—with conspiracy defined as an agreement between two or more people to commit an illegal act along with an intent to achieve the agreement's goal[31]—in the context of drug crimes. This Section outlines the history of the war on drugs and discusses its interaction with the conspiracy doctrine.

A. The War on Drugs and Its Societal Effects

The criminal justice system treats drug offenders in a highly racialized way, which is reflected in frequent sentencing disparities between white people and people of color.[32] In some states, "black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men."[33] In many large cities, approximately 80 percent of young African-American men now have criminal records.[34] The war on drugs, in combination with racialized police targeting and sentencing,

30. *See* ALEXANDER, *supra* note 18; Dolovitch & Natapoff, *supra* note 17; Levy-Pounds, *supra* note 1.

31. *Conspiracy*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/conspiracy (last visited Jan. 28, 2020) [https://perma.cc/5MK9-9W8G].

32. ALEXANDER, *supra* note 18.

33. *Id.* at 7 (referring to New York as the example state); *see also* Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Same Exact Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017, 11:33 AM), https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/ [https://perma.cc/27HK-E6BF].

34. ALEXANDER, *supra* note 18, at 8.

arguably serves as a legally supported war on race and poverty. The conspiracy doctrine is a crucial tool in exacting this result.[35]

The war on drugs was instrumental in the massive increase in the number of individuals incriminated for drug crimes. By "cleaning up the streets" it facilitated the subliminal racial and classist goals of the war on poverty,[36] as it mostly affected low-income people of color.[37] The Reagan Administration began the war on drugs in 1982 to deal with the "exploding" drug crisis in the United States.[38] Enforcement of drug crimes increased and Congress created mandatory minimum sentencing schemes and federal sentencing guidelines that called for severe criminal penalties for individuals convicted of violating drug trafficking laws, codified in section 841.[39] The war on drugs restructured the sen-

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35. Some even believe that the war on drugs was a government effort to obliterate poor, minority, urban communities.

> Conspiracy theorists surely must be forgiven for their bold accusation of genocide, in light of the devastation wrought by crack cocaine and the drug war, and the odd coincidence that an illegal drug crisis suddenly appeared in the black community after—not before—a drug war had been declared. In fact, the War on Drugs began at a time when illegal drug use was on the decline. During this same period, however, a war was declared, causing arrests and convictions for drug offenses to skyrocket, especially among people of color.

Id. at 6.

36. The War on Poverty was an expansive social welfare legislation introduced in the 1960s by the administration of President Lyndon B. Johnson and intended to help end poverty in the United States. The War on Poverty emphasized local control and experimentation to attack social problems. Matthew L.M. Fletcher, Peter S. Vicaire, *Indian Wars: Old and New*, 15 J. GENDER, RACE & JUST. 201, 203–04 (2012).

37. *See generally* Elizabeth Hinton, Book Review, *From the War on Poverty to the War on Crime*, HARVARD U. PRESS (2016), https://scholar.harvard.edu/elizabethhinton/war-poverty-war-crime [https://perma.cc/W6DQ-T3K9] (discussing how the War on Poverty "sought to foster equality and economic opportunity. But these initiatives were also rooted in widely shared assumptions about African Americans' role in urban disorder, which prompted Johnson to call for a simultaneous War on Crime . . . . Under Richard Nixon and his successors, welfare programs fell by the wayside while investment in policing and punishment expanded. Anticipating future crime, policy makers urged states to build new prisons and introduced law enforcement measures into urban schools and public housing, turning neighborhoods into targets of police surveillance.").

38. *Id.* at 5.

39. *See* Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (1984); *see also* Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (1986); U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-94-13 MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM? 2–3 (1993); Wayne L. Mowery, Jr., *Stepping up the War on Drugs: Prosecution and Enhanced Sentences for Conspiracies to Possess or Distribute Drugs Under State and Federal Schoolyard Statutes*, 101 DICK. L. REV.

tencing provisions so that the elevated mandatory minimums did not take into account gender, race, parental status, drug or alcohol dependence, socioeconomic standing, and, in some ways, individual culpability or connection to the drug crime.[40] Allegedly, Congress had two goals behind this sentence reform: first, to make sentences more "honest," where judicial discretion is statutorily limited and the prescribed sentence is the one a prisoner actually serves, and second, to reduce the stark racial and socioeconomic disparities in sentencing.[41]

But Congress's intent to limit the influence of social factors when sentencing drug offenders had the opposite effect. The impacts of Congress's sentencing reform are most notably demonstrated by the sentencing disparities between crack cocaine and powder cocaine. Crack cocaine and powder cocaine are the same drug but are produced and ingested in different forms.[42] Crack cocaine and powder cocaine's respective consumers also differ by class and race demographics; where expensive powder cocaine is typically ingested by wealthy, white drug users, crack cocaine is more affordable and thus more available to low-income minorities.[43] But Congress's mandatory minimums, which ignore any sociological considerations—such as socioeconomic standing, education, and race—imposed much longer and harsher sentences for crack cocaine offenses than for powder cocaine offenses.[44] The "imposition of harsher penalties for identical narcotic substances, 'crack' and 'powdered' cocaine, exacerbated the gross disparities and disproportionate punishments between African American and European American defendants."[45] Low-income minority communities were hit especially hard.[46] Thus, the "colorblind" sentencing guidelines

703, 706–09 (explaining that America needed a war on drugs as a preventative measure to keep kids off drugs and keep society safe).

40. *See generally* Raeder, *supra* note 11, at 922–23.

41. Johnson, *supra* note 11, at 40–41.

42. DEBORA J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW ii (2006), https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf [https://perma.cc/887X-EWGV].

43. *Id.* at i.

44. *Id.* See also Anti-Drug Act of 1986, 21 U.S.C. § 801 (1986), which was enacted to combat the crack-cocaine "epidemic" spreading throughout the United States, and which had sentencing disparities of one hundred-to-one between crack and powdered cocaine.

45. Johnson, *supra* note 11, at 41.

46. VAGINS & MCCURDY, *supra* note 42, at i, 1.

imposed during the war on drugs only widened the justice divide between low-income people of color and affluent, white Americans.

Although black, Hispanic, and white adults use drugs at approximately the same rate, minorities are criminalized at much higher rates than white people.[47] In fact, white youths are more likely than youths of color to engage in drug crimes—but this statistic is not reflected in enforcement and incarceration rates.[48] Possession of marijuana charges are illustrative of this problem: the national arrest rate for marijuana possession for black Americans is nearly four times that of whites.[49] In some jurisdictions, the rate is even thirty times greater.[50] This racial disparity is attributable, in large part, to law enforcement's heightened policing of minority communities where stop-and-frisks[51] have become a new reality.[52] For example, "[i]n New York, until the practice was challenged by public outrage and court order, police stopped over half a million people a year, disproportionately young men of color. In some poor black neighborhoods, every young male resident could expect to be stopped at least once a year."[53]

B. The Prosecutor's Best Tool in Drug Crimes: The Conspiracy Doctrine

As evidenced by Kemba's story, the conspiracy doctrine is far-reaching in its scope and is used as a powerful prosecutorial

47. Dolovitch & Natapoff, *supra* note 17, at 6.

48. ALEXANDER, *supra* note 18, at 7.

49. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 47 (2013).

