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A Proposal to Resolve the Interpretation of Mixture or Substance Under the Federal Sentencing Guidelines

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COMMENT

A PROPOSAL TO RESOLVE THE INTERPRETATION OF "MIXTURE OR SUBSTANCE" UNDER THE FEDERAL SENTENCING GUIDELINES

I. INTRODUCTION

According to the United States Sentencing Commission, drug trafficking offenses constitute roughly forty percent of all federal criminal prosecutions.[1] The majority of defendants who commit such offenses will be sentenced under section 2D1.1 of the Federal Sentencing Guidelines.[2] Unlike pre-guidelines sentencing practices,[3] section 2D1.1 sentences are based upon the total weight of the controlled substance possessed by a particular offender. As a result, drug traffickers who deal in larger quantities of controlled substances should theoretically receive longer prison sentences.[4]

However, the total weight is not necessarily based on the quantity of the pure substance. A footnote to the Drug Quantity Table in section 2D1.1 states that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire

[1] Thirteen thousand, four hundred and thirty-seven offenders were sentenced under the drug distribution and trafficking provisions of the Federal Sentencing Guidelines between Oct. 1, 1990 and Sept. 1, 1991, which represented 40.7% of all reported Guidelines sentences for that period. By comparison, of the other 31 primary offense categories listed by the United States Sentencing Commission, only sentences for fraud comprised more than an additional 10% of all reported sentences. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT (1991).

[2] Section 2D1.1 is entitled "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (Nov. 1992).

[3] *See infra* notes 11-18 and accompanying text for a discussion of pre-guidelines sentencing practices.

[4] *See* Ronnie Scotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses*, 26 CRIM. L. BULL. 51-53 (1990).

weight of any mixture or substance containing a detectable amount of the controlled substance."[5]

Although the foregoing language appears straightforward, the federal courts have applied section 2D1.1 inconsistently when determining which combinations of drugs and other materials constitute a "mixture or substance." This confusion has resulted in part from the failure of the Commission, Congress, and the Supreme Court to articulate clear principles to guide lower federal courts. This Comment suggests that current federal court interpretations of "mixture or substance" are inconsistent with the underlying purposes of the Sentencing Guidelines because the interpretations do not adequately relate drug offender punishments to criminal culpability and because they promote disparate sentencing practices.

Part II sets forth the basic goals Congress directed the Commission to achieve in promulgating the Sentencing Guidelines. This section also discusses the Anti-Drug Abuse Act of 1986,[6] which provided the framework for the Commission's final draft of section 2D1.1. Part III summarizes the Supreme Court's definition of "mixture" as applied to LSD and blotter paper in *Chapman v. United States*.[7] Part IV criticizes the Court's approach and discusses conflicting lower federal court applications of the *Chapman* decision. Finally, Part V proposes a revision of the drug offender sentencing provisions in light of the failure of the current provisions to provide the just, uniform, and proportional sentencing scheme envisioned by Congress.

II. THE FEDERAL SENTENCING GUIDELINES AND 21 U.S.C. § 841

This section briefly summarizes the concerns which led to the enactment of the Sentencing Reform Act of 1984 and sets forth the basic goals Congress sought to achieve through the promulgation of the Sentencing Guidelines.[8] Next, this section discusses the drug offender provisions in 21 U.S.C. § 841, and their influence on the final draft of U.S.S.G. section 2D1.1. This section concludes that the "mixture or substance" language contained in both § 841 and section 2D1.1 has not been adequately defined by Congress or the Sentencing Commission.

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[5] U.S.S.G. § 2D1.1(c). The footnote tracks the language in 21 U.S.C. § 841 upon which the drug offender portion of the Sentencing Guidelines is based. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A)(i)-(viii) (1988 & Supp. III 1991).

[6] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

[7] 111 S. Ct. 1919, 1925-1927 (1991).

[8] For a thorough discussion of the topic, *see* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990).

A. THE GOALS OF THE FEDERAL SENTENCING GUIDELINES

The Sentencing Reform Act of 1984[9] was enacted to "enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[10] The far reaching reforms initiated by Congress replaced the then-existing federal sentencing system with a more structured scheme designed to channel judicial discretion.[11]

Under the pre-guidelines system, federal judges enjoyed broad discretion to sentence offenders within wide penalty ranges established by Congress.[12] Furthermore, a sentence, once imposed, could only be reviewed by an appellate court for abuse of discretion.[13] Finally, a parole board determined the actual portion of a sentence that an offender would serve in prison.[14]

The pre-guidelines system was designed to promote individualized sentencing. However, empirical studies suggested that individualized sentencing resulted in widespread disparity—similarly situated defendants received widely different sentences. For instance, a statistical survey in the Second Circuit revealed that sentences imposed in almost identical cases ranged from three years to twenty years imprisonment.[15] The Commission itself found sentencing disparities attributable to race, sex, and region in which the defendant was convicted.[16] In addition, the public became increas-

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9 The Sentencing Reform Act of 1984 was passed as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-437, §§ 211-39, 98 Stat. 1837, 1987 (codified in 18 U.S.C. §§ 3551-86, 3621-25, 3742 and 28 U.S.C. §§ 991-998 (1988)).

10 U.S.S.G. Ch.1, Pt.A(3), intro. comment.

11 *See* Nagel, *supra* note 8, at 883-84.

12 *See* Theresa Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 393-94 (1991).

13 *Id.*

14 *Id.*

15 *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (citing Anthony Partridge & William B. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges*, 1-3 (1974)). *See also* Kevin Clancy et al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentencing Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 551-53 (1981) (reporting results of national survey of federal judges and concluding "[d]isparity is widespread"); William Austin & Thomas A. Williams, III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306, 306-10 (1977) ("[T]he five [hypothetical] cases [presented to forty-seven Virginia district court judges] produced a variety of patterns of disparity, but some form of disparity was always present."). Judge Marvin Frankel, an outspoken critic of the pre-guidlines system, stated: "The evidence is conclusive that judges . . ., administering statutes that confer huge measures of discretion, mete out widely divergent sentences . . . explainable only by the variations among judges." Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1973).

16 *See* Breyer, *supra* note 15, at 4 (citing *Sentencing Guidelines: Hearings on Sentencing*

ingly dissatisfied with the perceived dishonesty of a system in which the sentence imposed was rarely served as the result of parole.[17] In response to such criticism, Congress passed the Sentencing Reform Act of 1984 ("Reform Act").[18]

The main goal of the Reform Act was to channel judicial discretion with a highly structured sentencing scheme designed to promote honesty,[19] uniformity, and proportionality[20] in sentencing.[21] To promote honesty, Congress eliminated the parole system for federal prisoners sentenced after the Guidelines' effective date. As a result, the sentence imposed by the court is now the sentence served in prison, less approximately fifteen percent for good behavior.[22]

To promote uniformity and proportionality, the Reform Act established the Federal Sentencing Commission to promulgate detailed sentencing guidelines which judges must follow when imposing sentences.[23] Federal judges currently retain limited authority to sentence outside the prescribed Guidelines range, and may do so only upon finding "aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[24] Moreover, a judge must support his or her reason for such a departure in writing, and all sentences are reviewable for conformity with the law, rather than

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Guidelines Before the Subcommittee on Criminal Justice of the House Committee of the Judiciary, 100th Cong., 1st Sess. 676-77 (1987) (testimony of Ilene H. Nagel, U.S. Sentencing Commissioner).

17 *See* Breyer, *supra* note 15, at 4; Karle & Sager, *supra* note 12, at 394; Nagel, *supra* note 8, at 884. *See also* BUREAU OF JUSTICE STATISTICS, UNITED STATES SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1987, 142-43 (Katherine M. Jamieson & Timothy J. Flanagan eds., 1988).

18 Karle & Sager, *supra* note 12, at 393.

19 "By 'honesty' Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four." Breyer, *supra* note 15, at 4.

20 By "uniformity" and "proportionality," Congress meant "to reduce 'unjustifiably wide' sentencing disparity." *Id.*

21 UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, Ch.1, Pt.A(3), intro. comment (Nov. 1992).

22 *See* 18 U.S.C. § 3551 (1988 & Supp. III 1991); U.S.S.G. Ch.1, Pt.A, intro. comment. The Parole Board was scheduled to be phased out within five years after the adoption of the guidelines and all prisoners sentenced under the pre-Guidelines system were to be assigned specific terms of imprisonment. 18 U.S.C. § 3551(b)(1), (3) (1988).

23 "The United States Sentencing Commission is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." U.S.S.G. Ch.1, Pt.A, intro. comment.

24 18 U.S.C. § 3553(b) (1988).

abuse of discretion.[25]

The Sentencing Commission's *Guidelines Manual* clearly documents the goals Congress directed the Commission to achieve.[26] For instance, the Statutory Mission section states:

> The Sentencing Reform Act of 1984 . . . provides for the development of guidelines that will further the basic purposes of criminal punishment: *deterrence*, incapacitation, *just punishment*, and rehabilitation. The Act delegates broad authority to the Commission to *review and rationalize* the federal sentencing process.[27]

In addition, the Policy Statement recognizes that:

> Congress sought *reasonable uniformity* in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. [Congress also] sought *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.[28]

Congress also enacted a number of specific directives to further guide the Commission's drafting discretion.[29] For instance, statutes instruct the Commission to take into account the nature and degree of harm caused by the offense, community views and concerns about the gravity of the offense, and aggravating or mitigating circumstances, in establishing offense categories.[30] These directives also state that the nature and capacity of correctional facilities and services must be considered.[31] Finally, the maximum range of imprisonment for each sentencing category must not exceed the minimum by more than twenty-five percent.[32]

The Commission responded to the statutory directives by creating a generic sentencing table containing forty-three vertical offense levels and six horizontal criminal history levels.[33] Every federal offense is assigned a base offense level ranging from level 1, the lightest sentence, to level 43, the most severe. Similar offenses are grouped into generic categories and all offenders sentenced under the same offense category receive the same base offense level.[34] The base offense level must be increased in exactly the same manner when "specific offense characteristics," such as possession of a

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25 18 U.S.C. § 3742(a), (b), (e) (1988 & Supp. III 1991).

