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This Issue in Brief

Corrections Goes Public (and Private) in California.—Authors Dale K. Sechrest and David Shichor report on a preliminary study of two types of community correctional facilities in California: facilities operated by private for-profit corporations and facilities operated by municipal governments for profit. The authors compare the cost effectiveness and quality of service of these two types of organizations.

Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde.—According to author Henry Scott Wallace, mandatory minimums are "worse than useless." In an article reprinted from the *Federal Bar News & Journal*, he puts mandatory minimums in historical perspective, explains how they fall short of alleviating sentencing disparity, and offers some suggestions for correcting what he describes as a Jekyll-and-Hyde approach to sentencing reform.

Juvenile Detention Programming.—Author David W. Roush focuses on programming as a critical part of successful juvenile detention. He defines juvenile detention and programming; explains why programs are necessary; and discusses objectives of programs, what makes good programs, and necessary program components. Obstacles to successful programming are also addressed.

Legal and Policy Issues From the Supreme Court's Decision on Smoking in Prisons.—In *Helling* v. *McKinney*, the Supreme Court held that inmates may have a constitutional right to be free from unreasonable risks to future health problems from exposure to environmental tobacco smoke. Authors Michael S. Vaughn and Rolando V. del Carmen discuss the legal and policy issues raised in *McKinney*, focusing on correctional facilities in which smoking or no-smoking policies have been a concern. They also discuss litigation in the lower courts before *McKinney* and how this case might shape future lower court decisions.

Community Corrections and the Fourth Amendment.—The increased use of community corrections programs has affected the special conditions of probation and parole imposed on offenders. Author Stephen J. Rackmill focuses on one such condition—that probationers submit to searches at the direction of their probation officers. Explaining the importance of the Supreme Court's decision in *Griffin* v. *Wisconsin*, the author assesses the case law before and after *Griffin* regarding searches and points out that policy regarding searches is still inconsistent.

A Study of Attitudinal Change Among Boot Camp Participants.—Authors Velmer S. Burton, Jr., James W. Marquart, Steven J. Cuvelier, Leanne Fiftal Alarid, and Robert J. Hunter report on whether participation in the CRIPP (Courts Regimented Intensive Probation Program) boot camp program in Harris County, Texas, influenced young felony offenders' attitudes. The authors measured attitudinal change in

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Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*

By Henry Scott Wallace
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He put the glass to his lips and drank at one gulp. A cry followed; he reeled, staggered, clutched at the table and held on, staring with injected eyes, gasping with open mouth; and as I looked there came, I thought, a change—he seemed to swell—his face became suddenly black and the features seemed to melt and alter—and the next moment, I had sprung to my feet and leaped back against the wall, my arm raised to shield me from that prodigy, my mind submerged in terror.

"O God!" I screamed, and "O God!" again and again.

—Robert Louis Stevenson
Dr. Jekyll and Mr. Hyde

CONGRESS IS of two minds on sentencing reform. One mind is dispassionate and learned, deliberating for decades in search of a rational, comprehensive solution. The other is impulsive, reckless, driven by unquenchable political passions, and impatient with its plodding alter-ego.

The two are polar opposites, hardly aware of each other's existence, yet existing together within the same body, commonly within the same individual legislator. Both are strong, and have accomplished much to shape sentencing reform in their own image. From the dispassionate one came the Sentencing Reform Act of 1984, creating the United States Sentencing Commission and the federal sentencing guidelines under which all federal crimes since 1987 have been punished.[1] From the impulsive one—in random, angry bursts—came mandatory minimums.

They are a legislative Dr. Jekyll and Mr. Hyde, and their simultaneous existence is a mortal danger to themselves and society.

Different Paths to the Same Goal

Both Jekyll and Hyde are trying to accomplish the same thing: determinate sentencing. The goal is to reduce judicial sentencing discretion and the arbitrary and unpredictable sentencing disparities that have accompanied it.[2]

As recognized in 1983 by the one Senator who opposed both the Sentencing Reform Act and mandatory minimums, Senator Mathias (R-Md), "hardly anyone disagrees" (in 1983) that there is too much disparity in criminal sentences and that prison sentences are too indeterminate in duration.[3] The problem, he wrote, is in figuring out "how best to reduce the disparity and indeterminacy."[4]

If longevity were the test of merit, mandatory punishments would excel. They are as old as civilization. The biblical *lex talionis*—an eye for eye, a tooth for tooth—is mandatory,[5] and envisions "neither mercy nor mitigation of punishment."[6] Mandatory punishments are enshrined in earliest Anglo-Saxon law. King Alfred, who reigned in England around 900 A.D., prescribed mandatory fines for every conceivable injury, including:

> If a wound an inch long is made under the hair, one shilling shall be paid . . .
> If an ear is cut off, 30 shillings shall be paid . . .
> If one knocks out another's eye, he shall pay 66 shillings, 6⅓ pence . . .
> If the eye is still in the head, but the injured man can see nothing with it, one-third of the payment shall be withheld. . . .[7]

In America, mandatory punishments date back to the earliest days of the Republic, starting with various capital offenses in 1790.[8] Throughout the 19th century, mandatory prison terms were added for lesser offenses, such as refusing to testify before Congress, failure to report seaboard saloon purchases, or causing a ship to run aground by use of a false light.[9]

Mandatory minimums of broad applicability did not surface until the Boggs Acts of the 1950's, setting drug distribution penalties of a mandatory five years for a first offense, ten for a second or for any drug distribution to a minor, and a life sentence or the death penalty for a third offense.[10] The Senate report recognized the controversial nature of such severe penalties without possibility of probation, parole or suspension of sentence, particularly for first offenses, but concluded, significantly, that it could think of no alternative way "to define the gravity of the crime and the assured penalty to follow."[11] The federal Boggs Acts were mimicked by "Little Boggs Acts" in the states.[12]

But fourteen years later, Congress confessed error and repealed virtually all mandatory minimums for drug offenses,[13] citing the severity and inflexibility of the sentences.[14] Mandatory minimums were criticized for "treat[ing] casual violators as severely as they treat hardened criminals," raising qualms even with prosecutors, interfering with the judicial role of making individualized sentencing judgments, and perhaps most

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importantly, producing no reduction in drug violations.[15] The repeal was even praised by freshman Congressman George Bush for promoting "more equitable action by the courts . . . and fewer disproportionate sentences."[16]

