

**FEDERAL PRISON POPULATION:
PRESENT AND FUTURE TRENDS**

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

MAY 12 AND JULY 29, 1993

Serial No. 33



Printed for the use of the Committee on the Judiciary

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The following reports and publications were submitted for the hearing record but were too voluminous to incorporate into the record, therefore they will be retained on file in the subcommittee and will be made available for review upon request:

1. "Criminal Justice Sentencing Policy Statement," the National Council on Crime and Delinquency, April 1992, submitted by Todd R. Clear, professor and faculty chair, School of Criminal Justice, Rutgers University, Newark, NJ.

2. Lynn S. Branham, "The Use of Incarceration in the United States: A Look at the Present and the Future," the American Bar Association, Criminal Justice Section, April 1992.

3. Report of the Center for Alternative Sentencing and Employment Services (CASES), submitted by Joel Copperman, executive director, CASES; and Michael Smith, president, Vera Institute of Justice.

4. "Community Punishment Program, 1993-1994," a report of the State of Arizona, Maricopa County, Adult Probation Department.

5. "Drug Court," a report of the Superior Court of Maricopa County, Adult Probation Department.

6. "Desk Reference to Intermediate Sanctions in Maricopa County," a report of the Superior Court, Adult Probation Department, April 1993.

7. "Day Fine Demonstration Project (FARE Probation)," a report of the Superior Court in Maricopa County, Phoenix, AZ, Adult Probation Department, December 1, 1992.

8. "Day Reporting Center," a report of the Superior Court of Maricopa County; and "Day Reporting Center, Client Handbook," a report of the Maricopa County Adult Probation Service Center.

9. "Garfield Community Probation Center Project," Phoenix, AZ.

10. "Continuum Sentencing Project," Dakota County, MN.

11. "Dakota County Community Corrections Plan," 1992.

12. Programs of the Women's Prison Association, New York, NY.

13. Informational material from the Adult Probation Department, Superior Court of Arizona for the County of Maricopa.

FEDERAL PRISON POPULATION: PRESENT AND FUTURE TRENDS

WEDNESDAY, MAY 12, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, John Conyers, Jr., Romano L. Mazzoli, Mike Synar, Barney Frank, Howard L. Berman, Xavier Becerra, Carlos J. Moorhead, Howard Coble, Bill McCollum, and Steven Schiff.

Also present: Hayden W. Gregory, counsel; Jarilyn Dupont, assistant counsel; Phyllis Henderson, secretary; and Joseph Wolfe, associate counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order. Good morning and welcome to this morning's hearing.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, and still photography, or by any of such methods of coverage. In accordance with committee rule 5(a), permission will be granted unless there is objection. Is there objection? Hearing none, permission is granted.

Today we begin a series of oversight hearings on the Federal prison population. This first hearing will examine present and future trends in the Federal prison population. In subsequent hearings we will shift our emphasis to steps that might be taken to reduce our heavy reliance on traditional high-cost prisons.

Several of our States have, for example, developed alternative forms of imprisonment which may provide a more appropriate correctional setting and reduce costs at the same time. The Federal Bureau of Prisons has a well deserved reputation as a leader in prison administration, but learning is indeed a two-way street.

We will be hearing from the States regarding approaches they have developed that we might want to consider for the Federal system. The Federal prison population has been growing at a staggering rate over the past 5 to 10 years. Indeed, since 1981 the inmate population has more than tripled. The Bureau of Prisons embarked on a major building program in 1989 to respond to this increase. By 1997, we will have increased Federal prison capacity by 50,000 beds.

However, even the billions we have committed to prison construction seem to be insufficient to meet expected needs. The Bureau of Prisons projections of future inmate population growth tell us that

inmate population will continue to spiral, growing from 76,000 today to some 116,000 before the end of this decade. This projection is made particularly sobering by the fact that over the past several years the Bureau's projections have been uncannily accurate. A continued reliance on building more and more traditional prisons is not only prohibitive in terms of dollars, but it is also probably not the most effective and efficient correctional policy.

The Congress has supported and funded the expansion of the Bureau of Prisons to accommodate the huge increases in the prison population we have been experiencing. I believe that this was the right thing to do. We simply cannot direct an end to construction when the policies enacted by Congress continue to produce increases in the Federal prison population.

However, it is critically important that we seriously evaluate the policies that are driving this unprecedented explosion in the Federal prison population. The seriousness of the crimes we face is perhaps best illustrated by the fact that, for lack of funds to operate them, new prisons are being completed and left empty. I think that is a pretty strong indication that we need to reevaluate where we are going in Federal criminal justice policy.

The subcommittee must have the benefit of as much information as possible as we embark on this reevaluation. It is imperative that we educate ourselves on these issues and help provide information to the public so that collectively we can make the decisions which best serve the public interest.

I look forward to the testimony from our witnesses this morning. It promises to be a good start in a series of oversight hearings that hopefully will enable us to look at present policy and determine what future policy should be insofar as prison construction and alternatives to prison sentences and its impact basically on prison population.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I would like to commend you for scheduling this important hearing on Federal prison population trends. The recent growth in the Federal prison population is unprecedented and, by all accounts, will continue to accelerate at a very rapid pace. In fact, projections are that there will be more than 115,000 Federal prisoners by the year 1999 unless significant changes are made in our criminal justice system. Moreover, the situation is even worse in many of our State correction systems where prisons in 40 States have come under some form of Federal supervision.

Preliminarily as we begin this hearing today, certain facts stand out. According to statistics provided by the Bureau of Prisons as of September 1992, 27.6 percent of their population were classified as minimum security while another 29.5 were classified as low security. Thus, almost 60 percent of the Bureau's population have a minimum or low security classification. This suggests that there is a significant percentage of Federal inmates who do not pose a significant threat to the community. It is for this group of essentially nonviolent offenders as well as perhaps some others, such as certain first-time offenders, that we need to look beyond the traditional means of incarceration and carefully explore other approaches, such as the increased use of intermediate sanctions.

Another important fact when we talk about trends in the Federal prison population is that over 26 percent of all Federal prisoners are now non-U.S. citizens. Recently I joined with a member of this subcommittee and the ranking Republican on the Immigration Subcommittee, Bill McCollum, in cosponsoring H.R. 1459, the Criminal Aliens Deportation Act of 1993. The thrust of this legislation is to set up procedures to deport criminal aliens from the United States as expeditiously as possible. Clearly, we need to place a much greater emphasis on efforts to identify, apprehend, and remove criminal aliens from the United States, particularly those involved in drug-related or violent criminal activity.

At hearings such as this I have to say that I think the big failure in our prison systems, both State and Federal, is that not enough emphasis is placed on rehabilitation. I understand the average Federal prisoner has fallen three times before the offense that he is in for at the present time. This means that we are failing to do anything about first- and second-time offenders and their problems. When you have nearly 60 percent of the prisoners that are non-violent or pose no real threat, those are people that we can work on, that we have to turn around, or our society is going to become more and more violent.

I have had a chance to visit prisons in some other countries. I know some of them are far worse as far as the violent nature of their incarceration than ours are, but some of them, such as in Denmark, do a much better job. There is very little recidivism in that country, and they don't tend to dull every single sense they have by the nature of their incarceration in Denmark as we do many places in the United States.

I know when you get prisoners that have been in several times, there is probably not much you can do any longer about them. There are some of them, such as in Marion, IL, that are so violent that all you can do is try to keep them from committing further crimes while they are in prison.

But I think we have a major job to do to try to make our prison system one that sees to it that when these people go back out on the street the chance of them being violent toward other citizens is going to be at a minimum. We are not doing that job. We have been a big failure in this country both in the State and Federal prison systems in handling that problem.

I think all of us know that the violence in our communities is growing. We have to put a stop to it and begin to turn this thing around. When we are dealing with people as first-time offenders, and they are at our disposal, we need to do what we think is best to turn them around.

People fight the prison industries program, which I think do a lot of good, or they fight most everything, but we have to forget what many outsiders say are needed and do the things that are necessary to really protect our society. That doesn't mean just punishment, it means trying to turn offenders around so that their lives are worthwhile after they get out, and I think that is a challenge to all of us.

I hate to take up our meeting today bringing up perhaps this side issue, but it is, I think, the most important one that the prisons have to deal with today.

Thank you.

Mr. HUGHES. I think the gentleman is very eloquent, and I agree with just about everything the gentleman said.

The gentleman from California.

Mr. EDWARDS. Thank you, Mr. Chairman.

I would like to hear the witnesses, but I certainly give you and the ranking Republican, Mr. Moorhead, very high marks for your opening remarks. We have got a crisis in this country in the Federal system, and we had better do something about it.

Mr. HUGHES. I thank the gentleman.

The gentleman from New Mexico.

Mr. SCHIFF. Thank you for recognizing me, Mr. Chairman. I will be brief.

I want to say, however, that as both a former prosecutor and defense attorney, I am very concerned when the subject of prison population is presented, in my mind, in bottom line cost terms of incarceration. Now, of course, that is of concern, but I think we should be equally, if not more, concerned about what is the cost of not having criminals in prison for those who need to be in prison.

Every day, I pick up the newspaper or see television or hear radio reports on crimes that are committed by criminals who have been released on early release programs either directly or through halfway houses. Nevertheless they are free in the community, and this was done, in my opinion, for the sole purpose of saving money on prison administration. I think it costs our society a great deal more money, not to mention the other harm that is done by criminals being free in the street.

Nevertheless, although I have that general reservation and caution about the direction that I am hearing, I also would like to see alternatives to incarceration viewed not as a bottom line savings but because that is the appropriate sentence for that individual that would still provide public protection.

I have heard, as every member of this committee has, complaints about the current policy, complaints about sentencing guidelines and mandatory minimums that I think are reasonable to look at. They are not immune from inspection just because they result in convicted criminals going to prison.

So for those reasons I want you to know I do welcome this hearing very much, Mr. Chairman.

Mr. HUGHES. I might say to the gentleman, as I indicated, this is the first of a series of hearings, and we are going to look at all aspects of the problem. But not a week goes by that you don't read of some inmate being cut loose in some State system to make room for other prisoners coming into the system. We are releasing violent offenders while we have youthful offenders, first-time offenders, in jail with long prison terms, and so we need to look at the policy. It doesn't mean that we are going to be setting new policies after this hearing, but we are going to look at all the problems, and one aspect of it is what is happening throughout the country.

Violent offenders are being released into a community, when they shouldn't be released, to make room for new inmates coming into the system because we don't have room. That is just one part of the problem.

The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

I don't have a prepared statement, but I want to just share an idea or two with our witnesses prior to their coming to the table.

Ms. Hawk, about 5 or 6 years ago I addressed your predecessor at a hearing, and the subject for discussion was construction of new prisons. I suggested to him that we fully utilize existing facilities at some of these military bases that are being decommissioned or closed down, and he assured me at that time that that was on the drawing board and would be considered. It is my belief and my understanding that you all are utilizing these facilities. The beauty of that, of course, is, the infrastructure is already in place. It appears to be cost effective to do it, and I am hoping that you may touch on that, Ms. Hawk, some time during your testimony.

Now I recognize that this approach would suffice for only the low- and minimum-security prisoner because when you elevate the status to medium- and high-security, I suspect for the most part conversion costs would probably be prohibitive.

But many people in this town, Mr. Chairman and ladies and gentlemen, when you start talking about constructing new prisons say, "Oh, we have got to have a new facility. We have got to emphasize luxury." Well, I am not in favor of luxury. I am not suggesting that we should not provide comfortable quarters; I am not averse to that. But this business of having luxurious quarters is something else, and I am heartily opposed to that. But I do hope that we are fully utilizing these existing facilities that are in place. They may be antiquated, but they are still functional, and I think many dollars could be saved if we did utilize those facilities rather than go out and emphasize the construction of new facilities.

That is pretty much the extent of my comments, Mr. Chairman, and I thank you.

Mr. HUGHES. Well, the gentleman, I am sure, would just love to join me in the very near future in visiting Fort Dix, NJ, where we are taking an underutilized military facility and making it one of the biggest Federal prisons in the country. The gentleman has traveled with me to a number of prisons in the past few years, and that is a trip that I would invite the gentleman and other members of the committee to take with me in the very near future.

Mr. COBLE. Mr. Chairman, that pretty well tracks what I said, and I am glad to hear that that sort of thing is being implemented.

Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from Florida.

Mr. McCOLLUM. Thank you, Mr. Chairman.

I, too, would like to hear the witnesses, so I am not going to make much of a statement. However, I would make the comment that, it seems to me that, above all else, we have an obligation, as legislators and as administrators in the justice system, as you are, to make sure that particularly the violent offenders, the real violent criminals, are locked up, put away, and kept out of society. These are the source, the statistics show, as you are well aware, of many repeat offenders. States particularly have this problem, but, of course, we in the Federal Government have that problem as well, and whatever we can do to free up more prison space for that particular group and make the system work better I certainly am for.

I am pleased that Mr. Carlson and Congressman Moorhead mentioned a piece of legislation that I have introduced with regard to criminal aliens who might be deported more quickly, thereby giving us more prison space and not letting them come back and be repeat offenders. But I am sure there are many other ways in which we can assist you in making more prison space available for those whom we really need to incarcerate.

I, however, also agree with Congressman Schiff that we must not let the pendulum swing too far into the area of just freeing up prison space, or letting people out, or finding ways to do that. The cost of letting the wrong ones out and not keeping them in is far greater than the cost of incarceration to society.

So I look forward to your testimony and look forward to this subcommittee's work in the next few months on trying to come up with legislation that will assist in this regard.

Thank you.

Mr. HUGHES. I thank the gentleman from Florida.

Mr. HUGHES. Our first witness today is Kathleen Hawk, the Director of the Federal Bureau of Prisons.

Director Hawk, you may come forward now and bring with you whatever aides you would like to join you this morning.

Director Hawk is the sixth Director in the Bureau of Prisons' existence. She was appointed to the position on December 4, 1992, and has been with the Bureau since 1976. She received her doctorate of education in 1978 from West Virginia University. Director Hawk has held a number of positions in the Bureau, including warden of the Butner Federal Correctional Institution in North Carolina. Director Hawk testified 2 months ago before us on Federal Prison Industries.

This has been a busy time, I know, for you, Director, and we welcome you once again this morning.

We have your very excellent and comprehensive statement, which, without objection, will be made a part of the record, and we hope you can summarize, but you may proceed as you see fit.

Welcome, and maybe you can identify for us those accompanying you.

STATEMENT OF KATHLEEN M. HAWK, DIRECTOR, FEDERAL BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY WADE HOUK, ASSISTANT DIRECTOR FOR ADMINISTRATION; TOM KANE, ASSISTANT DIRECTOR, INFORMATION, POLICY, AND PUBLIC AFFAIRS DIVISION; AND GERRY GAES, CHIEF, OFFICE OF RESEARCH AND EVALUATION

Ms. HAWK. Yes, Mr. Chairman, I certainly will.

Good morning, and good morning to the members of the subcommittee. I certainly appreciate the opportunity to be here today to appear before you. I would like to introduce the individuals who are with me today. To my right is Wade Houk, who is our Assistant Director for Administration; to my left is Tom Kane, who is the Assistant Director for Information, Policy, and Public Affairs; and manning the overhead over there is Gerry Gaes, who is the Chief of the Office of Research and Evaluation.

Mr. Chairman, my testimony today will address three fundamental issues that are related to the dramatic growth of the Bureau of Prisons inmate population. First, I would like to describe the characteristics and causes of the growth and project our population over the next 7 years; second, I would like to speak about the budget consequences of the present and the projected growth; and, third, I would conclude with some hypothetical alternative sentencing strategies as a way to demonstrate the very intractable nature of our prison population problem.

I would like to direct your attention to the first graph being presented on the screen. The graph depicts the Bureau of Prisons inmate population from 1961 to the present. As you know, Mr. Chairman, the Bureau houses, in addition, about 10 percent of our population in contract facilities. For the purpose of this testimony, I will focus only on those individuals who are in our Federal facilities.

The graph shows that between 1961 and 1983 the inmate population varied between roughly 20,000 and 30,000 inmates. As you can also see, beginning in 1980 the inmate population began an unprecedented rate—that has continued until today. In 1980, there were 24,500 inmates confined in our main facilities. In 1986, that number was 41,000 inmates, and currently there are over 76,000 inmates in Federal facilities and another 8,200 in contract facilities.

If you look at the period from 1980 to the present, you can see that the growth is even more pronounced in the most immediate past. The little plateau that occurred between fiscal years 1987 and 1988 corresponds to the period after the implementation of the sentencing guidelines and ends at about the time significant challenges to the guidelines were resolved by the Supreme Court decision, *Mistretta v. United States*, issued in January 1989. During this period, we experienced a slight reduction in our prison population.

I will focus on some fundamental facts that show how increases in both admissions and in inmate length of stay over the past 13 years have led to this accelerated population growth. I will refer to two distinct periods. The first period is from 1980 to 1986, which precedes the legislation that significantly altered the structure of sentencing. The second period begins in 1986 following that legislation, and continues through today and has extraordinary consequences for the future growth of the Bureau of Prisons inmate population.

If we examine the facts about prison admissions first, we can see a dramatic rise in the number of defendants sentenced to a term of imprisonment. The Administrative Office of the U.S. Courts reported that 13,191 defendants were sentenced to a prison term in fiscal year 1980. By 1986, that number grew by 56 percent. During that same 6-year period, the Bureau's inmate population actually increased by 69 percent.

With respect to more recent Federal criminal justice activity, in fiscal year 1992 the number of defendants sentenced to prison increased by 59 percent over the 1986 level. Again, during that same time period, our population increased by 77 percent.

During the earlier period, 1980 to 1986, the growth in the inmate population was due to increased resources in investigation, arrest,

and prosecution. However, during that last 6-year period, the rate of growth in individuals receiving prison sentences was attributable to two factors.

First, there were some additional criminal justice resources; and second, the proportion of defendants who received a sentence of probation dropped significantly. This resulted in an even faster growth in the Bureau's inmate population. The extreme growth in inmate population from 1986 to 1992 is primarily attributable to changes in sentencing law and policy rather than to additional criminal justice resources.

In 1986, the Anti-Drug Abuse Act established mandatory minimum sentences for certain drug offenses. As a result of the Sentencing Reform Act of 1984, sentencing guidelines were implemented, parole was abolished, and good time credits were limited to 54 days per year. In 1988 and 1990, Congress passed additional sentencing legislation which increased mandatory minimum sentences for drug and weapons offenses. The combined effect of these statutory changes has been a reduction in the use of probation and an increase in length of prison stay.

If you will turn your attention to the next display, you will see a chart comparing the proportion of offenders receiving a term of straight probation—which means probation without any term of prison—in fiscal year 1986, prior to the new sentencing laws, and the proportion receiving straight probation in fiscal year 1991 under sentencing guidelines. As you see, for most offenses a much smaller proportion of defendants received straight probation.

Going to the next display, you will see that the average length of stay for these same offenses has also increased. The table shows that when we compare offenders convicted prior to the new sentencing laws with those sentenced under the new law—which includes again sentencing guidelines, mandatory minimums, reduced good time, and elimination of parole—the average length of stay has increased for all but property crimes.

The combined effect of decreases in proportion to offenders receiving straight probation and increases in the average prison length of stay accounts for almost 90 percent of the growth in our inmate population since 1986. Only 10 percent is a result of the rise in convictions.

Mr. Chairman, we can be even more specific in the nature of our inmate population growth. The dramatic changes we have described are primarily caused by drug offenders.

As we have already noted, the average prison length of stay for drug offenders has more than tripled, from 23 months to 71 months. At the same time, a higher proportion of drug offenders received a prison sentence rather than a sentence of straight probation. Thus, it is the conjunction of these two events—the dramatic increases in admissions for drug offenders and the threefold increase in length of stay—that has led to our burgeoning prison population. In 1980, about 25 percent of our sentenced inmates were drug offenders. Currently, over 60 percent are with us for drug convictions, and, by 1997, we are projecting that 72 percent of our inmate population will be drug offenders.

The average length of stay for drug offenders has increased so dramatically because of the relationship between sentencing

changes that resulted from mandatory minimum sentences and the incorporation of these changes into the sentencing guidelines for drug offenses. In a 1991 study, the Sentencing Commission found that although there were 40 statutes carrying approximately 60 mandatory minimum sentences, in practice only a few such statutes were being used. In fact, 91 percent of all defendants sentenced under statutes that carried mandatory minimum provisions were sentenced for drug offenses—91 percent.

Compounding this situation is the fact that the sentencing guidelines spell out drug offense guidelines consistent with the penalties prescribed by the mandatory minimum sentences. The guidelines increase penalties from a floor set by the mandatory minimum sentences. The combination of sentencing requirements, the mandatory minimums, and the guideline adjustments above the baseline has resulted in a more than tripling of the average length of stay for drug offenders under "new law" sentencing structures.

The next graph shows the projected future inmate population through 1999. It demonstrates not only the unprecedented growth of the last 13 years, but the continuation of that growth into the future based upon existing sentencing laws and recent conviction trends. By 1999, we will house approximately 116,000 inmates if things continue as they are today. That does not count the additional 11,000 inmates we will be holding in contract facilities around the country.

I would like to comment just briefly on the budget implications of these increases in our population. As the chairman indicated, since 1989, Congress has approved funding for about 50,000 new beds, which should be on line by the end of fiscal year 1997. The Bureau's operating budget for salaries and expenses is about \$1.8 billion for the current fiscal year. We are projecting that to keep the Bureau's overcrowding level manageable through the activation of new institutions, our budget by fiscal year 1997 for salaries and expenses would have to be \$3.6 billion.

The highest priority request in the 1994 budget is for activation of new facilities, including two new penitentiaries—the first high-security facilities that we have constructed in three decades. Our high-security population has experienced dangerous levels of crowding, so our need for high-security beds is acute. The other new beds include those in a new administrative maximum institution to replace our Marion facility, as well as some medium-security beds and some detention beds. This also includes, in response to your question, Mr. Coble, new beds at Fort Dix. As the chairman had mentioned, this will activate a total of 3,200 beds at Fort Dix by the end of 1994. We are also seeking funds to be able to take over the medical facility at Fort Devins, MA, and attach an institution to the medical facility there.

If we are able to activate all the beds that should be available in 1994, we would then, at the end of 1994, be at 132 percent of capacity. This is under our new standard of capacity which allows for double-bunking for all minimum, all low, 50 percent of all medium, and 25 percent of all high-security cells, plus all detention cells. This is a major departure from the old "one inmate per cell" standard that had been supported by the State systems and the American Correctional Association.

So, even with double-bunking as an accepted standard, we will still be at 132 percent of capacity at the end of 1994. That would equate to roughly 160 percent of capacity had we been using only single-bunking still utilized by the States.

In the final part of my testimony, I would like to touch briefly on some of the hypothetical strategies, which were presented in our formal statement that we submitted to the subcommittee, of ways in which one might approach population adjustments and sentencing adjustments. These are simply hypothetical and were presented to display the intractable nature of our population; even with some of the relatively radical strategies that we presented in our report to you, the adjustment in the population would still be only moderate by the year 2000. These hypothetical strategies include increasing good time, and diverting some of those inmates who are low-level offenders—who are currently in our institutions but have a minimal criminal history, no history of violence, and lower level drug or property offenses—out of our population into other types of intermediate programs that have been mentioned.

We also reviewed the possibility of adjusting the mandatory minimum ranges and also looked at the noncitizen population which makes up 26 percent of our current population. I would be very happy to deal with any questions you might have on each of those hypothetical strategies that we considered.

I am now finished with my formal statements and would be very happy to address any questions that you may have regarding my comments.

[The prepared statement of Ms. Hawk follows:]

PREPARED STATEMENT OF KATHLEEN M. HAWK, DIRECTOR, FEDERAL BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear before you today. With me today is Wade Houk, Assistant Director for Administration, Tom Kane, Assistant Director for the Information, Policy, and Public Affairs Division, and Gerry Gaes, Chief for the Office of Research and Evaluation.

Mr. Chairman, my testimony today will address three fundamental issues related to the dramatic growth in the Bureau of Prisons inmate population. First, I will describe the characteristics and causes of the growth, concluding this discussion with our projection of the inmate population over the next 7 years. Secondly, I will speak to budget consequences of the present and projected growth. Lastly, I will conclude my testimony by outlining some hypothetical strategies to better serve justice and slow this surge in the Federal inmate prison population; however, because these strategies are currently under study, they should only be considered illustrative. In this era of fiscal restraint, we consider prison bed-space as a precious commodity, to be used judiciously so that we can maximize the goals of criminal justice and minimize the cost to the taxpayer.

I would like to direct your attention to the first graph (Figure 1) being presented on the screen. The graph depicts the Bureau of Prisons inmate population from 1961 to the present. The points on the graph represent the end of the fiscal year inmate

population in Federal prison facilities. As you know, Mr. Chairman, the Bureau houses, in addition, about 10 percent of its total population in contract facilities. For purposes of this testimony, I will focus on the inmate population in our Federal facilities.

The graph shows that between 1961 and 1983, the Federal inmate population varied between 20 and 30 thousand inmates. As you can also see, beginning in 1980, the inmate population began an unprecedented increase which has continued to today. In 1980 there were 24,500 inmates confined in our main facilities. In 1986, that number was 41,500, and currently we have over 76,000 inmates in Federal facilities and another 8,200 in contract facilities.

If we look at the period from 1980 to the present, you can see that the growth is even more pronounced in the most recent years. The little plateau, which occurred between fiscal years 1987 and 1988, corresponds to the period just after the implementation of Sentencing Guidelines and ending at about the time significant constitutional challenges to the Sentencing Guidelines were resolved by the U.S. Supreme Court decision, *Mistretta v. U.S.* (488 U.S. 361), issued January 1989. During this period, when the constitutionality of the legislation was being determined, the Bureau experienced a reduction in prison admissions.

In this first part of my testimony, I would like to address the immediate causes of these dramatic population increases.

Mr. Chairman, while focusing on these immediate causes, I will not spend time on more removed criminological questions about the root causes of crime. My purpose in describing the causes of our inmate population growth is to apprise you of the implications of Federal criminal justice policy decisions over the last 13 years.

In that context, I will focus on some fundamental facts that show how increases in both prison admissions and inmates' length of stay over the past 13 years have led to our accelerated population growth. I will often refer to two distinct periods in the last 13 years. First, the period from 1980 to 1986 precedes legislation that has significantly altered the structure of sentencing in the Federal criminal justice system. Second, the period following that legislation continues through today and has extraordinary consequences for the future growth of the Bureau of Prisons inmate population as well as having concomitant budget and management implications.