50. *Id.* at 58.

51. "A stop-and-frisk refers to a brief, non-intrusive police stop of a suspect. The Fourth Amendment requires that before stopping the suspect, the police must have a reasonable suspicion that the crime has been, is being, or is about to be committed by the suspect." CORNELL LAW SCH., *Stop and Frisk*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stop_and_frisk (last visited Mar. 18, 2020) [https://perma.cc/K4K7-CWC4].

52. The media campaign for the war on drugs contributed to its persecution of poor people of color: "[a]lmost overnight, the media was saturated with images of black 'crack whores,' 'crack dealers,' and 'crack babies'—images that seemed to confirm the worst negative racial stereotypes about impoverished inner-city residents." ALEXANDER, *supra* note 18, at 5.

53. Dolovitch & Natapoff, *supra* note 17, at 6.

tool to secure guilty pleas and imprisonments.[54] A drug conspiracy is broadly defined as "an agreement between two or more people to commit an illegal [drug offense] . . . along with an intent to achieve the agreement's goal."[55] Under this broad definition, Kemba did qualify as her boyfriend's coconspirator. The sentencing breadth of the conspiracy doctrine was solidified in *United States v. Pinkerton*, which strips individual defendants of their identities in order to identify all conspirators as one singularly culpable entity.[56] *Pinkerton* held that an "overt act [by] one partner in crime is attributable to all," and, as a result, any and all acts in furtherance of the conspiracy are "attributable to the others for the purpose of holding them responsible for the substantive offense."[57] The *Pinkerton* Court opined that mens rea, or the state of mind statutorily required in order to convict a particular defendant of a particular crime,[58] is "established by the formation of the conspiracy" and that each conspirator instigated the commission of the crime when they agreed to aid and abet the principal.[59]

1. Pillars of the Criminal Justice System

It is impossible to discuss the conspiracy doctrine and prosecutorial discretion without briefly touching on the primary pillars of the criminal justice system. Although the criminal justice system's goals are not expressly established, they are often identified as: (1) accurate identification of the person responsible, (2) fair adjudication, (3) retribution, (4) deterrence of future crimes, (5) rehabilitation of "offenders," and (6) restoration.[60] Ideally, the system achieves each of these goals with every crim-

54. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 (2003) (stating that, as of 2003, "more than one-quarter of all federal criminal prosecutions and a large number of state cases involve prosecutions for conspiracy").

55. 21 U.S.C. § 846 (2018); *Conspiracy*, *supra* note 31 ("Most United States jurisdictions also require an overt act toward furthering the agreement. An overt act is a statutory requirement, not a constitutional one.").

56. 328 U.S. 640 (1946).

57. *Id.* at 647.

58. *Mens Rea*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/mens_rea (last visited Mar. 18, 2020) [https://perma.cc/9W7T-NA2G].

59. *Pinkerton*, 328 U.S. at 647.

60. The themes of the criminal justice system are discussed throughout the doctrinal text of SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES (10th ed. 2016).

inal proceeding. However, the majority of the time few—if any—of these goals are attained due to overburdened judicial dockets, the overcriminalization of many acts, and mass arrests and criminal proceedings.[61] Those who are most implicated by the system—low-income people of color—are the ones most affected. The rest of this Comment proceeds with these pillars in mind.

2. Dangers and Use of the Conspiracy Doctrine Today

Punishing an individual for someone else's acts seems contrary to the pillars of accurate identification and fair adjudication. But defenders of the conspiracy doctrine traditionally justify vicarious liability for three theoretical reasons.[62] The first reason is that an accomplice might contribute to *causing* the crime.[63] Second, under agency theory, the accomplice is thought to "vest the principal with authority to act on his behalf"—even without consent or knowledge of that act.[64] Third, vicarious liability is "justified on a theory of 'forfeited personal identity'" where, in essence, the accomplice tells the principal, "[Y]our acts are my acts."[65] All three of these justifications, though, largely dismiss the traditional common-law method of punishing criminals proportionally to their individual culpability.[66]

These three justifications are too general and ignore the nuances of conspiracy crimes. This Comment will explore this argument in the context of Kemba's story. First, Kemba's answering of phone calls and driving her abusive boyfriend to his drug deals arguably helped cause the crime—though her actions certainly were not the but-for cause of the crime, nor were they

61. The system in its current form runs rampant with various forms of injustice that obstruct the criminal justice system's professed ideals. *See, e.g.*, Thomas E. Daniels, *Gideon's Hollow Promise—How Appointed Counsel Are Prevented from Fulfilling Their Role in the Criminal Justice System*, 71 MICH. B. J. 136 (1992); *see also* Thomas L. Johnson & Cheryl Widder Heilman, *Racial Disparity in the Criminal Justice System*, 58 BENCH & B. MINN. 29 (2001).

62. Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 96 (2006) (discussing Professor Joshua Dressler's argument in his article, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 103 (1985), where he analyzes the inconsistencies of the different treatments of accomplices in conspiracy crimes).

63. *Id.*

64. *Id.* at 97.

65. *Id.*

66. *Id.*

a significant contributor to the crime. Second, due to her negligible involvement and her lack of knowledge of what her boyfriend was doing, it is hard to argue that Kemba was an agent acting on his behalf. Third, looking at Kemba's testimony, as well as the fact that she repeatedly tried to separate herself from her boyfriend but was pressured to stay with him, it is hard to assert that she had assumed responsibility and agency over each of his acts related to the drug offense.[67] Despite the clear injustice of Kemba's story, conspiracy defenders who support the breadth of the doctrine maintain that she—and many similarly situated individuals—is a guilty conspirator.

The conspiracy doctrine is a uniquely dangerous tool because of its ability to implicate even the most tenuously connected individuals, like Kemba, in a crime. If the criminal justice system premises itself on fair punishment for acts that it has labeled as criminal, then the conspiracy doctrine largely delegitimizes the "fairness" aspect of the punishment.

Critics of the conspiracy doctrine emphasize the danger of holding an accomplice liable for the crimes committed by the principal—especially because of the ambiguity in establishing the accomplice's requisite mens rea based purely on his agreement to aid and abet the principal.[68] And although the *Pinkerton* Court concluded that an accomplice should be held liable for acts "reasonably foreseen" when he agreed to join the conspiracy,[69] it is unclear both what constitutes an "agreement to assist the principal" and what counts as "reasonably foreseeable."[70]

Since the war on drugs, prosecutors have applied the conspiracy doctrine to catch and punish members of drug-trafficking rings.[71] Kemba's story is just one of many where an individual was labeled and severely punished by the government despite her negligible connection to the actual offense.[72] As noted earlier, approximately 95 percent of drug offense charges

67. *See Kemba Smith*, *supra* note 1.