It was about this time that the idea of sentencing guidelines was born. A national crime commission issued a report in 1971 calling attention to the need for more uniform federal sentencing.[17] Shortly thereafter, Federal District Judge Marvin Frankel outlined the sentencing system that, thirteen years later, would become law: a national commission writing federal sentencing guidelines which would assume the force of legislation in the absence of a congressional veto.[18]

The federal guidelines system enacted in 1984 seems to have been conceived as a middle ground between mandatory sentences and completely indeterminate sentencing. The Senate report on the Sentencing Reform Act, while emphasizing the need to curtail judicial sentencing discretion, stressed that the guidelines are not intended to be imposed "in a mechanistic fashion."[19] The purpose, the report stated, is "to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender,"[20] but not to "remove all of the judge's sentencing discretion."[21] Sentencing schemes in four states that relied on statutorily mandated sentences were discussed and rejected.[22] As one Senator said in 1975 in introducing one of the precursor bills of the Sentencing Reform Act: "An inflexible scheme is hardly an improvement on a arbitrary one."[23]

The resulting sentencing system, though open to criticism for tilting too far toward inflexibility[24] or for being a gutless abdication of Congress's fundamental responsibility to set criminal punishments,[25] seems at least to have been a compromise rationally arrived at.

But the appearance of a rational evolution of sentencing policy is fleeting. In the very same comprehensive crime bill that contained the Sentencing Reform Act of 1984—which in every aspect appeared to embody a complete repudiation of mandatory minimums—Congress, incredibly, included significant new mandatory minimums, harbingers of what has become the most sweeping regime of mandatory punishments in the nation's history.

The most significant ones in the 1984 bill were a mandatory five years for possessing a gun during a crime of violence, on top of the sentence for the crime of violence itself,[26] and a mandatory fifteen years for simple possession of a firearm by a person with three previous state or federal convictions for burglary or robbery.[27] Nowhere in the legislative history was any irony or inconsistency with the Sentencing Reform Act noted.

New mandatory minimums came every two years, in election-eve crime bills hundreds of pages long. In the 1986 Anti-Drug Abuse Act came numerous drug-related mandatory minimums, including the most widely used ones currently on the books: the five- and ten-year mandatory sentences for drug distribution or importation, tied to the quantity of any "mixture or substance" containing a "detectable amount" of the prohibited drugs.[28] Incredibly, although these provisions had been duly processed in committee, with a written report (a rare occurrence for mandatory minimum provisions over the past decade),[29] there was not a word of acknowledgement of the momentousness of the undertaking—not a word explaining why the lessons of the failure of the Boggs Acts were now being ignored; and not a word of discussion of any potential inconsistency with the guideline system of determinate sentencing that Congress had set in motion just two years earlier.

Instead, what appeared to be driving the drug bill was unprecedented media attention on drugs. University of Maryland basketball star Len Bias had died of a crack overdose during House consideration of the bill, and thoughts of sentencing uniformity and the integrity of the guidelines system were quickly eclipsed by the day's headlines. An anguished Congressman Robert Dornan (R-Cal.) explained: "I think it comes down to one young man not dying in vain."[30]

In 1988 came yet another Anti-Drug Abuse Act,[31] containing numerous mandatory minimums, including 20 years for "continuing criminal enterprise" drug offenses[32] or using a weapon during a violent or drug-related crime,[33] and mandatory life for use of a machine gun or silencer[34] or for any drug offender with three prior state or federal drug felony convictions.[35] Drug conspiracies and attempts were made subject to the same mandatory minimums as the completed offenses.[36]

The 1988 Act also contained the most bizarre and anomalous mandatory minimum in federal law: a five-year mandatory minimum for simple possession of five grams of "crack" cocaine—the weight of about two pennies.[37] Simple possession of any amount of other drugs, including powder cocaine and heroin—or 4.9 grams or less of crack—remained a misdemeanor, with a mandatory sentence required only for a second offense, and a mere fifteen days at that.

A few more mandatory minimums were approved in the 1990 crime bill, including 10 years for the Crime du Jour—being a savings-and-loan "kingpin."[38] But in a sign of emerging concern about the compatibility of mandatory minimums with the guideline system, a variety of other stiff mandatory minimums passed by the Senate were deleted in House-Senate conference, while a provision mandating a Sentencing Commis-

sion study of the impact and effectiveness of mandatory minimums was retained.[39]

This report, submitted to Congress in August 1991 and entitled *Special Report to the Congress: Mandatory Minimums in the Federal Criminal Justice System,* is the most authoritative and thorough—and thoroughly devastating—review of mandatory minimums to date.[40]

Still another large crime bill was poised for enactment in 1992, containing several new mandatory minimums—though fewer and less severe than those approved in the Senate's version—but died at the end of the Congress due to controversies over gun control and habeas corpus reform.[41]

In federal law today, although there are over 60 statutes containing mandatory minimum penalties, only four are used with any frequency. These four, covering drug and weapons offenses,[42] account for 94 percent of all federal mandatory minimum cases.

For the present, although harsh and radical mandatory minimums continue to be shouted through in floor deliberations on crime legislation, particularly under the less formal Senate rules, the momentum for new mandatory minimums appears to be slowing. Armed with the Sentencing Commission report and increasingly vociferous opposition from every federal judicial circuit in the country,[43] Judiciary Committee leaders are beginning to debate the merits of mandatory minimums openly and are able to hold the line on the most excessive new ones in House-Senate conference negotiations.

Thus, federal sentencing policy today is stalled with one foot in both camps, with Congress wise enough not to complete the "mandatorization" of federal criminal law, but far from bold enough to tamper with existing mandatory minimums and bear the very real risk of being savaged as "soft on crime" in the next election.

Uneven Prosecutorial Application

Perhaps the greatest appeal of mandatory minimums is the promise of universal, impartial application. On their face, they treat all offenders the same; as Senator Phil Gramm (R-Tex.) warned in proposing a ten-year mandatory sentence for first-offense sale of drugs to a minor in 1991, everybody who violates the statute must pay the same price, "no matter who your daddy is, and no matter how society has done you wrong."[44] But as the Sentencing Commission report found, the expectation that mandatory minimums would be applied to all cases that meet the statutory criteria of eligibility has not been fulfilled.