26 U.S.S.G. Ch.1, Pt.A, intro. comment.

27 *Id.* (emphasis added).

28 *Id.* (emphasis added).

29 *See* Nagel, *supra* note 8, at 902-05 for a summary of the directives.

30 28 U.S.C. § 994(c) (1988).

31 28 U.S.C. § 994(g) (1988).

32 28 U.S.C. § 994(b)(2) (1988).

33 UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, Sentencing Table (Nov. 1992).

34 Nagel, *supra* note 8, at 923.

firearm, are involved.[35] Clear rules establish an offender's criminal history.[36] Finally, any departure from the range prescribed at the point on the grid where the offense level and criminal history categories intersect must be supported in writing by the sentencing judge.[37]

B. CONGRESSIONAL INFLUENCE ON U.S.S.G. SECTION 2D1.1

While the Commission drafted its initial Sentencing Guidelines, Congress enacted the Anti-Drug Abuse Act of 1986 ("Drug Abuse Act").[38] The Drug Abuse Act limited the Commission's authority regarding drug trafficking offenses by establishing five- and ten-year mandatory minimum sentences for offenders trafficking in specified weights of heroin, cocaine, PCP, methamphetamine, LSD, and marijuana.[39]

The House Judiciary Committee endorsed the Drug Abuse Act as punishment for "major traffickers . . . who are responsible for creating and delivering large quantities of drugs."[40] A second level of focus was placed on managers at the retail level who deal in sub-

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35 *Id.*

36 *Id.* at 934.

37 *Id.* The following hypothetical case illustrates how the Sentencing Guidelines work in practice:

> A drug trafficker, with one serious prior conviction (i.e. a sentence of imprisonment exceeding thirteen months), is caught in possession of a firearm and 5 kilograms of cocaine mixed with the cutting agent mannitol. The sentencing judge would proceed as follows:
>
> 1. Look up the statute of conviction in the statutory index. The index will direct the judge to U.S.S.G. § 2D1.1.
> 2. Find the base offense level. The drug quantity table assigns trafficking in "at least 5 KG but less than 15 KG" of a mixture or substance containing a detectable amount of cocaine a base offense level of 32. U.S.S.G. § 2D1.1(c)(6).
> 3. Add "specific offense characteristics." Possession of a firearm in this case increases the base offense level by two levels (32 to 34). U.S.S.G. § 2D1.1(b).
> 4. Determine if any "adjustments" from Chapter 3 of the Guidelines apply. The base offense level may be adjusted in this case for the defendant's role in the offense, efforts to obstruct justice, or acceptance of responsibility. *See generally* U.S.S.G. Ch.3.
> 5. Calculate the criminal history score from the offender's past conviction record. Here, U.S.S.G. § 4A1.1 assigns three points for one prior serious conviction.
> 6. Refer to the Sentencing Table to determine the offender's sentence. Here, an offense level of "34" combined with "3 criminal history points" yields a range of 168-210 months in prison.
> 7. Impose the Guidelines sentence or impose a non-Guidelines sentence if special factors are present. In this case, the provisions of 21 U.S.C. § 841(b)(1)(A) impose a ten-year mandatory minimum sentence that the judge cannot reduce.

This hypothetical was adapted from Breyer, *supra* note 15, at 6-7.

38 Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. § 841 (1988 & Supp. III 1991)).

39 Scotkin, *supra* note 4, at 52-53.

40 H.R. REP. No. 845, 99th Cong., 2d Sess. 11-12 (1986).

stantial "street quantities" of drugs.[41] In order to punish these high volume dealers, Congress decided to base mandatory minimum sentences on quantities of drugs which the Committee felt would likely be possessed by high level drug traffickers.[42]

The Committee further decided that the quantities necessary to trigger the mandatory minimum sentences should "not necessarily [be] quantities of pure substance," but should include "mixtures, compounds, or preparations that contain a detectable amount of [a] drug."[43] As a result of the Committee's "market-oriented approach," drug quantities are not generally related "to the number of doses of the drug . . . in a given sample. The quantity is based on the minimum [total weight of drugs] that might be controlled . . . by a trafficker in a high place in the . . . distribution chain."[44]

The Commission responded to the passage of the Drug Abuse Act by adopting as reference points for the development of its drug trafficking offense guideline, the quantities of the controlled substances specified by Congress as necessary to trigger the five and ten-year mandatory minimum sentences.[45] The ten-year mandatory minimum offenses listed in 21 U.S.C. § 841(b)(1)(A) were assigned offense level 32, and the five-year mandatory minimum offenses listed in 21 U.S.C. § 841(b)(1)(B) were assigned offense level 26.[46] The quantities necessary to trigger base offense levels from 6 to 42 were then adjusted upward and downward to reflect trafficking in larger or smaller quantities of the controlled substances listed in §§ 841(b)(1)(A) and 841(b)(1)(B).[47]

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41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* The imposition of mandatory minimum sentences based not only on the weight of the pure drug, but also on mixtures or substances containing a detectable amount of the drug, represents a recent development in Congress. For example, Congress did not base punishments on the quantity of the drug distributed until 1984. *See* The Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, 98 Stat. 2068. Even then, the Act based penalties only upon the weight of the pure drug. *Id.* Furthermore, the Senate Judiciary Report accompanying the Reform Act of 1984 stated that "[t]he Committee generally looks with disfavor on statutory minimum sentences . . ., since their inflexibility occasionally results in too harsh an application of the law." S. REP. No. 225, 98th Cong., 1st Sess. 89 n.194 (1983).

45 Scotkin, *supra* note 4, at 53.

46 *Id.* at 54. The offense levels correspond to guideline ranges of 121-151 months and 63-78 months, respectively, for defendants in criminal history category I. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, Sentencing Table (Nov. 1992).

47 Scotkin, *supra* note 4, at 54. To illustrate the point, § 841(1)(A) imposes a ten year mandatory minimum sentence for possession of five kilograms or more of cocaine. U.S.S.G. § 2D1.1(c)(6) assigns a base offense level of 32 to possession of "[a]t least 5 KG but less than 15 KG of Cocaine." The Sentencing Table mandates a sentence of 121-

Although Congress used the phrase "mixture or substance containing a detectable amount" throughout § 841(b) as a basis for calculating the quantity of controlled substances, Congress failed to provide a clear definition for the phrase "mixture or substance."[48] The Sentencing Commission likewise declined to clarify the phrase's meaning. Instead, the Guidelines simply state that a " '[m]ixture or [s]ubstance' as used in this guideline has the same meaning as in 21 U.S.C. § 841."[49] Therefore, Congress and the Sentencing Commission have left the courts with the difficult task of deciding which drug combinations should be considered "mixtures or substances" for sentencing purposes. The following sections illustrate that the federal courts have ineffectively resolved the meaning of this undefined phrase.

III. *CHAPMAN V. UNITED STATES*: THE SUPREME COURT'S INTERPRETATION OF "MIXTURE OR SUBSTANCE"

A. BACKGROUND

In *Chapman v. United States*,[50] the petitioners/defendants were convicted of selling ten sheets of blotter paper containing 1000 doses of lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 841(a).[51] Although the weight of the pure LSD was only about fifty milligrams, the district court combined the weight of the LSD and the blotter paper in calculating the petitioners' sentences. The total combined weight of 5.7 grams resulted in the imposition of the mandatory five year minimum sentence required by § 841(b)(1)(B)(v) for distributing "more than one gram of a mixture or substance containing a detectable amount of LSD."[52] The Seventh Circuit, sitting en banc, affirmed the sentence imposed by the district court in a five to four decision.[53]

On appeal to the United States Supreme Court, the petitioners

151 months (10.1 to 12.7 years) for offense level 32. Higher or lower base offense levels are assigned to trafficking in less than five kilograms or more than fifteen kilograms of cocaine.

48 The words are neither defined in the statute itself nor by its legislative history. *See generally* 21 U.S.C. § 841 (1988 & Supp. III 1991); H.R. REP. No. 845, 99th Cong., 2nd Sess. (1986).

49 U.S.S.G. § 2D1.1, comment (n.1).

50 111 S. Ct. 1919 (1991).

51 21 U.S.C. § 841(a) (1988), provides: "[I]t shall be 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 . . . ."

52 *Chapman*, 111 S. Ct. at 1922.