If we examine facts about prison admissions first, we can see a dramatic rise in the number of defendants sentenced to a term of prison. The Administrative Office of the U.S. Courts (AOUSC) reported that 13,191 defendants were sentenced to a term of prison in FY 1980. By 1986, the AOUSC reported that 20,621 defendants received a sentence of prison in that fiscal year, a

56-percent increase over 1980. During that same 6-year period, the Bureau's inmate population grew from about 24,500 to 41,500, an increase of 69 percent.

With respect to more recent Federal criminal justice activity, the AOUSC reported that in FY 1992, 32,866 defendants were sentenced to a term of prison, an increase of 59 percent over the 1986 level. However, in that same 6-year time frame between 1986 and 1992, the Bureau of Prisons population grew from about 41,500 to 73,500 inmates, an increase of 77 percent.

During the earlier period, 1980 to 1986, the growth in the inmate population was due to increased resources for investigation, arrest, and prosecution. However, during the last 6 years, the rate of growth in individuals receiving prison sentences was attributable to two factors: some additional criminal justice resources and the reduction in the proportion of defendants receiving a sentence of probation. This resulted in an even faster growth in the Bureau's inmate population. This latter period of prison population growth is primarily attributable to changes in sentencing law and policy rather than to additional criminal justice resources.

In 1986, the Anti-Drug Abuse Act established mandatory minimum sentences for certain drug offenses. As a result of the Sentencing Reform Act of 1984, Sentencing Guidelines were

implemented for crimes committed on or after November 1, 1987.

The Sentencing Reform Act also abolished parole and limited good time credits to only 54 days per year. In 1988 and 1990, Congress passed additional sentencing legislation which increased mandatory minimum sentences for drug and weapons offenses.

The combined effect of these statutory changes has led to a reduction in the use of probation and an increase in prison length of stay for a significant proportion of Federal offenders. Allow me to further highlight the effects of those changes in sentencing structure.

If you will turn your attention to the next display (Table 1), you will see a chart comparing the proportion of offenders receiving a term of "straight" probation (probation without a term of prison) in 1986, prior to the new sentencing laws, and the proportion receiving straight probation in fiscal year 1991 under U.S. Sentencing Guidelines. As you can see, for most of the offenses, a much smaller proportion of defendants convicted of robbery, crimes against person, property, drug, fraud, income tax, and firearms offenses received a term of straight probation.

Going to the next display (Table 2) you will see that the length of stay for these same offenses has increased. This table shows that, when we compare offenders convicted prior to the new

sentencing laws ("old law") with those sentenced under the "new law" -- which includes Sentencing Guidelines, mandatory minimum sentences, reduced good time, and the elimination of parole -- length of stay has increased under the "new law" for robbery, crimes against person, drugs, firearms, fraud, and immigration offenses. The only offense category for which length of stay declined is property crime.

The combined effect under the "new law" of decreases in the proportion of offenders receiving straight probation and increases in the average prison length of stay accounts for almost 90 percent of the growth in our inmate population since 1986. The rise in convictions accounts for the remaining 10 percent in the total growth. The dramatic changes in inmate population growth we have described are primarily represented by drug offenders.

As we have noted, the average prison length of stay for drug offenders has increased from 23.1 to 71.8 months -- an increase of 211 percent. At the same time, a higher proportion of drug offenders received a prison sentence rather than a sentence of "straight" probation.

As I mentioned earlier in my testimony, increases in both prison admissions and average prison length of stay account for the growth of the Federal inmate population. The conjunction of

events -- dramatic increases in admissions for drug offenders and more than a threefold increase in their length of stay -- has led to our burgeoning prison population. In 1980, about 25 percent of our sentenced population was convicted of a drug offense. In 1986, that percentage was 38 percent. Currently, over 60 percent of our population was convicted of a drug offense and we expect that by 1997, that proportion will be 72 percent.

We can also take one step backward and ask the question "Why has the average length of stay increased so dramatically for drug offenders?". The answer lies in the relationship between sentencing changes that resulted from mandatory minimum sentences and the incorporation of these changes into the U.S. Sentencing Guidelines for drug offenses.

In August 1991, the U.S. Sentencing Commission published its Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System. In that report, the U.S. Sentencing Commission demonstrated that, although there were 40 statutes carrying approximately 60 mandatory minimum penalties, in practice, only a few such statutes were being used. Ninety-one of every one hundred defendants sentenced under statutes that carried the mandatory minimum provisions were sentenced for drug offenses.

Compounding this situation is the fact that the U.S. Sentencing

Commission, to meet the provisions of the law, has written its drug offense guidelines to be consistent with the penalties prescribed by the mandatory minimum sentences. To insure proportionality, the Guidelines increase penalties from a "floor" set by the mandatory minimums. This combination of sentencing requirements -- mandatory minimum baselines and Guideline adjustments above the baseline --has resulted in the more than tripling of the average length of stay for drug offenders under "new law" sentencing structures.

In concluding this part of my testimony Mr. Chairman, I would like to present another display (Figure 2). This graph shows the projected future Federal inmate population through 1999. It demonstrates, in a historical context, not only the unprecedented growth of the last 13 years, but the continuation of that growth into the future based upon existing sentencing laws and guidelines and recent conviction trends. By 1999, we project that Bureau of Prisons facilities will house approximately 116,000 inmates. Not shown here is that we anticipate another 11,000 Federal inmates will be housed in contract facilities. The structural changes in sentencing that I have been describing will continue to be the primary catalyst for this growth.

In light of this dramatic increase, I would like to turn my attention to the implications of this growth on the Bureau's operational and construction budgets.

As you know, Congress has appropriated substantial resources to add capacity to the Federal Bureau of Prisons. Funding approved by the Congress since 1989 for new construction, for conversion of surplus facilities and for expansion of existing facilities will eventually add about 50,000 new beds by the end of FY 1997. Approximately, 30,000 of these beds are currently under development and will be ready for activation between 1995 and 1997.

The Bureau's operating budget, the Salaries and Expenses appropriation, is about \$1.8 billion for the current fiscal year. In the face of the expected population growth, to keep the Bureau's overcrowding level manageable through the activation of new Federal prisons now under construction will require a doubling of the annual operating budget to \$3.6 billion by FY 1997.

As the Attorney General has indicated, there is little that can be done quickly to slow the growth of prisoners in Federal custody. Prisons are a finite resource, however, and we are working under the direction of the Attorney General to assess the impact of various investigative priorities, prosecutorial policies and potential legislative changes that might reduce future growth in our inmate population.

For 1994, our activation request is \$112 million. With this

budget request, we are seeking funds to activate the first high security penitentiaries in three decades. As the high security inmate population has continued to grow, the crowding in our penitentiaries has become acute. The activation of the penitentiaries in Allenwood, Pennsylvania and Florence, Colorado will alleviate this critical situation. Also requested for funding is the activation of detention beds at the Federal Detention Center in Miami, Florida and at the United States Penitentiary in Atlanta, Georgia. We also propose to activate a medical care unit at the Federal Correctional Institution in Fort Worth, Texas and to complete the activation of a low security institution at Fort Dix, New Jersey, where the Bureau has successfully initiated the conversion of a base closure property to correctional use. Together, these activations will add over 4,600 beds to our capacity. We are also requesting preliminary activation funding for an Administrative Maximum-Security Penitentiary in Florence, Colorado and three Federal Correctional Institutions in Pekin and Greenville, Illinois; and Cumberland, Maryland.

In addition, to address the growth in the Bureau's non-citizen population, we are requesting \$5 million to fund one-quarter year operations of a joint BOP/INS private contract facility in Arizona, which will provide 500 beds for each agency's alien population. This consolidated function will support an expedited deportation process, similar to the current operation at Oakdale, Louisiana.

The Bureau of Prisons has also added capacity by modifying its rated capacity standards. For decades, the national, professionally accepted rated capacity standard was one inmate per cell or cubicle. This single cell policy was included in the accreditation standards promulgated by the American Correctional Association (ACA) and has been used by numerous Federal District Courts in conditions of confinement cases involving State and local correctional facilities. In 1988, my predecessor, Mike Quinlan, directed a review of our policy and practice regarding double bunking at different security levels. This review determined that the single bunking standard was unnecessarily conservative and very costly. Former Director Quinlan then successfully persuaded the ACA to modify its standard to allow selected double bunking.

Our revised rated capacity policy provides for double bunking, within prescribed minimum space requirements, as follows: Minimum security, 100 percent; Low security, 100 percent; Medium security, 50 percent; and High security and Detention, 25 percent. The effect of this policy has been to increase our rated capacity to date by nearly 9,000 beds at virtually no cost.

The financial savings attributable to this policy change are substantial. Its implementation, however, has not actually reduced the number of inmates who live in crowded conditions nor has it made our institutions any easier to manage. Let me put it

in perspective with this comparison. Under the single cell standard, our current overcrowding would be 70 percent instead of 42 percent. By 1997, when we project our overcrowding will be reduced to 4 percent, it will still be the equivalent of 40 percent under the prior single cell standard.

As you know, the Congress provided us funding last fiscal year for the initial acquisition and development activities at Fort Devens, Massachusetts, an installation on the Base Closure list. We are very excited about the reuse potential Fort Devens holds for us. The transfer of the existing Army hospital to the Bureau will provide us with an economical increase in our in-house medical capacity. Our FY 1994 request of \$74.6 million when combined with the funding provided in FY 93, will fully fund our construction requirements at Fort Devens. When completed, this facility will provide capacity for sentenced offenders and pre-trial detainees, in addition to the medical beds which will service a region of the country where additional capacity is urgently needed.

Funding to increase detention capacity is also requested in 1994. For the Middle District of Florida and Phoenix, Arizona, \$20 million and \$8 million is requested respectively for the partial costs of two Federal detention centers which would add over 1,500 additional beds.

To expand pre-trial detention capacity in several court districts with critical shortages, a \$20 million increase is requested for the Cooperative Agreement Program (CAP), which is administered by the United States Marshals Service. This program was recently evaluated by GAO and found to be very cost effective. Use of CAP funds provides the government greater leverage and flexibility and reduces the pressure to construct Federal detention facilities.

Also requested is \$10.3 million for a joint INS/USMS detention facility in Buffalo, New York. INS enforcement activities have been hampered by the lack of available detention capacity near the western New York/Canadian border. Further, the pre-trial detention capacity in this district is very limited. Construction of a joint detention facility will provide much needed capacity in a cooperative, efficient manner.

Finally, many of our existing institutions are old and in need of regular repairs and upgrading. For 1994, an additional \$33 million is requested to fund 21 improvement, renovation, utilities, hazardous waste and energy savings projects at 20 institutions, whose average age is 46 years.

In summary, our budget request reflects our ongoing efforts toward efficiency and cost containment, while continuing to provide effective public protection, humane care for our inmate

population and a safe working environment for our staff. I am proud of our reputation as an efficient organization. As reported by GAO, we operate our institutions with 27 percent fewer staff and at 13 percent less cost than comparable State correctional facilities. I am committed to continuing efforts to make us an increasingly cost effective organization.

We are very sensitive to the budget constraints the Administration and Congress face and we endorse reasonable efforts to reduce or stabilize the rate of growth in our inmate population. One clear dilemma, however, is the fact that budget realities appear to be in conflict with the continuing growth of the Federal Prison System. Even if the rate of growth is slowed, there are quite a number of institutions currently under construction which must be completed and activated to provide us relief from overcrowding and inevitable future population increases.

The Attorney General has asked the Bureau of Prisons to work with the Department of Justice to examine the potential impact of prospective policy or legislative alternatives that would better serve the public interest, yet would slow down the Bureau's population growth.

In the last part of my testimony, I would like to discuss some hypothetical strategies we are studying that might be used to

limit the growth in our future inmate population. I will highlight several such strategies, including: diversion of non-violent first-time offenders, good time increases for all offenders who qualify, the reduction of sentences for some offenders, and the expedited return of sentenced non-citizens to their country of origin. Where possible, I will show the Subcommittee numerical estimates of the impact several of these strategies could have on the growth rate of the Bureau's future prison population. Let me emphasize, these strategies are only broad suggestions on how to limit our future growth and may or may not be initiatives that the Attorney General ultimately selects. These strategies will demonstrate however, that even relatively substantial changes in policy and sentencing structure will have only a moderate impact on the Bureau's population growth. The hypothesized examples we will offer, will also demonstrate our ability to estimate potential impact of legislative initiatives.

One hypothetical strategy is diversion from traditional incarceration for carefully selected offenders who pose negligible risk to the community. Diversion can involve other programs which can meet specific offender needs, including home confinement, probation with special conditions, or even "boot camps" where confinement is usually of a much shorter duration.

In response to a request from the Attorney General, we estimated

the proportion of our current prison population that might qualify for such an alternative sentence. After eliminating those offenders with any history of violence or more than a minor criminal history, and those whose current offense involved either a substantial quantity of drugs or a significant dollar value for a property crime, we estimated that approximately 1,612 offenders currently in our facilities would be eligible for diversion. We further estimated that as many as 30 percent of these 1,612 offenders are in need of substance abuse treatment which could be provided in the community. The remaining 70 percent might qualify for home confinement or probation sentences with special conditions. For the projected population in succeeding years, it is estimated that 10 percent of offenders sentenced in a given year might qualify for this kind of diversion.

Because the offenders who qualify for diversion programs generally have short sentences, the overall impact on the future growth of the Federal prison population would be minimal and for that reason, we did not attempt to model the impact of these policies on the future growth of the population. Unless there were major modifications to the criteria we used to identify prospective candidates for such alternatives, not more than 10 percent of drug traffickers admitted to prison could be diverted.

A second hypothetical strategy under study is to change good time allowances for offenders. Good time is an effective tool for

prison administrators to motivate inmates to participate in programs for personal development and to obey institution rules and regulations. An increase in good time allowances would also effectively reduce the Bureau's population level.

An effective good time program provides an incentive for inmates to participate in institutional self-help programs that better prepare them for a productive return to community life after release.

The current good time rate of 15 percent (54 days per year) could be increased to 30 percent (108 days per year). This rate would be somewhat lower than the rate at which inmates earned good time prior to the Sentencing Reform Act. Under the current law, good time is awarded if an inmate avoids negative behavior. Once awarded, the good time is vested and cannot be withdrawn for misconduct that occurs after it has been vested.

Conditions determining who receives additional good time or the extent to which an offender receives good time can be developed. Good time might be allocated to offenders who have demonstrated successful involvement in programs designed to help them prepare for a productive return to the community. Good time might be withheld from those offenders who have committed egregious offenses or have shown a propensity to commit serious crimes in the past. Such a good time program would provide a valuable

incentive to encourage inmates toward self-improvement activities. This opportunity has been lost under the current system now that parole is no longer possible and good time is vested. A secondary benefit of a good time program would be to reduce the inmate population.

Modification of good time allowances requires a statutory change and can be applied retroactively through administrative processes that do not require resentencing.

In order to portray the hypothetical impact of changes in good time allowances, we will show our current projection for our prison population over the next 7 fiscal years including the current fiscal year. We call this the baseline projection and it benchmarks the impact of each of the particular strategies I will illustrate. We represent this baseline on the screen first (Figure 3). This baseline excludes our projected contract population.

As indicated earlier, it is estimated that the Bureau's population will be 116,000 inmates by 1999, if there are no changes in the Federal sentencing process. This estimate of 116,000 is based, among other considerations, on inmates earning good time at the current rate of 54 days at the conclusion of each year of their sentence.

You can see the effect of changing good time relative to the baseline. Hypothetically, if the good time rate were immediately doubled to 108 days per year for newly admitted offenders, the Bureau's 1999 population could be approximately 111,000 (a difference of 5,000 from the baseline). If this doubling of good time were to be applied retroactively, the Bureau's 1999 population could be approximately 106,000, (a difference of 10,000 from the baseline). Under this scenario, 4,000 inmates could be immediately eligible for release if they met the criteria that qualified them for additional good time.

A third hypothetical strategy under study that would limit the growth of our future inmate population is to shorten sentences, especially for non-violent drug offenders. Under this scenario, we recognize that at least three significant changes to the current system should be considered: there would have to be a change to mandatory minimum sentences; the U.S. Sentencing Commission would have to revise its drug guidelines; and some kind of provision would have to be made to affect the sentences of offenders already adjudicated and in custody, for example a re-sentencing procedure. This last provision would be to insure equity, so that sentence reductions would be applied retroactively.

To illustrate the impact of potential sentencing adjustments, consider the Bureau's projected population in 1999 if a

25-percent reduction for first-time drug traffickers were to be applied henceforth and retroactively. We project the 1999 inmate population would be approximately 110,000 inmates (a difference of 6,000 from the baseline). If the penalties for first-time drug traffickers were to be reduced by 50 percent, and the penalties for all other drug trafficking offenses were reduced by 25 percent henceforth and retroactively, the 1999 projected population falls to just over 104,000 (a difference of 12,000 from the baseline).

For illustrative purposes, we also modeled the effects of combining two of the above scenarios: (1) reducing drug sentences by 50 percent for first-time drug offenders and 25 percent for other drug offenders; and (2) increasing good time to 30 percent (108 days per year).

We estimate that the effect of this combination applied only prospectively would be to lower the 1999 Federal prison population to approximately 104,000, a drop of 12,000 from the baseline. This demonstrates the considerable momentum of recent policy decisions on our increasing prison population. This scenario, after all, provides for some rather dramatic reductions. Yet, because of the defendants who are already sentenced and present in our system, and because of the length of those sentences, the population in 1999 decreases by only 10 percent.

Of course, were such changes applied retroactively, there would be a much greater effect (as well as a correspondingly greater demand for inmates to be resentenced). Under these circumstances, applying the two factors above, we estimate that in 1999 the prison population would be approximately 93,000; a drop of 23,000 from the baseline.

One other hypothetical initiative that we are reviewing with the Department of Justice has to do with the high number of non-citizens in our population. As you know, Mr. Chairman, almost 26 percent of our inmate population is composed of non-citizens. We are in the early stages of studying different strategies, that may be either legislative or administrative, to reduce this component of our inmate population.

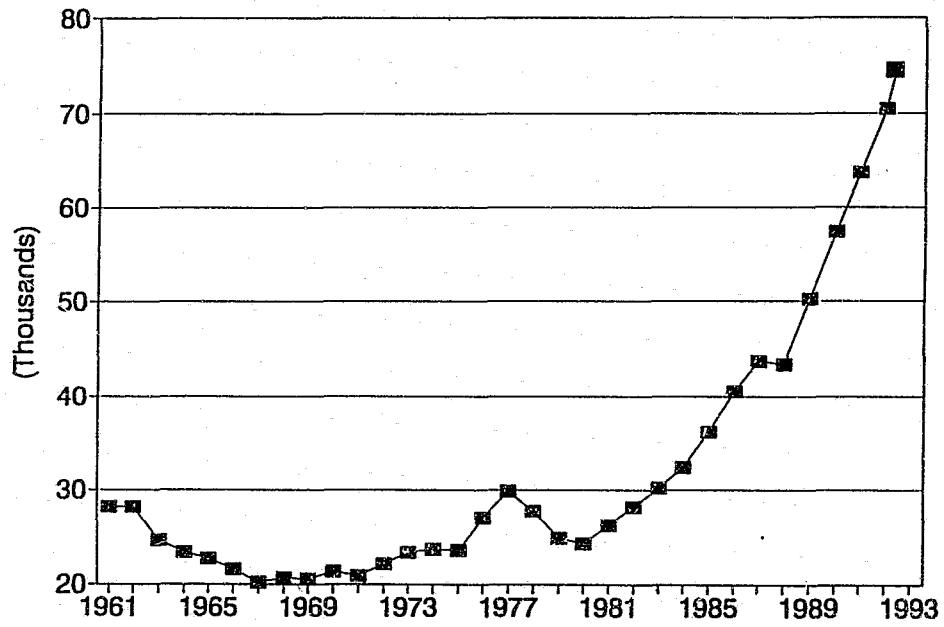
While this set of sentencing and policy scenarios is not exhaustive, it does illustrate the dramatic nature of changes that would have to occur to affect the growth rate of the Federal prison population, and then, the impact is only moderate.

It is important to note that even under these extreme changes and assuming there will be no further legislation that either increases penalties or Federalizes more offenses, the Bureau's inmate population will continue to grow. We developed these hypothetical sentencing reduction scenarios as a device to illustrate the nature of legislative or policy changes that will

have to be made to moderate the Bureau's population growth. In closing, Mr. Chairman, I want to emphasize that the Attorney General has tasked the Bureau with assisting her in identifying strategies that will both better serve justice and reduce the growth rate of the Bureau of Prisons' inmate population. It bears repeating, that the strategies I've discussed today are illustrative and not necessarily the strategies the Attorney General will pursue. Thank you for allowing me to testify today.

Figure 1

Bureau of Prisons Total Population Main Facilities, End of FY 1961 - 1993*



* 1993 represented by February data

Table 1

PERCENTAGE OF DEFENDANTS RECEIVING PROBATION BY OFFENSE TYPE

Offense	1986 Old Law	1991 New Law
Person	31.3	7.8
Robbery	18.0	0.3
Property	60.1	34.7
Drugs	20.8	6.4
Fraud	59.0	22.0
Income-tax	57.0	43.4
Firearms	37.0	9.2
Immigration	41.0	16.8
<hr/>		
Total	42.4	14.5

Table 2

**COMPARISON OF OLD LAW AND NEW LAW
LENGTH OF STAY (IN MONTHS)**

Offense	1986 Old Law	1991 New Law
Robbery	44.8	90.8
Person	37.7	53.3
Drugs	23.1	71.8
Firearms	14.1	35.3
Fraud	7.0	9.2
Property	6.8	5.7
Immigration	5.7	9.5

Figure 2

BOP Actual and Projected Population Main Facilities, End of FY 1961 - 1999

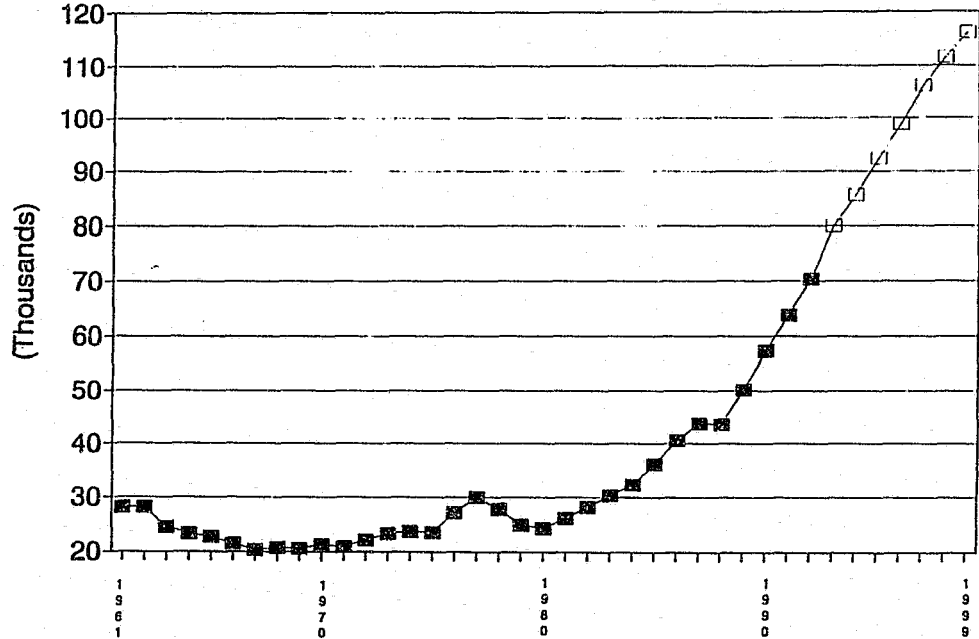


Figure 3

Projected Prison Population Baseline

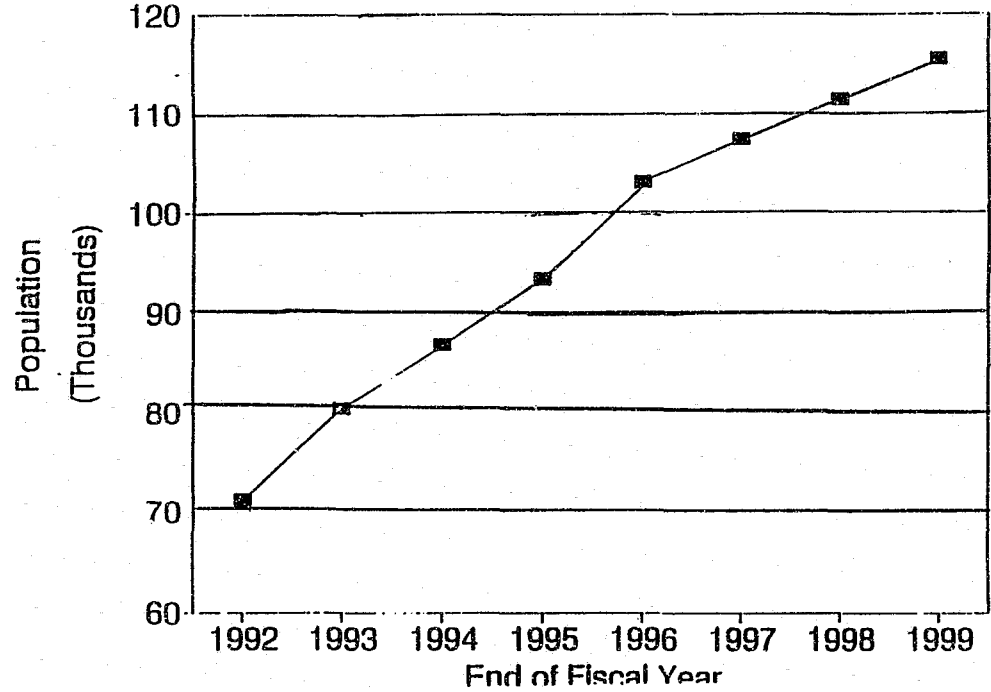
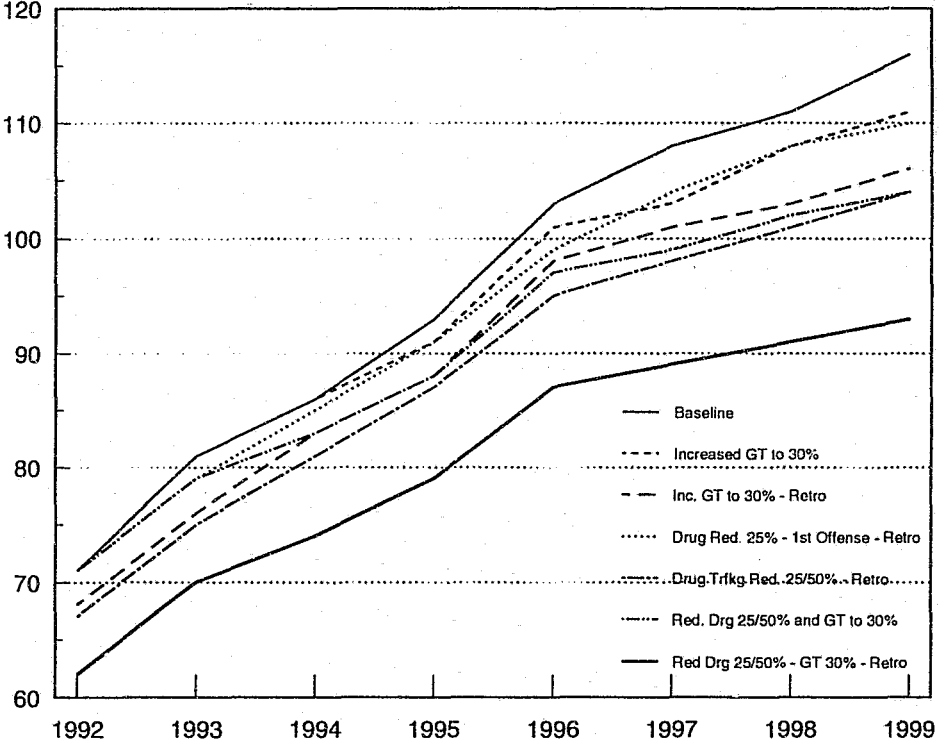


FIGURE 3

PROJECTED PRISON POPULATION

Population (Thousands)



Mr. HUGHES. I say to my colleagues, I am going to try to stick to the 5-minute rule myself, and I am going to ask my colleagues to do the same thing, and if we need additional rounds of questions, why, we will take additional rounds.