The prosecution's power to unilaterally reward a defendant's cooperation introduces significant disparities. The only available statutory basis for a judge to sentence below a federal mandatory minimum is the defendant's "substantial assistance" in prosecuting somebody else.[45] Since a judge may do this only "upon motion of the Government," and since U.S. Attorneys around the country are free to define "substantial" as they wish, the prosecutor, in effect, has sole, untrammeled and unreviewable discretion to grant a sentence below a mandatory minimum.[46]

A common problem with this cooperation discount is that higher level drug offenders, who have more "substantial" information to give to prosecutors, end up with lesser sentences than bit players. One press account compared the case of Stanley Marshall, who sold less than one gram of LSD and got a twenty-year mandatory sentence, to that of Jose Cabrera, who the government estimates made more than $40 million importing cocaine and who would have qualified for life plus 200 years in prison, but was able to cut a deal for only eight years because he knew Manuel Noriega and agreed to testify against him.[47]

One judge who imposed a mandatory sentence on a woman convicted of conspiracy in her boyfriend's drug dealing called it a "gross miscarriage of justice . . . to pick the one who may be the least involved of all and sentence her to over six times the time of . . . the real actors in this case [who cooperated]."[48]

U.S. District Judge Terry J. Hatter, Jr. commented: "The people at the very bottom who can't provide substantial assistance end up getting [punished] more severely than those at the top."[49]

The Sentencing Commission's report found that plea bargains were used to circumvent clearly applicable mandatory minimums in more than a third of the cases studied.[50] The report also found that prosecutors file mandatory minimum charges unpredictably. Prosecutorial practices included:

- Filing drug distribution charges specifying no amount of drugs, thus avoiding any mandatory minimums, or specifying a lower quantity than appeared supportable;
- Not charging the mandatory five-year weapon enhancement in almost half the cases where it would have been appropriate; and
- Not seeking mandatory sentence enhancements for prior felony convictions in almost two-thirds of the possible cases.[51]

Overall, the Commission's empirical data indicated, defendants do not receive mandatory minimum sentences in approximately 41 percent of the cases where they appear warranted.[52]

The Commission concluded: "To the extent that prosecutorial discretion is exercised with preference to some and not to others, and to the extent that some are convicted of conduct carrying a mandatory mini-

mum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced" into the sentencing system.[53]

Arbitrary State/Federal Case Allocation

The Sentencing Commission did not even discuss the most gaping hole in federal mandatory minimums' promise of uniform application: the reality that the vast majority of drug and weapons offenses which are subject to federal mandatory penalties are in fact prosecuted under state statutes covering the same offense conduct and resulting in far less severe punishments.

State and federal prosecutors are under no obligation to develop or publish standards governing the selection of cases to receive the more severe federal penalties. The Federal Courts Study Committee's 1990 final report, observing that the federal courts were being "flooded" with minor drug cases formerly prosecuted in state court, urged the Justice Department to "develop clear national policies governing which drug cases to prosecute in the federal courts," drawing the line, for example, at cases that do not involve "international or interstate elements."[54]

Bizarrely, selective use of federal mandatory minimums in random state cases often appears to be a specific legislative goal of Congress. The sponsor of the lengthiest mandatory minimum of the ground-breaking 1984 crop, the Armed Career Criminal Act (fifteen years for gun possession by a three-time burglar or robber),[55] expressly touted selective prosecution and disparate sentencing as the greatest advantages of his proposal. Prosecuting only "a handful" of possible cases in each jurisdiction would "set an example," he argued, that would have "a tremendous leveraging or rippling effect" on other offenders:

> Career criminals with cases pending in the state courts, once made aware of the risks of a federal prosecution and the certainty of 15 years in prison, would suddenly find themselves motivated to enter a guilty plea in the state case, in the hope of obtaining some lesser sentence. The result can be expected to be sentences of 5 to 10 years or 7 to 14 years—less than the expected federal sentence, but substantially more than [routine state] sentences. . . .[56]

A similar intent was expressed by the sponsor of one of the most sweeping and ambitious mandatory minimums ever proposed. In a 1991 crime bill debate, Senator Alfonse D'Amato (R-NY) sponsored an amendment to make virtually every offense in the nation committed with a firearm into a federal offense carrying mandatory federal prison terms of ten, twenty, or thirty years.[57] According to Justice Department figures, there are about 640,000 crimes committed every year with handguns[58]—about fourteen times the entire capacity of the federal prison system, which is already overloaded to 160 percent of its capacity. D'Amato added a proviso that his amendment should be used "to supplement but not supplant" state prosecutions, but did not suggest standards for how this selectivity should be exercised. He conceded that his proposal, which passed the Senate overwhelmingly,[59] might not solve the problem of gun-related crime, but argued that "it does bring about a sense that we are serious."[60]

These policy rationales—conveying a "sense" of seriousness rather than actually being serious, or randomly selecting a "handful" of possible offenders to "set an example" in the hope that others will plead guilty in order to receive lesser sentences—make a shameless mockery of sentencing uniformity and certainty of punishment. The extreme disparity between the harsh federal mandatory sentences for the same conduct, together with the overwhelming odds against any individual offender becoming one of the few singled out for federal prosecution, not only vitiate the deterrent power of the law, but threaten to do affirmative harm to the credibility and integrity of both state and federal criminal justice systems.

Judges Reduced to Automatons

As the discussion above suggests, prosecutors have enormous power under a mandatory minimum regime to decide what the sentence will be. They can decide what to charge, what quantity of drugs to allege, whether to "swallow the gun," whether to accept a lesser plea, whether to certify "substantial assistance," or which offenders are to be "made examples of" in federal court. Judges are all but superfluous. Echoing one of Congress's key themes in the 1970 repeal of mandatory minimums,[61] federal Circuit Judge Franklin S. Billings recently wrote:

> [The existence of mandatory minimums denies] judges of this court, and of all courts, the right to bring their conscience, experience, discretion and sense of what is just into the sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just.[62]

The refrain is increasingly heard from sentencing judges in mandatory minimum cases that they recognize the required sentence to be unjust and disproportionate, but their "hands are tied," in cases such as—

- David Schoolcraft, a successful businessman with a dozen-year-old felony record, sentenced to fifteen years under the Armed Career Criminal Act for a gun-possession offense that would have been a misdemeanor in state court.
- Bobby Joe Ward, a 60-year-old retired coal miner with black lung disease, caught accompanying his son to his son's marijuana patch; the sentencing judge lamented his inability to consider the father's disability and clean record.[63]

- Richard Anderson, a crane operator with no criminal record who accepted $5 to give an acquaintance a lift to a Burger King where the acquaintance was arrested for selling 100 grams of crack to an undercover drug agent; the Republican-appointed judge who imposed the mandatory ten-year sentence was moved to tears and called the sentence "a grave miscarriage of justice."[64]