53 Marshall v. United States, 908 F.2d 1312 (7th Cir. 1990), *aff'd sub nom.* Chapman v. United States, 111 S. Ct. 1919 (1991).

argued that blotter paper is only a carrier medium and that § 841 does not require the weight of a carrier medium to be included when calculating a sentence for LSD distribution.[54] As LSD is generally sold by dose rather than weight, the petitioners asserted that including the weight of the blotter paper would produce anomalous sentences based on the weight of the blotter paper instead of the actual amount of LSD. The petitioners urged the Court not to construe the ambiguous words "mixture or substance" to reach such an illogical result. Alternatively, the petitioners argued that the inclusion of carrier mediums such as LSD would violate the equal protection or due process clause of the Fifth Amendment.[55]

B. THE MAJORITY OPINION

Justice Rehnquist delivered the opinion of the Court. The Court rejected the petitioners' arguments and affirmed their sentences. In response to the petitioners' first argument, the Court began by analyzing the structure of § 841. The Court noted that the Act imposes mandatory minimum sentences for distribution of specified weights of a "mixture or substance containing a detectable amount" of drugs such as heroin, cocaine, and LSD.[56] However, with respect to PCP or methamphetamine, mandatory minimum sentences may be based either on the weight of a "mixture or substance" or on the lower weight of the pure drug.[57] The Court therefore concluded that "Congress knew how to indicate that the weight of the pure drug was to be used to determine sentence, and [intentionally decided] not [to] make that distinction with respect to LSD."[58]

The Court supported its conclusion by referring to the Drug Abuse Act's legislative history:

> Congress adopted a "market oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather that the amount of pure drug involved, is used to determine the length of the sentence . . . . Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going.[59]

The Court then held that LSD applied to blotter paper was in fact a "mixture or substance" under § 841 and section 2D1.1.[60]

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54 *Chapman*, 111 S. Ct. at 1923.
55 *Id.*
56 *Id.* at 1924.
57 *Id.*
58 *Id.*
59 *Id.* at 1925.
60 *Id.*

Noting that neither the statute nor the Sentencing Guidelines defined the terms "mixture or substance," the Court adopted a mechanical, dictionary meaning of "mixture."[61] Mixture was defined as matter consisting of two or more substances that are so thoroughly blended together that the particles of one are diffused among the particles of the other but nonetheless maintain a separate existence.[62]

The Court applied its definition of "mixture" to blotter paper and LSD as follows:

> The LSD crystals are [diffused among the fibers of paper], so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence . . . . Like heroin or cocaine mixed with cutting agents, the LSD cannot be distinguished from the blotter paper, nor easily separated from it. Like cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying LSD can be . . . ingested with the drug.[63]

The Court rejected the petitioners' argument that such a definition could include carriers like a glass vial or an automobile:

> The term does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a "container." The drug is clearly not mixed with a glass vial or an automobile . . . . It may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug.[64]

The Court also rejected petitioners' claim that the language was at least ambiguous and should be interpreted in their favor on the basis of the rule of lenity.[65] The majority concluded that the rule of lenity was not applicable because the Court's straightforward reading of the structure and language of the statute and the Guidelines was neither ambiguous nor "absurd or glaringly unjust."[66] Therefore, the Court held that "the blotter paper used in this case, and blotter paper customarily used to distribute LSD, is a 'mixture or substance containing a detectable amount of LSD.' "[67]

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61 *Id.* at 1926.

62 *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986); OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989)). The Court did not define the term "substance." *Id.*

63 *Id.*

64 *Id.*

65 If a court encounters a "grievous ambiguity or uncertainty in the language and structure of an Act," the court may, under the rule of lenity, choose to interpret the Act most favorably to the defendant so as to avoid an "absurd or glaringly unjust" result. *Id.* (citations omitted).

66 *Id.*

67 *Id.* at 1925.

Next, the Court dismissed the petitioners' constitutional objections to the inclusion of blotter paper for sentencing purposes. The Court stated that once a defendant has been duly convicted, the sentencing judge may impose whatever penalty is authorized by Congress without violating the due process clause of the Fifth Amendment, so long as the penalty is not based on an arbitrary distinction.[68]

The majority decided that Congress' decision to link distribution penalties to the "street weight" of drugs in the diluted form in which they are sold, regardless of purity, was not arbitrary, but was rationally related to the legitimate goal of punishing large volume dealers more severely.[69] With respect to LSD, the majority noted blotter paper facilitates the distribution of the drug by making it easier to transport, conceal, and sell. Thus, it was rational for Congress to base penalties upon the chosen tool of LSD traffickers.[70]

The Court also noted that the blotter paper used by the petitioners is indeed the carrier of choice, and that therefore including the weight of blotter paper in the "mixture or substance" for purposes of sentencing would in fact punish those who sell larger amounts of LSD more heavily.[71] Moreover, the majority decided that the penalty scheme for LSD distribution would be constitutional even if distributors with varying degrees of culpability were subject to the same sentence, because "Congress has the power to define criminal punishments without giving the courts any . . . discretion."[72] In conclusion, the majority held that "the statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD, and this construction is neither a violation of due process, nor unconstitutionally vague."[73]

C. THE DISSENTING OPINION

Justice Stevens, in dissent, interpreted "mixture or substance" within the broader framework and goals of the Sentencing Reform Act of 1984, instead of focusing narrowly on the language and structure of § 841(b).[74] He rejected the majority's construction of the

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68 *Id.* at 1927-28.

69 *Id.*

70 *Id.* at 1928.

71 *Id.* The Court did note, however, that LSD distributors could always choose to minimize their sentences by selecting lighter carriers (such as blotter paper) rather than heavy carriers (such as suger cubes). *Id.* at 1928 n.6.

72 *Id.*

73 *Id.* at 1929.

74 *Id.* (Stevens, J., dissenting). Justice Marshall joined in Justice Stevens' dissent. *Id.*

statute which, in his opinion, would produce anomalous sentences and thereby "undermine the very uniformity that Congress sought to achieve when it adopted the Sentencing Guidelines."[75]

Unlike the majority, Justice Stevens believed the plain meaning of neither "mixture" nor "substance" encompassed the combination of LSD and blotter paper.[76] Justice Stevens noted that the legislative history was not entirely clear and that no mention of the weight of LSD arose in the debates preceding the passage of the Drug Abuse Act.[77] Therefore, he disagreed with the majority that the Court was bound by the "plain meaning" and intent of Congress.[78]

Relying on a chart reproduced in the majority opinion,[79] Justice Stevens went on to conclude "widely divergent sentences may be imposed for the sale of identical amounts of [LSD] simply because of the nature of the carrier."[80] He maintained that "[i]nstead of punishing more severely those who sell large quantities of LSD, the Court would punish more severely those who sell small quantities of LSD in weighty carriers."[81] As a result, Justice Stevens asserted that the majority approach would lead to disparate sentencing practices, thereby frustrating the Sentencing Guidelines' goal of uniformity. Because he refused to construe § 841 "to undermine the very goals that Congress sought to achieve,"[82] Justice Stevens therefore concluded that only the pure LSD should be weighed for sentencing purposes.[83]

IV. A CRITICISM OF THE *CHAPMAN* INTERPRETATION

This section argues that the *Chapman* court's literal construction of "mixture or substance" undermines the goals Congress sought to achieve in formulating the Sentencing Guidelines.[84] First, this sec-

75 *Id.* (Stevens, J., dissenting).
76 *Id.* at 1930 (Stevens, J., dissenting).
77 *Id.* (Stevens, J., dissenting).
78 *Id.* at 1931 (Stevens, J., dissenting).
79 *See infra* note 99 for a reproduction of the chart.
80 *Id.* at 1932 (Stevens, J., dissenting).
81 *Id.* at 1934 (Stevens, J., dissenting).
82 *Id.* (Stevens, J., dissenting).
83 *Id.* (Stevens, J., dissenting).
84 *See supra* part II.A. Although it may be argued that the intent of the Anti-drug Abuse Act of 1986, passed two years after the Sentencing Reform Act of 1984, supersedes the 1984 Act, and therefore should not be read in light of the Sentencing Guidelines, the argument is not persuasive. Like the great majority of federal criminal statutes, the provisions of the Drug Abuse Act have been incorporated into the Sentencing Guidelines. *See* UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES, Statutory Appendix (Nov. 1992). Since Congress nowhere explicitly or implicitly states

tion notes that the statutory scheme, as interpreted by the Court, does not relate the punishment of LSD offenders to criminal culpability and therefore does not provide a just and uniform punishment to drug offenders.[85] Second, this section argues that the scheme will result in disparate, rather than uniform and proportional sentencing practices.[86] Finally, this section demonstrates that the Court's approach has created interpretational conflicts among lower federal courts.[87]

A. THE COURT'S DECISION FAILS TO RELATE LSD PUNISHMENTS TO CRIMINAL CULPABILITY

Although the *Chapman* majority correctly concluded that Congress is not constitutionally compelled to base punishments upon individual degrees of culpability,[88] the structure and legislative history of the Anti-Drug Abuse Act of 1986 both indicate that Congress did indeed intend to relate the sentences of drug traffickers to culpability.[89] This section begins by analyzing Congress' conception of criminal culpability to show that the Court's classification of LSD and blotter paper as a mixture fails to relate LSD punishments to criminal culpability as defined by Congress. As a result, LSD offenders will not receive the just punishments Congress envisioned when it approved the Sentencing Guidelines.

As mentioned in Part II.B, Congress enacted the Anti-Drug Abuse Act to punish high volume drug traffickers.[90] Congress' adoption of the mixture or substance method of calculating the quantity of a drug necessary to trigger the five and ten-year mandatory minimum sentences "reflected a conscious decision to mete out heavy punishment to large retail dealers, who are likely to possess 'substantial street quantities' of the diluted drug ready for

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that the provisions of the Drug Abuse Act should not be read in light of the Sentencing Guidelines, it makes little sense to interpret this particular act differently than every other criminal statute incorporated into the Guidelines. *See generally* H.R. Rep. 845, 99th Cong., 2nd Sess. (1986). Therefore, it seems more likely that Congress was not aware that the provisions of the Act would be interpreted to undermine the goals of the Sentencing Guidelines.

85 "Just punishment" is a goal of the Sentencing Guidelines. *See supra* notes 27-28 and accompanying text.

86 "Proportional" sentences are a goal of the Sentencing Guidelines. *See supra* notes 27-28 and accompanying text.

87 "Uniformity" is a goal of the Sentencing Guidelines. *See supra* notes 27-28 and accompanying text.

88 Chapman v. United States, 111 S. Ct. 1919, 1928 (1991).

89 *See supra* notes 40-49 and accompanying text.