Director Hawk, the explosion of the Federal prison population in recent years is by and large an explosion in the drug defendants, as you have just indicated. In this regard, the statistics you have supplied indicate that, in 1980, 13,191 Federal defendants were sentenced to prison. Of this number, 1,232, or less than 10 percent, were imprisoned for drug offenses. In 1992, the total number sentenced to prison terms was 150 percent higher than in 1980, 32,866 from your numbers. However, the percentage of this number sentenced for drug offenses has risen from 10 percent to about 50 percent.

In other words, the number of persons sent to the Bureau of Prisons following a drug conviction has risen about 1,200 percent from 1,232 in 1980 to 16,040 in 1992. Am I interpreting that percentage increase correctly? Has it been that dramatic?

Ms. HAWK. Yes, it has.

Mr. HUGHES. To take it a step further, let's factor in the fact that these inmates are being sent to you for much longer sentences than those arriving in the early 1980's. According to your figures, the average length of stay for drug offenders has increased from 23.1 to 71.8 months since the onset of the sentencing guidelines and mandatory minimums, an increase of 211 percent. Is that essentially correct?

Ms. HAWK. Yes, sir.

Mr. HUGHES. So by our computations, increasing the number of inmates convicted of drug offenses by a factor of 12 and increasing the length of stay by over 200 percent means that the need for prison space just to confine drug offenders has increased by a factor of about 35 since 1980. Is that about correct?

Ms. HAWK. Exactly. Yes, Mr. Chairman.

Mr. HUGHES. And as I understand your projection, that is going to continue to increase to where our inmate population is going to consist of 72 percent drug offenders by 1997.

Ms. HAWK. Yes.

Mr. HUGHES. How much of the inmate population in that category are first-time drug offenders? Do you know offhand?

Ms. HAWK. Roughly 3 percent of the current population are first-time offenders, low-level drug offenders, with no history of violence. The number is more striking when you look at the number of inmates coming to us each year.

Each year, the number of low-level drug offenders could be diverted, is 10 percent of our incoming population. Therefore, if you project over time, the total number of inmates that could be excluded from our population is quite large. In fact, of those who are drug offenders, who are first-time offenders, it is roughly 50 percent of the total number of drug offenders.

Mr. HUGHES. You know, what really troubles me as a former prosecutor is that I see the charging policies often resulting in people that are middle level traffickers walking because they have information to give up to U.S. attorneys, and the people that are the

mules carrying contraband across the border end up with prison terms.

Do you have any idea of the universe of prisoners there for drug violations that consists of people that basically were just carriers, low-level carriers?

Ms. HAWK. We suspect that it is a very large percentage. It is hard to determine exactly, because the only information that we receive, or that the Sentencing Commission receives, is actually what the individual is charged with. Oftentimes the amount that the individual is being held responsible for—the Attorney General frequently refers to the boat people, or simply low-level handlers—are charged with the volume of drugs that are actually on that boat.

Mr. HUGHES. And they don't have information to give up to the U.S. attorneys, so they end up doing big time, and they are often first-time offenders, and the person who is a higher level trafficker is able to bargain with the U.S. attorney, often has the resources to do so, and can give up some information. And that is important; I mean we all need to secure that information. But I wonder if we can get some hard numbers on that category of inmates that basically are low-level traffickers.

Ms. HAWK. Yes, Mr. Chairman. We will certainly work to provide those numbers for you and present it as part of the testimony.

Mr. HUGHES. OK.

[The information appears in appendix 3.]

Mr. HUGHES. I am also interested in, and I chatted somewhat with the Attorney General about the concerns that Mr. McCollum, the former ranking Republican in my former life as chairman of the Subcommittee on Crime; alluded to, and that is, the noncitizens who are in our prison system. As I understand it, they constitute roughly 25 or 26 percent of our inmate population.

How long does it take today, do you know offhand—I know it is not your area, but how long does it take to deport somebody who basically committed a violation in our country, who is serving time in our system, who is not a violent offender, but whom we should perhaps consider returning to their country and not be spending the tens of thousands of dollars that we have to every year in keeping them in prison?

Ms. HAWK. What is actually taking the longest amount of time is for them to serve their sentence, because many of these same noncitizens are receiving the mandatory minimum sentences and are doing 5, 10, 15 years in our institutions. We cannot deport them under current law until they have served the entire length of their sentences.

We have been working very closely with the Immigration and Naturalization Service as well as the Executive Office of Immigration Review to prepare for the deportation before their release date.

Mr. HUGHES. So we need a statutory change, and it seems to me that that is what we need to look at, because it is nonsensical for us to be basically housing and feeding inmates, who ultimately are going to be deported anyway, who should be deported back to their country, particularly when they haven't committed violent offenses or grievous offenses but have gotten caught up in our sentencing process.

Thank you. I have some additional questions, and I will hit them on the second round.

The gentleman from California.

Mr. MOORHEAD. Thank you.

I certainly agree with the trend that our chairman has been developing, especially with the last question. But in a recent Los Angeles County study, 80 percent of those identified as deportable and removed from the country returned within 12 months and were rearrested. In other words, they bounce right back. You kick them out, and they come back. Of all the deported aliens identified in the study, on an average, those rearrested had seven a.k.a.'s and seven prior arrests.

In May 1991, the Los Angeles office of the U.S. attorney agreed to modify its filing guidelines for cases involving criminal aliens who have been arrested before reentry after deportation. This local policy changes relaxed the criteria for accepting cases for prosecution under U.S.C., section 1326 and established the more effective interagency procedures between the local office of the U.S. attorney for case processing.

You know, coming back, I was asked to ask you a question, that I think is a good one, by Elton Gallegly, a member of the Judiciary Committee from California. He says, what about getting Mexico and other countries to agree to jail their own citizens? Now I don't think they are going to pay for it, but I think in the NAFTA treaty or in other arrangements that we have with Mexico we could agree to have them take these Mexican citizens that have violated our laws and agree to keep them incarcerated. Perhaps we could pay them something, but it costs nowhere near the amount of money there, and we wouldn't get them bouncing back within 12 months where we have the same problem all over again. Do you think something like that might be worked out?

Ms. HAWK. You have identified one of the big dilemmas in trying to deal with the alien population. If you simply send them home, it is too easy for them to come back and commit another offense, as you indicate.

One of the initiatives being explored is the possibility of returning them and letting them serve out their sentences in their home countries. Most of our noncitizens come from Mexico, Colombia, and Cuba. We would be willing to pay a per-day rate, because the rate per day of incarcerating an inmate in those countries is significantly lower than in this country. However, right now there is a major constitutional question that is being reviewed by the Department of Justice to see if this is possible when an individual has been sentenced to the custody of the Attorney General and is able to receive all the benefits thereof. This is one of the strategies that is being reviewed in terms of how we can possibly return aliens to their home countries.

We do have treaty agreements with other countries whereby they send us our citizens and we send them their citizens. We have those with many countries throughout the world, but in the statute it says the individual has to volunteer to go back. Many of these individuals would much rather do time in our system than in Mexico or Colombia, and that runs us into one of the dilemmas of immediately returning them.

But your suggestion is certainly being explored by the Department of Justice.

Mr. MOORHEAD. The other area I wanted to ask about: We hear that a large percent of the people who are in our prisons, State and Federal, have dropped out of high school, they haven't gone all the way through school. I don't know the answer to this. What is your educational policy? Is there a mandatory requirement that when they are in prison they finish their high school programs?

Ms. HAWK. We have a mandatory requirement that they be involved in education. We have changed their education requirement over the last several years from sixth grade, to eighth grade, now to GED level. If the individual does not actively work toward his or her GED, then we impose sanctions: they are not able to receive above the lowest level of pay in any of their jobs.

It is hard to tell them, "You have to go," because the worst we could do if they don't go is lock them up, and they are already locked up. So we really try to do it more through incentives and encouragement and motivation. But we do strongly encourage education for all inmates who have not yet achieved their GED's.

Mr. MOORHEAD. You know, for many individuals who are maybe never going to be able to advance professionally or otherwise, it would seem to me that a top-grade vocational training program would be an excellent idea and pay for itself, because it would save you a lot of time as they repeat. But you have got to get them out of the environment that they have been in, or you are going to get them bouncing right back on you.

Ms. HAWK. Absolutely. The comments that you made earlier, Mr. Moorhead, are right on target. We do provide a lot of opportunities for inmates to rehabilitate themselves. We provide education and lots of vocational programs. Our UNICOR program, Federal Prison Industries, is one of our major, proven programs that really has a direct impact upon whether or not one adjusts well to the community upon release.

What happens, though, to all the rehabilitation that might be done within an institution if they are going back to a community that does not have jobs available, where they are going to associate with the individuals that they had been with before who were dealing drugs or otherwise involved in crime? Much of the rehabilitation is lost and it really is going to require a partnership of sorts between all of the institutions of our society, including our prisons, but also the communities to which these individuals return. All the good that might be done in one setting can get lost as they move into the second setting. There aren't similar kinds of assistance for them there.

Mr. MOORHEAD. Perhaps we can place these people. I guess we could all ask you a million questions, but thank you very much.

Mr. HUGHES. We will have another round.

The gentleman from California.

Mr. EDWARDS. Thank you, Mr. Chairman, and thank you, Director Hawk.

Is most of the problem caused by the mandatory sentencing in the drug laws or by the increase in sentencing resulting from the Sentencing Commission guidelines? Which is the big offender?

Ms. HAWK. It is actually a combination of both, Mr. Edwards, in that the sentencing guidelines ratcheted up the sentencing baselines to meet the mandatory minimum sentences that were established. If the mandatory minimums were removed just by themselves, it would not change the sentencing structure very much. But if the mandatory minimums on the drug trafficking and drug offenses were removed and the Sentencing Commission then re-evaluated the sentences it had imposed and did not feel compelled to set its sentencing baselines at the mandatory minimums, then you could see a significant difference, I believe, in the sentences that were imposed.

Mr. EDWARDS. It would seem to me very clearly that the first and immediate step we could take, if we had the will and the votes, would be to enact my bill that does do away with the existing mandatory sentencing and then move on to the next step, which is to deal with the Sentencing Commission and so forth and the existing population. So there are about three steps that have to be taken.

Ms. HAWK. That is certainly a possible way of approaching it. The mandatory minimums that are driving our population growth are really a relatively small number of the mandatory minimums that actually have been put into place. We are not talking about those involving violent offenses, habitual offenders, or weapons charges. The ones that are driving our population are really those centering on drug offenders. In my comments I am really speaking only about that group of mandatory minimums at this time.

Mr. EDWARDS. I understand that, but the Sentencing Commission guidelines could take care of the mandatory ones that were enacted by Congress that are some kind of a safeguard. But that is neither here nor there.

The Federal probation, does it really work pretty well?

Ms. HAWK. I think it works very well. However, they now have fewer resources, and their caseloads are relatively large. But I think to the extent their resources allow them to actually be able to do what they are being tasked with doing, it works very well.

Mr. EDWARDS. So what you are saying is, if the resources were adequate, these nonviolent, first-time offenders could be able, to a large part, to work their way back into the American community of taxpayers and family people through the probation system, the Federal probation system.

Ms. HAWK. Yes, and I believe there are also perhaps some other intermediate programs, as was mentioned earlier, that have been tried by some of the States, and there are other programs that we have been exploring. Some do involve probation, and some don't directly involve the probation office. I think a marriage of each of those different types of programs could have a really dramatic effect.

Mr. EDWARDS. Thank you.

Mr. Chairman, working with the new Attorney General and Mr. Schumer's Crime Subcommittee, I think we can make an enormous contribution to this crisis, because it is a real one that the Director describes, and I thank you.

Mr. HUGHES. I thank the gentleman.

The gentleman from New Mexico.

Mr. SCHIFF. Thank you, Mr. Chairman.

Director Hawk, I would like to use my 5 minutes, if I can, to get into three areas. The first is, again, talking about the undocumented or illegal population within the prison system, I just want to say I encourage the direction in which the Justice Department is going to try to find a way for the native countries to take over the incarceration of these individuals. Perhaps it can be done at our costs as they violated laws in this country, but I have to tell you and would like your reaction, if you choose to voice one, I have a problem with deportation alone. Then I think the message becomes, "Come here, commit a crime, and the worst that happens to you is, we send you back home, in which case, by the way, you can come back again rather easily," but that is even a second issue. I think there has to be some kind of threat of punishment here, including for those who come from other countries with the idea of committing crimes. Do you agree or disagree with that?

Ms. HAWK. I agree absolutely. It was the same dilemma that Congressman Moorhead was referring to. We don't want to have a situation where individuals find it easy to come to this country, commit an offense, and receive no sanction.

I think the task at hand is to come up with a balance wherein there is a negative consequence for them committing the offense. It may not need to be very expensive for the American taxpayer to make the point that we need to make—that you do not come into this country to violate our laws, but then not retain them for long periods of time in our institution if they have not committed serious violent offenses. In finding that balance, we have not determined exactly what the answer is. Your point is very well taken.

Mr. SCHIFF. When you refer to serious violent offenses, it probably leads into the second area here. In view of what you said, what we are talking about in terms of the profile of a person who, by numbers, is swelling the prison system, if I understand correctly, is a person convicted of selling drugs, perhaps for the first time, but a person convicted of selling drugs. Is that right?

Ms. HAWK. And carrying quantities into the country, yes.

Mr. SCHIFF. Carrying is part of the distribution network.

Ms. HAWK. Yes, absolutely. It is all part of the drug trafficking issue.

Mr. SCHIFF. Drug trafficking—thank you. That is a better term.

Would that be the profile? Would that make up the largest number of the profiles of people you would divert to some other type of sanction?

Ms. HAWK. Yes, it is for the most part. There are some other lower-level, perhaps white-collar, offenders—not the high-level white-collar offenders that, as the Attorney General says, are bleeding the country dry. Those are not the individuals we are talking about diverting. We are not talking about diverting the violent offenders, the hardcore thugs, the ones who prey on the misery of others in this country, the white-collar thugs. Those are not in our divertible categories, and those are not sizable subpopulations of our inmates, either.

Mr. SCHIFF. Divert to what? If you had the magic wand—and none of us individually have it, we are an institution here—but if you had the magic wand, what would be your sanction for the individual, euphemistically, I think, termed the "mule" a little bit ear-

lier in this hearing. That is still someone trafficking in drugs—what would you do?

Ms. HAWK. I think there could be multiple sanctions available, depending upon the needs of the individual that we are talking about and what caused him or her to get involved in crime.

I know, Congressman, that you were at the drug summit the other week. There was a lot of discussion going on about the fact that drug treatment, if it really is to be effective, should occur before the individual comes to prison. You have got a major carrot and stick. So if these divertibles are drug abusers in addition to being offenders, and if they were offered something like the Miami Drug Court opportunity—where either you go to jail for a number of years or you get constructively involved in a drug program if you have a drug abuse problem—then I believe, this could not only provide the sanction but also make the point that Congressman Moorhead was making earlier, of causing them not to go out and continue to repeat crimes.

We also have intensive confinement centers for inmates who can best be served there. There are various other types of intermediate sanction programs, including supervised release, probation, special probations, and other types of programs that could be tailored to the individual needs of the offender.

Mr. SCHIFF. Let me take that one step further. Let us suppose we are dealing with someone who would be termed here a low-level trafficker, the carrier, the mule. They are not drug abusers, these are just people who decided that it is easier to earn money this way than it is to go work for a living and start from the bottom like everyone else. Would you still recommend such diversion for those individuals who have made a deliberate and conscious choice, "I would rather be a drug trafficker than work legitimately for a living"?

Ms. HAWK. Again, if this were a first-time offender, which is the large percent of our population that we are talking about diverting, having a minor prior history, and not showing a pattern of wanting to do this through his or her entire life, then it may well be worth exploring another option to better serve justice and attempt to divert this individual from incarceration, which is much more expensive. This could be effected either through urban work camp centers near where he or she is housed in a halfway house facility, where he or she provides services to the community; or through supervised release, and home confinement, where his or her recreational time is limited significantly but he or she is allowed to be a constructive taxpayer in the community by working a regular job. I believe there are many opportunities that could be afforded to the right type of inmate, at least as a first attempt.

Mr. SCHIFF. Let me conclude, and I will yield back. I, like the others, could ask a million questions, but we have a full house here.

My major concern was what you just said, because I don't consider any law so sacred that we can't look at it, including minimum sentences. My concern is the reference to expense. It seems to me that, yes, there is an expense with incarceration, but there is a deterrence there too, and we don't want the message to be, "Be a drug trafficker at any level, and if you get caught, don't worry, not

much will happen to you." I think that there has to be a sufficient sanction in place that that message is out there too.

Ms. HAWK. Absolutely.

Mr. SCHIFF. I yield back to the chairman. Thank you.

Mr. HUGHES. The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman.

Congratulations, Ms. Hawk.

Ms. HAWK. Thank you.

Mr. CONYERS. And my condolences all at the same time.

For us to get Norm Carlson and you here together speaking about this same subject is a very important occurrence in our criminal justice history.

I wonder if you have had a chance to look at the National Council on Crime and Delinquency in terms of their study of position statements and the philosophy of sentencing. If you haven't, I would like to make it available to you and continue our discussion about it. We in the Congress have been working with this particular organization off and on for a number of years, and what it leads me to raise cautiously is the whole question of the philosophy of sentencing and the criminal justice system.

The reason I look at it like that is that this is important, and as we listen to each other it is almost embarrassing. I mean you don't have to be a correctional official to figure out some of the snafus that we are in; you don't have to be a Member of Congress or lawyer or criminal justice expert. A lot of it is common sense.

We have now come to the situation, the time, where we have got to do something about it or we will bust the bank. We are at \$4.2 trillion right now, and it doesn't take a C.P.A. to tell us that, "Look, guys, at the rate that you are locking them up, it's not going to work."

It is an embarrassment to me that dollars and cents is the only thing that brings us to our senses. A more rational group of people governing might just say is it working as a test, regardless of how much it costs, and the more overriding issue is that it ain't working. If it was free, it isn't working, if it was at no cost.

So I am one Member who urges you and the head of the Department of Justice to continue looking at this situation in an even larger lens. I am troubled that habitual criminals, although they don't rate high in the numbers, some of those people who were put away as habitual criminals were shoplifters and petty criminals that were really, I thought, nonserious.

I further urge that we cautiously look at the sentencing guidelines. We don't want to upset anybody, because the philosophy that drove us here was, if you didn't show you were tough on crime—you know, this stuff came out of the Congress, it didn't come from Norm Carlson, or it didn't come from a former Attorney General, it came from us. We decided that judges were too easy on crooks. We decided that these sentences were giving judges the opportunity to use their own discretion. Who asked them to think?

So now we have worked ourselves into a corner, and that is why I want to approach this in a very timid, cautious way, because we don't want anybody to get too embarrassed; we don't want us to have to eat our own words too rapidly; we want to turn this ship around very slowly, consult all the conservative and reactionary

Members and make sure that at least enough of them can come on board so we can sign off. I commend the chairman. He has got a bipartisan group so far. It has started off very nice.

But how much genius do you need to see that the Nation that locks up more people than anybody on the planet has one of the worse crime records and that it may not be connected to sending criminals a message? The big drug pushers could care less.

You know, in my district where my office is located, in the Federal Building, we have had drug pushers come in and proposition the U.S. attorney, a lady, about working for him after they get through with this monkey business that is going on in the courtroom. He said he liked her style and would she consider after—I mean it never occurred to him that he could get locked up, because he brought his own steno, he brought his own lawyers, they ran the transcript through that night and did all the law work that prepared them far more than the two little U.S. attorneys that had been busting their butts for 2 years to bring this to a trial. And you know what? He walked out, and the U.S. attorney did not accept his proposal to talk further about her working for them.

But you bring a fresh breath of air to this subject, and I commend the chairman, the former chairman of the Crime Subcommittee, who somehow has got this jurisdiction still for bringing this to our attention. I think it is very important, and I think the time has come that we will be able to move forward.

Mr. HUGHES. The time of the gentleman has expired. Thank you. The gentleman from North Carolina is recognized.

Mr. COBLE. Thank you, Mr. Chairman.

Ms. Hawk, gentlemen, it is good to have you all with us.

Ms. Hawk, what is the current policy of the Bureau of Prisons regarding the privatization of facilities?

Ms. HAWK. We use privatization in the Federal prison system probably as much as, if not more than, all of the State systems around the country. We use it primarily to provide all of our community corrections programs.

We used to operate our own halfway houses many years ago. We determined that they can be run just as effectively if we privatize and go to either nonprofit or private groups in the community.

We also are using a number of intergovernmental agreements with communities that have prisons. These prisons can house some of our Federal offenders.

We have plans to open up, within this fiscal year, our first fully privatized institution, which is a joint facility between INS and the Bureau of Prisons. Although it shows up in our appropriations, this facility is for INS individuals, detainees, and those still serving out their sentences, but who are expected to eventually be deported. This facility is for 1,000 inmates and will be operated by a private concern in the Southwest.

We have attempted privatization of different components of operations within our institutions, but it did not meet with great success. We have had much success with the institutions that I have mentioned.

Mr. COBLE. You said earlier, I think, there were 76,000 Federal inmates in addition to 8,000 that are contract prisoners.

Ms. HAWK. Yes.

Mr. COBLE. Now most of these contract inmates, I presume, are housed in facilities operated by municipalities and/or counties. Would that be a valid conclusion?

Ms. HAWK. Roughly half are community corrections facilities that are not operated by municipalities at all. Most of that half are either private or nonprofit. The other half are run through intergovernmental agreements with municipalities, although they then contract out much of the services to private vendors.

Mr. COBLE. What is the current average length of time that a Federal inmate spends in a community treatment center prior to his or her release?

Ms. HAWK. The exact average is 123 days. It varies for the most part from 90 days to 180 days based upon the needs that the individual might have and the resources that we have available to place him or her.

Mr. COBLE. I am just probing now, and I may run into a brick wall. To extend that question, would it be possible, Ms. Hawk, to alleviate overcrowding by extending the time that an inmate spends in a community treatment center? Is that feasible?

Ms. HAWK. We have explored that a little bit, Congressman. Our feeling is that the main purpose of using the halfway houses at the end of a sentence is to transition the inmate back into the community, and the 6-month stay seems to work very well.

There are individuals, though, who are placed into the halfway houses at the front end. If they get a 6-month or no more than a 12-month sentence, they can be placed directly in and serve their entire sentences in halfway houses. That fits one of the intermediate sanctions that we could use to a greater extent in the future if that becomes a viable option, with perhaps adjustments made in the sentencing guidelines to allow that to happen more often.

Mr. COBLE. This question also directs attention to possibly an alternative solution. Given the overcrowded situation in the Federal system and the projections for yet continued increases in that number, should you all at the Federal Bureau of Prisons consider returning some of these inmates to the States? Now I understand the States probably have the overcrowding problem as well, but I would be glad to hear from you.

Ms. HAWK. We would love to give a lot of these inmates to anybody that would take them, but unfortunately the State systems, for the most part, are as crowded as, if not more crowded than, we are.

Mr. COBLE. I was afraid that was going to be the answer.

Ms. HAWK. Yes.

Mr. COBLE. Finally, Ms. Hawk, you probably don't have this at your disposal today, but I would be interested in knowing, let's say over the last 3 years, any statistics regarding recidivism as to Federal offenders generally, number one; and, number two, given the fact that 60 percent of the Federal inmates are serving sentences from convictions of drug-related offenses, recidivism as to drug-related inmates.

Ms. HAWK. I just happen to have those numbers. We just completed an outstanding study. We found that in tracking inmates over a 3-year period, we are successful with 59 percent of the inmates who are released from the Federal Bureau of Prisons. Suc-

cessful means they have no new offenses and were not revoked from parole. So 59 percent of those released from the Federal Bureau of Prisons are successful for 3 years after returning to the community. That compares to a 38-percent success rate, on average, for the State systems.

But the special group that you mention—the first-time drug offenders, the ones that we were talking about as being potentially divertible—they already have an 81-percent success rate in terms of return to the community. Of those who fail, the 19 percent that got in trouble, none of those that we tracked over this period of time committed a serious or violent offense. So that does appear to be a group that responds well to alternative types of sanctioning.

Mr. HUGHES. The gentleman's time has expired.

Mr. COBLE. Those are very impressive numbers.

Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. BERMAN. Thank you very much, Mr. Chairman.

I had a meeting last Friday at the request of the judges in the Central District of California. Needless to say, it was massively dominated by appointees of Presidents Reagan, Bush, and Nixon, and I think in one case Eisenhower. But the intensity of their hostility to what they feel has happened to the Federal criminal justice system with the application of mandatory sentences, not in the cases of habitual criminals or violent criminals but in some of these other cases like you are describing, the removal of any discretion on their part to try and match a sentence to the individual defendant that comes from the mandatory nature of the sentencing guidelines, the proliferation of appeals by defendants on the technical mathematics of the imposition of those sentences, the potential for the new federalization of a variety of traditional State crimes involving the use of a gun or in some cases spousal abuse, has turned them into as angry a group of people as I have seen in a long time.