On the premise of removing discretion from the sentencing process, mandatory minimums have succeeded only in shifting it from one place to another—from the judge, in public proceedings conducted on the record in the courtroom, to the prosecutor's office, off the record and behind closed doors. Since the charging and plea negotiation processes which handcuff the sentencing judge are "neither open to public review nor generally reviewable by the courts," concluded the Sentencing Commission in its report, "the honesty and truth in sentencing intended by the guidelines system is compromised."[65]

Perhaps because mandatory minimums suggest a profound congressional mistrust of judges' ability to do justice, even when guided and constrained by the guideline system, federal judges have risen up with one voice in protest. The judiciary in every federal circuit in the country has passed resolutions condemning mandatory minimums and call for their repeal.[66]

Unwarranted Sentencing Uniformity

When they are charged and applied, mandatory minimums are to sentencing uniformity what a meat axe is to brain surgery. As the Sentencing Commission observed in one of its earliest explorations of the subject, mandatory minimums operate "crudely," failing to "differentiate among dissimilarly situated defendants convicted of the same crime."[67]

The problem is that Congress, in setting these *minimum* sentences, consistently focuses on cases of *maximum* culpability. Drug mandatory minimums are passed amid speeches about "kingpins" and "major" dealers, with no discussion that the statute will apply equally to the lowest level flunky of the dealer—the lookout, the floor sweeper, or the impoverished Colombian peasant who risks his life for $100 by swallowing a cocaine-filled condom for an airplane flight to America.

Special mandatory minimums for any drug offense within 1,000 feet of a school are passed amid speeches about dealers hanging around schoolyards peddling poison to the nation's youth, with no mention that the statute will also punish an addict possessing drugs for personal use whose home happens to be within 1,000 feet of a school,[68] or every "mule" arrested on an Amtrak train passing through New York City because a business school is located in a skyscraper high above.[69]

Recently, when Senator John Seymour (R-Cal.) proposed an amendment setting a three-year mandatory sentence add-on for any adult who "encourages" a minor to commit any federal offense, he spoke of "young kids . . . being recruited as foot solders [for] organized crime activities, such as gambling, money laundering, and extortion," and of force, coercion and threats against the child's life or safety.[70] He did not dwell on the amendment's equal applicability to less coercive scenarios and less serious offenses, even misdemeanors, such as, conceivably, an eighteen-year-old telling a fifteen-year-old that he might enjoy trying marijuana sometime. There had been no hearings, nobody argued against the amendment, and it passed in minutes by voice vote.[71]

As Justice White pointed out in *Harmelin* v. *Michigan*, to be consistent with the notion of a "minimum" sentence, "the offense should be one which will *always* warrant that punishment."[72]

The distortion caused by this calibration of "minimum" sentences to maximum offense conduct is not limited to drug and firearm cases. It has corrupted the entire federal sentencing system, as the Sentencing Commission skews the ranges for all other offenses in a struggle to maintain system-wide proportionality.[73]

Requiring judges to impose on peripheral players sentences designed for their higher-ups has led to an endless parade of individual cases of excessively harsh, disproportionate and inconsistent punishment. For example:

- A migrant farmworker with no criminal record, single and the sole support of her five young daughters, serving a ten-year mandatory minimum for agreeing to drive a van with hidden drugs across the border from Mexico;[74]
- A Michigan man convicted of first-offense simple possession of a pound and a half of cocaine under state law and sentenced to mandatory life imprisonment;[75] when arrested, he voluntarily surrendered a concealed, registered handgun, perhaps not realizing that the penalty for his drug offense was the same as the penalty for murdering a police officer;[76] and
- A Washington, D.C. secretary sentenced to a five-year mandatory minimum because her drug-dealing son hid 120 grams of crack in her attic.[77]

Some of the most egregious inconsistencies in federal mandatory minimums are in drug cases, where statutory language ties the penalty not just to the amount of the drug involved, but to the amount of any "mixture or substance" containing a "detectable

amount" of the drug. Customarily, drugs such as heroin and cocaine are mixed with increasing amounts of non-narcotic mixing substances as they move further down the distribution chain; a street dealer may be handling drugs that are more than ninety percent powdered sugar. But for purposes of federal mandatory minimums, the sugar counts just as much as the drug. The sentence is tied to the weight of the entire mixture; purity is irrelevant. Thus, echoing the irony of the "substance assistance" discount discussed above, the more small-time the dealer, the more severe the relative punishment.

Nowhere is this problem more pronounced than in LSD cases. LSD, a highly concentrated drug, is placed on a carrier for retail sale; one dose, weighing only .05 mg, is commonly placed on a sugar cube weighing some two grams. The result is sentencing disparities that have been described as "crazy," "loony," and "absurd."[78] A person who sells five doses of LSD on sugar cubes will receive a ten-year mandatory minimum, based almost exclusively on the weight of the sugar cubes, while a person who sells 19,999 doses in pure liquid form is not even subject to the five-year mandatory minimum.[79] Depending on the carrier—ranging from sugar cubes to gelatin cubes to blotter paper to pure liquid form—the sentence for selling 1,000 doses can soar from fifteen months to thirty years.[80]

And these intra-drug disparities are compounded by inexplicable discrepancies between the various hard-core drugs subject to mandatory minimums. As Justice Stevens has written, one defendant who received a mandatory twenty-year prison term for selling less than 12,000 doses of LSD would have had to sell about 50,000 doses of crack, between one and two million doses of heroin, or between 325,000 and five million doses of powder cocaine (depending on purity) to get the same sentence.[81]

The anti-mandatory-minimum resolutions of the various federal judicial circuits characterize mandatory minimums often as being "manifestly unjust" or "inordinately harsh."[82] The Federal Courts Study Committee gently suggested that "Congress may not realize the impact" of mandatory minimums.[83]

Proportionality, wrote the Sentencing Commission, is "a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act," but it is compromised by mandatory minimums.[84] Though sentencing uniformity may be the desired goal of mandatory minimums, the Commission concluded that "an unintended effect of mandatory minimums is *unwarranted* sentencing uniformity."[85] The Commission wrote that:

> Deterrence . . . is dependent on certainty and appropriate severity. While mandatory minimum sentences may increase severity, the data suggest that uneven application may dramatically reduce certainty. The consequence . . . is likely to thwart the deterrent value of mandatory minimums.[86]

The alternative, the Commission modestly notes, is the guidelines' "finely calibrated . . . smooth continuum" of sentences,[87] permitting differentiation on the basis of offender and offense characteristics, role in the offense, criminal history and acceptance of responsibility, resulting in penalties that are not only "certain" and "substantial," but also "proportionate and fair."[88]