90 *See* H.R. Rep. No. 845, 99th Cong., 2nd Sess. 10-13 (1986).

sale."[91] As the structure and legislative history of the Act generally disregard the purity of a controlled substance,[92] an offender who sells a large quantity of a highly diluted drug is more culpable under Congress' approach than an offender who sells a small quantity of a purer form of the drug, even if both sell the same quantity of the pure substance. The former is more culpable because he or she has a larger quantity of street market level drug to sell and therefore "keeps the street markets going" longer.[93]

The Court's decision in *Chapman* to define LSD and blotter paper as a "mixture" fails to link sentences for LSD offenders to Congress' definition of culpability. Blotter paper does not, like the cutting agents typically mixed with heroin and cocaine, dilute pure LSD to increase the number of consumers to whom LSD can be sold at the street level. A typical dose of pure LSD weighs about 0.05 milligrams.[94] Although the dosage may vary depending upon the concentration of LSD applied to the blotter paper or the size of the squares of the blotter paper, the weight of the blotter paper itself has no effect on the dosage.[95] Blotter paper simply facilitates the distribution of a dose of LSD in an easily transportable, marketable, and consumable form.[96] As a result, whether one dose of LSD is consumed in pure liquid form, on a sugar cube, or on blotter paper,

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91 Michelle R. Kallam, Note, *Let the Punishment Fit the Crime:* State v. Newton, Chapman v. United States, *and the Problem of Purity and Prosecutions*, 52 LA. L. REV. 1267, 1279 (1992).

92 *See* H.R. REP. No. 845, 99th Cong., 2nd Sess., 11-12 (1986).

93 *Id.*

94 *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (Nov. 1992).

95 *Id.* The *Chapman* majority itself explains:

> Pure LSD is dissolved in a solvent such as alcohol, and either the solution is sprayed on paper or gelatin, or paper is dipped in the solution. The solvent evaporates, leaving minute amounts of LSD trapped in the paper or gel. Then the paper or gel is cut into 'one dose' squares and sold by the dose. Users either swallow the squares, lick them until the drug is released, or drop them into a beverage, thereby releasing the drug.

Chapman v. United States, 111 S. Ct. 1919, 1923 (1991).

In fact, if the squares of blotter paper are intentionally cut smaller than normal in order to reduce the dosage and increase the number of consumers to whom the drug can be sold, the weight of the entire sheet of blotter paper will not change. Furthermore, the weight of each individual dose will be lighter because less blotter paper will be involved. Thus, Congress' goal of punishing dealers who sell greater amounts of drugs by diluting their purity will be frustrated because the LSD mixture will weigh less. By contrast, diluting the purity of cocaine with a cutting agent to increase the amount of cocaine available to sell does increase the weight of the entire mixture. A cocaine trafficker dealing in large quanitites of highly dilute cocaine will therefore be punished more severely than a trafficker dealing with the same amount of cocaine in a purer form.

96 Kallam, *supra* note 91, at 1279-80.

it is still only one dose.[97]

As an illustration, the petitioners in *Chapman* were convicted of selling 1000 doses of LSD on blotter paper.[98] Since LSD is sold by the dose at the street market level, petitioners had the ability to engage in 1000 drug transactions with street market consumers. If they had elected to sell 1000 doses on sugar cubes, the weight of the mixture would have drastically increased for sentencing purposes. If they had elected to sell 1000 doses in pure form, the weight would have drastically decreased. However, in all three cases, the number of consumers to whom the mixture could be sold remained constant because the same 1000 doses were involved.[99] As the number of potential consumers was not increased because the petitioners elected to sell their LSD on blotter paper instead of on sugar cubes or in its pure liquid form, including the weight of the carrier medium is not consistent with Congress' definition of culpability.[100]

Furthermore, the weight of the LSD itself is slight compared to the average weight of the blotter paper upon which it is carried.[101] Thus, sentences based on the majority's approach in *Chapman* will be based primarily on the weight of a substance which bears no relationship to the quantity of LSD a trafficker might distribute, but which may have a dramatic effect on the offender's sentence.[102] The petitioners in *Chapman*, for example, distributed 1000 doses of LSD on blotter paper which resulted in a five year mandatory minimum

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97 *Chapman*, 111 S. Ct. at 1933 (Stevens, J., dissenting). Judge Posner illustrates the point as follows: "Two quarts of 50 proof alcoholic beverage are more than one quart of a 100-proof beverage, though the total alcohol content is the same. But a quart of orange juice containing one dose of LSD is not more, in any relevant sense, than a pint of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint." United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting), *aff'd sub nom.* Chapman v. United States, 111 S. Ct. 1919 (1991).

98 *Chapman*, 111 S. Ct. at 1922.

99 The majority opinion in *Chapman* reproduced the following chart prepared by the petitioners to illustrate potential sentencing disparity:

Carrier	Weight of 100 Doses	Base Offense Level	Guidelines Range (Months)
Suger Cube	227 gr.	36	188-235
Blotter Paper	1.4 gr.	26	63-78
Gelatin Capsule	225 mg.	18	27-33
Pure LSD	5 mg.	12	10-16

Id. at 1924.

100 *See* Kallam, *supra* note 91, at 1279-80.

101 *Chapman*, 111 S. Ct. at 1932 (Stevens, J. dissenting) (citing *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (Posner, J., dissenting)). For example, 100 doses of pure LSD weighs approximately 5 mg., whereas the same 100 doses on the blotter paper used by the petitioners in *Chapman* weighed 1.4 grams—280 times heavier than the pure LSD.

102 *See* Kallam, *supra* note 91, at 1280-81.

sentence.[103] However, if the petitioners had distributed that same 1000 doses in pure liquid form they would have been subject only to a sentence of between 15 and 21 months in prison.[104] In fact, even if the petitioners had sold 19,999 doses in pure form rather than 1000 doses on blotter paper, they still would not have been subject to a five year mandatory minimum sentence.[105]

Although the majority conceded that under its approach, "distributors of varying degrees of culpability might be subject to the same sentence,"[106] the Court argued that this will not occur often because "blotter paper seems to be the carrier of choice, and the vast majority of cases will therefore do exactly what the sentencing scheme was designed to do—punish more heavily those who deal in larger amounts of drugs."[107]

The majority failed to recognize, however, that even the weight of blotter paper varies considerably. For instance, in *United States v. Rose*,[108] the defendant sold 472 doses of LSD on blotter paper which weighed 7.3 grams.[109] In contrast, the defendants in *Chapman* sold 1000 doses on blotter paper that weighed only 5.7 grams.[110] The Sentencing Guidelines impose a sentence of between 97 and 121 months for distribution of 7.3 grams of LSD and a sentence of between 87 and 108 months for distribution of 5.7 grams.[111] As a result, the defendant in *Rose* was punished more severely than the defendants in *Chapman* even though the defendants in *Chapman* possessed twice as many doses of LSD.

Therefore, even among offenders who use blotter paper, sentences imposed under *Chapman* will not uniformly be based on culpability because offenders dealing in the same amount of LSD might receive different sentences due simply to variations in the weight of the blotter paper.[112] The Court nonetheless reasoned

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103 *Chapman*, 111 S. Ct. at 1922-23.

104 One thousand doses multiplied by the average dose of 0.05 mg. per dose equals 50 mg. which yields a base offense level of 14. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1(c)(15) (Nov. 1992). Base offense level 14 corresponds to a sentence of between 15 and 21 months for an offender in criminal history category I. U.S.S.G., Sentencing Table.

105 *Chapman*, 111 S. Ct. at 1924 n. 2. Although 19,999 doses seems quite high, part IV.B. will show that the a quantity of cocaine equal to the weight of 19,999 doses of LSD might yield between 325,000 and five million doses of cocaine. *See infra* Part IV.B.

106 *Chapman*, 111 S. Ct. at 1929.

107 *Id.* at 1928.

108 881 F.2d 386, 387 (7th Cir. 1989).

109 *Id.*

110 *Chapman*, 111 S. Ct. at 1923.

111 *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1(c)(7), (8) & Sentencing Table (Nov. 1992).

112 It might be argued that the approach taken by the majority in fact promotes uni-

that blotter paper is a "tool of the trade" which facilitates the distribution of LSD, and therefore, "it was rational for Congress to set penalties based on this chosen tool."[113] The majority further justified its interpretation by noting that LSD distributors can minimize their sentences by choosing lighter carrier mediums.[114]

The majority's approach will not necessarily punish more severely those offenders who sell larger quantities of LSD, but *will* punish more severely those offenders who sell LSD on more weighty carriers.[115] The major flaw in the majority's approach is that it effectively deters only the use of heavy carrier mediums, not the distribution of larger amounts of LSD. The Court's holding encourages the use of lightweight carrier mediums which will have the practical effect of permitting larger numbers of doses to be sold under each base offense level in the Guidelines. This is certainly contrary to the intent of Congress, which enacted 21 U.S.C. § 841 to punish high volume drug dealers more severely.[116] Furthermore, as the weight of the blotter paper does not increase the price, quantity, or potency of LSD, the majority's interpretation of "mixture or substance" destroys any relationship between the punishment and culpability of LSD offenders. Therefore, the majority approach undermines the "just punishment" and "uniformity" goals embodied in the Sentencing Guidelines.[117]

B. LSD OFFENDERS WILL NOT RECEIVE PROPORTIONAL SENTENCES UNDER THE COURT'S APPROACH

This section demonstrates that the Court's analysis in *Chapman* not only fails to relate punishments to culpability, but also violates the Sentencing Guidelines' goal of proportionality[118] when LSD sentences are compared to sentences for other drugs. For instance, a minimum of five kilograms of cocaine and a minimum of ten grams

formity because offenders who possess equal weights of LSD and blotter paper will in fact receive the same sentence in all federal courts. This argument confuses procedure with substance. Any non-discretionary procedure for calculating sentence, if uniformly applied, will result in the same sentences for LSD offenders. This comment argues that the procedure utilized by the Court is itself incorrect because it fails to adequately relate criminal punishments to criminal culpability. However, Part IV will also demonstrate that lower federal courts have not even been able to apply the Court's procedure in a uniform manner.