68. *Id. See generally* Fred J. Abbate, *The Conspiracy Doctrine: A Critique*, 3 PHIL. & PUB. AFF. 275 (1974).

69. Pinkerton v. United States, 328 U.S. 640, 648 (1946).

70. Noferi, *supra* note 62, at 120–46 (explaining that courts largely vary in what they consider "reasonably foreseeable").

71. Bruce A. Antokowiak, *The* Pinkerton *Problem*, 115 PENN ST. L. REV. 607, 619 (2011); Solomon A. Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOK. L. REV. 1 (1957).

72. *See* Levy-Pounds, *supra* note 1, at 471.

result in guilty pleas.[73] Like the war on drugs itself, the application of the conspiracy doctrine to drug possession and trafficking crimes disproportionately implicates low-income people of color who experience greater enforcement and prosecution than their white peers.[74] Thus, the conspiracy doctrine makes a larger number of people in those communities susceptible to the doctrine's breadth and respective punishments. But the ambiguity of the doctrine, its expansiveness, and prosecutors' eagerness to use it in harsh sentencing for drug crimes create a dangerous tool that implicates individuals who are only peripherally involved.[75]

C. *Prosecutorial Discretion: Bargaining Information for Reduced Sentences*

Some scholars argue that prosecutors have greater power than courts when sentencing defendants because prosecutors are the primary decision-makers in the early (and often most critical) stages of drug trafficking cases.[76] Further, in the early stages prosecutors arguably have greater power over innocent defendants because they do not have to prove guilt. Prosecutors frequently use the conspiracy doctrine when charging individuals with drug offenses.[77] The use of the doctrine, as well as the expansive nature of drug crimes, results in huge numbers of

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73. CARSON & ANDERSON, *supra* note 14; *see also* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284 (1997).

74. Levy-Pounds, *supra* note 1, at 467.

75. *Id.* ("[T]housands of low-level, nonviolent women are serving lengthy prison terms for peripheral involvement in drug-related activity under the drug-sentencing statutes.").

76. The early stages of drug trafficking cases are essential to determining who is involved in the drug ring and the respective sentence of each member of that drug ring. Because so many drug charges result in guilty pleas, this gives prosecutors great power over the defendants' futures. *See* Milton C. Lorenz, Jr., Comment, *Conspiracy in the Proposed Federal Criminal Code: Too Little Reform*, 47 TUL. L. REV. 1017, 1037 (1973) ("Indiscriminate or reflexive use of the conspiracy charge by the government prosecutors may be equated to a wide dragnet .... Even this overkill might be tolerable were it not for the costly drain upon judicial and law enforcement resources."); *see also* Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371, 378 (1947) ("In the final analysis the *Pinkerton* decision extends the wide limits of the conspiracy doctrine to the breaking-point and opens the door to possible new abuses by over-zealous public prosecutors.").

77. Lorenz, *supra* note 76, at 1037.

guilty pleas.[78] With these foundations, prosecutorial discretion can determine the outcome of an individual's case and the resulting sentence.[79] There are three means by which an individual charged with a drug offense can potentially decrease her sentence. First, she can qualify for the Safety Valve Provision;[80] second, she can cooperate with the government and provide "substantial assistance" to prosecutors in their investigations;[81] or third, she can do both.[82]

The Safety Valve Provision is the sentence reducer that involves the least amount of prosecutorial discretion.[83] It is also very infrequently used.[84] In response to public outcry over harsh sentencing regimes, Congress enacted the Safety Valve Provision to reduce sentences for individuals implicated in drug crimes.[85] The provision can significantly reduce sentences to below the mandatory minimums.[86] To qualify for this protection, charged offenders must satisfy five requirements:

(1) Have limited prior criminal history;

(2) Present proof of no violence, credible threats of violence, or the use of a firearm in connection with the offense;

(3) Show that the offense did not result in death or serious bodily injury;

(4) Present proof that he or she was not a leader or organizer of the drug ring; and

(5) Provide truthful information to the prosecutors pertaining to the activities of the drug trafficking ring.[87]

78. *Id.*
79. *Id.*
80. 18 U.S.C. § 3553(f) (2018).
81. Levy-Pounds, *supra* note 1, at 475.
82. *Id.*
83. 18 U.S.C. § 3553(f).
84. Levy-Pounds, *supra* note 1, at 475.
85. 18 U.S.C. § 3553(f).
86. *Id.*
87. *Id.*

Most people charged with drug conspiracy do not meet these prerequisites, so they do not qualify for this form of sentencing relief.[88]

If individuals do not qualify for the Safety Valve Provision, they can attempt to attain sentencing relief by substantially assisting prosecutors. "Substantial assistance" equates insider knowledge of the drug ring's members with their dealings.[89] Prosecutors have developed a culture surrounding drug crimes that encourages codefendants to testify against each other in order to alleviate their respective sentences.[90] Paradoxically, prosecutorial deals that encourage snitching (talking to the police) in exchange for sentence reductions serve to greatly benefit only the most knowledgeable members of the drug ring—the high-level dealers who operate the conspiracy.[91] Conversely, low-ranking individuals who are only peripherally involved lack sufficient information to bargain with prosecutors for lower sentences.[92] As a result, they, like Kemba, may be given even longer sentences than high-level dealers who are able to provide "substantial assistance" to prosecutors based on their intimate knowledge of the drug trafficking activity and conspiracy participants.[93] In this system, the less you know and the less you do, the more you pay.

Even if peripherally connected or low-ranking members possess some helpful information to offer prosecutors in exchange for shorter sentences, there are many sociocultural reasons for not doing so. In many communities of color, there persists a strong "anti-snitching" culture, where entire communities strive to protect each other from the law enforcement officials who so

88. Levy-Pounds, *supra* note 1, at 475. Many low-income people of color have criminal records due to a variety of socioeconomic factors and over-policing in their communities. Therefore, they do not qualify for relief under the Safety Valve provisions.

89. *Id.*

90. Adriano Hrvatin, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using "Substantial Assistance" to Defeat the Intent of Federal Sentencing Laws*, 32 GOLDEN GATE U. L. REV. 117, 152–53 (2002); *see also* Katyal, *supra* note 54, at 1312–13 (explaining that the conspiracy doctrine "uses mechanisms to obtain information from those who have joined and decide to cooperate with the government").

91. Levy-Pounds, *supra* note 1, at 472. *See generally* Gaskins, *supra* note 11.

92. *See generally* Raeder, *supra* note 11.