I just found it very interesting that, coming from this area and from their perspective, the intensity of their feeling was not about the pleasantness of their work, it was about what they felt was the whole damage to the Federal judicial system. I think it should make a lot of people who have looked at this situation one way in the past to reconsider some of it, and I just thought I would say that.

Thank you.

But these are the kinds of people that Mr. Carlson would have known from his earlier days in California. They were very active in those days, probably in some cases supporting some of these very programs.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

The gentleman from Florida is recognized.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

Ms. Hawk, I am not going to ask you today about the question of the criminal aliens. That is an interest of mine, and you have already been asked enough about that, but I don't want you to think, though, that by my not asking you I am not very serious about that; I am.

I thought what you responded a couple of minutes ago about the success rate was interesting, your 59 percent nonrepeat rate after 3 years out. I am curious if you have any data on it, or you could get it for us, on the 41 percent who do come back, who are the repeat offenders.

For example, what type of crimes have they committed? Is there a percentage breakdown of that type of thing so we can see analytically the type of criminal who is repeating?

Second, how many of the repeat offenders are repeat offenders before who have gotten out and are just coming back again and again and again?

Do you have those kind of data, or are they available?

Ms. HAWK. We do, but I do not have that information with me. I only brought our success data with me today.

Mr. MCCOLLUM. That is all right. I understand.

Ms. HAWK. But we would be very happy to prepare that and make it available to you.

Mr. MCCOLLUM. If you could present that for the record, I would appreciate that.

Mr. HUGHES. Without objection.

[The information follows.]

Incarcerating Offense and Rearrest Offense

Table 19 examines the relationship between the original incarcerating offense and the post-release rearrest offense. The percentages shown represent the percentage of recidivists in each incarcerating offense category arrested for each follow-up offense category. While an adequate test of whether offenders tend to specialize in one crime, such as drug trafficking, or are equally likely to commit any crime, would review the offender's entire criminal career. However, looking only at incarcerating offense and recidivating offense, we see a high degree of offense specialization for many of the releasees. For example, looking at the row percentages, we see that 47.2 percent of the drug offenders who recidivated were rearrested for a drug offense; 35.3 percent of the property offenders were rearrested for a property offense; and 25.5 percent of the robbery offenders were rearrested for robbery. One notable exception to this seeming pattern of specialization are those committing crimes against a person (violent and sex crimes) since these individuals were most likely to be rearrested for a property crime. This finding suggests that incarceration, while not necessarily eliminating further criminal behavior, may at least reduce the level or seriousness.

Before moving on to use multivariate models to evaluate the effects of prison programs, we will briefly compare recidivism among the 1987 release cohort with that among earlier Federal prison release cohorts.

Table 19. Incarcerating Offense By Rearrest Offense.

Incarcerating Offense	Rearrest Offense								
	Against Person	Robbery	Property	Drugs	Fraud	Traffic	Miscel.	Parole Viol.	
Against Person	3 15.79%	1 5.26%	7 36.84%	1 5.26%	0 0.00%	1 5.26%	2 10.53%	4 21.05%	100%
Robbery	8 14.55%	14 25.45%	8 14.55%	11 20.00%	0 0.00%	1 1.82%	7 12.73%	6 10.91%	100%
Property	8 6.72%	5 4.20%	42 35.29%	14 11.76%	15 12.61%	4 3.36%	14 11.76%	17 14.29%	100%
Drugs	11 6.92%	1 0.63%	11 6.92%	75 47.17%	10 6.29%	9 5.66%	16 10.06%	26 16.35%	100%
Fraud	5 7.58%	2 3.03%	12 18.18%	7 10.61%	13 19.70%	3 4.55%	9 13.64%	15 22.73%	100%
Miscel.	6 9.38%	2 3.13%	14 21.88%	14 21.88%	4 6.25%	3 4.69%	14 21.88%	7 10.94%	100%
Total	41	25	94	122	42	21	62	75	

Frequency Missing = 9

Mr. MCCOLLUM. Also, one of the interesting comments that has been made in one of the publications with the testimony of a witness down the road here is by the National Council on Crime and Delinquency. They say most felons need not serve more than 12 months in prison, and I think they are referring to those that are not repeat offenders or not violent criminals. Do you generally subscribe to that, that anything greater than 12 months is not meaningful for a general felon, or is that too broad a statement?

Ms. HAWK. It depends upon what you see as the purpose of the incarceration. If it is punishment, that would be one length of time; if it is incapacitation, which I know is one of the reasons for the very long sentence for some of those who commit offenses against persons in our country. I am not sure that 12 months would be an agreed-upon length of time for incapacitation.

If we are talking about making the point for deterrence, I think it depends upon what purpose you have in mind for issuing a sentence as to what length of time would be most meaningful.

Mr. MCCOLLUM. We are talking now, in part, about these traffickers that are first-time offenders, and I guess 12 months is probably all that you would need for those that are the mules, so to speak. Is that not what we are hearing today from most people's testimony?

Ms. HAWK. I think that is certainly being offered as one possible way of dealing with that group of offenders, yes.

Mr. MCCOLLUM. If you are talking about parole and probation and so forth, we now have abolished parole essentially, although there are still some parole folks in the system. What proportion of those whom you are getting back again and incarcerating are parolees or people who have been on probation in the Federal system? I presume it is lower than the States.

Maybe that is another piece of data that you will have to provide us later, but I am curious about that too, because there is a question in my mind as to how many of them are coming back again who have been in that category, in other words, were incarcerated simply because they violated parole or probation.

Ms. HAWK. If I can defer to Tom Kane, he may well have that information.

Mr. MCCOLLUM. Tom.

Mr. KANE. I don't have the exact number, Mr. McCollum, but it is relatively small, and we can certainly provide it for the record.

Mr. MCCOLLUM. All right. That would be something I would be very interested in.

[The information follows:]

There were 4,763 parole and probation violators returned to prison in calendar year 1992. There were 33,311 commitments from U.S. district courts. Thus, the violators represented 12.5 percent of these two categories of commitments.

Mr. MCCOLLUM. The whole question of what deterrence incapacitation really does do is important, and I agree with the comments you made. I would certainly subscribe to the school that the violent offender and the repeat offender need to be incapacitated and that is where the lengthier sentences ought to be. To the degree the system is not working that way and trying to have longer sentences for those who are not the ones that most of us would agree need

to be incapacitated, we are putting undue pressure on your duties and on the taxpayers with this lengthier incarceration.

I think probably there is a consensus growing in that regard, and I think that is what you are saying to us today in many ways, is it not?

Ms. HAWK. Yes. I think the real concern is that we make sure that we always have bedspace available in prison for the individuals who do need to be locked away. Our concern is that we cannot afford to devote bedspace to individuals who do not necessarily need to be there.

Mr. MCCOLLUM. One last question. How do you define or consider a violent criminal? What is that, a person who commits a crime with a gun, or who is a violent criminal?

Ms. HAWK. We use a relatively liberal definition, so anyone who has a weapon, even if the weapon is not used actively in the offense; anyone who perpetrates physical action that is assaultive, and anyone who comments a crime against a person, or even makes a threat of damage to the individual, is considered a violent criminal, such as in robberies where they would threaten the individual. We use a pretty broad definition.

Mr. MCCOLLUM. And all of those would probably be those we should consider incapacitation for, and that is the lengthier sentence?

Ms. HAWK. Yes.

Mr. MCCOLLUM. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman.

This is a very important subject for us to deal with, because we who make the public policy of this country have created a screw-up. We have mandated one set of policies, and we have refused to provide the money to carry them out, and the result is some very unfortunate consequences which I believe we are obligated to straighten out. Either we change the policy or we put up the money, because the effects that the current mismatch has are, I think, worse than many of the things or as bad as many of the things we try to deter.

I also think it is important not to kid ourselves. I have yet to see the area of public policy where we could save a lot of money by doing exactly what we were doing better. People don't intentionally waste money. People who say, "Oh, we can continue to do everything we are doing, we will just be more efficient and we'll save vast amounts of money," have never, in my experience, been correct, especially when we are dealing with something as complicated as locking up bad people. This is not a neat business, this is an inherently messy and difficult business, it is one of those areas where Government has to step in because it is very difficult, it is the part the private sector, quite sensibly, doesn't look at. It is never going to be done with great neatness.

What that means is, either we provide a substantially greater amount of money for the prison system and all of the accoutrements, which would seem to me to be very hard and which would come out of other needs which are quite pressing, or we

change the public policy, and, again, I think there is a very heavy burden on anyone who tells us we can maintain the current set of public policies and finances and just do it better. That is much more easily said than done.

The one area of public policy, it seems to me, we ought to be looking at—and I was pleased I had a chance to look through Mr. Carlson's testimony—is to deal with the extent to which we lock up people for long periods of time because they have sold small quantities of drugs. I think that is one of the areas that has got to give. I think there are some others. I will pursue this in other areas.

I am personally convinced from intuitive thought and conversations I have had with people that one of the greatest wastes of money right now in this country is the effort in this very large country, with a very free economy, with an enormous amount of goods coming in physically, and an enormous amount of people coming in physically, the notion that we can physically prevent something that is as valuable in small quantities as drugs from physically coming into this country. I think it is just the worst kind of wishful thinking that costs us a lot of money that goes elsewhere.

Let's talk here about the extent to which we incarcerate people. I honestly believe if we said to the police and the armed services and everybody else, "We do not want to see another horse coming into America," being as good as they are, they could probably cut the number of horses smuggled in here to less than 90 percent of the current total. As the entity gets smaller, their ability to keep it out of here diminishes far more, and I think by the time you get to powder it is about nonexistent.

But with regard to the people we lock up, I gather there is a consensus that the greatest increase in the prison population has come from increased prison sentences both as to number of sentences and length of sentence for people involved in selling drugs. Is that correct?

Ms. HAWK. Yes, sir.

Mr. FRANK. Do you have an idea of the percentage that that now is compared to, say, what it was 20 years ago?

Ms. HAWK. Sixty percent of our current population is confined for drug offenses. In 1980, that was 25 percent.

Mr. FRANK. And, of course, that is 60 percent of a much larger number of people.

Ms. HAWK. Yes.

Mr. FRANK. What percent of that 60 percent were in any way involved in violent crimes? And using the liberal definition of violent crime that you gave to Mr. McCollum, which may be the only liberal definition he approves of.

Ms. HAWK. It is roughly 40 or 50 percent of that group would be—

Mr. FRANK. In violent crimes.

Ms. HAWK. In violent crimes.

Mr. FRANK. So about 30 percent of the population then—let's take your high end figure of 50 percent in the violent crimes. That would mean 30 percent of this expanded population are people who have been convicted of nonviolent drug offenses.

Ms. HAWK. Yes.

Mr. FRANK. Are there any significant number of people in there—I mean there could always been one or two—but how many people are in there solely for possession and use? Are there any in there solely for possession and use?

Ms. HAWK. In the Federal system, we end up with a very small percentage of inmates convicted for simply possession and use. Most of those end up in State facilities.

Mr. FRANK. But there would be some?

Ms. HAWK. Some, but very, very few.

Mr. FRANK. OK. So these others were people who were presumably involved in sale?

Ms. HAWK. Trafficking and sale.

Mr. FRANK. What is trafficking besides sale? Transporting?

Ms. HAWK. Transporting, right. Many that we receive are those who are transporting it into the country.

Mr. FRANK. I am told by people who are experts at this some traffickers, obviously, are people who make a nice living of this, but a substantial number of people who get arrested for trafficking, I am told, are people who are themselves users, who are involved in trafficking at least in part to finance their own use. Have you any idea what percentage would be involved there?

Ms. HAWK. Thirty percent of those 60 percent who are with us for drug offenses actually have a drug abuse problem.

Mr. FRANK. Are they more or less likely to be in the violent offense category?

Ms. HAWK. No, not necessarily; no.

Mr. FRANK. That doesn't cut.

Among the users, they are then more likely to be people whose trafficking was presumably in part related to their own need to finance what they were doing.

Ms. HAWK. We assume that in most cases, yes.

Mr. FRANK. And where are we now in terms of the number of people who are users in the Federal prisons who are getting treatment? I know our colleague, Mr. Schumer, has pushed hard on this. What is the number of people who are users who are now in prison? And I assume some of the people who are in for other offenses are also users.

Ms. HAWK. Right.

Mr. FRANK. But what is the percentage of people who have a drug habit who are in Federal prison who are getting treatment of any kind?

Ms. HAWK. We are touching roughly 23,000 inmates annually in some form of drug abuse education or treatment. We have right now approximately 2,900 beds in inpatient—

Mr. FRANK. What percentage would the 13,000 be?

Ms. HAWK. What is 13,000 of 76,000?

Mr. FRANK. About a fifth. Less than 20 percent, so it is about 17 or 18 percent.

Ms. HAWK. But it is important to keep in mind that many of those individuals are doing very long sentences, so we would not be treating them all at the same time. Once they receive the treatment program of 9 months to a year, we continue a transition type of program with them after they have completed the program. But

many of them will complete the program and not be released for 7, 9, 15 years, depending upon their length of sentences.

Mr. FRANK. If someone is in there as a user, and that has presumably contributed to the circumstances that led to his or her—mostly his—incarceration, if that individual successfully completes a treatment program and a certain period of time goes by in which you can certify that the treatment program seems to have taken—and I realize it doesn't always—does that enter into at all, under our current law, whether or not that person gets released?

Ms. HAWK. No, it does not.

Mr. FRANK. Because of the mandatory minimums. I mean, you go in as a user; that was part of your problem; you have completed the treatment; you are now drug free; you appear to be very good. But, under the current law, that is irrelevant to whether or not you get out?

Ms. HAWK. Right. It used to affect terms of parole when we had parole available to us, but once we lost that and the sentences are now fixed, it does not affect it.

One of the strategies that we had in our prepared testimony was the possibility of looking at increased good time allowance for those individuals who got involved in programs that could help them make a better adjustment, one of which would be drug abuse treatment. That is one strategy.

Mr. FRANK. Do you need a statutory change for that?

Ms. HAWK. Yes, we do.

Mr. FRANK. Because of where we are.

I thank you, Mr. Chairman. I think the case is pretty clear.

Mr. HUGHES. The gentleman from Oklahoma.

Mr. SYNAR. Thank you, Mr. Chairman.

Just a couple of questions, Ms. Hawk. Of the 60 percent of the prison population that are incarcerated for drug offenses, how many of them are first-time offenders?

Ms. HAWK. Fifty percent.

Mr. SYNAR. Fifty percent of that 60 percent are first-time offenders?

Ms. HAWK. Yes.

Mr. SYNAR. And what is the average age of the prison population in that category of 60 percent drug offenders?

Ms. HAWK. The average age of the total prison population is roughly 37 years. It would be somewhat younger, but not significantly younger, for the drug offense population.

Mr. SYNAR. It doesn't have any female or male characteristics? Is it balanced?

Ms. HAWK. Actually, the number of women coming into our system has increased at a faster rate than the number of males coming, although our female population is still only 7.7 percent of the total. But the increase has been most dramatic with the females, and many of those are low-level drug offenders who have been mules or carriers and are under the mandatory minimum umbrella.

Mr. SYNAR. Did I understand correctly that there is not a requirement that you be drug free to leave prison?

Ms. HAWK. They must be drug free because we do testing repeatedly on all inmates throughout our prison system, and drugs are

not allowed into our institutions. Sometimes they do manage to smuggle them in, but we do frequent drug testing and sanction any individuals who test positive for drug use. Our hit rate in terms of positives on random testing is less than 2 percent on an annual basis among the inmate population.

I believe the question was: Do they have to have successfully completed a drug abuse treatment program? The answer is no, they don't have to have successfully completed a treatment program to be released, but they would be drug free.

Mr. SYNAR. If my mandatory sentence has run out and I test the day before I am to go out as drug positive, would that keep me in?

Ms. HAWK. The only way it could keep you in would be if we took away some of the good time, if we did not award your good time for that year, because we can only take away the 54 days that you would earn in a year. Once the year is completed, that time is vested under the current good-time regulation.

Mr. SYNAR. So back to my original question: You do not have to be drug free to be released if you have completed your sentence?

Ms. HAWK. That is right.

Mr. SYNAR. OK. In 1980 we had 24,500 in prison; 41,500 in 1986; and today we have roughly 76,000 plus 8,200 under contract. That is about a 3½-fold increase in 10 years, or 12 years. Do we have less crime in the United States because of that?

Ms. HAWK. It would depend somewhat on whose measure you look at. A recent FBI measure indicated that the crime rate actually decreased between 1991 and 1992. But if you look at the violent crime rate over time, which I think is a more definitive description of the crime rate, it is significantly higher than it has been in years past.

Mr. SYNAR. So the argument could be made that the mandatory sentences have not been a very strong deterrent to crime, have they?

Ms. HAWK. That argument could be made, yes.

Mr. SYNAR. One final question. There are a number of communities in my district that know that the present fiscal budget has \$1.8 billion in it for prisons and that by the year 1997 the operating budget would have to be about \$3.6 billion to take care of the increased population. These communities are interested in maybe siting a prison in their area. However, they were told by prison officials that it is one of the policies of the Federal Bureau of Prisons to site prisons where the crime rate is the greatest.

Now that is not to suggest, I hope, that we have to increase the crime rate in Oklahoma to move to the head of the list, is it?

Ms. HAWK. No, sir. As I believe you know, we have an institution already in Oklahoma, and we are also building our new prisoner transport center at the Oklahoma City Airport.

Mr. SYNAR. If it is still there after the flood, because it was 5 feet under water when I left it on Saturday.

Ms. HAWK. I didn't realize that.

But what we try to do is, because integration back into the community upon release is such a critical part in determining whether or not an individual is going to stay crime free, we try to make sure they are able to retain their contacts with their families and whatever support groups they have in their home communities. We try

to keep inmates within 500 miles of their release destination, and so that is considered in where we site our institutions.

Mr. SYNAR. So there is some truth to the fact that the higher crime rates of the country are going to enjoy the greatest prison building program.

Ms. HAWK. Yes, there is. Some of the communities wouldn't call that "enjoy," though. I mean some communities don't particularly want us in populous urban centers.

Mr. SYNAR. Four hundred permanent Federal paying jobs in an economic time like this would be enjoyed by most communities.

Thank you, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

The gentleman from California, Mr. Becerra, who, I might say, is back with us after having their first child, a daughter, I believe, and we offer our congratulations.

Mr. BECERRA. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman is recognized.

Mr. BECERRA. Thank you very much.

I wasn't able to listen to all the testimony, I apologize for that, but I did have a chance to read over your written testimony, and I just have a couple of questions. Most of them have been answered. With regard to drug treatment and rehabilitation, do we find that the Federal prison system has enough resources to really address the needs of the inmates with addictions?

Ms. HAWK. Right now, we believe we have adequate resources to treat those inmates with drug abuse problems who want treatment. One of the dilemmas we are dealing with in a prison setting is that most individuals, once they come to prison, feel that their drug abuse problems are over because they can't get to the drugs in prison, and they are really not interested in treatment.

Our major initiative right now is to try to educate them on drug problems and motivate them to get involved.

We anticipate having all of our residential drug treatment beds filled by late summer of this year. Once we achieve that, if our population continues to go up, then our resources will probably not stretch far enough to cover all of those who have drug abuse problems and seek treatment.

Mr. BECERRA. Does the system provide any type of priority for someone with a short sentence, versus a long-term prisoner when it comes to drug rehabilitation?

Ms. HAWK. Yes, we do. We try to give first priority to those individuals who are nearing release, because the feeling is that that is the best time, near when they are going to be reentering their communities. That would obviously then give priority to those with shorter sentences.

Now some inmates are not in prison long enough—our programs are 9 months and 12 months for the residential programs, so far. Those individuals that get less than a 9- or 12-month sentence or for some reason need to be at an institution without a residential program, we do provide outpatient drug treatment counseling and get them involved in some of the self-help groups that would be available to them when they return to their communities.

Mr. BECERRA. Let me switch now to the issue of the noncitizen prisoner. What would you say is the average profile of the noncitizen prison population?

Ms. HAWK. Many of those fall into the relatively low-level drug offender category that we have been discussing. They obviously come in all kinds of shapes and sizes and with all kinds of offenses. But there is a sizable proportion of those who do fall into the lower level drug offender category who are involved in trafficking drugs into the country and are arrested in that process.

Mr. BECERRA. So we are talking about the carrier perhaps, the "mule," as they call them?

Ms. HAWK. Many of them are, yes.

Mr. BECERRA. OK. Is there any indication as to where most of these criminal noncitizens come from? Is it the border countries, or is it in some cases from places like Colombia or perhaps Turkey and other far-out places as well?

Ms. HAWK. Most of them today are coming from Colombia, Mexico, and Cuba. We also are getting a larger number from Nigeria—actually, when we get the inmates they claim Nigeria, although they may be from many of the countries surrounding Nigeria—and also more from the Mideast. But the largest percentages are Colombian, Mexican, and Cuban.

Mr. BECERRA. Does it appear that some of these prisoners really are just, as we have just described them, "mules," and nothing more within the system of the drug cartels and distribution of drugs?

Ms. HAWK. Obviously, we have received some individuals from the drug cartels who are the high-level individuals, all the way down to medium-levels, but, again, a fairly sizable percentage of the alien population are the lower level drug traffickers.

Mr. BECERRA. Is there a way to quantify the percentage of those noncitizen criminals who are in Federal prisons who are also drug abusers?

Ms. HAWK. There is a way to quantify that. I don't have that information with me. We will be very happy to submit it for the record.

Mr. BECERRA. Any ideas as you sit here today as to how many might be drug abusers?

Ms. HAWK. Our head of research, who knows all the numbers, is telling me it would be a lower percentage than the 30 percent that we say is existing in our regular population. It would be less than a 30-percent figure for the aliens.

Mr. BECERRA. Now in terms of nonviolent offenders, how would you quantify the noncitizen criminal that is in our Federal prisons?

Ms. HAWK. Again, the majority would be less violent. Obviously, there are some on the other end who are the very violent drug cartel members, but the majority of them would be nonviolent.

Mr. BECERRA. Give me your impressions or an idea of this type of prisoner. It seems to me that we have in some cases noncitizens who are deeply involved in drug trafficking and very much have a stake in successfully trafficking drugs into the United States because they stand to profit quite a bit from it. But there are also those who seem to be doing it because they get a little bit of money

because they are the mules and take the risk and they happen to get caught.

I am trying to get a sense for—of those that we house, how many of them are really violent? How many of them are out there doing this type of damage to people who are drug abusers with the full intention and knowledge that what they are doing is terribly wrong? Versus, those who are doing this, unfortunately, although they know they are doing something wrong, they see it as their way of making some money?

Ms. HAWK. Again, I don't have the specific numbers, and we can submit those for the record. I do know that a sizable portion of the 26 percent of noncitizen individuals that we have are nonviolent, low-level drug traffickers.

Mr. BECERRA. I missed the testimony with regard to deportation. What is the possibility of deporting some of these prisoners, especially the nonviolent prisoners?

Ms. HAWK. Most of these are eventually deported. The problem is, they cannot be deported until they have served the entirety of their sentences under current statutes. One of the options that is being explored is some way to perhaps deport them without them having to serve the total length of their sentences or some variation there of.

Mr. BECERRA. Do you feel comfortable that if we could devise a method to deport more expeditiously those noncitizen prisoners, that we could devise a way to find out who are the violent, and who are the nonviolent prisoners, so we know, when we are deporting someone, we are not putting a violent person out on the streets again?

Ms. HAWK. Our limitation is that we would only have available to us their criminal records in this country. We rarely have access to records from other countries. So our knowledge of their histories is oftentimes limited.

Mr. BECERRA. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman's time has expired.

The gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Chairman, and I salute you again on an excellent hearing, which I gather from your statement is one of others which you will have.

Unfortunately, I was not able to be here from the start, Ms. Hawk, but I commend you and wish you well on your work.

I have just two questions. One is, I read where Ms. Reno, the Attorney General, has indicated that her view about handling drugs and sentencing for drugs is different than in the previous administration. Her emphasis will be more not on interdiction and interruption of the supply as much as trying to treat people—drug abuse training, treatment, education. My question is: Do we run anything like that in the Federal prisons?

Ms. HAWK. In terms of drug treatment and education?

Mr. MAZZOLI. Yes.

Ms. HAWK. Yes, we do. We have spent a lot of time and energy over the last several years. We have always been involved in drug treatment historically.

Mr. MAZZOLI. In all your facilities, or are they a selected few?

Ms. HAWK. In the last several years, we have redefined what drug treatment is and how to make it work. We currently have available in every one of our institutions drug education, a 40-hour drug education program for all new inmates if they have any history of drug use. The program helps to screen out those who have serious problems, but it also motivates inmates and encourages them to get involved in drug treatment beyond just the education.

We then have available in 31 of our institutions a residential treatment program that varies in length from 9 months to 12 months, and the individuals who have a severe to moderate drug abuse problem are encouraged to get involved in that program.

Mr. MAZZOLI. You said 31. How many total do you have? I should know that but don't.

Ms. HAWK. We have, totally, a little over 2,900 beds in inpatient.

Mr. MAZZOLI. No, no. Total number of facilities.

Ms. HAWK. Oh, institutions, I'm sorry. Seventy-two right now.

Mr. MAZZOLI. So 31 of 72 offer this more extensive residential program.

Ms. HAWK. Right. We also have outpatient treatment available in the institutions that do not have the inpatient program.

Mr. MAZZOLI. Outpatient treatment for people who have been released or paroled?

Ms. HAWK. They are drug abusers within our institutions, but they are not in a residential, therapeutic community.

Mr. MAZZOLI. OK. So in this case, there are special beds and they live in a special area of the prison.

Ms. HAWK. Yes.

Mr. MAZZOLI. But also, in some cases, the other facilities have programs where a person in the mainstream of the prison population can plug into some kind of a program.

Ms. HAWK. Yes, sir.

Mr. MAZZOLI. So everyone, who has any kind of evidence of drug problems, has at least that 40 hours, and that is in every one of your facilities. And you have 31 facilities for those who have specific troubles, screen for that so they can enter this residential program of 9 to 12 months.

Do you have any data as to recidivism of those who have taken this program here, the residential program?