113 *Chapman*, 111 S. Ct. at 1928.

114 *Id.* at 1928 n.6.

115 *See Chapman*, 111 S. Ct. at 1934 (Stevens, J., dissenting).

116 *See supra* Part II.B.

117 *See supra* notes 27-28 and accompanying text.

118 *See supra* notes 27-28 and accompanying text.

of LSD each constitute a level 32 offense.[119] Five kilograms of cocaine in 1988 was worth between $55,000 and $170,000 at wholesale prices.[120] In contrast, tens grams of LSD on blotter paper yields approximately 1135 doses of LSD.[121] The value of 1135 doses of LSD at wholesale prices of between 35 cents and a $1.50 per dose equals only $397.25 to $1702.50.[122] As a result, an offender caught with $400 worth of LSD may be subject to the same sentence as an offender caught with $55,000 worth of cocaine. Nonetheless, only one district court has concluded that Congress and the Commission could not have intented such a disproportional result.[123]

However, if the blotter paper is in fact excluded, as Justice Stevens advocated,[124] a more proportional result is possible. For instance, as noted earlier, the five kilograms of cocaine required to achieve base offense level 32 was worth between $55,000 and $170,000 in 1988.[125] The ten grams of the pure LSD necessary to achieve offense level 32 under Justice Stevens' approach equals about 200,000 doses at 0.05 milligrams per dose.[126] At 35 cents to $1.50 per dose, ten grams of pure LSD is worth between $70,000 and $300,000—a much more proportional result.

The *Chapman* dissent also focused on the disproportionately larger number of doses that cocaine and heroin dealers would be able to sell while still receiving the same sentence as an LSD dealer. Justice Stevens noted that Mr. Marshall, a defendant in one of the

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119 A level 32 offense carries a Guidelines range of 121-151 months (10.1-12.6 years) in prison for an offender in criminal history category I. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1(c)(6) & Sentencing Table (Nov. 1992).

120 United States v. Healy, 729 F. Supp. 140, 143 (D.D.C. 1990) (citing NATIONAL CONSUMERS COMMITTEE, THE NNICC REPORT 1988: THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES 31 (1989)).

121 *Id.*

122 *Id.*

123 *See id.* at 143-44. ("The Sentencing Commission did not intend that a person caught with $1,000 worth of LSD would face the same sentence as one caught with $100,000 worth of cocaine, especially considering the relative impacts of the two drugs."). Regarding the relative impacts of the two drugs, the *Healy* court noted that "while physical and psychological [dependence on cocaine] is known to occur, physical dependence on LSD is not, and only a small fraction of LSD users become psychologically dependent." In addition, deaths do occur from cocaine overdose, but not from LSD overdose. *Id.* (citing T. COX ET AL., DRUGS, AND DRUG ABUSE: A REFERENCE TEXT (1983)).

124 *See* Chapman v. United States, 111 S. Ct. 1919, 1929-34 (1991) (Stevens, J., dissenting).

125 *Healy*, 729 F. Supp at 143 (citing NATIONAL CONSUMERS COMMITTEE, THE NNICC REPORT 1988: THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES 31 (1989)).

126 UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1, comment. (n.11) (Nov. 1992).

suits consolidated for appeal, was sentenced to twenty years in prison for selling fewer than 12,000 doses of LSD on blotter paper.[127] Justice Stevens asserted that such a severe sentence was inequitable because:

> [To] receive a comparable sentence for selling heroin, Marshall would have had to sell ten kilograms, which would yield between one and two million doses. To receive a comparable sentence for selling cocaine he would have had to sell fifty kilograms, which would yield anywhere from 325,000 to five million doses.[128]

The majority's interpretation of "mixture or substance" thus punishes LSD traffickers more severely than similarly situated cocaine and heroin traffickers, even though the street value and total number of doses sold by LSD traffickers may be considerably less than that sold by the cocaine and heroin traffickers. This disproportionate result is contrary to the proportionality goal Congress sought to achieve in the Sentencing Guidelines.[129] As Justice Stevens correctly noted, the Court's construction "will necessarily produce sentences that are so anomalous that they will undermine the very uniformity that Congress sought to achieve when it adopted the Sentencing Guidelines."[130]

C. CONFLICTING INTERPRETATIONS

Although *Chapman* established that a typical combination of LSD and blotter paper is a "mixture" under 21 U.S.C. § 841 and section 2D1.1 of the Sentencing Guidelines, lower federal courts have struggled to apply the *Chapman* principles to other drug combinations. This section will demonstrate the continuing disparity in drug offender sentencing practices by discussing the conflicting positions taken by the lower federal courts regarding the proper interpretation of *Chapman*.

1. Literal Interpretations

This section will discuss opinions from several circuits which adhere strictly to the Supreme Court's technical definition of mixture. These circuits focus only on whether the particles of a drug are intermingled with and difficult to distinguish from the non-drug substance with which the drug is mixed. Such a literal approach tends to result in counter-intuitive sentencing patterns that have

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127 *Chapman*, 111 S. Ct. at 1932 n.12 (Stevens, J., dissenting).
128 *Id.* (Stevens, J., dissenting).
129 *See supra* notes 27-28 and accompanying text.
130 *Chapman*, 111 S. Ct. at 1929 (Stevens, J., dissenting).

even less connection between punishment and culpability than the Court's opinion in *Chapman*.

The First Circuit developed its literal interpretation in *United States v. Mahecha-Onofre*.[131] In that case, Mahecha-Onofre unsuccessfully attempted to evade customs agents by chemically bonding cocaine to several suitcases.[132] The district court imposed a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), based on the weight of the cocaine and the suitcase material (12 kilograms), instead of the weight of the cocaine itself (2.5 kilograms).[133]

On appeal, the First Circuit reasoned that the Supreme Court's definition of mixture, and its application to LSD and blotter paper, applied equally to the cocaine and suitcase material.[134] The court recognized that, unlike blotter paper or cutting agents, the suitcase material must be removed before the cocaine can be ingested, but did not believe "this fact alone can make a difference to the outcome, for 'ingestion' would not seem to play a critical role in the definition of 'mixture' or 'substance'."[135] Therefore, the court held the suitcase/cocaine combination fit the definition of "mixture" as interpreted by the Supreme Court in *Chapman* and the appellant's sentence was affirmed.[136]

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131 936 F.2d 623 (1st Cir.), *cert. denied*, 112 S. Ct. 648 (1991).

132 *Id.* at 624.

133 *Id.* at 625. The defendant was convicted of violating 21 U.S.C. § 841(a), *see supra* note 51 for text of statute, and sentenced under § 841(b)(1)(a) which provides: "In the case of a violation of subsection (a) of this section involving—(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—(II) cocaine . . .; such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . ." 21 U.S.C. § 841 (1988 & Supp. III 1991). U.S.S.G. § 2D1.1(c)(6) assigns a base offense level of 32 for trafficking in "[a]t least 5 KG but less than 15 KG of Cocaine." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1(c)(6) (Nov. 1992). Offense level 32 corresponds to a sentence between 121 and 151 months for an offender in criminal history category I. *Id.* at Sentencing Table.

134 *Mahecha-Onofre*, 936 F.2d at 625-26.

135 *Id.* at 626.

136 *Id.* Several other First Circuit decisions have adopted this literal approach to sentencing drug offenders. In United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992), the court held that the weight of beeswax statues containing cocaine was properly included with the weight of cocaine in calculating the total weight of the controlled substance for purposes of establishing the base offense level under the Sentencing Guidelines.

In United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir.), *cert. denied*, 113 S. Ct. 484 (1992), the court held that the weight of fiberglass suitcase material containing cocaine was properly included with the weight of cocaine for sentencing purposes. Dissenting from the First Circuit's denial of a rehearing en banc, Judge Brown urged the First Circuit to overturn its *Mahecha-Onofre* decision. United States v. Lopez-Gil, No. 90-2059, 1992 U.S. App. LEXIS 10204, at *7 (1st Cir. May 12, 1992). He argued that "[c]arrier mediums that cannot be digested, inhaled or otherwise consumed, but still significantly

The Fifth Circuit has taken a similar approach.[137] In *United States v. Sherrod*,[138] the defendants were convicted of manufacturing methamphetamine with intent to distribute.[139] They argued that drug enforcement agents interrupted the manufacturing process and that the 17.5 kilogram mixture in their possession would have produced much less actual methamphetamine had it been given time to fully react.[140] Nonetheless, the district court based the defendants' sentences on 17.5 kilograms of a "mixture or substance containing a detectable amount of methamphetamine."[141]

On appeal, the Fifth Circuit noted that "pure" methamphetamine and mixtures containing methamphetamine are expressly distinguished in 21 U.S.C. §§ 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii) which provide the same penalty for a small amount of "pure" methamphetamine and a comparatively larger amount of a "mixture or substance containing a detectable amount of methamphetamine."[142] The court also emphasized the Supreme Court did not intend its market-oriented analysis to apply to methamphetamine since the Court established its market-oriented analysis after expressly distinguishing the treatment of LSD from

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increase the weight of the controlled substance, have no place in drastically affecting the number of years a person must serve in prison." *Id.*

Finally, in United States v. Lowden, 955 F.2d 128 (1st Cir. 1992), the court held that the gross weight of LSD impregnated blotter paper and the gross weight of LSD bearing liquid were properly included in the total weight of LSD for sentencing purposes. As the appellant pointed to no evidence that the 5.7 grams of LSD bearing liquid (apparently water) was an unusual or heavy carrier medium within which to mix LSD, the court concluded the liquid did not fall under the possible exception in *Chapman* for very heavy carriers containing very little LSD. *Id.* at 131.