Racial Disparities

One of the Sentencing Commission's most disturbing findings was that whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.[89] Whites are less likely than Black or Hispanic defendants to be indicted or convicted at the indicated mandatory minimum level, more likely to plead guilty, and more likely to receive a "substantial assistance" reduction.[90]

Such findings may produce an upsurge in race-based constitutional challenges to mandatory minimums. The Minnesota Supreme Court ruled that it violates federal equal protection guarantees for a statutory scheme to punish offenses involving crack cocaine—the drug of choice among Black cocaine users—more severely than powder cocaine—preferred among White users.[91] Federal law contains an even greater crack/cocaine differential than the Minnesota statue.[92]

Interestingly, the *prevention* of racial and social discrimination was at one point a reason cited in *support* of mandatory minimums. Senator Edward Kennedy (D-Mass.), today the Senate's strongest opponent of mandatory minimums, introduced one of the first post-1970 bills to restore federal mandatory minimums, citing the need to impose sentences "evenhandedly [on] all offenders." Because the poor "often pay a heavier price for crime than others in society," he explained, "[w]e must end that shameful double standard and assure that mandatory sentences will be applied with an equal hand."[93]

Overloaded Courts, Prisons, But No Reduction in Crime

A consistent finding of the various studies is that because of the high stakes involved, mandatory minimums reduce the number of cases settled by plea, and correspondingly increase the number of cases going to trial. The Federal Courts Study Committee reported:

> [L]engthy mandatory minimum sentences seriously frustrate the normal and salutary process of pretrial settlements in criminal cases. Even defendants who have little doubt of the likelihood that they will be found guilty are more likely to take their chances on a trial when faced with the possibility of a lengthy minimum sentence.[94]

And as the Committee noted, "even a 5 percent reduction in guilty pleas means 33 to 50 percent increase in trials."[95]

Mandatory sentences in drug and weapons cases are fueling an unprecedented increase in federal prison populations. The federal prison population roughly tripled during the 1980's, and may double again the next decade.[96] By far the largest component of this increase is in the drug area; drug case fillings increased 280 percent during the 1980's, with the trend continuing upward.[97] About half of the cases sentenced in federal court now are drug cases[98]—the mother lode of mandatory minimums in federal law.

There are several effects of this trend. One is cost: keeping up with rapidly expanding federal prison populations will add billions to the annual federal corrections budget, with the cost of building a single new federal prison space as high as $100,000,[99] and construction costs accounting for only about five percent of a facility's total operating costs over its lifecycle.[100] Another is prison discipline: the head of the federal Bureau of Prisons told Congress in 1991 that mandatory sentences were creating severe discipline problems and asked for legislative authority to grant new "good time" sentence reductions.[101] And a looming risk is that, as the proportion of prisoners serving mandatory minimums increase and budget pressures make it more difficult to build the necessary prison space, the early release of other offenders, perhaps more serious but not serving mandatory minimums, may become necessary. This is precisely what happened when Florida instituted an aggressive new regime of mandatory sentences in drug cases,[102] with one-third of those released early committing new crimes after their release.[103]

One irony is that avoiding prison overcrowding was one of Congress's key goals back when the present regime of mandatory minimums was launched. In 1984, the Sentencing Commission was specifically directed to formulate the sentencing guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[104]

But the bottom line is clear: in the midst of all this explosive growth of budgets, prisons, and court dockets, aimed primarily at drugs and violent crime, drug offenses and violent crime have continued to grow at an unprecedented rate. The U.S. is now experiencing the highest rate of violent crime in history, a 45 percent increase since 1982.[105] Hard-core drug use is dramatically increasingly.[106] And new young drug offenders are starting up at an alarming rate: juvenile drug arrests have jumped 713 percent in the past decade.[107]

Is There Hope?

The Supreme Court has washed its hands of the debate over mandatory minimums. Even the massive disparities of LSD cases have withstood constitutional attack.[108] Proportionality and individualized sentences are policy issues, says the Court, not constitutional ones.[109]

And as a policy matter, for all the foregoing reasons, mandatory minimums are worse than useless; they are counterproductive. They serve no purpose that is not served equally well or better by sentencing guidelines. Yet advocates of mandatory minimums have spilled precious little ink explaining specifically the need for mandatory minimums vis-a-vis the vast new guideline system painstakingly fashioned to accomplish precisely the same goal.

The Sentencing Commission has endorsed an important first step to restrain new mandatory minimums in the future. The Commission's central recommendation was that all new legislation increasing sentences should be written as directions to the Commission to incorporate increases into the "established process of the sentencing guidelines, permitting the sophistication of the guidelines structure to work." By doing so, the Commission concluded, "Congress can achieve the purposes of mandatory minimums while not compromising other goals to which it is simultaneously committed."[110] Congress started doing this sporadically in 1988,[111] and must finally resolve to make a consistent habit of it.

Congress should also stop letting sentencing legislation be drafted on the floor of the House and Senate and passed without review or debate. A procedure should be instituted requiring objective review by the Sentencing Commission of any legislation affecting criminal punishment, to determine its impact on the courts, prisons, budgets, sentencing uniformity, proportionality and certainty, and importantly, on crime, as well as whether it is procedurally compatible with the existing sentencing guideline system. This can be accomplished either by rules changes in both Houses, by legislation (a requirement for "prison impact assessments" was included in last year's unenacted omnibus crime bill),[112] or at the least, by obtaining commitments from the Judiciary Committee chairmen and the leadership of each chamber that they will put a substance-neutral hold on any amendment that has not been through this process.

But the more challenging task is doing something about the mandatory minimums already on the books. For the first time since 1970, a bill has been introduced in Congress to repeal mandatory minimums—not just some, but every single one, to give the sentencing guidelines a chance to work. The legislation is entitled the Sentencing Uniformity Act, H.R. 6079, and was introduced on October 1, 1992 by Rep. Don Edwards (D-Cal.), Chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights.[113]

Such legislation, hopeless a year ago, now faces a possible favorable reception by the Clinton admini-

stration. During the campaign, candidate Clinton spoke about the need to get "smarter" about crime and about use of scarce prison space.[114] As Governor, he refused to allow the extradition of a young woman from Arkansas, an honor student at a Connecticut prep school charged with helping her boyfriend smuggle 300 grams of cocaine through JFK Airport, to stand trial in New York, saying that it would be "unconscionable" to expose her to New York's harsh fifteen-year mandatory minimum. She ended up pleading to lesser charges in Connecticut and being sentenced to probation but no prison.[115] Perhaps most significantly, President Clinton may be mindful that his own brother's fifteen-month federal prison sentence for a 1984 cocaine sale, which his brother credits with turning his life around, would have been a mandatory—and uselessly punitive—five or even ten years had his offense occurred after 1985.[116]

The key concept is balance. Prison has an important function in incapacitation, deterrence and retribution. But because it is the costliest sanction by far, and inimical to rehabilitation, it must be parsed wisely, to produce the biggest crime-control bang for the scarce federal buck. Complete sentencing uniformity is a nice ideal, but in fact an unattainable one, since docket pressures chronically require the vast majority of criminal cases to be resolved by deals and pleas. The best practical goal is rationality, fairness, and reasonable predictability.