93. *See, e.g.*, United States v. Griffin, 17 F.3d 269, 274 (8th Cir. 1994) (Bright, J., dissenting) (noting that the defendant was a drug courier (or mule) with less knowledge but was sentenced to a significantly longer prison term than the drug kingpin, who was able to offer "substantial assistance" that reduced his term).

actively prosecute them.[94] Snitching is often viewed as an internal betrayal of the individuals who are already targeted by the police.[95] In over-policed communities a strong animosity toward the police often exists.[96] Thus, even individuals who are unafraid of community repercussions and aim to reduce crime rates in their neighborhoods still feel that cooperating with the government is something that "good people don't do."[97] Professor Alexandra Natapoff's research has estimated that one in twelve black men in the highest-crime neighborhoods are snitching, thereby straining the social fabric of low-income minority neighborhoods where as many as half the young men have been arrested.[98] Moreover, policies encouraging "snitching" create perverse incentives: "According to a study by the Northwestern University Law School's Center on Wrongful Convictions, 51 of the 111 wrongful death penalty convictions since the 1970s were based in whole or in part on the testimony of witnesses who had an incentive to lie" to the prosecutors to reduce their own sentences.[99]

Thus, the prosecutor's "snitching" tool cultivates a narrative of distrust in over-policed and over-prosecuted low-income communities of color. And though informers either guarantee themselves immunity or shorten their own sentences, they often experience intense backlash within their communities.[100] As a result, the number of organized campaigns aimed at reducing snitching has increased around the country, and many individuals protect themselves and their kin by refusing to cooperate

94. Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA TODAY (May 28, 2006, 11:51 PM), https://usatoday30.usatoday.com/news/nation/2006-03-28-stop-snitching_x.htm [perma.cc/C5U9-73K9].

95. *Id.*

96. *Id.*; *see also* ALEXANDER, *supra* note 18.

97. Hampson, *supra* note 94 (quoting David Kennedy, Dir. of the Ctr. for Crime Prevention and Control at John Jay C. of Crim. Just. in N.Y.).

98. *Id. See also* Loyola Law School, *Alexandra Natapoff on Snitching*, YOUTUBE (Nov. 8, 2011), https://www.youtube.com/watch?v=Aacl73Z6ThI [https://perma.cc/365N-GNQ9].

99. Hampson, *supra* note 94.

100. Derek Gilna, *Sentence Reductions for "Snitching" Undermine U.S. Justice System*, PRISON LEGAL NEWS (Sept. 15, 2014), https://www.prisonlegalnews.org/news/2014/sep/15/sentence-reductions-snitching-undermine-us-justice-system/ [https://perma.cc/U52B-PJQM] (discussing the pervasive issue of snitching as a mechanism to reduce sentences and how in many over-policed neighborhoods citizens are growing increasingly tired of the culture of snitching and are promoting "stop snitching" campaigns).

with prosecutors.[101] Thus, low-ranking and peripherally connected members receive disproportionately long prison sentences that compromise their own futures—as well as the futures of their families and communities—in ways they may not anticipate.

The United States Supreme Court has upheld, and even promoted, prosecutorial discretion where prosecutors encourage methods like snitching to maximize the number of individuals charged with conspiracy.[102] In *Pinkerton*, the Court explained its deference to prosecutors, using public safety and deterrence as its main reasoning:

> For two or more to . . . combine together to commit . . . a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.[103]

Further, in *United States v. Jimenez Recio*,[104] the Court held that:

> [C]onspiracy poses a "threat to the public" over and above the threat of the commission of the relevant substantive crime—both because the "[c]ombination in crime makes more likely the commission of [other] crimes' and because it 'decreases

101. *See, e.g.*, Farai Chideya, *'Stop Snitching' Movement Confounding Criminal Justice*, NPR (May 8, 2008, 9:00 AM) https://www.npr.org/templates/story/story.php?storyId=90280108 [https://perma.cc/J9YR-G4EC]. *See also* Levy-Pounds, *supra* note 1, at 475 (describing both community-based harm, where there is a social structure that seeks revenge or justice against snitches, and harm from individuals connected to the drug ring who might seek vengeance against informants; as a result, many women choose not to snitch in order to protect their families).

102. Pinkerton v. United States, 328 U.S 640, 644 (1946); United States v. Rabinowich, 238 U.S. 78, 88 (1915).

103. Damon Porter, *Federal Criminal Conspiracy*, 54 AM. CRIM. L. REV. 1307, 1308 (2017) (quoting *Pinkerton*, 328 U.S. at 644 (quoting *Rabinowich*, 238 U.S. at 88)).

104. 537 U.S. 270, 275 (2003).

> the probability that the individuals involved will depart from their path of criminality."[105]

Although the Court has justified its deference to prosecutors by emphasizing its deterrent effect, I suggest that further research must be done. Currently, there exists scant research on whether higher rates of conspiracy charges and sentences actually deter future offenders. If this research is conducted, it would be useful to know whether charging higher numbers of individuals in drug conspiracies actually deters future drug conspiracies from forming. Additionally, it would be helpful to know whether prosecuting large numbers of predominantly poor people of color in drug conspiracies, regardless of their individual culpability, actually protects public safety. It is important to look at which conspiracies are punished, as well as who is actually being punished. Currently, it is hard to argue that public safety is actually improving, particularly when nominally involved individuals are punished. Further, it would be beneficial to research whether further prosecuting drug conspiracies results in cycles of recidivism that perpetuate systemic oppression.

The following Section briefly explores the collateral consequences suffered by all individuals convicted of drug felonies.

D. Collateral Consequences of Drug Convictions

Felony drug convictions carry lifelong punishments that impact offenders, their partners, and their families, including the denial of federal aid, housing, and the right to vote.[106] The Supreme Court has largely found collateral consequences that deny felons their civil rights to be constitutional—including deportation for noncitizens as well as the deprivation of a citizen's rights to vote, hold public office, serve on a jury, testify, and possess firearms.[107] These secondary sanctions significantly impact in-

105. *Id.* (quoting Callanan v. United States, 364 U.S. 587, 593–94 (1961)).

106. Meredith A. Schnug, *Rising Again: Collateral Consequences and Kansas Expungement Law*, 87 J. KAN. B. ASS'N 44, 47 (2017) ("This penalty—targeted only at felony drug convictions—especially hurts women and people of color, who are disproportionately represented both among those incarcerated in state prisons for a drug offense, and among those receiving [Temporary Assistance for Needy Families ("TANF")] benefits. Children are impacted, too. Even though children may still receive assistance when a parent is ineligible, the total amount of an already modest benefit is reduced, which creates a hardship for the whole family.").