137 The Fifth Circuit has consistently held that in calculating the defendant's base offense level under U.S.S.G. § 2D1.1, the district court properly included the weight of a liquid waste substance containing small amounts of methamphetamine. *See, e.g.*, United States v. Walker, 960 F.2d 409 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 443 (1993); United States v. Mueller, 902 F.2d 336 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 82 (1990); United States v. Baker, 883 F.2d 13 (5th Cir.), *cert. denied*, 493 U.S. 983 (1989).

138 964 F.2d 1501 (5th Cir. 1992).

139 *Id.* at 1501. The defendants were convicted for violating 21 U.S.C. § 841(a). *See supra* note 51 for the full text of § 841(a).

140 *Id.* at 1506.

141 *Id.* at 1503. 21 U.S.C. § 841(b) provides: "In the case of a violation of subsection (a) of this section involving—(viii) . . . 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . ." 21 U.S.C. § 841 (1988 & Supp. III 1991). U.S.S.G. § 2D1.1(c)(4) assigns a base level of 36 for trafficking in "[a]t least 10 KG but less than 30 KG of Methamphetamine." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (Nov. 1992). Level 36 corresponds to a sentence between 188 and 235 months for an offender in criminal history category I. *Id.* at Sentencing Table.

142 *Sherrod*, 964 F.2d at 1510.

methamphetamine in *Chapman*.[143] Thus, the court held the entire mixture was properly considered for sentencing purposes.[144]

The Ninth Circuit considered a similar combination of methamphetamine and poisonous by-products in *United States v. Beltran-Felix*.[145] In that case, the court relied on the plain language of the statute to reject the appellant's argument that only the methamphetamine present should be weighed for sentencing purposes. Because "the statute conspicuously *does not* say 100 grams of a 'marketable mixture,' " the court held that the defendant's 192 gram amphetamine solution, "falls within the statute's terms." The court also decided that no "language in the legislative history . . . requires us to read the phrase 'a mixture or substance' to mean 'a [readily marketable] mixture or substance.' "[146]

2. *Ingestibility/Marketability Interpretations*

In contrast to those circuits which focus narrowly on *Chapman*'s definition of "mixture" or the technical language of the statute, the circuits in this section favor an approach aimed at effectuating the underlying purposes of the Guidelines within the parameters of the Supreme Court's opinion in *Chapman*. As a result, these circuits interpret *Chapman* to include an ingestibility or marketability requirement. Such an approach, although unable to address the LSD and blotter paper inequity, is a positive step toward linking Guidelines punishments more closely to culpability.

The Eleventh Circuit first imposed an ingestibility requirement in *United States v. Rolande-Gabriel*.[147] The defendant in that case pled guilty to importing cocaine.[148] The district court based its sentence on the gross weight of the liquid in which the defendant attempted to conceal the cocaine.[149] Although the total weight of the liquid

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143 *Id.*

144 *Id.* at 1511.

145 934 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992).

146 *Id.* at 1076. The Tenth Circuit has also consistently held that the weight of a mixture may include waste products from the manufacturing process. *See, e.g.*, United States v. Hood, 1992 U.S. App. LEXIS 1928 (10th Cir. Feb. 5, 1992); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991); United States v. Callihan, 915 F.2d 1462 (10th Cir. 1990); United States v. Larsen, 904 F.2d 562 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

147 938 F.2d 1231 (11th Cir. 1991).

148 *Id.* at 1232. The appellant pled guilty to a violation of 21 U.S.C. §§ 952(a)(1) and 960(a)(1).

149 The total quantity was not sufficient to trigger a mandatory minimum sentence under 21 U.S.C. § 841(b). U.S.S.G. § 2D1.1(c)(12) imposes a base offense level of 20 for trafficking in "[a]t least 200 G but less than 300 G of Cocaine." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (Nov. 1992). Level 20 corre-

was 241.6 grams, only 7.2 grams of cocaine and 65 grams of cutting agent were present.[150]

In reversing the appellant's sentence, the Eleventh Circuit opined that strict adherence to the Sentencing Commission's intent to give the term "mixture" the same meaning as in 21 U.S.C. § 841(b) would result in the inclusion of all mixtures for sentencing purposes, because § 841(b) does not differentiate between types of mixtures.[151] The court rejected such a "hypertechnical and mechanical application of the statutory language" in favor of interpreting "mixture" in relation to the purposes behind the Sentencing Guidelines.[152]

Unlike the First Circuit, the Eleventh Circuit focused on the marketable and ingestible nature of the LSD and blotter paper in *Chapman*, as distinguished from the liquid and cocaine combination used by Rolande-Gabriel.[153] The court emphasized that the LSD considered by the Supreme Court was "usable, consumable, and ready for wholesale or retail distribution when placed on standard carrier mediums, such as blotter paper . . . [whereas] the cocaine mixture in this case was obviously unusable while mixed with the liquid."[154]

Noting that the Supreme Court determined inclusion of the weight of standard carrier mediums was rational because such carriers facilitate the use and marketing of LSD, the Eleventh Circuit concluded that the liquid waste failed to fulfill such a function.[155] The court analogized the liquid more closely to a "packaging material" because it was easily distinguished from the cocaine and cutting agent.[156] Therefore, the court restricted its interpretation of "mixture or substance" to "drug mixtures which are usable in the chain of distribution."[157]

The Second Circuit reached a similar conclusion in *United States*

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sponds to a sentence of between 33 and 41 months for an offender in criminal history category I. *Id.* at Sentencing Table.

150 *Rolande-Gabriel*, 938 F.2d at 1233.

151 *Id.* at 1235.

152 *Id.*

153 *Id.* at 1237.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* *See also* United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (holding district court improperly included weight of liquid (wine) in which cocaine was suspended); United States v. Robins, 1992 U.S. App. LEXIS 14296 (9th Cir. June 24, 1992) (holding district court erred in concluding combination of cornmeal and cocaine was a "mixture" under Guidelines).

v. Acosta.[158] In that case the court held that the weight of creme liqueur in which 2.245 kilograms of cocaine was dissolved should not be included in calculating the defendant's base offense level.[159] As opposed to the LSD in *Chapman*, the Second Circuit found the "mixture" to be useless for distribution at the wholesale or retail level because the cocaine could not be ingested or mixed with cutting agents until the creme liqueur was removed.[160]

The Second Circuit looked to Congressional intent to support its exclusion of the unusable portion of the mixture. The court determined Congress was most concerned with consumable mixtures which will reach the streets.

> Viewed through a market-oriented prism, there is no difference in culpability between individuals bringing the identical amount and purity of drugs to market but concealing the drugs in different amounts of unusable mixtures. . . . Sentencing these individuals differently . . . would also fly in the face of the fundamental underpinnings of the Guidelines, namely, uniformity and proportionality in sentencing.[161]

In dissent, Judge Van Graafeiland criticized the majority for reading an "ingestibility" requirement into § 841. First, he noted that the creme liqueur/cocaine mixture was in fact ingestible.[162] Second, he noted that Congress adjusted the drug trafficking penalties to punish "big-time traffickers in drugs" and to focus on the manner in which such traffickers distribute their products. He therefore believed the ingestibility of the product moving along the chain of distribution was irrelevant.[163] The Second Circuit has not thus far adopted Judge Van Graafeiland's position.[164]

Finally, the Sixth Circuit relied on a "market-oriented" approach to reverse a sentence based on 4180 grams of a mixture containing only 1.67% methamphetamine in *United States v. Jennings*.[165]

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158 963 F.2d 551 (2d Cir. 1992).

159 *Id.* at 552. The total weight of the creme liqueur and cocaine combined equalled 4.662 kilograms. *Id.* That quantity did not trigger a mandatory minimum sentence under 21 U.S.C. § 841(b). U.S.S.G. § 2D1.1(c)(7) imposes offense level 30 for "[a]t least 3.5 KG but less than 5 KG of Cocaine." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (Nov. 1992). Level 30 corresponds to a sentence between 97-121 months for an offender in criminal history category I. *Id.* at Sentencing Table.

160 *Acosta*, 963 F.2d at 555.

161 *Id.* at 554.

162 *Id.* at 558 (Van Graafeiland, J., dissenting).

163 *Id.* at 559-561 (Van Graafeiland, J., dissenting).

164 *See, e.g.*, United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (holding district court improperly included weight of alcohol that was mixed with cocaine in calculating net weight of the drug because the alcohol made the mixture uningestible and, therefore, unmarketable).

165 945 F.2d 129 (6th Cir. 1991), opinion clarified by 966 F.2d 184 (6th Cir. 1992). 21 U.S.C. § 841(b)(1)(b) states: "In the case of a violation of subsection (a) of this section

In that case the appellant was interrupted in the process of "cooking" methamphetamine. He argued if the chemicals had been allowed to react the final product would have weighed considerably less.[166] Unlike the Ninth Circuit,[167] the *Jennings* court relied on *Chapman*'s interpretation of Congressional intent[168] to conclude distributors who dilute their drugs to increase the amount available for sale to consumers should be subject to punishment for the entire weight of the mixture. However, the court distinguished the methamphetamine mixture in *Jennings* because "the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestible byproducts of its manufacture."[169]

Thus, the Sixth Circuit found section 2D1.1 did not warrant punishing the defendants for the entire weight of the methamphetamine mixture when "they could have neither produced that amount of methamphetamine nor distributed the mixture containing methamphetamine."[170] The case was remanded to the district court with directions to determine the amount of methamphetamine that could have been manufactured.[171]

3. *These Conflicting Interpretations Create Disparity*

As the preceding sections illustrate, the federal courts have been unable to establish a consistent interpretation of "mixture or substance." Nonetheless, the Supreme Court has yet to grant *certiorari* in order to clarify its stance in *Chapman*.[172] Under the present

involving—(viii) . . . 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years." 21 U.S.C. § 841 (1988 & Supp. III 1991). U.S.S.G. § 2D1.1 imposes a base offense level of 28 for trafficking in "[a]t least 400 G but not less than 700 G of Methamphetamine." U.S.S.G. § 2D1.1. Level 28 corresponds to a sentence between 78 and 97 months for an offender in criminal history category I. *Id.* at Sentencing Table.