These are complex and delicate balancing tasks, which Congress can either attempt itself—in the one minute of floor time routinely allotted to debate new mandatory minimums—or entrust to the expert body it created eight years ago for precisely such purposes.

The key question is whether Congress trusts the Sentencing Commission to produce appropriate sentences according to Congress's directions. If it does—and not even the biggest congressional champions of mandatory minimums have said a word against the Commission in this regard—it should junk all mandatory minimums and let the Commission do its job. To retain mandatory minimums is to call into question the integrity and, ultimately, the viability of the Commission.

A choice must be made. Continued legislative schizophrenia will be destructive of the goals of sentencing reform—just as the depraved Edward Hyde finally overwhelmed the good Dr. Jekyll, and in the end, both were sent to the gallows together.

NOTES

[1]Enacted as Chapter II of Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[2]The overriding goal of the Sentencing Reform Act was the elimination of "unwarranted sentencing disparity." S. REP. NO. 225, 98th Cong., 2d Sess., at 52 [hereinafter *Senate Report*]. 28 U.S.C.§ 991(b)(1)(B). Reducing disparity is likewise a goal of mandatory minimums. See UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 14 (Aug. 1991) (reducing judicial discretion and disparity commonly cited by supporters of mandatory minimums) [hereinafter SENTENCING COMM'N REPORT]; statement of Senator Kennedy, Senate Judiciary Committee Chairman, in introducing S.2698, to establish mandatory minimums for certain firearms offenses, violent robberies, and heroin sales (goal is to make "certainty of punishment more of a reality"). 121 CONG. REC. 37561 (NOV. 20, 1975).

[3]*See* studies cited in UNITED STATES SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, Vol. 1, at 14, n.58 (Dec. 1991).

[4]*Senate Report, supra* note 2, at 792 (minority views of Senator Mathias, explaining his vote against the Sentencing Reform Act) *id.* at 422.

[5]Leviticus 24:19-20.

[6]Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839,844 (1969).

[7]J. Dawson, *The Development of Law and Legal Institutions* 44 (unpublished, Harvard Law School 1965), cited in Granucci, *supra* note 6, at 845 n.25.

[8]See § 3, 1 Stat. 112, 113.

[9]2 U.S.C. § 192; 19 U.S.C. § 283; 18 U.S.C. § 1658, as cited in a historical section on mandatory minimums in the SENTENCING COMM'N REPORT, *supra* note 2, at 5-10 and Appendix A.

[10]These penalties are from the second "Boggs Act," the Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (1956). An earlier version with lesser mandatory penalties was passed in 1951. Pub. L. No. 82-255, 65 Stat. 767 (1951) (two years for a first offense, five for a second, and ten for a third).

[11]S. REP. NO. 1997, 84th Cong., 2d Sess. 6 (1956).

[12]Zeese, *Mandatory Minimum Sentences and Drug Control: A Brief History* (unpublished), at 1, Drug Policy Foundation (1991).

[13]Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[14]S. REP. NO. 613, 91st Cong., 1st Sess. 2 (1969).

[15]*Id;* H.R. REP. NO. 1444, 91st Cong., 2d Sess. 11 (1970). *See* discussion in SENTENCING COMM'N REPORT, *supra* note 2, at 6-7.

[16]116 CONG. REC. 33314 (Sept. 23, 1970).

[17]NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) (the Brown Commission). The Commission was established by Congress by Act of November 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516.

[18]Marx Lectures, November 3-5, 1971, published as Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972), *reprinted in Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess., Part IV, at 3923 (1972).

[19]*Senate Report, supra* note 2, at 52.

[20]*Id.*

[21]*Id.* at 51.

[22]*Id.* at 62. The systems in Pennsylvania, California, Illinois and Indiana were contrasted with "a more flexible sentencing guidelines system," such as the Minnesota system upon which the Sentencing Reform Act was modeled.

[23]121 CONG. REC. 37565 (1975) (statement of Senator Tunney upon introducing S.2699, to establish a United States Commission on Sentencing Guidelines).

[24]Senator Mathias' prescient objection in 1983 was that the mandatory guidelines would strip federal judges of their traditional sentencing discretion and force them "to adhere to preordained guidelines except in the most extraordinary circumstances," consigning judges to the task of "operating a sentencing decision machine designed and built by somebody else." *Senate Report, supra* note 2, at 792. At the same time, the House Judiciary Committee had approved legislation establishing a voluntary system of guidelines, to be developed by the judiciary itself (H.R. 6012, 98th Cong., 2d Sess. (1984); H.R. REP. NO. 1017, 98th Cong., 2d Sess. (1984)), but it was never considered by the full House. Concerns about the inflexibility and mandatory nature of the guidelines have persisted, dominated by the unanimous recommendation of the bipartisan, congressionally-established Federal Courts Study Committee, in its April 2, 1990 Final Report, at 135-40, that "serious consideration" be given to making the guideline system noncompulsory [hereinafter *Final Report*].

[25]This abdication of legislative responsibility, I have written elsewhere, lies in the process by which the guidelines become law—automatic enactment if Congress neither vetoes or modifies them within six months. Wallace, *Congressional Abdication*, 10 NAT'L L. J. 13 (1987). It is a system that results in the maximum possible diffusion of responsibility for any individual prison sentence. Congress is not responsible because it did not write the guidelines. The Sentencing Commission is not responsible because it was Congress which, through inaction, enacted them. And the sentencing judge is responsible only for toting up the points and entering the defendant's score on the predetermined guideline grid.

[26]Pub. L. No. 98-473, § 1005(a), amending 18 U.S.C. § 924(c).

[27]*Id.*, Chapter XVIII, The Armed Career Criminal Act of 1984, currently codified at 18 U.S.C.§ 924(e).