107. *See* Galvan v. Press, 347 U.S. 522, 529 (1954); *see also* Caron v. United States, 524 U.S. 308, 318 (1998) (Thomas, J., dissenting) (discussing the possibility

dividuals who, after their release from prison, are given no government assistance to support themselves or their families.[108] Some states have moved away from denying felony drug offenders financial aid, instead taking the position that the ability to make ends meet is a key factor in reducing recidivism.[109] States that uphold the federal denial of financial aid to prior drug offenders promote recidivism because, with limited access to education, housing, and food, many convicted drug offenders see no option but to return to a life of drug distribution in order to support themselves.[110]

The combination of disproportionately long prison sentences and lifelong sanctions serves to further oppress low-income people of color and deny them opportunities to raise their standing in society.[111] The vast number of individuals incarcerated for drug conspiracies creates a waterfall effect within these communities.[112] The children of incarcerated parents often find themselves in foster care if extended family members are unable to care for them.[113] Even the children of incarcerated parents who are able to remain in the care of family are constrained because of the federal limitations imposed on their parents.[114] When convicted drug offenders are refused federal assistance for welfare, education, and housing, their children are then similarly stigmatized and denied opportunities to elevate their societal statuses. As such, these children become adults who are socially situated to perpetuate racialized, class-based stereo-

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that "an ex-felon's . . . civil rights, such as the right to vote, the right to seek and to hold public office, and the right to serve on a jury, [might be] restored. In restoring those rights, the State has presumably deemed such ex-felons worthy of participating in civic life") (internal citations omitted); Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974); Baldwin v. New York, 399 U.S. 66, 69 n.8 (1970) (noting that in New York, "the convicted felon is deprived of certain civil rights, including the right . . . to hold public office"); Andrea Steinacker, Note, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 804–08 (2003) (reviewing state positions on restrictions on former felons' right to hold public office).

108. Steinacker, *supra* note 107, at 804–08.

109. *Id.*

110. *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 254 (2002).

111. *See generally* ALEXANDER, *supra* note 18, at 9–14.

112. *Id.*

113. Levy-Pounds, *supra* note 1, at 465 (explaining that the incarceration of poor women of color leads to foster care and financially burdened grandparents); *see also* Raeder, *supra* note 11, at 932 ("[C]hildren have become the unintended victims of so-called gender-neutral sentencing.").

114. Levy-Pounds, *supra* note 1, at 465; Raeder, *supra* note 11, at 932.

types—and cyclically, like their parents who were given no alternatives, they are similarly persecuted and suffer the disproportionate consequences for drug crimes.[115]

The conspiracy doctrine and the war on drugs are highly problematic, but they are not going anywhere. Though the emphasis on individual culpability rather than conspiracy-wide guilt does not overtly address the larger issues at play, it does serve to alleviate the harsh incrimination and over-incarceration of low-income people of color who commit low-level offenses or were tangentially related to a conspiracy. Thus, while *Stoddard* is not a clear, or necessarily purposeful, step toward breaking the cycle of oppression, its adoption of the individualized approach for drug conspiracy sentences is a step toward reducing the number of people unjustly implicated in drug conspiracies.

II. *UNITED STATES V. STODDARD*: THE D.C. CIRCUIT'S ADOPTION OF INDIVIDUALIZED SENTENCING IN DRUG CONSPIRACY CASES

Recently, in *Stoddard*, the D.C. Circuit adopted an individualized, rather than conspiracy-wide, sentencing approach for drug conspiracies.[116] Though not necessarily intentional, the court's decision in this case was a step toward alleviating the harsh, community-oppressing repercussions of drug convictions.

This Section addresses (a) the facts of the case and (b) the court's analysis and argument for adopting the individualized approach. As addressed later, this Comment argues that the D.C. Circuit correctly held that all courts should adopt a more individualized approach for drug conspiracy sentencing. This approach more directly allocates punishment according to each participant's mens rea, which better upholds the pillar of fairness in cases where a mere connection to a drug conspiracy can change a charged individual's entire life.

A. Background of Stoddard

This case began in 2012 when the FBI initiated an investigation into the heroin-trafficking activities of notorious drug

115. *See* ALEXANDER, *supra* note 18, at 9–14.
116. *See* United States v. Stoddard, 892 F.3d 1203, 1219 (D.C. Cir. 2018).

dealer Jermaine Washington.[117] The FBI's investigation tactics included phone tapping, wiretapping, and controlled buys by a confidential informant.[118] The FBI recorded phone calls and observed a meeting between Washington and the two defendants, Sidney Woodruff and Calvin Stoddard.[119] The intercepted phone conversations recorded the men negotiating prices and discussing matters that strongly suggested that Woodruff and Stoddard were distributing the heroin they purchased from Washington.[120] When the FBI searched Washington's residence the agents found over twenty grams of heroin, drug paraphernalia, and thousands of dollars in cash.[121] Washington pled guilty to various drug conspiracy charges and agreed to cooperate with the government as a witness.[122]

A grand jury indicted Stoddard and Woodruff for conspiracy to distribute one hundred grams or more of heroin in violation of sections 841 and 846.[123] Washington testified against Stoddard, identifying Stoddard as a coconspirator and claiming that he sold heroin to Stoddard.[124] For the jury instructions, the government proposed that the jury determine the amount of drugs that they believed to be reasonably attributable to each individual defendant.[125] Despite this suggestion, the district court instructed the jury to use a verdict form without individualized drug-quantity determinations.[126]

Woodruff and Stoddard were found guilty on the conspiracy charge, and the jury further found that the whole conspiracy involved the trafficking and distribution of one hundred grams or more of heroin.[127] The defendants moved for a new trial on the premise that the jury should have been instructed with the individualized sentencing approach.[128] The Government agreed,

117. *Id.* at 1208.
118. *Id.*
119. *Id.*
120. *Id.* at 1209.
121. *Id.* at 1208.
122. *Id.*
123. *Id.*
124. *Id.* at 1209.
125. *Id.* at 1210.
126. *Id.*
127. *Id.*
128. *Id.* at 1210.

though it opposed the defendants' motion for a new trial.[129] The district court rejected the motion for a new trial.[130]

Woodruff and Stoddard appealed on the basis that the district court "improperly sentenced each of them to the mandatory minimum for entering a conspiracy to distribute 100 grams or more of heroin, even though the jury did not make individualized findings as to the amount of heroin attributable to each of them."[131] Instead, the trial jury was only asked to determine "whether the defendants had conspired to distribute some amount of a substance containing heroin, and whether the amount of heroin ultimately distributed in connection with the conspiracy exceeded 100 grams."[132] Essentially, Woodruff and Stoddard, despite their tenuous connection to the heroin ring, were sentenced at the same level as Washington and were held responsible for the amount of heroin possessed and distributed by the entire conspiracy.[133]

B. The Adoption of the Individualized Approach

In its adoption of the individualized approach, the *Stoddard* court applied the Supreme Court's reasoning from *Burrage v. United States*[134] and *Alleyne v. United States*.[135] The bench used these cases to establish that "a defendant convicted of conspiracy to deal drugs, in violation of § 846, must be sentenced, under § 841(b), for the quantity of drugs *the jury attributes to him as a reasonably foreseeable part of the conspiracy*."[136] Both *Burrage* and *Alleyne* considered mandatory minimums in felony sentences under section 841(b).[137] *Burrage* stated that "[sentence] enhancement[s] increase[] the minimum and maximum sentences," so in order to convict a defendant, such enhancements