166 *Jennings*, 945 F.2d at 134.

167 *See* United States v. Beltran-Felix, 934 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992). *See supra* notes 145-46 and accompanying text for a complete discussion of the case.

168 "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes." United States v. Chapman, 111 S. Ct. 1919, 1924 (1991).

169 *Jennings*, 945 F.2d at 137.

170 *Id.* at 136.

171 The court did, however, note that it was possible for the appellants to receive the same sentence on remand because the court might impose an upward departure for drug purity. *Id.*

172 However, in Fowner v. United States, 947 F.2d 954 (10th Cir.), *cert. denied*, 112 S. Ct. 1998 (1992), Justice White dissented from the Court's refusal to grant *certiorari*. In

state of conflict in the law, offenders in different jurisdictions receive disparate sentences based upon the same criminal conduct.

In order to illustrate this disparity, consider the case of Luis Mahecha-Onofre, the defendant in *United States v. Mahecha-Onofre*.[173] He possessed 2.5 kilograms of cocaine which was chemically bonded to a suitcase weighing 9.5 kilograms.[174] Relying on *Chapman*'s technical definition of "mixture," the First Circuit determined that the cocaine/suitcase combination was a mixture for sentencing purposes equalling 12 kilograms.[175] The Guidelines impose a Level 32 sentence of between 121 and 151 months for distribution of that quantity of cocaine.[176] The First Circuit sentenced Mahecha-Onofre to 146 months in prison.[177]

However, had Mahecha-Onofre been convicted and sentenced in the Second, Sixth or Eleventh Circuit, the weight of the suitcase material would have been discarded as not marketable or ingestible.[178] Therefore, only the 2.5 kilograms of cocaine would have been weighed for sentencing purposes.[179] The weight of 2.5 kilograms of cocaine corresponds to a Level 28 sentence of between 78 and 97 months.[180] As a result, Mahecha-Onofre received a sentence between 49 and 68 months (4 to 5.6 years) longer by being sentenced in the First Circuit as opposed to being sentenced in the Second or Eleventh Circuits.[181] Until this interpretational conflict is resolved, drug offenders engaging in identical criminal conduct will

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that case, the petitioner appealed his sentence based on 24 gallons of liquid waste containing a small amount of methamphetamine. The issue was whether "the weight of uningestible waste material should be included in calculating the weight of a 'mixture or substance.' " *Id.* at 1999. Justice White would have granted *certiorari* because "identical conduct in violation of the same federal laws may give rise to widely disparate sentences in different areas of the country." *Id.* at 2000.

173 936 F.2d 623 (1st Cir. 1991). *See supra* notes 131-36 and accompanying text for a complete discussion of the case.

174 *Id.* at 625.

175 *Id.* at 625-26.

176 *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1(c)(6) & Sentencing Table (Nov. 1992).

177 *Mahecha*, 936 F.2d at 624.

178 *See, e.g.*, United States v. Acosta, 963 F.2d 551 (2d Cir. 1992) (uningestible material not part of "mixture or substance"); United States v. Jennings, 945 F.2d. 129 (6th Cir. 1991) (same); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (unusable or uningestible material not part of "mixture or substance").

179 *Acosta*, 936 F.2d at 556-57.

180 *See* U.S.S.G. § 2D1.1(c)(8) & Sentencing Table.

181 Mahecha-Onofre was also subject to the ten-year mandatory minimum sentence under the First Circuit's interpretation, *see* 21 U.S.C. § 841(b)(1)(A) (1988 & Supp. III 1991), but would have only been subject to the five-year mandatory sentence, *see* 21 U.S.C. § 841(b)(1)(B), under the Second, Sixth, or Eleventh Circuit's interpretation.

continue to receive disparate sentences based solely on the jurisdiction within which they are sentenced.

Although the discretion of the federal judges has supposedly been limited by the Sentencing Guidelines,[182] the resulting limitation, as demonstrated, has not produced uniform sentencing practices. The disparity resulting from conflicting interpretations of "mixture or substance" undermines the very purpose for which the Sentencing Guidelines were adopted—the promotion of uniform federal sentencing practices.[183]

V. A Proposal For Principled Reform

This section proposes an alternative construction for interpreting "mixture or substance" in light of the inconsistencies created by *Chapman*. This section then demonstrates how the proposed construction links the sentences of LSD offenders more closely to criminal culpability and provides a clearer framework for lower courts to follow. Because they require modifications in § 841 and section 2D1.1, the proposals in this section are primarily directed to Congress or the Sentencing Commission.[184]

This Comment suggests the following three-prong test to determine which combinations of drug and non-drug substances should be considered a "mixture" under 21 U.S.C. § 841(b) and U.S.S.G. section 2D1.1. Under this test, the weight of a mixture or substance shall include the weight of the pure drug plus the weight of any non-drug substance only if the following conditions are met:

(1) The substance cannot be easily distinguished or separated from the pure drug;
(2) the substance is commonly ingested with the pure drug by street market level consumers; and
(3) the substance dilutes the pure drug in order to increase the total

182 *See supra* Part II.A.

183 "The [Sentencing Reform Act] creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently." S. Rep. No. 222, 98th Cong., 1st Sess. 45-46 (1983).

184 Congress obviously has the power to amend the penalty scheme contained in § 841 at any time. *See* U.S. Const. art. I. The Sentencing Commission itself has also been established as a permanent agency to monitor sentencing practices in the federal courts. United States Sentencing Commission, Guidelines Manual, Ch.1, Pt.A, intro. comment (Nov. 1992). Although the Commission cannot change the language of a statute, it does have the power to submit amendments to the Sentencing Guidelines to Congress each year between the beginning of a regular congressional session and May 1. *Id.* "Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary." *Id.* In fact, the Commission has emphasized that it expects continuing experience and analysis to result in "modifications and revisions of the guidelines through submission of amendments to Congress." *Id.*

quantity of the drug available for distribution at the street market level.

All three elements must be present in order to include the weight of the non-drug substance.[185]

Element number one is taken from the *Chapman* opinion itself and, like *Chapman*, excludes the weights of containers and other packaging materials which are clearly not "mixed or otherwise combined with the pure drug."[186] As a result, a glass vial containing LSD would be excluded by a judge applying element one because the glass vial can easily be separated and distinguished from LSD.[187] Thus, element one essentially excludes drug and non-drug combinations which are not in fact mixtures at all because the "particles of one are [not] diffused among the particles of the other."[188]

Element two draws upon and clarifies the Second, Sixth, and Eleventh Circuits' interpretations of the *Chapman* opinion.[189] As suggested by those circuits, element two excludes any non-drug substance which is not ingestible.[190] As a result, the suitcase material which was mixed with cocaine in *United States v. Mahecha-Onofre*[191] would not be weighed because it is not ingestible. The poisonous by-products of the methamphetamine manufacturing

185 A repeal of the mandatory minimum sentence provisions in § 841 would further promote the relationship between punishments and culpability. *See* 21 U.S.C. § 841(a), (b) (1988 & Supp. III 1991). Although not directly related to the interpretation of mixture or substance, the mandatory sentences inhibit the ability of federal judges to make adjustments for factors that even a revised construction of mixture or substance cannot anticipate. *See* Hon. Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 786 (1992). The Federal Courts Study Committee recommends that these mandatory minimum sentences be repealed. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 133-34 (1990).

The mandatory sentences have also placed an artificial structure on § 2D1.1 because the Commission graded sentences upward and downward using the quantity of drugs in the mandatory minimum sentences as guideposts. *See supra* Part II.B. As a result, the mandatory minimums contribute to sentencing practices which do not adequately relate the punishment to criminal culpability. In addition, a recent study suggests that mandatory minimum sentences are contributing to overcrowding in an already overcrowded federal prison system. *See* Karle & Sager, *supra* note 12, at 393. This result is contrary to the intent of Congress which directed the Commission to take into account the capacity of the penal system when formulating the Guidelines. *See* 28 U.S.C. § 994(g).

186 *See Chapman*, 111 S. Ct. at 1926.

187 *Id.* The *Chapman* majority indicated in dictum that it would exclude the glass vial on these grounds. *Id.*

188 *Id.* The *Chapman* Court's dictionary definition of "mixture," *see supra* note 62 and accompanying text, could be applied to decide whether a drug and non-drug combination satisfies element one.

189 *See supra* Part IV.C.2.

190 *See supra* Part IV.C.2.

191 936 F.2d 623 (1st Cir. 1991). *See supra* notes 131-36 and accompanying text for a complete discussion of the case.

process would also be excluded on the same grounds.[192] If, as in *United States v. Jennings*,[193] the manufacturing process is interrupted, the weight of the total quantity of ingestible methamphetamine that could be produced, rather than the weight of the poisonous ingredients at the time of interruption, should be used. The end product is ingestible, whereas the poisonous ingredients are not.[194]

However, element two further requires that the non-drug substance normally be consumed with the pure drug at the street level. This clarification responds to Judge Van Graafeiland's dissent in *United States v. Acosta*.[195] He noted that the creme liqueur/cocaine mixture in that case was in fact ingestible.[196] Unlike the majority opinion in *Acosta*, which held the mixture was not ingestible,[197] a judge applying element two could concede such a mixture is ingestible, but not normally ingested by a street level consumer. Thus, the judge will reach the same result as the *Acosta* majority without engaging in the fiction that a liqueur/cocaine mixture is not ingestible.