Ms. HAWK. For our new program which has been in effect since 1989, we do not yet have data. We have an agreement with NIDA, the National Institute of Drug Abuse, which is working with us to do a major study on the effects of this drug abuse treatment on the inmates.

When we look back at our old drug abuse programs that we had, there was not one single, consistent, therapeutic model, and the effect on recidivism was not significant at all. But we are more hopeful with this program; it is designed to be state of the art. It is going to have a major component that reintegrates the inmate into the community in a way that our old programs did not, and that has been found to be a critical factor—transitioning the drug treatment with them into the community.

Mr. MAZZOLI. You anticipated the next area of inquiry. Most of us believe that, unless a program follows that individual into his or her hometown, the mean streets that some come from, and, fur-

thermore, unless that person wants to be part of that program—it works both ways. Whatever you do in prison probably is not going to have a really lasting effect on large numbers of your people. So that is where, of course, the money comes in and the programming.

Would you, in your planning, have any contact with those prisoners once they are out of your system, or would you just put them over and not hear back from them?

Ms. HAWK. The evaluation program that I mentioned that we are doing in concert with NIDA will be tracking these inmates back into the community to measure whether or not they are remaining drug free. When we hand them over into the community, they are generally handed over either to a halfway house facility where drug treatment is available or to the Probation Service for continued supervision where drug treatment is required. In most cases there is some connection with them in the community.

Mr. MAZZOLI. Since your program went into effect in 1989, and we are now 4 years later, and you say you have no data, what is the problem?

Ms. HAWK. The data are beginning to come in, but since most of these individuals, as I mentioned earlier, are looking at long sentences, we are not necessarily able to release them as soon as they complete the program. It is really going to take a few years to get enough releasing—

Mr. MAZZOLI. So you haven't had that many releases.

Ms. HAWK. Yes.

Mr. MAZZOLI. Can you tell anything from your prison population and their problems, whether they persist after the 12 months they have been in a residential program?

Ms. HAWK. One of the things that we are finding that I think speaks very positively of the program is, initially I had indicated we are having difficulty getting inmates to volunteer for drug treatment because they think they don't have a problem any more. Our biggest sales pitch now comes from inmates who are coming out of the program or those who are part way through the program. They are feeling so positively about it even though they are not going to get released earlier—there is no more parole, they are not getting extra good time for it—they are so positively motivated by the benefits of the program, they are selling the program to the other inmates, and we are finding more and more inmates engaging in it as a result.

Mr. MAZZOLI. Let me wind up, Mr. Chairman, by following up on some questions opened by my colleague from California, Mr. Becerra. The question is on quantifying your prison population based on the so-called low-level mules, whether they are U.S. citizens or whether they are non-U.S. citizen mules and high-level drug dealers and kingpins.

I have a certain queasiness about the debate that is beginning, which will be continued by Mr. Carlson later this morning, on this whole question of mandatory minimums and sentencing guidelines. I think that we may be dismissing them too quickly out of hand in view of what they have succeeded in doing, which is putting behind bars people who deserve nothing better than to be behind bars.

At the same time, no one of us wants to put the wrong person behind bars or keep that person there for long periods of time. If we can apply some legislative wisdom to this task, we will certainly try to do it.

But I am just curious as to why you don't have with you today some of those numbers. Would they not have been pretty normal to bring to this kind of hearing, given the fact that your own statement talks about mandatory minimums?

Ms. HAWK. Right. I have available the number of individuals that fall into that category who are first-time offenders, and that was 50 percent. The problem is, where do you draw the line to determine who is a high-level or low-level offender? At the request of the Attorney General, we drew one line at what we felt was a reasonable point which was a high-level or low-level offender, and we determined that there were roughly, as I indicated earlier, 3 percent of our current population who could be immediately divertible, and that would also apply to 10 percent of all the new inmates coming in each year.

That line, though, could be drawn really anywhere across the spectrum in terms of what constitutes higher-level or lower-level amounts.

Mr. MAZZOLI. I wasn't here, I guess, at the time. What was that distinction that you drew?

Ms. HAWK. I would like to ask either Tom or Gerry to give the criteria.

Mr. MAZZOLI. OK—unless, Mr. Chairman, this has already been covered.

Ms. HAWK. The criteria have not been stated, no.

Mr. HUGHES. The criteria have not been.

Tom Kane.

Mr. KANE. Yes, Mr. Mazzoli, when we walked through the hypothetical exercise of identifying a subgroup of our population that might be divertible to some other kind of sanction, as the Director described earlier, we looked at two groups of inmates basically. One were drug offenders; the other were white-collar criminals including property offenders, individuals who had violated fraud laws, income tax evaders, and perpetrators of embezzlement, forgery, and counterfeiting.

When we first looked at the drug offenders, the total number of drug offenders in the population was 39,508. After eliminating those who have either a history of violence or violence in their current offense, those who have a criminal history that is relatively substantial, and those whose offense involved a substantial amount of drugs or a high property value, only 1,164 remained. That is about 3 percent of the drug offenders. Looking at the property offenders, the total was—

Mr. MAZZOLI. Can I go back to that just a second? So you are saying that with a 39,508 population, taking away those who are prone to violence, you came up with only 1,164 people who would then not have had some activity of violence?

Ms. HAWK. That is, again, based upon the line that we drew of how much constitutes a significant amount of drugs.

Mr. FRANK. Would the gentleman yield for a second on that?

Mr. MAZZOLI. Yes.

Mr. FRANK. I think he is at a very important point, but I may have misunderstood.

You had two categories of violence that you screened out but one prior criminal history which might also have been nonviolent. So I am not sure that—

Mr. KANE. No. History of violence included both prior criminal history and instant offense.

Mr. MAZZOLI. So in either case violence was involved.

Mr. FRANK. If you exclude violence, what do you get it down to in those two categories?

Mr. KANE. After you eliminate those who have a history of violence and who have a substantial criminal history, and a significant amount of drugs or property involved in the instant offense, then you are down to 1,164.

Mr. FRANK. Yes, but that is my question. Does a substantial criminal history always include violence, or could a substantial criminal history have been an identical prior nonviolent drug offense?

Mr. KANE. It could also include prior nonviolent drug offenses.

Let me tell you what the cutoffs are for prior drug offenses that did not necessarily include any violence but involved these amounts of drugs: 400 grams of cocaine or more, 1 gram of crack, 80 grams of heroin, 25 kilos of marijuana.

Mr. FRANK. Those are alternatives?

Mr. KANE. The threshold.

Mr. FRANK. So they might have been there for 1 gram of crack with no violence.

Mr. KANE. They could be, that is correct.

Now, as the Director said, we had to pick a line somewhere.

Mr. FRANK. I am not criticizing your lines—I appreciate the gentleman giving me the time—but I think a misleading impression was inadvertently created that if you got away with violence you were down to over 1,000, because it does seem to be—I mean having a gram of crack is not cause for joy, but it is not violent either, so I think there was a mistake in the way I heard that.

Mr. MAZZOLI. I appreciate what my friend is saying, but what I believe the gentleman is saying is that you are talking about 25 kilos of something, or 400 grams—

Mr. FRANK. Only 1 gram of crack.

Mr. MAZZOLI [continuing]. One gram of crack, 8 pounds of something else. You are talking about nothing for personal use. These were all people who were involved in it for dealing and grabbing somebody else and putting that somebody else in a position of committing violent crime to feed their habit.

Mr. KANE. That is correct. Drug offenders were considered divertable if their drug quantities were less than 400 grams of cocaine, 25 kilograms of marijuana, 80 grams of heroin, or 1 gram of crack.

Mr. MAZZOLI. You are not talking about exactly choirboys, to say the least.

Mr. HUGHES. The gentleman's time has expired.

Mr. MAZZOLI. Then let me just ask, Mr. Chairman, for the record, if they could supply, an answer to my friend from Massachusetts and my question. How many of this 39,500 fit in the category of

previous crimes, perhaps of nonviolence, involving large drug activities and how many had violence in their backgrounds, because the total of both of them equals 1,164?

I would say just finally, that it does surprise me because the current lingua franca is that our jails are just full of these nice, decent people who just happen to be muling for somebody else. That is not exactly the case. So we don't want to be opening our doors because of changes to sentencing guidelines or because of mandatory minimums which would result in having a bunch of these folks out there. So we have to be careful in what we do to calibrate this system.

Ms. HAWK. Absolutely.

Mr. MAZZOLI. OK. Thank you.

[The information follows:]

**OFFENDERS CURRENTLY IN THE INMATE POPULATION WHO MAY
QUALIFY FOR DIVERSION**

	Drug
Number in Current Population...	39,508
Number Excluding Violent Offenders	16,744
Number "Divertable"... (See note below)	1,164
Percent "Divertable"...	2.9%

Drug offenders were considered "divertable" if their drug quantities were less than 400 grams of cocaine, 25 kilograms of marihuana, 80 grams of heroin, or 1 gram of cocaine base ("crack").

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman's time has expired, and of course that is precisely why we are conducting these oversight hearings. I think it is important for us to take testimony today, and in the future, that lays out all the numbers so we know exactly what the profile is of our inmate population, how much it is costing us, what is happening at the front end and the back end of the system, so that we can develop policies that are rational and make sense.

Nobody is suggesting any solutions yet because, frankly, we need to learn a lot more about what is happening in the system before we decide, you know, what we want to do with it.

I might say that you have a series of graphs that are hypothetical adjustments for good time, making good time retroactive, and I would call that to the attention of my colleagues. Many, I am sure, have already looked at those graphs, but they are very instructive on what we can do, but in many instances it doesn't make very much of a dent in the inmate population; you know, we can slow the growth.

But instead of asking you to go through the various graphs, they are available to the members, and I would suggest the members take a look at those graphs.

Also, just on a point of clarification for the record, and that is, even though we have over 3,000 beds for detoxification programs, we do not provide all the drug treatment that is needed in the system today.

Ms. HAWK. No.

Mr. HUGHES. No. We don't have the resources, we don't have the beds, and that is an important consideration. Here we have a system that works fairly well. I think the Federal Bureau of Prisons has to be commended for developing their system of education, which is one program, and, the detoxification program which is another, but we are not reaching the universe of inmates that need it. We know that when we cut them loose after they have served their sentence, if they have drug problems, the likelihood is, they are going to be another recidivist, back in the system.

Mr. MAZZOLI. Mr. Chairman, would the gentleman yield just for one second?

Mr. HUGHES. Mr. Mazzoli.

Mr. MAZZOLI. We were talking with your colleague, Ms. Hawk, about the drug offenders. The second category was white collar, and you talked about IRS tax violations, fraud, counterfeiting. If you have some numbers on those cases, because, again, I have a little trouble with the impact of what we would do if we were to all of a sudden clear out our Federal prisons of all white-collar people because they happen not to be violent. We may not be making a very important social statement, but I would love to know what the numbers are there too.

Mr. HUGHES. The gentleman will have an opportunity because, instead of going to a second round, we have developed the consensus that it would just take too much time. We are very happy that we had so many of our colleagues out today, but we have been at it now for 2 hours, and we are going to give you some R and R.

But I am going to leave the record open for questions from the members. I have about 20 questions I would like to direct to the

Director and staff. We will submit those in writing to the Director and ask if you would respond within 10 days to the questions, if possible, and we thank you very much.

[The additional questions and answers appear as appendixes 1 and 2.]

Ms. HAWK. If I could offer, Mr. Chairman, we can count these numbers any way you wish. If you would want us to include violent offenders, nonviolent offenders, or break it down by amount of drugs, etc., we can cut it any way you would like us to. If the questions could specify those kinds of cuts we would be very happy to respond.

Mr. HUGHES. Thank you very much, Director Hawk. It has been a very, very good hearing, and we appreciate your contributions this morning, and, frankly, we are very proud, really, of the work that the Federal Bureau of Prisons does.

I just visited Fairton, which is in my district, during Federal National Correctional Workers Week, and, frankly, Warden Cooksey and the other institutions I visited really do a very good job. We still have a lot to learn, I am sure, from what the States are doing, but, by the same token, we have provided tremendous leadership at the Federal level, and I congratulate the Bureau on their forward-looking, visionary leadership in the area of penology.

Ms. HAWK. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you very much.

The next witnesses include a panel consisting of Mr. Norman Carlson and Mr. Todd Clear. Mr. Carlson, as we all know, is no stranger to this subcommittee, having testified before my predecessor a number of times. He was the fourth Director of the Federal Bureau of Prisons and served in that capacity for some 17 years. He retired from the Bureau of Prisons in 1987.

Mr. Carlson began his career with the Federal Bureau of Prisons in 1957 after receiving his M.A. degree in criminology from the University of Iowa in 1957. He has had extensive experience in all aspects of correctional administration, including being named as a delegate to the United Nations Committee on Crime Prevention and Control and chairman of the Prevention of Crime and Treatment of Offenders in 1975. He also served as the president of the American Correctional Association from 1978 to 1980. He continues to be involved in various correctional organizations and is currently a senior lecturer at the Department of Sociology at the University of Minnesota.

Mr. Clear is a professor and faculty chair at the School of Criminal Justice at Rutgers University, my alma mater I might say. He holds a Ph.D. in criminal justice from the University of Albany. He is an author of numerous works on corrections policy and has worked extensively throughout the United States and in several other countries.

In 1986, Professor Clear received the Cincinnati Award of the American Probation and Parole Association for his research on supervision technologies. During my tenure as chairman of the Subcommittee on Crime, Professor Clear testified before the subcommittee on the issue of correctional options.

Professor Clear, it is good to see you once again. I welcome you and Director Carlson, now Professor Carlson, to today's hearing.

We have your statements, which, again, are excellent and very comprehensive, and, without objection, they will be made a part of the record in full, but we would like you to summarize for us, if you could, since we have read your statements, and we can get right to questions.

Why don't we begin with you, Professor Carlson. Welcome.

STATEMENT OF NORMAN A. CARLSON, FORMER DIRECTOR, BUREAU OF PRISONS, AND SENIOR LECTURER, DEPARTMENT OF SOCIOLOGY, UNIVERSITY OF MINNESOTA, STILLWATER, MN

Mr. CARLSON. Thank you very much, Mr. Chairman. It is good to be back before the committee once again and renew acquaintances that go back many years.

I first of all want to compliment Kathy Hawk, the new Director of the Bureau of Prisons. I couldn't think of a better person in the organization that I left some 6 years ago to take over than Ms. Hawk. She is an outstanding individual, and I know she looks forward to a long working relationship with this committee. I commend the decision to appoint her to the position of Director.

Let me try to put these numbers in a context that I can relate to. I retired 6 years ago. At that time, there were 43,500 Federal offenders. Today the number is 76,000. Despite the fact that Congress has appropriated over \$3.2 billion to add 50,000 new beds, the system is more overcrowded today than when I retired. What, to me, is even more frightening is the fact that unless something is done in terms of public policy, the number of Federal prisoners will exceed 116,000 in just 6 more years, by 1999. To me, that is a startling figure. I think it illustrates the point Congressman Frank made that public policy has to be revisited in some of these important areas or we are going to find ourselves behind the eight ball in terms of the amount of money required to operate Federal prisons.

Without question, the population explosion, as we have already discussed this morning, has resulted from two actions of the Congress: one, the minimum mandatory sentence laws, particularly for drug offenders; and, two, sentencing guidelines promulgated by the U.S. Sentencing Commission.

The two acts working together have served to do two things. First, they have substantially reduced the number of people placed on probation by Federal judges; that number has decreased dramatically so those individuals are now coming to prison when they are sentenced; and, second, it has increased dramatically the length of sentence drug offenders serve when they are in prison. So you have two things working together: more people coming in at the front end and, once they get there, serving longer periods of time because of the operation of the sentencing system.

As you have discussed with Director Hawk and others, today most of the Federal prisoners are drug offenders; drug law violators are now over 60 percent of the total Federal prison population, and over half of that number are serving their first sentence—in other words, their first major period of incarceration. In addition, 60 percent of the total number of drug offenders, as I understand it, under the U.S. Sentencing Commission guideline system, fall into

the lowest offense category. They categorize offenders according to the risk they present in terms of their prior criminal records, and 60 percent of all the drug violators fall into the lowest level of the Sentencing Commission's scale, which I think says something in terms of the type of offenders that are being committed. Not all offenders, but certainly there are some being committed who may well present a rather low-level risk to society.

I want to focus particularly on minimum mandatory sentences, as I have in my statement. To me, that is one point that should be addressed by this committee and by the Congress. I understand the public's support for the notion that certainty of punishment is going to have dramatic impacts on crime rates across the country, but, to me, minimum mandatory sentences are based on several faulty assumptions.

First, all offenders are not alike. Some are serious offenders and ought to be locked up for long periods of time. They are predators, and I have no hesitancy to suggest that they ought to be confined for incapacitation purposes. But there are other offenders who are not like that, who are not predatory and do not constitute a serious threat. To have them lumped together under a minimum mandatory sentencing statute, to me, makes no sense.

Point number two is that all crimes are not alike. Even though the statute that has been violated may be the same as the next offender, there are differences in crimes. Some are much more serious to society and to the public than are others. I think, again, minimum mandatory sentencing is based on a faulty assumption that all crimes are necessarily alike in terms of the threat they present.

The third point I would make, to my knowledge, there is no empirical evidence that the possibility of a lengthy period of incarceration under a minimum mandatory statute has any deterrent effect on individuals in the community. I think there is deterrence in terms of certainty of apprehension, certainty of punishment. As to the fact that there is a lengthy minimum mandatory, I find no evidence in the literature to suggest that it provides a deterrent effect.

What I am suggesting in my statement, as you may have noticed, is that the committee reconsider minimum mandatory sentences. There are faulty assumptions that have been made, and I think that reconsideration would go a long way to weed out some of the low-risk offenders that could be handled in a more cost-effective way in terms of the taxpayer.

The second point I make in my statement concerns the 26 percent of the Federal prison population who are non-U.S. citizens. This has been discussed previously. Some of these undoubtedly are major drug traffickers, and for that group I have no hesitancy at all, they ought to be in prison for long periods of time.

But to me it makes little sense to take a low-level, low-risk "mule" who is bringing drugs into this country for payment, an airplane ticket and \$1,000 for example, and lock them up for 5, 10, 15, or 20 years under the minimum mandatory statute at a cost to the taxpayer of \$20,000 per year. I think we can find a better way to deal with the low-risk offenders, and I support the committee's concerns in this area. Congressman Moorhead and Congressman McCollum, I understand, have introduced H.R. 1459, the Alien De-

portation Act of 1993, which to me is a step in the right direction. I certainly would hope that the Congress would enact such legislation because it would impact not only on the Federal system but also would dramatically impact on many of the State prison systems which have an identical problem with non-U.S. citizens backing up and causing immense problems in terms of population pressure.

That concludes a very brief summary, Mr. Chairman. I would be happy to answer any questions now or after Professor Clear has given his presentation.

Mr. HUGHES. Thank you, Mr. Carlson.

[The prepared statement of Mr. Carlson follows:]

Mr. Chairman; members of the Committee:

It's a pleasure for me to appear before you once again. During my tenure as Director of the Federal Bureau of Prisons, I had an opportunity to testify before this committee on a regular basis and discuss a number of legislative and oversight issues. I want to again express appreciation for the support, assistance and encouragement you provided during those years.

While I've been retired for nearly six years, I continue to be an interested observer of the Federal criminal justice system. My interest relates in part to the fact that I teach in the area of criminal justice at the University of Minnesota. In addition, I have strong attachments to the men and women who are employed by in the Department of Justice--both in the Bureau of Prisons as well as the other divisions and agencies. They are, in my opinion, an exceptionally talented and dedicated group of public servants--a group that I am proud to have been associated with during my 30 year career.

Since retiring, my only official contact with the federal system occurred during 1989 and 1990 when I Chaired an Advisory Group established by the United States Sentencing Commission to explore the possibility of expanding intermediate punishments for federal offenders. In connection with that assignment, I had an opportunity to become familiar with the effect Sentencing

Guidelines and Minimum-Mandatory sentences are having on the system. In addition to reviewing available data concerning those initiatives, I learned of their human impact and the tremendous frustration that is experienced by prosecutors, Federal Judges, U.S. Probation Officers and the staff of the Bureau of Prisons because of the absence of discretion in sentencing.

I don't have to tell you, Mr. Chairman, that the population of Federal prisons has dramatically increased during these past six years. When I retired in July 1987, there were 43,500 inmates confined in 47 federal institutions. Today, there are over 78,000 offenders incarcerated in 73 facilities. Despite the fact 50,000 additional beds have been or will be added in the future at a cost of over \$3.2 Billion, federal prisons are more overcrowded today than when I left. While the increase is unprecedented, the future is even more alarming. Unless there are fundamental changes in the criminal justice system, there will be over 115,000 federal prisoners by 1999 according to current projections.

From personal experience, I can tell you that severe overcrowding exacerbates the tensions and frustrations that are found in any place of confinement. Beyond limiting the amount of living space available for inmates, overcrowding taxes the support areas such as food service and medical care. More importantly, it creates idleness because existing work and educational programs, which are already limited, cannot accommodate the additional

population pressure.

The population explosion during the past six years is directly attributable to two factors; (1) minimum-mandatory sentences contained in the Anti-Drug Abuse Act of 1986 and (2) sentencing guidelines established by the Sentencing Reform Act. These two acts have resulted in a significant reduction in the use of probation---even for first offenders---and a dramatic increase in the length of time many inmates---particularly drug offenders---will spend in prison.

There has also been a significant change in the composition of the federal prison population during the past several decades. When I became Director in 1970, Armed Bank Robbery and Drug Laws were the largest offense categories, each constituting approximately 16% of the total population. Today, narcotic violators are, by an over-whelming margin, the largest category constituting over 60% of the population. In terms of background, over 50% of the drug violators now in federal prison are serving their first sentence. Data from the U.S. Sentencing Commission indicates that 60% of all the drug violators fall into the lowest of the six criminal history categories used by the Commission in determining sentence length. These facts would appear to suggest that at least some of these offenders may not constitute a significant threat to the public.

No one disputes the fact that prisons and jails are important and necessary components in our nation's criminal justice system. They are, without question, needed to confine violent and dangerous offenders as well as those who repeatedly violate our laws. Having said that, however, we must also look at the economic costs of building and operating prisons. No matter how safe, humane and well managed they are, prisons will always be a scarce---and very expensive---resource in the system. As is the case with any scarce resource, we need to insure that prisons are utilized in a manner which maximizes their contribution to public safety. Simply locking up more and more offenders for longer and longer periods of time is, in my opinion, not a rational response. Instead of simply continuing to build prisons, we should, first of all, insure that space is available for violent and dangerous inmates who require incarceration and find other means of punishing less serious offenders who can be dealt with in more cost-effective ways from the standpoint of the taxpayer.

I believe that most individuals who seriously examine the Federal criminal justice system would conclude that minimum-mandatory sentences have produced results which have not served the public interest and are costing the taxpayers a tremendous amount of money. While recognizing that the certainty of locking offenders up for long periods of time may appear to have surface validity, minimum-mandatory sentences are, in my opinion, based on several false assumptions. First, all offenders are not alike--

some have long histories of anti-social and predatory behavior, others are non-threatening individuals with little or no prior criminal record. To impose similar minimum-mandatory sentences on disparate individuals is both unwise and unjust. Secondly, all offenses are not the same. Even though the specific acts may violate a common statute, some crimes present a much more serious threat to the public and deserve harsher punishment. Finally, I am aware of no empirical evidence which suggests that the threat of lengthy minimum-mandatory sentences has a demonstrable deterrent effect on potential violators in the community.

Further compounding the problem is the fact that the minimum-mandatory sentences serve as a major force driving up the guidelines developed by the U.S. Sentencing Commission. In an attempt to conform with Congressional action, the Commission established the minimum-mandatory as the lowest guideline sentence. In effect, this has resulted in a "ratcheting" up of all guideline sentences where mandatorics are included in the statute.

For these reasons, I would urge the committee to re-consider minimum-mandatory sentences, particularly for drug law violators. In my opinion, they are contributing to the present crisis in the Federal criminal justice system. Studies have demonstrated that the possibility of such sentences frequently results in circumvention by prosecutors and occasionally by juries. All too often, they result in the imposition of prison terms that virtually

everyone agrees are unduly harsh given the facts of the crime and the background of the offender.

One additional issue that I would suggest the committee consider relates to the fact that 26% of all federal prisoners are non-U.S. citizens. The vast majority of these offenders have been committed for drug law violations. While there unquestionably are major traffickers included in this group who should be confined for many years, a substantial percentage are low level "mules" who were recruited by others to smuggle drugs. Even though a period of confinement may be necessary I question keeping them in federal prison for 5, 10, or even 20 years at a cost to the U.S. taxpayers of over \$20,000 per year. In addition to the cost factor, one must also keep in mind that their continued incarceration means that over a quarter of all federal prison space is not available for offenders who may constitute a far greater threat to the public safety. In my opinion, it makes little sense to use scarce and expensive U.S. prison capacity to incarcerate relatively low level, non-violent foreign offenders for long periods of time.

A number of state prison systems, particularly California, New York, Florida and Texas are experiencing similar problems with non-U.S. citizens taking up substantial amounts of prison capacity. In this connection, I was pleased to note that several members of this committee have introduced H.R. 1459 entitled "The Criminal Aliens Deportation Act of 1993". I believe the Congress should

address this issue, particularly the impact non U.S. citizens have on prison and jail capacity.

This concludes my formal statement, Mr. Chairman. I'd be pleased to respond to any questions you and your colleagues may have.

Mr. HUGHES. Professor Clear, welcome.

STATEMENT OF TODD R. CLEAR, PROFESSOR AND FACULTY CHAIR, SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY, NEWARK, NJ

Mr. CLEAR. Thank you.

I am pleased to be here. These hearings take up a very important question that has been in need of debate, and I congratulate Chairman Hughes and the honorable committee members for undertaking this issue.

I have a fairly lengthy statement that is in the record and also a policy statement issued by the National Council on Crime and Delinquency, which I authored, which is also part of the record, so I will try to be very brief in my summary of those comments.

We have been engaged in the United States in an experiment in penal reform. Since 1971 we have increased the size of the corrections system by dramatic proportions. In 1970, there were 96 per 100,000 citizens in the U.S. prison system. Today, the number exceeds 300 per 100,000 citizens. This is over a fourfold increase in the use of prison in only two decades, and the number of prisoners currently incarcerated in the United States is larger than the populations of the cities of San Francisco, Washington, DC, or Boston.

The prison population was not the only area of growth for our corrections system. Probation, parole, and jail populations have also grown. Today, more than 1 out of every 50 adult Americans is under some form of correctional supervision. This is twice the rate of correctional control that existed in 1980, nearly three times the level that existed in 1974.