129. *Id.* at 1211.
130. *Id.*
131. *Id.* at 1218.
132. *Id.*
133. *See id.* at 1219.
134. *Id.* (citing the reasoning applied in Burrage v. United States, 571 U.S. 204 (2014)).
135. *Id.* (citing the reasoning applied in Alleyne v. United States, 570 U.S. 99 (2013)).
136. *Id.* at 1221 (quoting United States v. Law, 528 F.3d 888, 906 (D.C. Cir. 2008) (emphasis in original)).
137. *Id.* The *Burrage* case concerned a drug crime, and the *Alleyne* Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury." *Alleyne*, 570 U.S. at 103.

constitute "element[s] that must be submitted to the jury and found beyond a reasonable doubt."[138] Similarly, the *Alleyne* Court asserted that any factor increasing mandatory minimums is an element of the crime—not a sentencing factor—that must be submitted to the jury for an individual finding.[139] The *Stoddard* court also followed *Burrage*,[140] where the Supreme Court faithfully upheld *Pinkerton*'s rule that coconspirators are liable for the acts committed by the whole conspiracy when those acts are "in furtherance of the conspiracy."[141]

The *Stoddard* court concluded that conspiring to distribute drugs is a lesser-included offense of the drug offense itself, which encapsulates harm caused by distribution of drugs as well as the amount of drugs possessed and distributed.[142] It is the latter offense—the conspiracy's entire drug quantity—that triggers an enhanced mandatory minimum sentence.[143] Thus, it is unjust to trigger the mandatory minimum sentence for the lesser crime of conspiracy. Under this logic the D.C. Circuit reversed the district court's decision and sentence, and it concluded that the trial court had committed harmful error because "the evidence was far from overwhelming with respect to the quantity of heroin involved in the conspiracy that was reasonably foreseeable to Woodruff and Stoddard."[144]

Beyond upholding precedent, the *Stoddard* court also opined that "the Government's general charging and motions practices offer further evidence that the criminal justice system is moving toward the individualized approach."[145] It supported this argument with statements from oral arguments and federal circuit court decisions from around the country.[146] Each of these statements and decisions demonstrated that no other cases in

138. *Burrage*, 571 U.S. at 210; *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stating that the jury has the task of finding any facts "that increase the prescribed range of penalties to which a criminal defendant is exposed."); *Alleyne*, 570 U.S. at 108 ("Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.").

139. *Alleyne*, 570 U.S. at 103.

140. *Stoddard*, 892 F.3d at 1221.

141. *Id.* (referring to where the Supreme Court upheld United States v. Pinkerton, 328 U.S. 640, 647 (1946)).

142. *Stoddard*, 892 F.3d at 1222.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

the D.C. Circuit were adopting the conspiracy-wide approach—and that, in circuits that had expressly adopted the conspiracy-wide approach, the Government "has at times urged those courts to reconsider, and represented that its charging policy employs the individualized approach."[147] While the *Stoddard* court was more explicit about its general dislike of conspiracy-wide sentencing, courts around the country are split on whether defendants implicated in drug conspiracies should be charged under mandatory minimums for the amount attributable to the entire conspiracy or only to themselves.

III. CIRCUIT SPLIT: SHOULD COURTS APPLY THE INDIVIDUAL OR CONSPIRACY-WIDE SENTENCING APPROACHES?

The *Stoddard* court concisely summarized the current circuit split by exploring two different avenues for sentencing individuals implicated in drug conspiracies:

> The circuits are split on whether an individualized jury finding as to the quantity of drugs attributable to (*i.e.*, foreseeable by) an individual defendant is required to trigger a mandatory minimum, or if it is sufficient for the jury to find that the conspiracy as a whole resulted in distribution of the mandatory-minimum-triggering quantity. The difference is subtle but important. In *Law*, we suggested a preference for the former approach. Here, that would require the jury to find that each defendant entered the conspiracy to distribute not just an indeterminate amount of heroin that turned out to be over 100 grams, but that the 100-gram quantity was reasonably foreseeable, or within the scope of the conspiracy entered by a particular defendant.[148]

Currently, the First, Fourth, and Ninth Circuits have adopted the individualized approach.[149] Conversely, the Third and Sev-

147. *See id.* (citing Oral Arg. Recording at 47:45–48:56); *see also* United States v. Young, 847 F.3d 328, 366 n.3 (6th Cir. 2017) ("The government also mentions it has adopted a defendant-specific approach to charging future drug conspiracies.").

148. *Stoddard*, 892 F.3d at 1219.

149. *See* United States v. Haines, 803 F.3d 713, 742 (5th Cir. 2015) (overturning the district court's sentence because it "erroneously applied a statutory maximum of life imprisonment . . . based on the conspiracy-wide quantity of heroin, rather than based on an individualized quantity finding"); *see also* United States v. Rangel, 781 F.3d 736, 742–43 (4th Cir. 2015) (holding that the district court erred and

enth Circuits have explicitly adopted the conspiracy-wide approach.[150] *Alleyne* has called into question the conspiracy-wide sentencing approach[151] for both the Third and Seventh Circuits, as well as for those circuits that have not yet decided their position.[152] The Supreme Court in *Alleyne* undermined the conspiracy-wide approach that "the judge lawfully may determine the drug quantity attributable to [each] defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide

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should have considered the amount of drugs attributable to the individual defendant); United States v. Pizarro, 772 F.3d 284, 292–93 (1st Cir. 2014) (holding that the district court "jury did not make a finding with respect to the quantity of drugs in the conspiracy foreseeable to him [the defendant, alone]." The *Pizarro* Court held that juries must make a finding to the amount of drugs attributed to each defendant); United States v. Banuelos, 322 F.3d 700, 704 (9th Cir. 2003) ("[i]n sentencing a defendant convicted of conspiracy to distribute a controlled substance, a district court may not automatically count as relevant conduct the entire quantity of drugs distributed by the conspiracy. Rather, the court must find the quantity of drugs that either (1) fell within the scope of the defendant's agreement with his coconspirators or (2) was reasonably foreseeable to that defendant." (citations omitted)).

150. *See, e.g.*, United States v. Phillips, 349 F.3d 138, 142–43 (3d Cir. 2003), *vacated on other grounds* ("In drug conspiracy cases, *Apprendi* requires the jury to find only the drug type and quantity element as to the conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator"); *see also* United States v. Knight, 342 F.3d 697, 710 (7th Cir. 2003) (holding that "defendant-specific findings of drug type and quantity in drug-conspiracy cases" is not required under *Apprendi*).

151. *Stoddard*, 892 F.3d at 1220 ("Notably, the circuits to adopt the conspiracy-wide approach did so before *Alleyne* was decided in 2013, while all circuits to explicitly address the issue in *Alleyne*'s wake have adopted or followed the individualized approach. The circuits that earlier adopted the conspiracy-wide approach have, at times, failed to grapple with it in subsequent published and unpublished cases decided after *Alleyne*.").