[28]21 U.S.C. § 841(b)(1). Also in 1986, a variety of firearms-related mandatory sentences were included in the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

[29]H.R. REP. NO. 845, pt. I, 99th Cong., 2d Sess. (1986).

[30]Wallace, *A Bias in the War on Drugs*, X THE CHAMPION 20 (Dec. 1986). In the resulting "can-you-top-this atmosphere," editorialized the Washington Post, "if someone had offered an amendment to execute pushers only after flogging and hacking them, it probably would have passed."

[31]Pub. L. No. 100-690, 102 Stat. 4377 (1988).

[32]*Id.*, § 6481, amending 21 U.S.C. § 848(a).

[33]*Id.*, § 6460, amending 18 U.S.C. § 924(c)(1).

[34]*Id.*

[35]*Id.*, § 6452, amending 21 U.S.C. § 841(b)(1)(A).

[36]*Id.*, § 6470, amending 21 U.S.C. § 846.

[37]*Id.*, § 6371, amending 21 U.S.C. § 844(a). Under the amendment, the five-year mandatory minimum is triggered also by a second offense involving three grams, or a third offense involving one gram.

[38]Comprehensive Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4846, § 2510 (establishing a new offense of "continuing financial crimes enterprise" as part of Title XXV of the bill, separately entitled the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990).

[39]*Id.*, § 1703.

[40]*See* note 2 *supra*. A second government study, by the Government Accounting Office, an independent auditing arm of the Congress, has been under way for two years, with a report expected this spring.

[41]Violent Crime and Law Enforcement Act, Conference Report on H.R. 3371, H.R. REP. NO. 102-405; also printed in CONG. REC. H11686 (Nov. 26, 1991).

[42]*See* 21 U.S.C. §§ 841 (drug distribution), 844 (possession), 960 (importation), and 18 U.S.C. § 924(c) (firearm enhancement). The full range of federal mandatory minimum provisions is catalogued in the SENTENCING COMM'N REPORT, *supra* note 2, at 10 *et seq.* and Appendix A.

[43]*See* note 66 *infra*.

[44]CONG. REC. S8888 (June 27, 1991). The amendment was approved by unanimous consent without further debate, but was dropped in House-Senate conference; the conference bill was never passed. *See* note 41, *supra* and accompanying text.

[45]18 U.S.C. § 3553(e).

[46]*See* United States v. Roberts, 726 F. Supp. 1359, 1373-77 (D.D.C. 1989), *rev'd sub nom.* United States v. Doe, 934 F.2d 353, *cert. denied*, 112 S. Ct. 268, *reh'g denied*, 112 S. Ct. 959 (1991) (prosecutor's arbitrary withholding of motion for sentence reduction for the defendant's actual cooperation held by district court to violate due process).

[47]*Long LSD Prison Terms—It's All in the Packaging*, LOS ANGELES TIMES, July 27, 1992, at 8-9.

[48]United States v. Richardson (D. Ala. March 16, 1992) (unpublished transcript of sentencing).

[49]LOS ANGELES TIMES, *supra* note 47, at 9.

[50]SENTENCING COMM'N REPORT, *supra* note 2, at ii, 58.

[51]*Id.* at 57.

[52]*Id.* at 89.

[53]*Id.* at iii.

[54]*Final Report, supra* note 24, at 37,

[55]*See* note 27 and accompanying text, *supra*.

[56]Statement of Senator Arlen Specter (R-Pa.) on passage of Comprehensive Crime Control Act of 1984, 130 CONG. REC. S13080-81 (Oct. 4, 1984); A. Specter, *Juvenile Justice Issues, Justice Assistance, Career Criminal Provisions, and the Insanity Defense*, 32 FED. BAR NEWS & J. 76 (Feb. 1985).

[57]Debate on Biden-Thurmond Violent Crime Control Act of 1991, S.1241, § 1213, CONG. REC. S8666 (June 26, 1991).

[58]U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME IN THE UNITED STATES 1989 (Sept. 1990). This includes roughly 407,000 assaults, 210,000 robberies, 12,100 rapes, and 9,200 murders.

[59]*See* debate on Biden-Thurmond crime bill, *supra* note 57. The vote was 88-11. The provision was subsequently deleted in House-Senate Conference negotiations after federalism and budgetary objections were raised by the U.S. Judicial Conference. *See* letter from Chief Justice William H. Rehnquist to Rep. William J. Hughes, House Judiciary Committee, transmitting a resolution of the Judicial Conference, September 19, 1991.

[60]*Senate's Rule for Its Anti-Crime Bill: The Tougher the Provision, the Better*, New York Times, July 8, 1991, at A6.

[61]*See* S. REP. NO. 613, 91st Cong., 1st Sess. 2 (1969) (mandatory minimums infringe "on the judicial function by not allowing the judge to use his discretion in individual cases"). *See* notes 15-17 and accompanying text *supra*.

[62]United States v. Medkour, 930 F.2d 234 (2d Circ. 1991).

[63]Both these cases, and others, are summarized in FAMILIES AGAINST MANDATORY MINIMUMS, MANDATORY MINIMUM CASES (1992) [hereinafter FAMM SUMMARY].

[64]Stuart Taylor, Jr., *Ten Years for Two Ounces: Congress is Packing Prisons With Bit Players in Small-Time Drug Deals*, AM. LAW. (Mar. 1990) (*reprinted in* CONG. REC. S9013 *et seq.* (June 28, 1990)).

[65]SENTENCING COMM'N REPORT, *supra* note 2, at ii.

[66]*See* Resolutions collected in *id.*, Appendix G. These resolutions do not necessarily suggest complete judicial unanimity; the Sentencing Commission surveyed federal judges and found a small percentage (2 of 48) who had nothing but positive comments about mandatory minimums, and a slightly larger minority (6 of 48) who had mixed comments (e.g., finding some deterrent benefit, but injustices at low levels of culpability). *Id.* at 93-96.

[67]Letter of Commission Chairman William W. Wilkins to Senator Sam Nunn (Aug. 23, 1988).

[68]FAMM SUMMARY, *supra* note 63, at 3 (case of Huey Johnson, serving ten-year mandatory minimum; already convicted and sentenced on overlapping state charges, but a federal agent told him he felt the state sentence was not severe enough). *See* United States v. Holland, 810 F.2d 1215 (D.C. Cir.), *cert. denied* 481 U.S. 1057 (1987) (defendant's residence within school zone).