An extrapolation of these trends into the year 2000 is as astounding as it is unthinkable. If the 1980's rate of penal system growth continues into the year 2000, we will have over 7 million adults in prison or jail or on probation or parole. Remarkable as these figures are, they do not tell the entire story.

The impact of this experiment has been borne by minorities and inner-city youths. The rate of incarceration of African-American young males is an astounding 3,109 per 100,000, over 10 times the national average. There are more black males aged 20 to 29 in prison or in jail than are in college. One-fourth of all black males in this age group are under correctional control, and in some cities, such as Baltimore, more minority male youths are under correctional supervision than are free of it.

It is time to reevaluate these trends in sentencing. The original impetus for sentencing reform was a liberal-minded effort to eliminate sentencing disparity. It was a belief that rehabilitation was a failed concept. But by the late 1970's the impetus for sentencing reform had taken a notable shift. Instead of a primary concern with fairness, a growing emphasis was placed upon the aim of crime prevention based not upon rehabilitation but upon punishment. Over 20 States have experimented with a complete overhaul of their sentencing codes since 1975, and this trend was capstoned by the Federal sentencing guidelines taking effect in 1987.

What have we learned from this experiment? The sentencing changes of the last 20 years have been subjected to a larger body of research than perhaps any other question confronting criminal

justice policy. Four major lessons have been learned. First, with regard to disparity, the most positive aspect of the sentencing reforms has been that they appear to have reduced judicial disparity. However, they have shifted the discretion for charging into the prosecutor's realm and, in many States, have resulted in a common practice of overcharging an arrest to increase the coercion to obtain plea bargains. When draconian sentences are applied to some offenders but not others, disparity may actually be worse now than before the reforms.

Second, with regard to reducing crime, it appears that increases in punishment have had little impact on crimes reported to the police, crimes reported by victims, or crimes committed by persons of different age groups.

Third, with regard to system crowding, the "get tough" approach has overburdened an already heavily strained correctional system. In over 40 States, Federal courts have intervened to supervise their corrections systems. Probation and parole caseloads are normally in excess of 100 per officer and are often two or three times that high. Nobody believes that the current resources of the system are sufficient to handle demand, and demand seems to increase inexorably.

Fourth, with regard to correctional expenditures, the growth of corrections has fueled dramatic increases in government spending. Between 1971 and 1990, total annual expenditures for State and local corrections increased by an alarming 990 percent.

Why did the experiment fail to reduce crime? First, the vast majority of prison-bound offenders are neither serious nor violent. Over one-third of the 400,000 persons who enter prison annually are probation or parole violators unconvicted of new crimes. Of the remainder, nearly half were convicted of property crimes and over half were convicted of petty crimes.

Second, most offenders who are incarcerated serve 15 months or less. The limited amount of time served results primarily from the pressures of prison crowding but even more from the relatively mediocre nature of the offenses for which they are being incarcerated. Even if these typical offenders were dangerous—and most are not—15 months in prison prevents little crime through incapacitation.

Third, most crimes are committed by young males aged 15 to 18, but offenders sentenced to prison have a median age of 27 to 28 years. Because of offenders' maturation, as prisons hold an increasingly aging population, they have a decreasing impact on crime prevention. Moreover, evidence suggests that when young offenders are removed from the community and incarcerated, little criminality is prevented because other youths are recruited to take their place.

Fourth, while incarcerated, offenders receive little assistance in learning how to live a crime-free lifestyle. Instead, they are often exposed to harsh environments that do little to promote respect for the law; they are then released back into the same disorganized and criminogenic communities they left, often with a heightened commitment to use illegal means to gratify their desires.

Fifth, the forces that predominate in the communities afflicted by crime remain unaltered—dysfunctional families, inadequate

schools, entrenched and multigenerational patterns of poverty, child abuse, and chemical dependency. The imprisonment of large proportions of males from these communities further damages families, especially those with young males living in them.

Thus, for two decades we have adopted a national policy of punishing offenders in ways that extend us way beyond our means. At the same time, we have ignored those social and economic forces that contribute to America's high crime rates. It is as though there is an enormous crime production machine operating in our Nation, especially in our inner cities, spewing forth criminals at an accelerating rate but we choose to leave the machine intact and deal only with its products.

It is time to move beyond the "tough at any cost" policy and consider new strategies for developing a less costly and more effective penal practice. I might add that we have heard a lot of good suggestions of the kinds of things that should be recommended. I will identify four overriding strategies that I think need to be considered by this committee.

First, expand correctional options beyond probation and prison. For many offenders, probation provides too little in the way of punishment or control while prison offers far more of both than is warranted. Intermediate sanctions, such as intensive supervision, fines, public work, day treatment centers, boot camps, and house arrests are both fiscally and programmatically wise, and they need to be more widely available.

Second, increase programs of offender risk reduction. A growing body of literature demonstrates the promise of risk reduction programs which intervene into offenders' lives to change the problems that promote criminal behavior. Drug treatment, relapse prevention, cognitive treatment, and prosocial supports have emerged as effective new ways to interrupt the pattern of criminal careers by changing offenders rather than merely caging them.

Third, eliminate ineffectively harsh sentences. Already the U.S. Sentencing Commission has recognized that mandatory minimum sentences result in many injustices and that the draconian penalties left over from the extreme days of the drug war are excessive and unjust. To this list we can add most life without parole sentences and many terms beyond a decade.

From the standpoint of preventing the resumption of most criminal careers, penalties that incapacitate the offender into his or her forties are ineffective and waste precious resources. The availability of careful risk screening and intensive risk management programs justifies experimental release of selected long-term offenders.

Fourth, increase the emphasis on prevention. Two decades of focusing on offenders in their twenties and thirties has taught us the cost of waiting for criminal careers to develop. A deliberate and targeted policy of violence prevention directed toward youth and children will pay off exponentially in the reduction of crime. Prevention programs will include making schools more effective, strengthening the supports for nontraditional families, and increasing the range of prosocial options for high-risk youth.

Instead of maintaining the current failed emphasis on tough prison terms and pure just desserts, we must develop a new perspec-

tive on sentencing. Piecemeal approaches will not work. The lesson of history is that without a comprehensive strategy little could be done to alter the present trend in imprisonment.

If sentencing in the United States is to be brought under control, changes are needed in every area affecting sentencing function: the philosophy of sentencing; the role of the victim in the sentencing process; the options available to the judge at sentencing; the relationship between Federal, State, and local governments in the sentencing process; standards for sentences to imprisonment; the structure for the prison release decision; elimination of ineffective sentencing practices; and better research on the effectiveness of sentencing.

Last year, I authored this report of the National Council on Crime and Delinquency, making recommendations for the reform of sentencing practices. It is a description of the kind of broad-scale approach that I think is needed, it fairly represents my views on the elements needed in a comprehensive sentencing reform strategy, and I have appended it to my policy statement in this testimony.

Thank you for allowing me the opportunity, Mr. Chairman.

Mr. HUGHES. Thank you, Professor Clear.

[The prepared statement of Mr. Clear follows.]

PREPARED STATEMENT OF TODD R. CLEAR, PROFESSOR AND FACULTY CHAIR, SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY, NEWARK, NJ

Chairman Hughes, and honorable committee members: Thank you for allowing me the opportunity to provide this testimony on the need for reform in the way we sentence offenders to prison.

The great American punishment experiment

Over the last 20 years, the United States has engaged in an unprecedented social experiment that has fundamentally changed how offenders are sentenced by our courts. Dramatic changes were made in the sentencing codes in almost every jurisdiction in order to achieve two aims, to "get tough" on criminals and to limit the discretion of judges and parole boards.

Some of the effects of this experiment are now apparent. Prison populations have skyrocketed. In 1970, there were 96 prisoners per 100,000 Americans, and a total prison population of 196,429. Today, the rate of imprisonment has grown to exceed 300 per 100,000 citizens, and the actual number of citizens in prison and jail now exceeds one million. This is a four-fold increase in the use of the prison in only two decades. The increase has been so great that by 1992, the number of U.S. citizens in prison exceeded the population of six states, and was larger than the cities of San Francisco, Washington, D.C.; or Boston.

The prison population was not the only area of growth for our correctional system. Probation, parole, and jail populations have also grown. Today, more than one out of every fifty adult Americans is under some form of correctional supervision. This is twice the rate of correctional control that existed in 1980, and nearly three times the level in 1974.

The dramatic increase in the use of correctional control is neither explained by higher victimization rates, which actually fell by 1%, nor by arrests, which have remained essentially stable since 1975. It seems that victims reported a somewhat higher percentage of crimes to the police, fueling a sense of growing crime rates, and prosecutors and the courts responded by becoming more efficient in securing convictions through guilty pleas. And, as more convictions were achieved, especially for drug offenders, the use and costs of all forms of correctional control escalated to historic levels.

An extrapolation of these trends into the year 2000 is as astounding as it is unthinkable. If the 1980s rate of penal system growth continues into the year 2000, we will have over 7 million adults in prison or jail, or on probation and parole.

Remarkable as these figures are, they do not tell the entire story. The impact of this experiment has been borne by minorities and inner-city youths: the rate of incarceration of African American young males is an astounding 3,109 per 100,000. Today

there are more Black males aged 20-29 in prison or jail than in college. One-fourth of all Black males in this age group are under correctional control, and in some cities (such as Baltimore) more minority male youths are under correctional supervision than are free of it.

It is time to re-evaluate these trends in sentencing. The original impetus for sentencing reform was a liberal-minded effort to eliminate sentencing disparity. There was also a belief that rehabilitation was a failed concept. By the late 1970s, the impetus for sentencing reform had taken a notable shift. Instead of a primary concern with "fairness," a growing emphasis was placed upon the aim of crime prevention, based not upon rehabilitation, but upon punishment. Three ideas came to dominate the discourse: many offenders deserve severe punishment because of the seriousness of their crimes; other, so-called "persistent" offenders require severe punishments because no other way exists to stop their criminality; and all crimes require at least some punishment if the law is to retain its deterrent potency.

Over 20 states have experienced a complete overhaul of their sentencing since 1975, and this trend was capstoned by the Federal Sentencing Guidelines which took effect in 1987. Nearly every other state passed revisions in sentencing law of one kind or another. These changes took several forms:

- o Elimination of Parole Release
- o Sentencing guidelines
- o Mandatory sentences
- o Longer sentences

What have we learned from this experiment in punishment?

The sentencing changes of the last 20 years have been subjected to a larger body of research than perhaps any other question confronting criminal justice policy. Four major lessons have been learned.

1. **Disparity.** The most positive aspect of the experiment may be that some structured sentencing reforms have reduced judicial disparity. However, this important achievement has often merely meant a shift from disparity in judge's sentences to disparity in prosecutor's charges, with the all-to-common result of overcharging at arrest and increased coercion to engage in plea bargaining. When draconian sentences are applied to some offenders but not others, disparity may actually be worse now than before the reforms.

2. **Reducing Crime.** It appears that increases in punishment have had little impact on crimes reported to the police, crimes reported by victims, or crimes committed by persons of different age-groups.

3. **System crowding.** The "get tough" approach has overburdened an already heavily strained correctional system. In over 40 states, Federal courts have intervened to supervise their corrections systems. Probation and parole caseloads are normally in excess of 100 per officer, and often are two or three times that high. Nobody believes that the current resources of the system are sufficient to handle demand -- and demand seems to increase inexorably.

4. **Correctional Expenditures.** The growth of corrections has fueled dramatic increases in government spending. According to the U.S. Department of Justice, federal, state, and local governments spent nearly \$75 billion in fiscal year 1990 for justice services. Between 1971 and 1990, total annual expenditures for state and local corrections increased by an alarming 990% percent.

Why did the experiment "fail" to reduce crime?

The social experiment in criminal punishment was based on an idea that a "war" against crime could be "fought" by punishing

individual criminals. Yet our experience has been that expansion of incarceration has done little to combat crime. Why is this so?

- o The vast majority of prison-bound offenders are neither serious nor violent. Over one-third of the 400,000 persons who enter prison annually are probation or parole violators, unconvicted of new crimes. Of the remainder, nearly half were convicted of property crimes, and over half were convicted of "petty" crimes.

- o Most offenders who are incarcerated serve 15 months or less. The limited amount of time served results partly from the pressures of prison crowding, but even more from the relatively mediocre nature of the offenses (or rules violations) for which they are being imprisoned. Even if these typical offenders were "dangerous"-- and most are not -- fifteen months in prison prevents little crime through incapacitation.

- o Most crimes are committed by young males age 15-18, but offenders sentenced to prison have a median age of 27-28 years. Because of offenders' maturation, as prisons hold an increasingly older population, have a decreasing effect on crime rates. Moreover, evidence suggests that when young offenders are removed from the community and incarcerated, little criminality is prevented because other youths are recruited to take their place.

- o While incarcerated, offenders receive little assistance in learning how to live a crime-free lifestyle. Instead, they are often exposed to harsh environments that do little to promote respect for the law. They are then released back into the same disorganized and criminogenic communities they left, often with a heightened commitment to use of illegal means to gratify their desires.

- o The forces that predominate in the communities afflicted by crime remain unaltered: dysfunctional families, inadequate schools, entrenched and multi-generational patterns of poverty, child abuse and chemical dependency. The imprisonment of large proportions of males from these communities further damages families, especially children.

Thus, for two decades, we have adopted a national policy of punishing offenders in ways that extend us well beyond our means. At the same time, we have ignored those social and economic forces that contribute to America's high crime rate. It is as though there is an enormous crime-production machine operating in our nation, especially in our inner cities, spewing forth criminals at an accelerating rate. But we choose to leave the machine intact, and deal only with its products.

Little positive change will be possible until the public context for sentencing policy is changed. The political process has

distorted the sentencing policy agenda. Politicians have learned that it is bad campaign policy to speak rationally about crime and punishment, and that the obligatory position is an ever-increasing appeal to "tough" policies -- even though research, resources and basic logic confirm that the policies cannot work. A first step in rethinking sentencing policy is to accept six "truths" about sentencing as a social policy:

- o The increase in punishment has little to do with preventing crime;
- o The collective impact of our punishment system falls disproportionately upon minorities, especially young males;
- o The costs of the penal system are beginning to restrict government options in other service areas;
- o Most prisoners, probationers and parolees are not dangerous;
- o Our sentencing system has been distorted by a handful of highly publicized cases; and
- o The increase in punishment has done little to ameliorate the plight of victims of crime.

It is time to move beyond the "tough-at-any-cost" policy, and to consider new strategies for developing a less costly and more effective penal practice. Among corrections professionals, there is an emerging paradigm that seeks to take advantage of what we have learned over the last 20 years, but also to move beyond the stale rhetoric of "get tough" penology. Some elements of this emerging view are:

1. Expand correctional options beyond probation and prison.

For many offenders, probation provides too little in the way of punishment or control, while prison offers far more of both than is warranted. Intermediate sanctions such as intensive supervision, fines, public work, day treatment centers, boot camps, and house arrest are both fiscally and programmatically wise. They need to be more widely available.

2. Increase programs of offender risk reduction. The career criminal paradigm carried with it an implied belief that offending behavior cannot be prevented except through incapacitation. A growing body of literature demonstrates the promise of "risk reduction" programs which intervenes into offenders' lives to change the problems that promote criminal behavior. Drug treatment, relapse prevention, cognitive treatment and pro-social supports have emerged as effective new ways to interrupt the pattern of criminal careers by changing offenders rather than merely caging them.

3. Eliminate ineffectively harsh sentences. Already, the U.S. Sentencing Commission has recognized that mandatory minimum sentences result in many injustices, and that the draconian penalties left over from the extreme days of the drug war are excessive and unjust. To this list we can add most life-without-parole sentences, and many terms beyond a decade. From the standpoint of preventing the resumption of most criminal careers, penalties that incapacitate the offender into his or her forties are ineffective and waste precious resources. The availability of careful risk screening and intensive risk reduction practices justifies experiments with release of selected, long-term offenders.

4. Increase emphasis on prevention. Two decades of focussing on offenders in their 20s and 30s has taught us that the cost of waiting for criminal careers to develop. A deliberate and targeted policy of violence prevention, directed toward youth and children, will pay off exponentially in the reduction of crime. Prevention programs will include making schools more effective, strengthening the supports for non-traditional families, and increasing the range of pro-social options for high-risk youth.

Instead of maintaining the current failed emphasis on "tough prison terms" and "pure just deserts," we must develop a new perspective on sentencing. Four principles would help us move toward a more effective and sensible sentencing system.

I. The circumstances of offenders should be an important object of sentencing.

Recent legal reforms have emphasized the idea of "equality" of sentences -- that people who commit similar crimes should receive similar sentences. But equal sentences can be unjust when they are substantively inappropriate, and far too often the sentences required under determinate and mandatory sentencing schemes "fit" neither the crime nor the circumstances of the offender or the victim.

Much would be gained by reinserting a concern for individual circumstances into the sentencing process. If we are serious about combatting drug use, for example, we will find ways to incorporate treatment programs into the sentencing process. If we are serious about victims, we will find ways to allow offenders and their victims to reconcile -- not because the offenders need it, but because victims so often do.

II. Sentences must serve a multiplicity of purposes including risk-reduction through rehabilitation and treatment.

For too long, we have approached the problem of punishment philosophy as though a single philosophical orientation should apply to all sentenced offenders. In practice, a multiplicity of goals guides our thinking about offenders. The dominant American

philosophy is one of pragmatism--we are more committed to problem-solving than to the abstractions of philosophical debate.

The problem with multiple goals is, of course, the temptation toward erratic, piecemeal sentencing policy. The failure to clearly articulate a complex, guiding sentencing philosophy to control sentencing policy has been a major cause of the current chaos in corrections. In place of chaos, an integrated sentencing philosophy is needed, one that makes a coherent order of our various ideals regarding punishment.

III. Less expensive and more effective forms of criminal penalties must be expanded.

Because our sentencing tradition has overemphasized the prison, we have failed to make full use of alternative non-prison sanctions -- often referred to as "intermediate sanctions.". Compared to the prison, intermediate sanctions are at least as effective as imprisonment and certainly less costly to taxpayers. They can also be designed to fit better the circumstances of both victims and offenders.

There are two concerns we must bear in mind if we are to successfully turn to intermediate sanctions. First, a significant shift in funding must occur. The dollars now devoted to expansion of the prison system must be reallocated to the community-based corrections system to support intermediate sanctions. Second,

intermediate sanctions must be implemented in ways that directly cut into the rising prison population.

IV. The length of most prison sentences should be reduced.

The vast majority of offenders in the United States serve less than two years in prison. To most Americans, this sounds like very short punishment. Yet the time served in U.S. prisons is longer than in nearly every other Western democracy in the world.

Why do we perceive our harsh punishments to be so lenient? First, most judges pronounce "sentences" at the sentencing hearing far in excess of the time that will eventually be served. Second, despite a large and impressive body of literature showing virtually no relationship between the length of time served and the amount of general or specific deterrence, we still hold desperately to a cultural belief that punishment is effective in controlling our behavior and that of others.

In fact, virtually any sentencing purpose we desire can be achieved with shorter sentences than we now impose. General deterrence would be unaffected if average time served were 9 months instead of the current 18. The symbolic message of punishment is also satisfactorily demonstrated by short, determinate sentences -- there is little difference in punitive value between a 6-month term, say, and a 12-month term. Community protection is not endangered by releasing offenders a few months earlier. Even life

without parole, designed to incapacitate, can in nearly all instances be replaced by terms lasting 10 or 20 years, since this takes the offender out of the criminally active ages.

There are substantial advantages to be gained by reducing the length of sentences. We could replace some time in prison with less costly, more effective combinations of correctional approaches, such as electronic monitored home detention, substance abuse treatment and job training. By reducing our emphasis on the prison term, we can increase our effectiveness at less financial and human cost.

An agenda for sentencing reform is needed

Piecemeal approaches to sentencing reform will not work. The lesson of history is that without a comprehensive strategy, little can be done to alter the present trend in imprisonment. If sentencing in the United States is to be brought under control, changes are needed in every area affecting the sentencing function:

- o The philosophy of sentencing;
- o The role of the victim in the sentencing process;
- o The options available to the judge at sentencing;

- o The relationship between federal, state and local governments in the sentencing process;
- o The standards for sentences to imprisonment;
- o The structure for the prison release decision;
- o Elimination of ineffective sentencing practices; and
- o Better research on the effectiveness of sentencing.

Last year, I authored the sentencing policy statement of the National Council on Crime and Delinquency. NCCD is one of the oldest and currently the largest nation-wide prison reform group in the United States. Their policy statement, which makes a series of recommendations for change in sentencing, provides a comprehensive strategy and rationale for the reform of sentencing in the United States. It also fairly represents my views on the elements needed in a comprehensive sentencing reform strategy. I append the NCCD policy statement to this testimony as the more elaborate basis for reforming sentencing in the United States.

Thank you again for allowing me this opportunity to testify.

Mr. HUGHES. Professor, many of the studies and the statistics cited, including some of those in your testimony, refer to all prison populations, Federal and State. Aren't there significant differences between Federal and State inmate populations which dictate against using these studies in talking only about the Federal inmate population?

Mr. CLEAR. I think it is important to recognize that the Federal prison population represents a different mix in some regards from the State prison populations, and States also vary dramatically. But the Federal sentencing reform can set a tone for what the States are looking for.

I was just making some notes on the States represented by the Members in this room, for example, that have implemented some of the kinds of things that I have talked about quite successfully, and that Federal leadership, I think, would be an important bonus for the States.

Mr. HUGHES. One big difference is the young inmate population you refer to, 15 to 18. That is a lot different in the Federal system. We have very few youthful offenders in that category, 18 years of age, and yet in the State systems are just loaded to the gunnels with youthful offenders in that range, in fact, 13 to 18 years of age.

Mr. CLEAR. That is correct.

Mr. HUGHES. Your testimony indicates that most prisoners, probationers, and parolees are not dangerous. Do you equate dangerousness with the Bureau of Prisons determination of violent inmates, or is there a difference?

Mr. CLEAR. I am glad to have an opportunity to address that, because I heard earlier the Federal definition that they use that is a very broad one, and I think it is appropriate when you are talking about gross numbers to use a fairly conservative estimate, as they have done.

But when you are trying to identify individuals for programs, you don't just use a simple rule that anybody who has any prior arrest for an offense that may have had a potential for violence is absolutely barred from special alternative programs, because our research that we have done on these programs in various States indicates that individuals even who have previous histories of violence often do very well in these programs.

So the number shows the size of the problem but doesn't tell you the number of people that you can actually move into those programs successfully.

Mr. HUGHES. Mr. Carlson, you are very clear in your testimony, now that you don't have any constraints, you don't have to clear anything through OMB in telling us what you—

Mr. CARLSON. It's a great life.

Mr. HUGHES. But you make it very clear in your testimony, you think that one of the most serious problems we face is mandatory minimums.

Mr. CARLSON. Absolutely. I think the point was made that minimum mandatories drive the guidelines to a great extent, in the area of drug abuse in particular.

Mr. HUGHES. And including the ratcheting up that is done by the Sentencing Commission of other offenses so that you have some degree of proportionality, which is another major factor.

What would you do with mandatory minimums?

Mr. CARLSON. Mr. Chairman, I feel strongly that minimum mandatories are based on some very faulty assumptions, and I would reconsider the strategy of having judges totally constrained in terms of what they can do.

What Congressman Berman mentioned earlier today is what I hear from Federal judges across the country. I serve as special master for a U.S. district court in a matter involving a jail and know the judges in that district very well. What he described is what I hear from many Federal judges. They see cases before them that are simply inappropriate for minimum mandatories because they are based on the assumption that all inmates are alike and that all crimes are similar. In reality they are not, they are very different in terms of the harm they cause to the public.

Mr. HUGHES. Since your retirement, you have chaired an advisory group of the U.S. Sentencing Commission concerning expanding intermediate punishments for Federal offenders. What conclusions did you reach? And, secondly, do you believe that the alternative punishment options already available to the Federal Bureau are being utilized fully?

Mr. CARLSON. We recommended, Mr. Chairman, that the Sentencing Commission expand the possibility of Federal courts imposing nonincarcerative sentences—in other words, expand the number of intermediate sanctions, which is the faddish term that people like to use today. The Commission did not at the time adopt that recommendation, although I understand subsequently they have made some adjustments in the sentencing scheme. But our proposal was that they substantially increase the number of low-risk cases where judges would have the option—not be forced to, but have the option of using a nonincarcerative sentence for the low-risk offender.

Mr. HUGHES. When you were Director of the Federal Bureau of Prisons, did you participate in some of the negotiations with Mexico on prisoner exchange?

Mr. CARLSON. Yes, I did, sir.

Mr. HUGHES. We do have some track record in that regard in exchanging prisoners. Did that work fairly successfully?

Mr. CARLSON. I believe it did at the time I was Director, and I think it still does. The problem, as Director Hawk points out, however, is that the offenders themselves have to be a participant in the decision to go back to their home country. I question whether that is necessarily the position we should be in.

Mr. HUGHES. There is no question that we need to be very careful about expanding that. We are talking about a fairly sizable universe of noncitizen inmates, but many of those should serve out their prison terms, because of the nature of their offense, either here or in their native country, and that is going to require negotiations much along the lines that we saw back in the eighties when we negotiated that prisoner exchange. Would you agree?

Mr. CARLSON. That is correct. For the major traffickers, I have no hesitancy at all. As I said, they should be incarcerated for incapacitative purposes. I submit, however, that there are many low-level, and I use the term "mules," who, in reality, are not a serious threat. While they may have a quantity of narcotics in their

possession or with them on the boat or the airplane, if you look at the circumstances, they are merely a courier who has been hired by the higher level official.

Mr. HUGHES. But they do present another problem, and that is, you need to send a very clear signal, as I think my colleague from New Mexico says, that you don't get a free ride. I mean if all we do is send them back on the next bus across the border, I'm not so sure we have sent the right signals.

So there has got to be some punishment, either in this country or in their country, so that there is some deterrence, so that we don't reward them.

Mr. CARLSON. I would agree. On the other hand, I would question: 10 years in Federal prison at \$20,000 per year.

Mr. HUGHES. That is another thing.

Mr. CARLSON. That is the problem.

Mr. HUGHES. We seem to have some consensus in this committee on that score that that doesn't make sense.

Mr. CARLSON. There has to be some punishment; it is the degree.

Mr. HUGHES. Yes. And it troubled me—I think you probably heard me say—that I have seen higher level traffickers walk because they had some information to provide, and you have the poor mule that spends 15 years in prison—

Mr. CARLSON. Exactly, and that is a dilemma.