Element three departs from the position taken by the *Chapman* Court. It distinguishes between cutting agents that dilute the pure drug in order to increase the amount of the drug available to the consumer, and carrier mediums that simply facilitate distribution of the pure drug. Thus, element three differs from *Chapman*[198] in that a judge applying element three would only weigh the pure LSD, not the blotter paper upon which the LSD was placed, because the blotter paper itself does not increase the amount of LSD that can be distributed to consumers.[199]

However, element three would not exclude the typical cutting agents used to dilute drugs like cocaine and heroin. Unlike blotter paper upon which a dose of LSD is placed, cutting agents like mannitol actually increase the amount of cocaine available to the ultimate consumer.[200] Once a dose of LSD is placed on blotter paper, it remains a dose and is not further diluted by adding additional

192 *See* United States v. Fowner, 947 F.2d 954 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1998 (1992).

193 945 F.2d 129 (6th Cir. 1991). *See supra* notes 165-71 and accompanying text for a complete discussion of the case.

194 The *Jennings* Court reached the same conclusion using a similar analysis. *See Jennings*, 945 F.2d at 129.

195 963 F.2d 551, 557-561 (2d Cir. 1992) (Van Graafeiland, J., dissenting).

196 *Id.* at 558 (Van Graafeiland, J., dissenting).

197 *Id.* at 551.

198 The majority held that the weight of the blotter paper should be included with the weight of the pure LSD. Chapman v. United States, 111 S. Ct. 1919 (1991).

199 *See supra* Part IV.A.

200 *See* Kallam, *supra* note 91, at 1279.

blotter paper.[201] However, cutting agents can be added to cocaine or heroin at every level in the distribution chain to further dilute those drugs and increase the number of consumers to whom those drugs can be distributed.[202]

For example, one gram of pure cocaine might yield anywhere from 6.5 to 100 diluted doses of cocaine at the street level.[203] Under the three-prong test, a dealer in possession of 100 heavily diluted doses of cocaine would receive a more severe punishment than the dealer with 6.5 purer doses even though both possess the same one gram. The sentence will be more severe because the larger quantity of cutting agents necessary to achieve 100 doses will increase the weight of the cocaine for sentencing purposes.

This approach is consistent with Congress' definition of culpability because the cutting agents themselves were necessary to increase the number of doses. As a result, they played a vital role in the ability of the dealer selling 100 doses to keep the street market going longer than the dealer selling 6.5 doses.[204]

Although the three prong test attempts to tie punishments closer to culpability, the system is not perfect. For instance, the actual amount of LSD in one dose may vary from the 0.05 milligram dose established by the Sentencing Guidelines.[205] If the weight of the blotter paper is excluded under these circumstances, and only the pure LSD is weighed, punishments still might not relate exactly to culpability. For instance, a dealer who sells 0.025 milligram doses of LSD, as opposed to a dealer who sells 1 milligram doses of LSD, could conceivably reach more consumers even though both dealers begin with the same quantity of pure LSD. Nonetheless, both dealers will receive the same sentence because each possesses the same pure quantity of LSD.[206]

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201 *Id.*

202 *Id.*

203 The figures in this example are based upon figures in Chapman v. United States, 111 S. Ct. 1919, 1932 n.12 (1991) (Stevens, J., dissenting) (citations omitted).

204 *See* H.R. Rep. No. 845, 99th Cong., 2nd Sess. 11-12 (1986). *See supra* Part IV.A for a discussion of Congress' definition of culpability.

205 *See* United States v. Marshall, 908 F.2d 1312, 1315-16 (7th Cir. 1990), *aff'd sub nom.* Chapman v. United States, 111 S. Ct. 1919 (1991).

206 *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (Nov. 1992). In his dissent, Justice Stevens noted that Senators Biden and Kennedy each introduced amendments that would simply exclude the weight of "carrier mediums" such as blotter paper. *See* 135 Cong. Rec. S12, 748 (daily ed. Oct. 5, 1989) (statement of Sen. Biden); 136 Cong. Rec. S70, 69-70 (daily ed. May 24, 1990) (statement of Sen. Kennedy). Senator Biden's amendment was adopted as part of Amendment No. 976 to S. 1711, but that amendment never passed the House of Representatives. Chapman v. United States, 111 S. Ct. 1919, 1931 (1991) (Stevens, J., dissenting).

Including the weight of the blotter paper for sentencing purposes, however, is not an adequate response to this problem because the blotter paper itself does not increase the amount of LSD available to consumers.[207] The LSD is increased by cutting the blotter paper into smaller squares or applying smaller doses of LSD to the blotter paper.[208] As a result, sentences for LSD and other drugs sold by the dose should be based upon the actual number of doses possessed by a drug offender.

The legislative history of the Drug Abuse Act states only that Congress "has not *generally* related [drug] quantities to the number of doses."[209] Thus, it would not be completely inconsistent with Congress' previous intent to punish LSD offenders by the dose. In fact, the approach would be consistent with Congress' treatment of drugs like cocaine, which are sold by weight. Like cocaine punishments, LSD offenders punished on the basis of the number of doses in their possession would be punished on the basis of their ability to "keep the street markets going" rather than on the basis of drug purity.[210] Thus, a dealer in possession of more doses, regardless of the quantity of LSD in each dose, will be punished more severely.[211]

This approach would also be easier to administer than the current weight-based system. The actual number of squares (doses of LSD) can be counted on a sheet of blotter paper.[212] Thus, the testing required to separate the pure LSD from the blotter paper would only be necessary when the total number of doses cannot be accurately counted. In such cases, the Sentencing Guidelines have already established an average dose at 0.05 milligrams.[213] Thus, the pure LSD could be weighed and divided by 0.05 in order to determine the number of doses available.[214]

Finally, the promulgation of sentences based upon the number of doses should not be too difficult. The weights of existing quantities of LSD already set out in the Guidelines could simply be divided by 0.05 in order to determine the appropriate dosage levels.[215]

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207 *See supra* Part IV.A.

208 *See supra* Part IV.A.

209 H.R. Rep. No. 845, 99th Cong., 2nd Sess. 11-12 (1986) (emphasis added).

210 *Id.*

211 *Id.*

212 In Chapman v. United States, 111 S. Ct. 1919 (1991), the Court noted that once LSD is placed upon blotter paper, the paper is cut into one dose squares. *Id.* at 1923.

213 UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1(11) (Nov. 1992).

214 If the total number of doses, but not the quantity is known, the Guidelines presently direct the judge to multiply the number of doses by 0.05 mg. in order to determine the quantity. *Id.*

215 *See* U.S.S.G. § 2D1.1(c).

Then adjustments could be made if necessary to reflect any additional Congressional concerns.

It might be argued the approach taken in this section will not provide a clearer framework for the courts to follow. Certainly, a list of substances which should be excluded or included in the weight of a controlled substance for sentencing purposes could be developed. However, the three-prong test provides a more flexible system that can adjust to future changes in drug distribution patterns, while at the same time clarifying the existing conflicts among the circuits.

Another possible criticism of the alternatives suggested by this section is that they do not adequately differentiate between high volume dealers and drug couriers.[216] For instance, a drug courier frequently does not know the value, type, or amount of a drug that he or she has been hired to carry.[217] Nor would such a person be considered a high volume trafficker at the wholesale or market level.[218] Nonetheless, the courier's punishment will normally be based on the quantity of drugs possessed, in the same fashion as a high volume retail dealer.[219] Although the issue is important, the argument is more appropriately addressed to a modification of the minor participant provisions in the Guidelines, rather than a modification of the mixture or substance interpretation.

A final criticism of any approach which requires separation of a mixture into component substances for sentencing purposes is that such testing will be an undue burden on the courts.[220] This criticism is without merit. First, in all the cases analyzed in this Comment, the courts separated mixtures into drug and non-drug substances. Thus, separating the mixture appears to be common practice.[221] Second, the proposed alternative sentencing scheme should actually ease the administrative burden of sentencing LSD traffickers. In a majority of these cases the pure LSD would not have to be extracted because the court could count the number of squares (doses) of LSD.

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216 Albert Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 921 (1991).

217 *Id.*

218 *See* H.R. Rep. No. 845, 99th Cong., 2nd Sess. 11-12 (1986).

219 Alschuler, *supra* note 216, at 921; Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT. RPTR. 63 (Sept.-Oct. 1990).

220 United States v. Marshall, 908 F.2d 1312, 1324 (7th Cir. 1990).

221 *Marshall*, 908 F.2d at 1333 (Posner, J., dissenting).

VI. CONCLUSION

In conclusion, the proposed three-prong test and the modification in LSD sentencing procedure proposed in this Comment would establish a closer relationship between punishments and criminal culpability than existing practices. As explained in Part IV.A., when Congress passed the Drug Abuse Act, it intended to relate criminal culpability to the quantity of drugs which a trafficker can distribute to consumers at the street level. Unlike the *Chapman* approach, the three-prong test excludes substances that currently have a drastic effect on the weight of the mixture, even though they are not ingested by the street level consumer and do not increase the number of consumers to whom the drug can be sold. The proposed test, however, does continue to include non-drug substances that are indistinguishable from the drug, are normally consumed with the drug at the street level, and increase the number of consumers to whom the drug can be distributed. LSD offenders will not receive lighter treatment under the three-prong test because such offenders will be punished by the number of doses which they could distribute, rather than by the quantity of pure LSD. As a result of the three-prong test, drug offenders will be more uniformly punished on the basis of their true culpability—the quantity of the drug in their possession which can affect the street market consumer—and the Sentencing Guidelines will better achieve their intended purpose of promoting honesty, uniformity, and proportionality in sentencing.

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