152. The Sixth and Tenth circuits have not established a sentencing approach. The Sixth Circuit seemingly adopted the conspiracy-wide approach in United States v. Robinson, 547 F.3d 632, 639 (6th Cir. 2008), but later panels in the same circuit questioned whether it was consistent with Sixth Circuit case law. *See also* United States v. Gibson, No. 15-6122, 2016 WL 6839156 (6th Cir. Nov. 21, 2016), *vacated*, 854 F.3d 367 (6th Cir. 2017) (en banc) (reinstating, on a divided panel, the district court's sentence based on the conspiracy-wide approach). The Tenth Circuit is similarly inconclusive. *See* United States v. Stiger, 413 F.3d 1185, 1193 (10th Cir. 2005) ("[T]he jury is not required to make individualized findings as to each coconspirator because '[t]he sentencing judge's findings do not, because they cannot, have the effect of increasing an individual defendant's exposure beyond the statutory maximum justified by the jury's guilty verdict.'"); *see also* United States v. Ellis, 868 F.3d 1155, 1170, n.13 (10th Cir. 2017) ("[A] defendant can be held 'accountable for that drug quantity which was within the scope of the agreement and reasonably foreseeable' to him." (quoting United States v. Dewberry, 790 F.3d 1022, 1030 (10th Cir. 2018) (internal quotation marks omitted))).

drug quantity determination)."[153] Even in the Third and Seventh Circuits, courts have recently questioned the application of the conspiracy-wide approach, and some panels have reversed defendants' sentences if juries and judges have not sufficiently determined that the drug quantity for which they were sentenced was directly foreseeable to the individual defendant.[154]

A. The Individualized Approach Is a Step Toward Justice

The *Stoddard* court's adoption of the individualized approach, as well as the nation's trending shift toward that practice, ensures a greater protection of defendants' constitutional rights and better upholds the pillars of the criminal justice system. While the conspiracy doctrine remains massive in scope, especially with drug charges, the individualized approach serves to somewhat limit its breadth and reinforce principles of culpability and proportionality in sentencing.[155] Although drug conspiracy charges still implicate even peripherally-involved individuals (perhaps marking them with lifelong collateral consequences), the individualized approach at least provides greater opportunities for reduced sentences and, ideally, acquittals for individuals who could not "reasonably foresee" that *any* drugs would be attributed to them.[156] Thus, under this approach, there are fewer stories like that of Kemba Smith, where individuals are essentially punished for their romantic or familial connections to drug dealers—they are sentenced as if they themselves are the drug kingpins.

Due to the conspiracy doctrine's pervasive application to drug crimes, it is optimistic, and perhaps a little idealistic, to

153. *Stiger*, 413 F.3d at 1192 (quoting Derman v. United States, 34 F.3d 34, 43 (1st Cir. 2002)).

154. *See, e.g.*, United States v. Cruse, 805 F.3d 795, 817–18 (7th Cir. 2015) (holding that the failure to give the jury a *Pinkerton* instruction as to drug quantity did not affect the defendant's substantial rights, but stating that if it had, "the remedy for the error would be resentencing under the default drug-conspiracy penalty provision"); *see also* United States v. Miller, 645 Fed. App'x 211, 218 (3d Cir. 2016) (finding error on review because "the jury did not determine [a drug quantity] directly attributable" to the individual defendant—but the panel held that the error was harmless).

155. *See generally Stoddard*, 892 F.3d at 1212.

156. *But see* United States v. Santos-Rivera, 726 F.3d 17, 29 (1st Cir. 2013) (implying that the individualized approach offers defendants greater agency "[a]s a member of a conspiracy, [the defendant] was not liable only for the drugs 'attributable' to him, but also to those 'reasonably foreseeable by' him").

assume that an individualized approach will relieve the majority of people in the drug trade of legal guilt. And while the D.C. Circuit's adoption of this approach will reduce neither the overpolicing of low-income communities of color nor judge and jury biases when sentencing defendants of color, it represents a symbolic step toward a concerned awareness of the conspiracy doctrine and its tendency toward injustice. In its focus on the amount of drugs reasonably attributable to the defendant herself, the individualized approach subtly emphasizes the importance of an individual's mens rea and personal culpability, and it acknowledges that a mere connection to a drug circle is insufficient to sentence a defendant to harsh mandatory minimums required by the war on drugs.[157] Further, this approach shifts much of the sentencing power from the prosecutors to the judge or jury.[158] Where the conspiracy-wide approach encourages prosecutorial bargaining of knowledge in exchange for reduced sentences, the individualized approach instead requires the judge or jury to find the amount of drugs attributable or foreseeably distributed to *each individual defendant*.[159] If the individualized approach is adopted, prosecutors would be less concerned with attributing the maximum number of individuals to the crime, and, therefore, there would likely be a reduced impetus to encourage "substantial assistance" and snitching.[160]

B. Legal and Theoretical Justifications for the Conspiracy-Wide Approach

Critics of the individualized approach support their arguments with facts surrounding the dangers of group activities. For example, Yale scholar and conspiracy-doctrine supporter Neil Kumar Katyal asserts that conspiracies should be charged as a whole rather than as individual components because after agreeing to commit a crime, coconspirators form one social iden-

157. *See supra* Part I (discussing the pillars of the criminal justice system as well as the sentencing schemes passed by Congress during the war on drugs).

158. Levy-Pounds, *supra* note 1, at 472.

159. *Stoddard*, 892 F.3d at 1219.

160. The judge and jury, as the triers of fact, are more likely than the prosecutor to be unaffected by career bias and goals when imposing sentences on defendants charged with drug conspiracy. As a result, many defendants found with only minimal amounts of drugs are less likely to receive the same punishments as high-ranking drug ring members. *See generally* Noferi, *supra* note 62.

tity.[161] Katyal compounds his legal argument with psychology and economic data that demonstrate the dangers that groups of criminals pose to society and to each other.[162] Katyal and other supporters of the conspiracy doctrine and its progeny contend that the wide reach of the doctrine and its sentences *deter* individuals from joining conspiracies.[163] This argument encourages harsh, conspiracy-wide sentencing on the premise that, because the law is so onerous and expansive, people will increasingly hesitate to join conspiracies where prosecutorial discretion and the immersive nature of the law have eroded trust within groups, and coconspirators will assume that their peers are acting out of self-interest.[164]

Besides generally supporting the conspiracy doctrine and the sanctions involved in the war on drugs, supporters of the conspiracy-wide sentencing approach object to the fact that the individualized approach allows many criminals to walk free, thus, they argue, threatening public safety.[165] This fear stems from the premise that drug distributors walk away with little to no sanctions and then proceed to continue their illegal practices that injure society as a continuation of the "group think" that is fostered by drug conspiracies.[166] Further, supporters of conspir-

161. Katyal, *supra* note 54, at 1312 (noting that the special social identity shared by coconspirators cultivates "risky behavior, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against nonmembers"); *see also* LAURIE L. LEVENSON & ALEX RICCIARDULLI, *Conspiracy – Public Policy Concerns: Policies Supported by Conspiracy Laws*, *in* CALIFORNIA CRIMINAL LAW § 12:19 (The Rutter Group ed., 2018–2019 ed., 2018).