Mr. HUGHES [continuing]. Which is an injustice, aside from the question of the expense involved and other factors to be considered.

Well, I have used my 5 minutes and then some.

The gentleman from New Mexico.

Mr. SCHIFF. I will use a little less than my 5 minutes to catch up here, Mr. Chairman.

Mr. HUGHES. I thank the gentleman.

Mr. SCHIFF. Let me say, with respect, I have no questions for this panel, because I enjoyed their presentations and they were exceedingly eloquent in making their points. There is nothing I need to ask, because I think they were abundantly clear. So I would like to take 2 minutes to make a basically responsive statement, allow the panel to respond if they wish, and then yield back.

As I said before, Mr. Chairman, I don't think any law or policy enacted by this Congress is above review, and I acknowledge having seen a number of problems in mandatory minimum sentencing, including the one you just observed that, if one can negotiate with the law enforcement agents or with the prosecutors, one can actually avoid the effect of the mandatory sentencing because the case will never get that far, and that is fair to look into.

But there is a drumbeat I am beginning to hear that is making me very uncomfortable in a couple of respects. The first is, I am hearing over and over again the call for a need to change our policy based on the assumption that the increasing number of people in prison is bad, and I have not come to that conclusion. I can make an equally good argument that sentences were too soft in the past, and the laws were not adequately enforced in the past, and an increasing prison population indicates an increasing seriousness to enforce the laws of the United States and not to wink at them.

I don't come to the conclusion, in other words, that numbers prove anything except numbers, but that is not what I am hearing,

I am hearing numbers prove, "Oh, my goodness, we have made a mistake, we have to go in another direction." I don't think so necessarily.

The second item I am concerned about is the diminuation of offenses and the diminuation of individual responsibility that I am hearing over and over again. The nonviolent offenders we keep hearing about include, just as one example, those individuals who break into our homes and steal everything we have saved over a lifetime and then abscond without touching anybody. Most of America is terrified to leave their homes because of the impact these individuals have, and yet we are kind of, in my opinion, placing them here in some kind of a, "Well, boys will be boys" kind of attitude.

Similarly, I am hearing people involved in drug trafficking diminished in their responsibility as mules, as just people who need a little pocket money, you know, and, again, "Boys will be boys" kind of thing.

It has to be remembered that, if you strip all that away, these are people who have decided to get involved in drug trafficking; these are people who have decided they want more money and they have got a choice: they can go to school and then go to work, like most of our population, or they can violate the laws, and they are being penalized for this choice.

It seems to me that it also ought to be emphasized that if there were no mules, there were no couriers, there would be no drug trafficking, you need every part of this, and although we can look at that sentence, and maybe we are too draconian at times, we ought to recognize what our ultimate goal is.

So, with that, I will yield to the panel and then yield back to the Chair.

Thank you, Mr. Chairman.

Mr. CARLSON. My response would be the overwhelming nature of the budgetary demands that are being placed by prisons on the Department of Justice budget, given the constraints that you face in terms of the overall budget of the United States.

When I was Director, the FBI was, by far and away, the largest component of the Department of Justice's budget. Everyone can recall those days. Today, it is no longer the FBI or DEA, it is the Bureau of Prisons. Prisons are now driving the rest of the criminal justice system, which I think is unfortunate.

Also, in response to your comment, Congressman Schiff, I don't disagree at all with punishment for offenders that are coming in with drugs. I am just suggesting that perhaps 5, 10, 15, 20 years, at \$20,000 a crack may be more than we can afford, that there ought to be a different way to handle them. Yes, they ought to be incarcerated, but it is the length of time that I am concerned about.

Mr. CLEAR. I would add one further point to that, which is, as the testimony earlier this morning, if you are simply interested in the function of the sentence serving a punitive aim, sometimes these very, very long sentences are no longer as important. So if you focus on sending a signal, you can send an equally effective signal sometimes with shorter sentences.

Most of the research that we have done over this 20-year period when we have quadrupled the size of the corrections system dem-

onstrates, without any question, that it has had little or no impact on crime. So the position that I would argue is that we need to be much more wise about how we spend our dollars in the corrections system, identify those approaches that have impact on the communities that are suffering with regard to crime, particularly front-end approaches that deal with youths, that don't wait until the criminal careers have developed, and focus on resources there, because I think we have learned well that the growth of the corrections system has not produced much, if at all, in the way of reduction in the amount of crime experienced by the citizens.

Mr. SCHIFF. Could I ask just one followup question on that, Professor? It is my just individual recollection that when the State of Texas went from a heavy degree of incarceration to releasing people in huge numbers from their prisons as a cost-saving device, that their crime rate shot right up. Is that correct?

Mr. CLEAR. I am a little bit familiar with the study you are referring to, and it has been criticized because of its methodology, but identifying the—the crime rates in surrounding States at the same time also fluctuated in the same kinds of ways as they did in Texas. So attributing the change in crime in Texas to what the punishment policy changes were is probably stretching the credibility of that study a little bit beyond what it deserves.

Mr. SCHIFF. I thank the panel.

Mr. HUGHES. Would the gentleman yield to me?

Mr. SCHIFF. I yield to the chairman.

Mr. HUGHES. Another interesting thing is occurring with regard to the mandatory minimums, and I am not sure it was contemplated. You have individuals committing heinous offense, violent offenses—homicide—that are out in 7 years in the State system, and you have people that have no previous convictions get caught up in the mandatory minimum of 15 years, with no previous record, who happen to be transporting. So the disparity that we were looking for in the sentencing guidelines is basically being undercut by what is occurring in the real world.

Mr. CARLSON. I would agree.

Mr. SCHIFF. Mr. Chairman, that raises the question of the sentence for murders as much as it raises the question that you would raise.

Mr. MAZZOLI. Exactly. I think the point is that the sentence is too little for murders, and we are comparing, I think, apples with oranges.

Mr. HUGHES. The Chair recognizes the gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. I will use my 5 minutes but no more.

First of all, it is nice to see Mr. Carlson again and Professor Clear.

I would have appreciated, Professor Clear, and gotten more from your testimony, if you hadn't mixed incarceration, Federal, local, State, young kids, seasoned hardened criminals. And, I found your statement to be a bit tendentious in its approaches in what to do. But, anyway, it will certainly add to our body of knowledge here.

Professor Carlson, one thing I remember years ago is that the electric industry was extrapolating figures about electric use and

power use, and they were reaching the point where, by the year 2000, we would have an electric power station at every intersection in America. And, of course, that hasn't happened and will not happen.

Again, 116,000 persons, which you sort of predict, may not happen. I think we have to be aware of it, but I'm not sure we ought to predict our program specifically on that. I was very much pleased to hear the gentleman from New Mexico's statement about the question of the failure of the system.

I remember once being in a hearing where people were complaining about the failure of the American judicial and criminal justice system because our prisons are overcrowded. And, I said, "Well, maybe that is evidence of the success of the system, not its failure; we are finally putting people away that haven't been put away heretofore." So I would be a little concerned about this drum fire. As I said, it is making me a bit queasy about this whole subject because of what we are hearing.

Also, Norm, you mentioned that 60 percent of the people in Federal prisons are drug offenders and 50 percent of them are there, you say, for the first major sentence. I don't know much about this subject, but I would be willing to bet that each one of these people has 10 different sentences at the State level. They have been busted 50 times and they have had all kinds of problems. I can't believe that these are just choirboys who wind up in the Federal prison. But, maybe you could help me on that.

Mr. CARLSON. I am not suggesting they are choirboys, Congressman Mazzoli. I am suggesting that this is their first prison sentence, State or Federal; it is their first time. They may have a prior arrest record, and I am not saying that they are obviously scouts in terms of their prior criminal record. But I would suggest that there are some of them at least, that may not be a high risk to the public.

Mr. MAZZOLI. You mentioned that 50 percent—I presume 50 percent of the 60 percent—are at the lowest level of whatever the—

Mr. CARLSON. The sentencing; that is correct.

Mr. MAZZOLI. Have you done any study at the school on just exactly how many of those in that lowest level would, by reason of the characteristics that the Bureau of Prisons have used, would fit within the guidelines? I assume you would want them released or have severely reduced sentences rather than what they are having. Do you have any quantification to help us on that?

Mr. CARLSON. No, I don't.

Mr. MAZZOLI. It would help us if you did. I think what the chairman is getting around to is that, eventually in our hearing we have to get some numbers. We have to find out. I asked Ms. Hawk to supply us with some numbers. We need to know what we are talking about. It is one thing to make great, emotional, and important statements, but they don't really help us much. If we are going to do something sensible to calibrate this system, to wisely give it some nuance, which it apparently doesn't today have, we have to know the population we are dealing with, their characteristics, their tendencies and proclivities. And, if we don't, we may be letting a worse thing happen.

So let me urge you, to the extent you can, to give us some numbers of just what type of thing we are dealing with. I don't want to be a kind of skunk at the lawn party here, but I do think you say in your three points that not all offenders are the same, not all crimes are alike, and deterrence, a question mark.

I think we can safely say that at least so long as they are in the slammer they are deterred from doing much of anything except to themselves and the people around them. And, it makes me feel a little more comfortable that, to that extent, there is a deterrence. Now it may not be a deterrence to their brother or their uncle or their close friend back home, but it is a deterrence to them.

So I think we have to be real careful, because sentencing is, in part, a deterrence to that person doing something else, not so much an example of what not to do for fear that you will be busted as well. So we, I think, have to put some perspective to it.

But I am interested in this, that 26 percent, Norm, of all of the people in Federal prisons are noncitizens.

Mr. CARLSON. That is correct, sir.

Mr. MAZZOLI. And I think you said, further, some are major drug offenders and some are the mules, and given allowance for the mules being an integral part of the unified effort of moving drugs, have you any idea as to which of those might be subject to deportation quickly or to a lower sentence?

Mr. CARLSON. No, sir, I don't. I think your point is well taken. That is the sort of numbers that I think should be generated for the committee.

Mr. MAZZOLI. The last question is, do you or Professor Clear know, are numbers being developed? Are they accessible in some fashion?

Mr. CLEAR. I think the Director said this morning that the size of the number depends on where you set your cutting points, and that is one of the critical points about all of this, which is why I said earlier, rather than a piecemeal approach, a comprehensive approach.

Mr. MAZZOLI. That is true, because there is a certain subjectivity in deciding which cutting point. But, how about telling us the population: How many of them did this? How many of them did that? And, let the computers figure out who fits into which categories, and arrange them somehow, and then maybe we can decide, or a sentencing committee, or a panel of experts or whatever, on what the cuts could be based. And, basing cuts not on the judgment of what should be considered, but just on who they are and what they have done to get there.

Mr. CLEAR. Let me say I would also encourage you to think of that as the open playing field, because when we do those kinds of cuts in prison populations around the country, we find that among the groups that, for example, would have a prior conviction or an arrest for a crime that has violent potential, if you do an assessment of that individual they might fit very well into existing programs that are community-based programs. So that would give you an open playing field. But there might also be some ways in which those numbers themselves would shift.

Mr. MAZZOLI. That is up to the chairman. He is the chairman of the committee. He will ask for what he thinks we can use. But I

would hope that it wouldn't be tailored, and trimmed, and modified, and molded by you. I want information. Your views are wonderful, and laudable, and important, and based upon your profession, quite acceptable. I might not agree with them. So, to say that this person is from a troubled home and therefore we should do thus and so, or this person is likely to be more amenable to a drug program and we should do that with them—just tell me who they are and what they have done to get there. What offenses they have committed, taking into consideration the fact that breaking and entering may not be violent, but it is not a happy thing either.

Mr. Chairman, thank you for your indulgence.

Mr. HUGHES. The gentleman from California.

Mr. BECERRA. Thank you, Mr. Chairman.

Let me go back to the whole question of the drug couriers, because I think all of us would agree that they have to be punished, there is no doubt, but that there is a problem oftentimes when they are in our jails for 20 years. Any specific responses or solutions to this problem other than perhaps revising our mandatory minimum sentencing, or somehow trying to address quicker deportation? You can see, we are all sort of deliberating over that issue as well.

Mr. CARLSON. I don't have anything more specific, Congressman Becerra. What I would suggest is that it has to be done, obviously, on a case-by-case basis depending on the circumstances of the offender and the offense. I do think it could be done, and I think the numbers themselves—26 percent is tremendous—you know, a quarter of the prison population are non-U.S. citizens. I think that suggests that at least some of these could probably be handled in a more cost-effective manner, which would free up space for the offenders that Congressman Mazzoli is concerned about, the violent and the dangerous. I think that is who ought to be incarcerated rather than a low-level "mule" from another country who I think should be sent back home as quickly as possible.

Mr. BECERRA. Do you think it is possible for us, through the judicial system, to try to determine the circumstances under which this individual has involved himself or herself in crime—whether or not this is a low-level or high-level person?

Mr. CARLSON. Again, from my experience in discussing this matter with Federal judges, I think they feel that there is a way to make decisions that would be more cost effective than the present system where they get minimum mandatory sentences based solely on the quantity of the drugs that they happen to have in their possession at the time.

Mr. BECERRA. Let me ask a question of either of the two of you with regard to judicial disparity. It seems to me that as a result of mandatory minimum sentencing we do have less disparity in the sentences that are being dispensed by judges. It may be just a result, as was said earlier, that they are increasing in time. If we were to somehow reform the sentencing structure that we have, what is to prevent the disparity from again occurring for the wrong reasons?

Mr. CLEAR. When you have a system of mandatory minimums that can be used to generate a lot of pressure for plea negotiation, what you do is, you move the disparity from the judicial decision

point to the prosecutorial decision point, and we have heard comments already about that.

The kinds of sentencing systems that seem to be better at reducing disparity without generating nearly as much prosecutorial activity are presumptive systems where there is judicial discretion at the sentencing stage, that that discretion can respond to a variety of issues but has to be recorded in the record at the time of sentencing, and the reason why—so that the reasons for the judicial sentence can themselves be appealed, and we find that those kinds of sentencing systems that provide latitude at the sentencing stage but provide presumption do reduce both judicial disparity and disparity across cases.

But I think one of the driving forces of disparity is when one type of crime gets treated more severely than it deserves compared to other kinds of crime, so that in the time when we ratcheted up the punishment for drug offenses, for example, it made rape and armed robbery and those kinds of things look less serious comparatively, and so it created a secondary pressure for us to increase those penalties. So what happens is that rather than bringing sentences down to a level where we can actually operate a system within fiscal realities, we create a pressure through sentencing disparity across crimes that inexorably leads toward increasing the sentences for other kinds of crimes, so that the system moves up and never gets recalibrated down.

Mr. BECERRA. One final question I pose to the two of you. This is a hearing, of course, that is dealing with prison populations and individuals who have committed crimes and been sentenced; but, I think we often miss the boat by just talking only about incarceration—the remedial effects of crime being committed in our country. Any thoughts on what we could try to do?

Professor Clear, I think you mentioned it briefly in your testimony, about the forces that cause crime to be committed are really not being dealt with. Is there anything that you can think of that perhaps was not touched on? Again, I know that we are dealing with incarceration after the fact; but, is there anything that we can do up front in terms of prevention to try to help prevent not only someone going to prison but prevent there being a victim who has been hurt or harmed by this criminal who is now in jail?

Mr. CLEAR. Most research on criminal careers and on the ending of a criminal career finds two issues: that in the early stages of a young male's development, it is the strength of the bonds that develop to prosocial institutions that determine the likelihood of getting involved in criminality in the first place. So we need to make these prosocial institutions in our cities more attractive and more useful to those young adolescents—schools, families, churches, the kinds of community forces that lead toward involvement and commitment to safe communities for young males growing up.

Once a criminal career has begun, research indicates that desistance, the ending of the criminal career, is aided by two kinds of events: either ending a chemical dependency or a commitment to a group that is involved in criminality, so you can intervene into that person's life to try to reduce those sorts of problems; or becoming more stable, things like marriage or having a child.

So if we can provide social supports to make those community elements stronger, more attractive as influences on those kids, and then, secondly, accelerate the speed at which the negative bonds get eliminated, we can do a lot on the prevention side to reduce the length of criminal careers, to reduce the proportion of kids who get involved in crimes, and reduce the seriousness of the crimes they are committing.

Mr. BECERRA. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUGHES. I want to thank the panel. The panel has been very, very helpful to us. Frankly, you can see the kind of passion that this subject generates. I think the fact of the matter is, if nothing else occurs in this series of hearings, it will lay out basically all the variables, all the options, and cost is just one of them. Cost should not drive policy, it should be a factor. We should be aware of what we are doing and what it is going to cost, because we have to go to the taxpayers and tell them that now the Bureau of Prisons in 1997 needs \$3.6 billion compared to the \$1.8 billion today in operating costs because of the exploding prison population.

I think the American taxpayer wants us to develop good penal policy, and that is an important part of our role at the Federal level, to show some leadership in penology. One of the factors that we need to look at is whether past policies have contributed to good public policy.

I know of situations because judges, in frustration, have come to me about situations where a housewife happens to have 5.1 grams of crack in her purse that belonged to her husband, but she possessed it, she knew about it; two children; she is serving 5 years, no parole, in prison. The judge was so frustrated because he felt that he would never see her again, she had learned a hard lesson, but there was no flexibility for the judge.

There is flexibility however, which is an aspect of the judge's concern and that is the flexibility with the U.S. attorneys office in its charging policy. So we have flexibility, but it has shifted from the court to the U.S. attorney.

The second thing that is occurring is that, unfortunately, we are seeing some concern about new sentences where they are not mandatory minimums, and now judges are taking into consideration where there are violent offenders involved basically what is happening to the prison system. Violent prisoners should be taken out of circulation, most people understand that we need to do that, and yet now, all of a sudden, one of the factors being considered by sentencing courts around the country is the overburdened prison population.

Then you have the situation that we have in Federal prisons and in State prisons. We know that detoxification programs work, but we don't have the resources so that the Director of the Federal Bureau of Prisons can provide to those that need drug treatment the kind of treatment they need because we don't have the dollars to do that.

So, frankly, out of these hearings, hopefully, will come all the variables, all the considerations, so that we can take a look at past policy and determine whether or not that will serve as well as we see an exploding prison population. We are going to have to build

more Federal prisons, there is no question about that, the only question is whether we can develop alternatives that make more sense in serving the public good by returning, perhaps, citizens who can be rehabilitated to the community, as we should, and provide additional sentencing options so that judges have more than one of two options: either sending them back home, basically, on probation, or off to prison, which is often the only options that are available to sentencing judges.

So it has been a good hearing, and it is the first of a series of hearings that will enable us to make, hopefully, wiser decisions in the future. So thank you very much. We appreciate your testimony. You have been very helpful to us. Thank you.

Mr. CARLSON. Thank you, Mr. Chairman.

Mr. HUGHES. That concludes the testimony for today, and the subcommittee stands adjourned.

[Whereupon, at 12:48 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

FEDERAL PRISON POPULATION: PRESENT AND FUTURE TRENDS

THURSDAY, JULY 29, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, John Conyers, Jr., Romano L. Mazzoli, Carlos J. Moorhead, Howard Coble, and Bill McCollum.

Also present: Hayden Gregory, counsel; Jarilyn Dupont, assistant counsel; Veronica Eligan, secretary; and Joseph Wolfe, minority counsel.

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order. Good morning and welcome to this morning's hearing.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, still photography, or by any other such methods of coverage. In accordance with committee rule 5(a), permission will be granted unless there is objection. Is there objection?

Hearing none, permission is granted.

Today we are holding our second hearing on the status and direction of the Federal prison population. At our first hearing, we heard testimony from the Director of the Federal Bureau of Prisons describing the exponential increase in the Federal prison population over the past dozen years. Her testimony indicated that this growth trend is continuing and will continue for years to come.

Not surprisingly, these increases in our inmate population bring with them a voracious appetite for resources. As we discuss these issues this very day, the Federal prison population is increasing at a rate of 200 inmates per week. That may not sound so dramatic, but, as one of our witnesses described it in her prepared testimony, that translates into the need to build staff and open one additional 800-bed prison each and every month. Furthermore, when and if we find the money to build, staff, and begin to operate that prison of the month, each month we will have signed onto a much larger financial obligation to maintain and operate that prison for the many decades of its useful life, not to mention the followthrough that is required after inmates are released from prison.

In our first hearing, in addition to getting a picture of what our Federal prison population looks like now and examining future trends, we began to identify the causes of this tremendous growth. The factors leading to the growth are many, but clearly there is one single factor which far outshadows all others. That single factor

can be described in a single word, "drugs." Persons confined for drug offenses currently comprise well over half the total demand for prison space and resources, and this percentage continues to rise every day.

Some will argue that there is nothing surprising or disturbing about this. We have made conscious choices to address our crime and drug problems with tougher policies relying heavily on incarceration, and we simply have to find the money to build the prisons and pay for the bills.

I think many Americans might respond to that argument somewhat like one of our witnesses today, Dr. Blumstein. His response, in essence, is that if we could be convinced that this tremendous drain on resources was bringing about a reduction in our drug problem, then we would pay the price. He, like many who have carefully studied this matter, does not believe that the almost monolithic reliance on incarceration as a solution to our drug problem is working. They call for a reexamination and revision of our policies. We will be hearing some of those recommendations today.

We also will be hearing from family members of persons who have been on the receiving end of incarceration policies which we developed during the eighties in particular. Frankly, there are limits to the value of anecdotal evidence such as this. Last year, over 32,000 persons received Federal prison sentences and over 10,000 received mandatory minimum sentences. From such large numbers it would not be hard to find examples of individual cases which would support practically any point of view but not be representational of major trends occurring.

I am convinced, however, that the experiences being reported by these family members are not aberrations but, rather, represent scenarios being played out in similar form every day in our Federal courts throughout the country. I believe these personal experiences of family members provide us an important additional dimension to consider along with many other factors which we must weigh in making policy decisions.

These hearings are oversight hearings on the Federal Bureau of Prisons. In these hearings we will be examining the phenomenon of the tremendous growth in the Federal prison population over the past decade. An important dimension of our examination is to identify policies which are bringing about these increases. It may be that our oversight examination will result in recommendations for legislative changes or changes in enforcement policies which do not require legislative changes, such as charging policies.

Some of these changes may fall within the areas of responsibility of this subcommittee, and some may not. The administration of Federal criminal justice is a complex undertaking involving interaction with various agencies within the executive branch of government and with the judicial branch. Responsibility within the Congress is likewise shared by many subcommittees, including our own subcommittee, and with other committees of the Congress besides Judiciary.

Our subcommittee will work with the various entities with which we share responsibility for our criminal justice system, whether they are in the legislative, judicial, or executive branch to provide the most effective, efficient, fair, and cost-effective criminal justice

system available. It promises to be an excellent hearing with excellent witnesses, and I look forward to the testimony.

The distinguished gentleman from North Carolina.

Mr. COBLE. I thank the chairman.

Mr. Chairman, I have no opening statement, but I would, without objection, introduce the statement of the gentleman from California, Mr. Moorhead, into the record.

Mr. HUGHES. The statement will be received, without objection.

[The prepared statement of Mr. Moorhead follows:]

PREPARED STATEMENT OF HON. CARLOS J. MOORHEAD, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA

THANK YOU MR. CHAIRMAN. IN REVIEWING THE TESTIMONY OF THE WITNESSES FOR THIS OUR SECOND DAY OF HEARINGS ON TRENDS IN THE FEDERAL PRISON POPULATION, IT IS CLEAR THAT MUCH OF THEIR FOCUS IS ON MANDATORY MINIMUM SENTENCES. NUMEROUS CONCERNS ABOUT MANDATORY MINIMUMS HAVE BEEN RAISED BY FEDERAL JUDGES, THE DEFENSE BAR AND OTHERS. I THINK IT'S IMPORTANT THAT WE NOTE THE VARIOUS OBJECTIONS TO MANDATORY MINIMUMS AND THIS SERIES OF HEARINGS AFFORDS US THE OPPORTUNITY TO FULLY EXPLORE THEIR USE.

AT OUR FIRST HEARING THERE SEEMED TO BE A CONSENSUS AMONG OUR WITNESSES THAT THE MAJOR PROBLEM WITH MANDATORY MINIMUMS IS THAT THEY HAVE RESULTED IN A SITUATION WHERE ESPECIALLY FIRST TIME OFFENDERS END UP SERVING UNNECESSARILY LONG SENTENCES. THIS IS A LEGITIMATE ISSUE THAT WE SHOULD LOOK CLOSELY AT. AT THE SAME TIME I WOULD NOTE THAT THESE WITNESSES WHO

INCLUDED THE CURRENT AS WELL AS A FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS DID NOT QUARREL WITH THE NEED FOR SOME FORM OF PUNISHMENT IN THESE CASES, WHICH I THINK IS A VERY IMPORTANT POINT.

ANOTHER ISSUE THAT IS RAISED WITH REGARD TO MANDATORY MINIMUMS IS THAT THEY HAVE RESULTED IN THE VERY KIND OF SENTENCING DISPARITY THAT THEY WERE INTENDED TO ELIMINATE. HOWEVER, THERE IS SOME INDICATION THAT WHATEVER DISPARITY THERE IS, IS A RESULT OF CHARGING POLICIES PURSUED BY FEDERAL PROSECUTORS, RATHER THAN THE MANDATORY MINIMUMS THEMSELVES.

FINALLY, I WOULD NOTE THAT A GREAT DEAL HAS BEEN MADE ABOUT THE RAPIDLY INCREASING FEDERAL PRISON POPULATION WITH ITS ATTENDANT COSTS AND THAT AS A RESULT THEREOF, WE MUST NOW EMBARK ON A COURSE OF WHOLESALE CHANGE. ON THIS POINT, I AGREE WITH THE

REMARKS THAT THE CHAIRMAN MADE AT THE CLOSE OF OUR FIRST HEARING ON THIS TOPIC THAT: "IF NOTHING ELSE OCCURS IN THIS SERIES OF HEARINGS, IT WILL LAY OUT BASICALLY ALL THE VARIABLES, ALL THE OPTIONS, AND COST IS JUST ONE OF THEM. COST SHOULD NOT DRIVE POLICY, IT SHOULD BE A FACTOR." HAVING SAID THAT MR. CHAIRMAN, I LOOK FORWARD TO THE TESTIMONY OF OUR DISTINGUISHED WITNESSES. THANK YOU.

Mr. HUGHES. Does the gentleman from Florida have an opening statement?

Mr. MCCOLLUM. I have none this morning. Thank you, Mr. Chairman.

Mr. HUGHES. The first panel to testify today includes Dr. Alfred Blumstein; Prof. Lynn Branham, accompanied by Alan Chaset; and Jim Bredar.