[69]*See* United States v. Liranzo, 729 F. Supp. 1012 (S.D.N.Y. 1990); United States v. Coates, 739 F. Supp. 146 (S.D.N.Y. 1990).

[70]CONG. REC. S8886 (June 27, 1991) (text of proposed Criminal Exploitation of Minors Control Act and comments of Senator Seymour).

[71]*Id.* The provision was subsequently deleted in House-Senate Conference negotiations on the 1991 crime bill, *supra* note 41 and accompanying text.

[72]Harmelin v. Michigan, 111 S. Ct. 2680, 2716 (White, J., dissenting) (emphasis in the original).

[73]SENTENCING COMM'N REPORT, *supra* note 2, at 112.

[74]*See* Taylor, *supra* note 64.

[75]*See Harmelin*, 111 S. Ct. 2680.

[76]Stuart Taylor, Jr., *Don't Throw Away That Key*, LEGAL TIMES, October 22, 1990, at 25.

[77]CONG. REC. S9000 (June 28, 1990) (Statement of Senator Kennedy).

[78]Chapman v. United States, 111 S. Ct. 1919, 1933 (1991) (dissenting opinion of Justice Stevens).

[79]*See Chapman*, 111 St. Ct. 1919, 1932 (citing Judge Posner's dissent in United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990)).

[80]*Id.*

[81]*Id.* at n.12.

[82]*See* note 66 and accompanying text *supra*.

[83]*See Final Report*, *supra* note 24, at 134.

[84]SENTENCING COMM'N REPORT, *supra* note 2, at iii.

[85]*Id.* at ii.

[86]*Id.* at ii-iii.

[87]*Id.*

[88]*Id.* at 25-26.

[89]*Id.* at ii.

[90]*Id.* at 76, 82.

[91]State v. Russell, 477 N.W.2d 886 (Minn. 1991) (*en banc*).

[92]Under 21 U.S.C. § 841(b)(1), as well as the "kingpin" provisions of § 848, the amount of powder cocaine which triggers the various mandatory minimums is 100 times the amount of crack which triggers the same sentence.

[93]121 CONG. REC. 37560 (Nov. 11, 1975) (statement of Senator Kennedy introducing S.2698, containing two-year mandatory minimums for any gun crime, robbery with serious bodily injury, or heroin sale; exceptions were included of juveniles, mental disease, duress, or "mere accomplices").

[94]*Final Report*, *supra* note 24, at 134. *See* BOSTON BAR ASSOCIATION TASK FORCE ON DRUGS AND THE COURTS FINAL REPORT, DRUGS IN THE COMMUNITY: A SCOURGE BEYOND THE SYSTEM (Mar. 15, 1990) (citing the "tremendous negative impact on the ability to move cases swiftly and surely through an underfunded criminal justice system").

[95]*Final Report*, *supra* note 24, at 137.

[96]UNITED STATES SENTENCING COMM'N, 1990 ANN. REP. 96-97.

[97]*Final Report*, *supra* note 24, at 36.

[98]UNITED STATES SENTENCING COMM'N, 1990 ANN. REP. 42-43.

[99]CRIMINAL JUSTICE INSTITUTE, CORRECTIONS YEARBOOK (1992) (federal maximum security costs $98,000 per space, $65,000 for medium security; total 1992 federal prison budget: $2.7 billion).

[100]*Projections for U.S. Corrections*, MONDAY MORNING HIGHLIGHTS (U.S. Department of Justice Federal Prison System) (July 15, 1991).

[101]Testimony of J. Michael Quinlan before the House Judiciary Subcomm. on Crime and Criminal Justice, April 24, 1991. Quinlan never followed up by submitting draft legislation, presumably due to political pressure from above, and the issue has gone nowhere.

[102]*Florida's Crackdown on Crime Forces Early Release of Inmates*, WASHINGTON POST, Dec. 28, 1990, at A14.

[103]NATIONAL COUNCIL ON CRIME AND DELINQUENCY, THE NCCD PRISON POPULATION FORECAST: THE IMPACT OF THE WAR ON DRUGS 5 (Dec. 1989) (*citing* Final Report of the Florida Consensus: Criminal Justice Estimating Conference (Feb. 23, 1989)).

[104]28 U.S.C. § 994(g).

[105]FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1991: UNIFORM CRIME REPORTS 11 (Aug. 30, 1992).

[106]According to figures released in December 1992 by the National Institute on Drug Abuse, the number of persons using cocaine about once a week rose from 606,000 to 855,000 in one year. Cocaine- and heroin-related hospital emergency room visits increased 31 and 26 percent respectively. *1991 NIDA Household Survey*, CRIMINAL JUSTICE NEWSLETTER 5 (Dec. 16, 1991).

[107]*FBI Finds Major Increase in Juvenile Violence in Past Decade*, WASHINGTON POST, August 30, 1992, at A13. The juvenile drug arrest rate includes arrests for use or sale of heroin or cocaine.

[108]*Chapman*, 111 S. Ct. 1919 (1991).

[109]Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion); *Harmelin*, 111 S. Ct. 2680 (Eighth Amendment challenge).

[110]SENTENCING COMM'N REPORT, *supra* note 2, at iv.

[111]*See* Pub. L. No. 100-690 (1988), §§ 6453, 6454 (directing the Sentencing Commission to raise the guideline levels for certain drug importation offenses and drug offenses involving children to "in no event less than level 26"); Pub. L. No. 101-647 (1990), §§ 321 (suggesting the Sentencing Commission might raise the guidelines to provide "more substantial penalties" for sexual crimes against children if it finds current penalties "inadequate"), 401 (ordering the Commission to raise guidelines by three levels for certain aggravated child-kidnapping offenses); and 2701 (ordering a two-level guideline increase for offenses involving methamphetamine in its "smokable crystal" form). Both Acts, however, also contained mandatory minimums. *See* notes 31-38 and accompanying text *supra*.

[112]*See* note 41 and accompanying text *supra*.

[113]*See* CONG. REC. E2901-02 (Oct. 2, 1992) (statement of Rep. Edwards and cosponsor Rep. Ed Jenkins (D-Ga.)).

[114]*See Bush v. Clinton: The Candidates on Legal Issues*, A.B.A.J., 61 (Oct. 1992).

[115]*Clinton Interceded in N.Y. Drug Case*, WASHINGTON POST, Oct. 5, 1992, at A6.

[116]Stuart Taylor, Jr., *Mandatory Sentence, Minimum Sense*, LEGAL TIMES, Nov. 16, 1992, at 25.