162. Katyal, *supra* note 54, at 1312 (explaining, through an example of robbing a bank, that pernicious group activity is more harmful than individual bad behavior because "[s]everal individuals are needed to carry weapons and provide firepower (economies of scale), someone needs to be the 'brains behind the operation' (a form of specialization of labor), and another should serve as a lookout (specialization again)").

163. *Id.* at 1312–13 ("[C]onspiracy law resolves the tension of group behavior through a method of price discrimination. The law strives to prevent conspiracies from forming with high up-front penalties for those who join, but also uses mechanisms to obtain information from those who have joined and decide to cooperate with the government."); *see also* Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147 (2008).

164. Katyal, *supra* note 54, at 1313.

165. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640, 644 (1946); United States v. Rabinowich, 238 U.S. 78, 88 (1915); *see also* Elizabeth McKinley, *The Importance of Drug Quantity in Federal Sentencing: How Circuit Courts Should Determine the Mandatory Minimum Sentence for Conspiracy to Distribute Controlled Substances in Light of* United States v. Stoddard, 87 U. CIN. L. REV. 1144, 1153 (2018).

166. Ohlin, *supra* note 163, at 148.

acy-wide sentencing and the conspiracy doctrine in general argue that the mere agreement to aid and abet a crime—even if it is just guarding the door—constitutes culpability, and all members should be thereby charged.[167] They argue that this promotes efficiency in the criminal justice system—if a mere agreement to aid a drug ring constitutes culpability for the entire crime, the heightened sentencing results are equitable and occur at a faster pace.[168] Despite their arguments of efficiency and public safety, supporters of the conspiracy doctrine ignore the fact that, under the current system of prosecutorial bargaining for lighter sentences, drug kingpins are offered lighter sentences than low-ranking members who lack the knowledge to bargain with prosecutors.[169]

The conflict between these two sentencing approaches is emblematic of the omnipresent balance of criminal law, where the legislature, prosecutors, and the judicial branch must reconcile competing interests: justice, liberty, and societal peace. Though seemingly cohesive, these interests are somewhat divergent in the context of conspiracy theory and drug convictions. This conflict arises because each actor—the legislature, prosecutor, judicial branch, police officer, etc.—adopts a different notion of what justice, liberty, and societal peace are, and the methods to achieve their idealistic objectives may conflict. While a prosecutor may seek an elevated number of arrests to ensure peace, a judge might release seemingly guilty individuals under the conspiracy doctrine in order to satisfy her own perception of justice and liberty.

I argue that, in order to ensure that interests such as individual culpability, due process, and proportional punishments are protected, society should assume the risk that some drug offenders will walk free.[170] In some ways, society has already assumed the risk of living and operating among drug offenders because so many people of all backgrounds knowingly and willingly consume drugs and because the criminal structures in place allow for the highest-level drug offenders to walk free. This risk is controversial, but I argue that it should be both tolerated

167. *See id.*; McKinley, *supra* note 165, at 1153 (stating that United States v. Robinson, 547 F.3d 632 (6th Cir. 2008), is emblematic of a court adopting the conspiracy-wide approach).

168. *See* Ohlin, *supra* note 163, at 148.

169. Johnson, *supra* note 11, at 40–41.

170. *See* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2192 (2016).

and constructively approached. People of all races and socioeconomic backgrounds are affected by drug addictions and distribution scandals—but low-income people of color are the ones facing the greatest consequences for these behaviors.[171] Society has already unknowingly, or at least unconsciously, assumed the risk of drug addicts and distributors—many of them white and relatively privileged—walking in its midst. Yet allowing poor people of color who commit the same crimes to walk away with lighter sentences is seen as a dangerous risk that society is unwilling to take.

There remain, of course, individuals who do not want to accept the risk of living among convicted criminals. The unwillingness to accept this risk is controversial because it positions race and socioeconomic standing in opposition to perceived safety. I argue that, to improve racial inequality and reduce privileges, it is necessary to confront these issues directly and recognize that the system as it stands disregards mens rea and serves to oppress poor people of color. While the risk of an individualized sentencing approach is unacceptable to some, it prioritizes justice and liberty and likely poses little risk to the safety of the general population. The perpetuation of the conspiracy doctrine is facilitated by media-induced fear and overprosecution, breeding a vicious cycle wherein those incriminated lack the requisite culpability and those on the outside fear for their safety because of the omnipresent drug trade.

CONCLUSION

The traditionally applied conspiracy-wide sentencing approach undermines the legitimacy of the criminal justice system by ignoring individual culpability and perpetuating the systemic oppression of poor people of color.[172] By convicting individuals like Kemba Smith—who lack the requisite mens rea to possess and distribute large quantities of drugs but are nonetheless convicted—individuals implicated in or connected to drug conspiracies lose respect for the system in its entirety.[173] This

171. *Id.*

172. *See supra* Part I.

173. Levin, *supra* note 170; *see also* Hillary Clinton, *Respect by the Law, Respect for the Law*, BRENNAN CTR. FOR JUST. (Apr. 28, 2015), https://www.brennancenter.org/our-work/analysis-opinion/respect-law-respect-law [https://perma.cc/X3XL-SWJE] (discussing how, as more people recognize rampant

delegitimized system does not seek justice; rather, it serves as a catalyst for prosecutors to incarcerate larger numbers of people and causes disquieting, distributive effects across marginalized racial and socioeconomic groups. Though the individualized approach does not abolish the negative effects of the war on drugs and the conspiracy doctrine, it serves as a step to minimize sentencing injustice, which, in turn, can alleviate some of the current distributive effects and re-legitimize the criminal justice system. The individualized approach can diminish some of the injustices that the current conspiracy-wide sentencing approach implements by shifting power from the prosecutor to the judge or jury and focusing on individual culpability—ensuring that each individual defendant is guaranteed due process when the fact finder considers the amount of drugs attributable to *the defendant*, rather than to the entire conspiracy.

In practice, the conspiracy-wide sentencing approach does not uphold its proclaimed goals of public safety and justice. Instead, this approach serves as the war on drugs' weapon against poverty and race. Too many poor people of color are charged, convicted, and deprived of their civil liberties, which prevents them from voting or serving as public civil servants, denies them their essential needs to elevate their status, and prevents their communities from obtaining federal aid for higher education. Thus, these impoverished communities remain in a stagnant state of oppression. And while the individualized approach surely is not a quick fix for this systemic social control, it is a much better alternative than the conspiracy-wide sentencing approach for drug conspiracy crimes.

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injustice in the system, the system itself loses legitimacy because people have no respect for it and believe there are no elements of fairness or accuracy).