Dr. Alfred Blumstein is the dean and J. Erik Jonsson Professor of Urban Systems and Operations Research at the H. John Heinz III School of Public Policy and Management at Carnegie Mellon University. Dr. Blumstein has extensive experience with the criminal justice system. He served on the President's Commission on Law Enforcement and Administration of Justice from 1966 to 1967 and was a member of the National Academy of Sciences' Committee on Research on Law Enforcement and the Administration of Justice from 1975 to 1986. He has been a member of the Pennsylvania Commission on Sentencing and was chairman from 1979 through 1990 of the Pennsylvania Commission on Crime and Delinquency. His research has focused on prison populations, sentencing, and criminal careers.

Lynn Branham is a professor of law at the Thomas M. Cooley Law School in Lansing, MI. She is a member of the Commission on Accreditation for Corrections and is on the advisory board of the Edna McConnell Clark Foundation's Justice Program. She is the former chairperson of the American Bar Association's Corrections and Sentencing Committee. During her tenure as chairperson, the committee produced a model Adult Community Corrections Act as well as guidelines concerning prison and jail impact statements. She recently prepared a study for the ABA on the use of incarceration. Professor Branham will testify on behalf of the American Bar Association today.

Professor Branham is accompanied by Alan Chaset, an attorney in private practice and currently the vice chair of the American Bar Association's Sentencing Advisory Group. He also is chairman of the National Association of Criminal Defense Lawyers' Post-Conviction Guidelines Committee. He previously served as special counsel to the U.S. Sentencing Commission.

Jim Bredar is the Federal public defender for the district of Maryland, having been appointed to that position on November 30, 1992, for a 4-year term. He is a former assistant U.S. attorney and clerked for Federal District Judge Richard P. Matsch in Denver after graduating with honors from Georgetown University Law School. He served as a sentencing consultant to the British Government Home Office while director of the London Office of the Vera Institute of Justice.

All very distinguished witnesses with extensive backgrounds, and I have just touched on just some of their credentials.

I wonder if the panel would come forward at this point. We have your statements, which we have read. They are excellent, they are very comprehensive, in some instances they are very long, and we would request that you summarize so that we can get right to questions. I think the staff has asked you to do that, and I'm going to ask you to do that today.

Dr. Blumstein, welcome. Let's start with you.

STATEMENT OF ALFRED BLUMSTEIN, DEAN AND J. ERIK JONSSON PROFESSOR OF URBAN SYSTEMS AND OPERATIONS RESEARCH, H. JOHN HEINZ III SCHOOL OF PUBLIC POLICY AND MANAGEMENT, CARNEGIE MELLON UNIVERSITY, PITTSBURGH, PA

Mr. BLUMSTEIN. Thank you.

Let me just take a few minutes to point out what I think are the highlights of the points I want to make. The first is a recognition that prison populations were quite stable in the Nation from the twenties to the early seventies. This is reflected in the graph that is right after page 2 of the statement. The U.S. incarceration rate was quite stable at about 110 per 100,000, taking account of the growth in population. Starting in the seventies and particularly in the eighties, the rates really went through the roof; it is now about three times the earlier rate. This certainly suggests to me that things have gotten out of control in terms of incarceration practice and policy.

The question, then, is what is giving rise to this growth? One of them is a realization that there has been an age shift. The baby boomers are in the ages where the prison risk is highest, but that is turning around, so that is not going to be a factor in the future; indeed, it has already started to turn around.

A second is the growing crime rate, but the crime rate hasn't been growing anywhere like the growth in incarceration rate. Indeed, in the early eighties the crime rate was coming down and prison populations continued to grow. The crime rate started to go up again in the late eighties, and populations continued to grow at much the same rate. This highlights that incarceration is really a policy choice that comes out of public pressure and legislative appeal.

In the late eighties, we saw really serious concern across the Nation about the drug problems. Drug offenders formerly comprised about 5 percent of prison populations; today, drug offenders comprise about 25 percent of State prison population and about 60 percent in the Federal system, and that fraction keeps growing up.

Part of the problem was that the public, very concerned about the drug problem, demanded the political system to do something about that. Unfortunately, democratic political systems are not very good at confessing that they don't know what to do about something, and, perhaps even more unfortunately, they seem to have discovered that if they pose an air of punitiveness, insisting that they are going to crank up sanctions, then the public seems not only to accept that, at least for the time being, but also seems to cheer them on. In particular, the mandatory minimum sentencing policy started as a new device about 15 years ago or so; then, it was focused on offenses for which judges might have been particularly lenient but on which the public or the legislative bodies wanted to crack down on. It became so popular that now its use is widespread in a wide variety of crimes that attract public attention. As soon as the crime attracts attention, regardless of how leniently or punitively the judiciary is dealing with it, legislation gets introduced to impose mandatory minimums, and the public inevitably stands up and cheers for that particular act of legislative heroism.

One wouldn't be particularly concerned about the significant growth in punitiveness if it were effective. The problem I see, most particularly in the drug area, is the clear lack of effectiveness of punitive policies in trying to stop the flow of drugs. The basic crime-control mechanisms of the criminal justice system are incapacitation—you remove the offenders from the street, put them in prison, and that should stop their crimes—and deterrence—you pose a sanction severe enough to scare offenders off the street.

There is no question that we have been incapacitating drug offenders by locking them up in prison. There is no question that we have been deterring some potential drug offenders by scaring them off the street by the magnitude of the sanctions. The point is that those crimes don't leave the street. As long as there is a demand out there, the supply system will recruit from a large enough queue of sellers ready to meet the demand by replacing those who have been taken off the street through incapacitation or deterrence. That is why we haven't seen any significant impact of this enormous effort attacking the supply side. Ultimately we have got to get at the demand side. Everybody in law enforcement will agree that a basic strategy that attacks only the supply side is not enough. We ultimately have to get at the demand side.

Part of the problem is that when it is found that the 5-year mandatory minimum isn't doing the job, then they say they have to do more, to crank it up to 10 years. But no one addresses the issue of whether the basic approach of attacking the supply side, even with enormous effort, is going to do enough good to change the consequences.

I would like to address one other particular aspect of the problem, and that relates to race. For a variety of reasons, black offenders have become the principal focus of the war on drugs since the mideighties. Indeed, in a graph I have following page 6 in the testimony, you can see that for a large period of time white offenders were being arrested at a higher per capita rate than were nonwhite offenders, who are predominantly black; over 90 percent of the nonwhite offenders in these data are black.

We saw as a nation that lots of decent young people were getting caught up at a vulnerable point in their lives. In 1974, you see a turnaround where there was a clear reduction in the arrests of whites primarily for marijuana offenses. To a significant degree, the Nation decriminalized marijuana sales and use when it was done on a small scale. That, in large part, was because those were our kids.

What we also see in that graph is that, starting in the mideighties, there has been a major growth in the nonwhite arrests, several times that of the whites, and this doesn't necessarily reflect the racial differences in participation as sellers.

There was a story in USA Today the other day about the differences between whites and blacks in use compared to arrest, but use is not what people get arrested for; it is primarily sales or a presumption of possessing for sale. The problem is that markets operated by blacks tend to be out in the open, tend to be in the streets, whereas whites much more often tend to be at higher levels in the system and also doing their sales indoors.

Compounding the difference between the selling and the arrest is the difference in incarceration. You can account for only about 50 percent of the racial disproportionality in prison by differences in arrest for drugs. This contrasts markedly with robbery, for example, where the race difference at arrest is almost exactly mirrored by the race difference in prison.

Drug offenses leave much more room for judicial discretion and prosecutorial discretion, and so I am not arguing that these differences are because of the race alone. But it is clear that imprisonment for drug offenses is being reflected quite differentially on black arrestees than it is on white arrestees.

Where can the Congress go? I think these hearings represent an important opportunity for the Congress to try to rethink some of the policies that have been in place for this past decade with growing intensity and, I might add, with growing futility. I recommended some months ago that we establish a Presidential Commission like the one whose 25th anniversary we celebrated last year, the President's Commission on Law Enforcement and Administration of Justice, to get an apolitical, nonpartisan assessment of what our policies have been, what good they have done, what harm they have done, and ways in which we can reconsider some of those policies.

As one immediate step, I would hope the Congress would be willing to consider lifting the mandatory minimums that it imposed, and that the Sentencing Commission incorporated into its guidelines; this was quite a significant departure from prior practice. I appreciate the politics of that may not be too easy, but I would at least urge the Congress to consider a sunset rule on mandatory minimum laws. That is, 2 years after enacted, any mandatory minimum sentencing law should go out of effect. In large part, this reflects a realization that a mandatory minimum becomes a knee-jerk reaction to the intensity of concern at the moment about a particular kind of offense. I would urge that they consider a sunset law so that the mandatory minimum law goes out of effect if it is no longer needed. That doesn't preclude the law from being reenacted, but it forces a reconsideration periodically of these mandatory minimums that seem to have gotten out of hand.

I would urge consideration of some focus on the mandatory minimums as not only bad in themselves but also as a symptom of the compulsion to look very tough even in the cases where that doesn't do much good. If we can move that small step, then I would think that many more possibilities for reconsidering sentencing policy might be open.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Doctor.

[The prepared statement of Mr. Blumstein follows:]

PREPARED STATEMENT OF ALFRED BLUMSTEIN, DEAN AND J. ERIK JONSSON PROFESSOR OF URBAN SYSTEMS AND OPERATIONS RESEARCH, H. JOHN HEINZ III SCHOOL OF PUBLIC POLICY AND MANAGEMENT, CARNEGIE MELLON UNIVERSITY, PITTSBURGH, PA

Congressman Hughes and Members of the Subcommittee:

I am honored by the opportunity to appear before you today as you consider the question of the growth in the prison population in the United States. It is an extremely important issue that our political process has ignored for much too long in our concerns with being "soft on crime." I believe that this obsession has wasted considerable resources, has perverted many lives, and may well have led to more rather than less crime.

I address these issues as a scholar who has been concerned with the problems of crime and the criminal justice system since I was recruited 28 years ago by President Lyndon Johnson's President's Commission on Law Enforcement and Administration of Justice as the head of its Task Force on Science and Technology. In that time, I have had the honor and privilege of being the immediate past-President of the American Society of Criminology, an organization of about 3000 members concerned with the scholarly, scientific, and professional knowledge of the causes, prevention, control, and treatment of crime and delinquency. I have also been honored to have chaired the National Academy of Sciences Committee on Research on Law Enforcement and Administration of Justice, and to have chaired its panels on research on deterrent and incapacitative effects, on sentencing, and on criminal careers.

I should also point out that my own personal background of extensive involvement in criminological research has been augmented by my service as a member of the Pennsylvania Sentencing Commission since 1986 and as the chairman for over eleven years of the Pennsylvania Commission on Crime and Delinquency, the State criminal justice planning agency

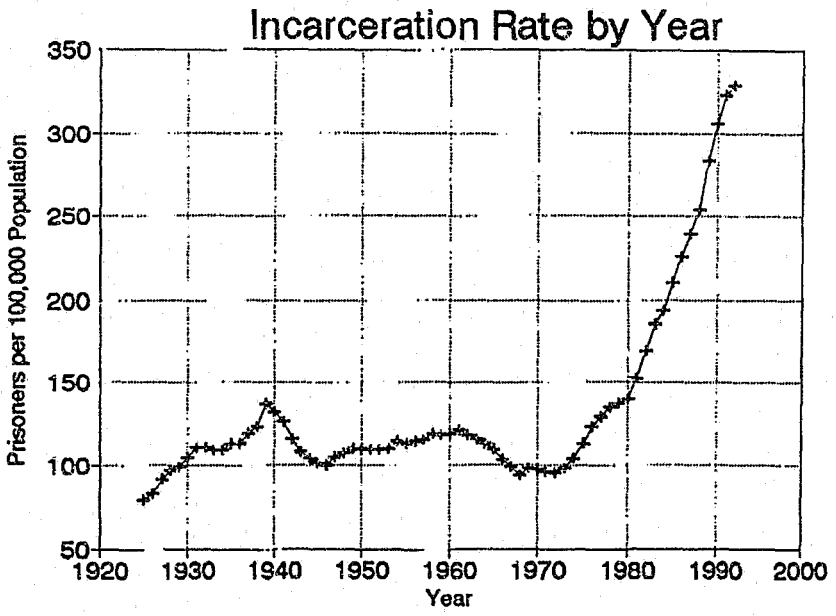
for Pennsylvania. I am attaching a short biographical statement for your reference.

Some Background

The growth in prison populations in the United States over the past two decades has been astonishing. The trend in prison populations over the fifty year period from the mid-1920's to the mid-1970's (shown in the left portion of the attached graph) had been impressively stable. The nation's incarceration rate averaged about 110 per 100,000 population with relatively small fluctuation, even though that period saw our nation's worst depression and its most all-encompassing war.

When we next turn to the period following the mid-'70's, and especially after 1980, however, one must be impressed by the much more dramatic growth of the incarceration rate subsequent to that period, a growth rate that had averaged about 8% per year since 1980. I have seen this graph many times, and I am sure many members of this committee have also, but I must confess that I find it astonishing every time I look at it. Clearly, something has gone out of control, and it is important that we identify what that is.

As the nation tries to re-establish control, we must examine how we got into this situation, what good has been accomplished, and what harms have we done. Then, if we find the costs exceed the benefits, then we might explore what can we do to reverse at least the harmful aspects of the current policy.



Factors Contributing to the Growth in Prison Populations

I see several factors contributing to the current prison crisis. One relatively small aspect is the changing age structure of the US population. Over the past decade, the "baby boomers" (those born between 1947 and about 1965) have been in the ages of greatest vulnerability to imprisonment - the mid- to late-20's, and so their greater numbers have contributed to filling prison cells even if there were no other changes. But that effect should soon be reversing itself as the baby boomers move into their late 30's and beyond.

A second factor has been the growing crime rate, especially since the mid-1980's. Obviously, if there is more crime, more people are likely to be arrested, convicted, and imprisoned. But indeed, that is not necessarily the case: In the early '80's, we saw a steady reduction of crime during a period of a clear growth in the prison populations.

This highlights the importance of the policy dimension of incarceration decisions. It was clear that the 1980's was a period of growing use of incarceration for most offenses and generally increasingly aggressive use of parole re-commitment for technical violations.

The most dramatic growth in the use of imprisonment was in the case of drug offenses. In the mid-1980's the public was becoming seriously alarmed at what it saw as a drug problem that was getting out of hand, and put intense pressure on the political system to "do something" about that problem. Unfortunately, democratic political systems find it extremely difficult to confess that they really don't have any good ideas about what to do that will demonstrably make

things better. Even more unfortunately, they have discovered something that does get them off that hook: It seems that, when they demand increased punishment for the objectionable behavior, the public not only seems to accept that as a satisfactory response, but actually to cheer them on.

The favorite version of this approach is the mandatory-minimum sentencing law. And if they find that a 5-year mandatory sentence doesn't help, then the next session of the legislature will raise it to 10 years. And as long as the public cheers these actions, there seems to have been little that could impede them. Thus, what began about fifteen years ago as an attempt by legislators to send a message to judges who were being particularly lenient about some kinds of offenses seems to have turned into a more generalized reaction by legislative bodies to any crime that catches the public's attention, whether that be drug trafficking, carjacking, or child abuse, and almost regardless of how punitively judges already deal with such cases.

Punitiveness in the War on Drugs

This whole process seems to go on without probing very deeply into whether that punitive approach will do any real good. For drugs in particular, the punitiveness is demonstrably of limited effectiveness. Anyone who thinks for a few minutes about the drug-abuse problem recognizes the futility of these approaches to attack the supply side of the market. That is because the problem is inherently driven by the demand side, for which treatment and prevention are the necessary approaches. We can incapacitate some sellers by locking them up, and we can deter other sellers by the severe threat of punishment. But as long as there are substitutes ready

to replace them in the marketplace, the assault on the supply side will look like Mickey Mouse as the Sorcerer's Apprentice in *Fantasia* - the replacements will arrive faster than they can be pushed off the street.

The irrationality of this punitive approach can be explained as some combination of ignorance of these effects and as a cynical response to the public's call for "action" when no demonstrably effective approach is available. My principal uncertainty here is in knowing how much to attribute to ignorance or cynicism. If it is truly ignorance and they are unaware of the futility of their efforts, then I am more hopeful that education through hearings such as these will help. I am more concerned about the cynical approach, where they understand the futility of what they are doing, but pursue it because it "works" - at least politically even if not functionally. That would be a much more difficult effort because it calls for a widespread education of the public generally to enable them to distinguish those settings where punitiveness simply is inadequate.

This dominant supply-side strategy as a response to the admittedly serious drug problem has been an enormous increase in the prison population serving time for drug offenses. At this time, 60% of Federal prisoners - a clear majority - and 25% of state prisoners are in prison on a drug charge. This compares with rates of about 5% in 1980, and with a much smaller prison-population base. If one were convinced that this growth were effective in ridding the nation of the drug problem, then one might be willing to consider those costs reasonable and acceptable. But if the number of drug transactions that have been averted by this enormous growth in

imprisonment is negligibly small, then the effort seems futile and wasteful of the money spent to build the cells and to house all those prisoners.

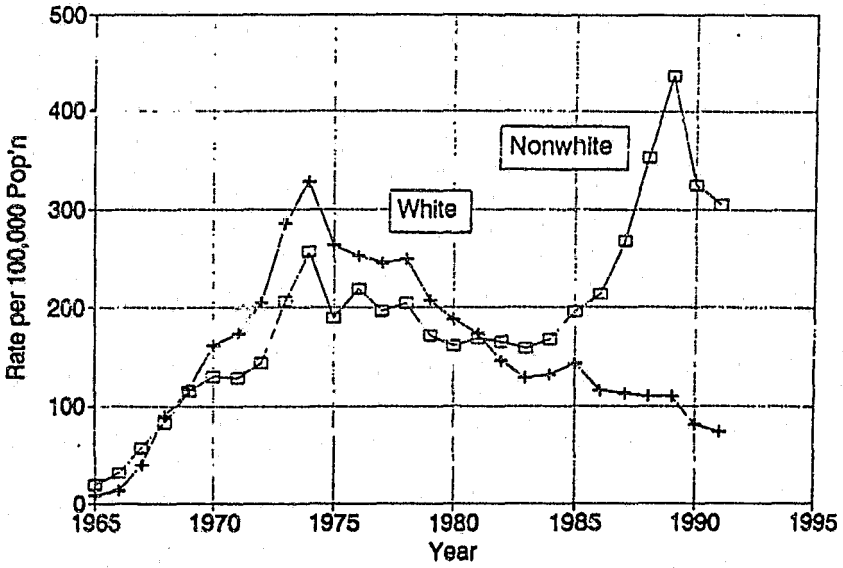
But matters are made worse by the fact that many serious, violent offenders have either not been imprisoned or have been released prematurely because of the mandatory nature of many drug sentences. They have to be imposed because of the mandatory-minimum laws, and so they take precedence in the allocation of the limited number of available cells. And to the extent that the imprisoned drug seller is not the malevolent pusher depicted in *The Man with the Golden Arm*, but rather a ghetto youth out to pursue the American dream in his own fashion - perhaps because he sees all other routes blocked to him - then he might well emerge from his period of incarceration far more committed to much more generic criminality, and probably far more skillful at it than when he went in.

The Race Aspects of the Problem

One of the most distressing aspects of the war on drugs has been the degree to which it has been particularly focused on minorities, and especially African-Americans. This situation has developed most dramatically since the emergence of crack cocaine as major drug of abuse in urban ghettos in the mid-'80's.

This effect is perhaps best reflected in the following graph, which shows the drug arrest rates for white and non-white (primarily African-American) juveniles. From 1965 until about

Drug Arrest Rate - Juveniles



1980, arrest rates for white and nonwhite juveniles were very similar; indeed, from 1970 until 1980, the arrest rate for whites was *higher* than for nonwhites. But arrest rates for both groups were growing from a rate of about 10 per 100,000 juveniles in 1965 to a peak about 30 times higher in 1974 (329 for whites and 257 for nonwhites).

The decline after the 1974 peak was a consequence of the general trend toward decriminalization of marijuana in the United States. A major factor contributing to that policy shift was a realization that the arrestees were much too often the children of individuals, usually white, in positions of power and influence. Those parents certainly did not want the consequences of a drug arrest to be visited on their children, and so they used their leverage to achieve a significant degree of decriminalization. Following the peak, arrest rates for both racial groups declined, and continued to decline for whites. On the other hand, for nonwhites, the decline leveled out in the early 1980s, and then began to accelerate at a rate of about 20-25% per year until the peak in 1989.

It is particularly troublesome that the war on drugs of the late 1980's has been so disproportionately imposed on nonwhites. There is no clear indication that the racial differences in arrest truly reflect different levels of activity or of harm imposed. A large part of the difference is attributable to enforcement patterns and practices that makes nonwhites more vulnerable to arrest compared with whites. There tends to be a more dense police presence where nonwhites reside because crime rates are higher there. There have also been reports of race being used in police profiles of drug couriers. Perhaps most important, markets operated

by blacks tend much more often to be outdoors and vulnerable to police action, whereas markets run by whites tend much more often to be inside and thereby less visible and more protected from police surveillance and arrest. Further, the dramatic growth in arrests of blacks since 1985 also reflects the growth of crack-cocaine use, a growth that has occurred predominantly in black communities, and the associated enforcement focus on that drug.

It is also the case that blacks who get arrested on drug charges also get sent to prison more readily than do their white counterparts. This kind of racial disproportionality in prison compared to arrest is not the case with the violent crimes of murder and robbery, which leave less room for prosecutorial and judicial discretion. For the drug offenses, however, there is considerable room for such discretion, and the disproportionality in prison results.

What Can the Congress Do?

Several years ago, when it passed its various mandatory-minimum drug laws, the Congress was guilty of many of the same sins that have afflicted many state legislatures. But I do sense an emerging realization that what we have been doing about the drug problem has been ineffective, wasteful, and harmful in many respects, and a growing willingness to reconsider the policies. The Attorney General has certainly suggested the need for such reconsideration.

Last November, just after the election, in my presidential address to the American Society of Criminology, I urged the creation of a Presidential Commission that would take a

hard and honest look at the effectiveness of our current policies regarding drugs, and more generally about our crime-control policies. Such a commission would be able to collect the evidence on the limited effectiveness of our current policies. They should get the support of the National Academy of Science in any such efforts. In that context, I find it astonishing that the Congress appropriates only \$20 million per year to the National Institute of Justice to develop the knowledge to address all of these issues. In contrast, we spend about three times as much to carry out research into the problem of dental caries. We clearly must step up our research efforts so that policies can be driven by knowledge rather than by rhetoric and ideology alone.

As an immediate action step, the Congress can also face up to its error in passing the mandatory-minimum drug laws. One step would be to simply repeal those immediately, restoring the sentencing discretion to judges, and acknowledging the futility as well as the inherent injustice of making drug sentences comparable to those for homicide. I do not know whether the Congress has yet reached the level of awareness that it is willing to address this issue responsibly in this way. I cannot judge how many political ambush parties would exploit such an act of reason by accusing those who support it as being "soft on crime", obviously a very powerful political threat over the past decade.

In recognition of the political difficulty of doing that in the current climate, we should at least be able to establish a sunset provision so that those mandatory-minimum laws become inoperative after some reasonable time, say two years. Of course, the sunset provision could be negated by an explicit re-enactment of the original law or some variation of it. This would at least be a reasonable and responsible first step in re-introducing rationality to our current sentencing policy. I would certainly urge its consideration. If we can move that small step, then many more possibilities for reconsidering sentencing policy will become open.

Mr. HUGHES. Professor Branham, welcome.

STATEMENT OF LYNN S. BRANHAM, PROFESSOR OF LAW, THOMAS M. COOLEY LAW SCHOOL, FORMER CHAIRPERSON, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, CORRECTIONS AND SENTENCING COMMITTEE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION, ACCOMPANIED BY ALAN CHASET, ATTORNEY AT LAW AND VICE-CHAIRPERSON OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, U.S. SENTENCING GUIDELINES COMMITTEE

Ms. BRANHAM. Thank you.

Mr. Chairman and members of the subcommittee, we are pleased to appear before you today on behalf of the American Bar Association to discuss the severe problem of crowding in the Federal prison system and the suggestions of the American Bar Association as to what should be done to redress that problem.

I am sure from your opening remarks, Congressman Hughes, that you are all well aware of the population explosion in the Federal prison system and the enormous financial burden that is being imposed on American taxpayers and on our deficit-ridden Government because of that population explosion.

What I would like to do today is turn immediately to some of the recommendations of the American Bar Association as to what can be done to make the Federal criminal punishment system more rational, more cost effective, and truly protective of the public safety.

First, we strongly urge that Congress enact a Federal Comprehensive Community Corrections Act, following the lead of about 20 States—I guess North Carolina passed one last week—21 States across the country. We recommend that that act contain the central components found in the ABA-developed model Adult Community Corrections Act.

That model act reflects the central understanding that community sanctions can be very punishing if properly structured. Criminal offenders understand this. That is why research studies have found that when offenders are given the choice between going to prison and being punished in an intensive supervision program in the community, up to a quarter of them choose to go to prison rather than being punished in the community. And the public, when informed about what community sanctions are and what they can be, recognizes how punishing community sanctions can be.

A survey was conducted several years ago by the Clark Foundation in Alabama in which about 400 citizens were told about 23 hypothetical cases involving offenders that typically find themselves in prison and jail. Initially, the respondents were asked: "How shall we punish these people? We have two choices, send them to prison or send them to probation." In 18 of the 23 cases the citizens wanted to send these people to prison. But then when they were given five other sentencing options and told about what those sanctions really entail and about the relative cost of incarceration vis-a-vis those community sanctions, the citizens wanted prison in only 4 of the 23 cases.

This study has been replicated in Delaware, it has been replicated in Pennsylvania, and there have been studies conducted by other organizations that show that an informed public wants real

change and understands how punishing these community sanctions can be.

Now this ABA model act that we are commending to you for your consideration is admittedly a State-local model, so its features would have to be modified somewhat to fit the contours of the Federal criminal justice system.

The overarching purpose of a Comprehensive Community Corrections Act is to ensure that there is a wide array of sanctions available to the sentencing judge from which to choose so that the most appropriate sanction can be imposed on the criminal offender. Our model act lists that broad array of sanctions, sanctions which are not now mostly available in the districts across the country.

Another benefit of the ABA model act is that it avoids incarceration which is unnecessary, which is tremendously expensive, and that may, in fact, as some research studies have demonstrated, be endangering the public safety. The model act establishes a rebuttable presumption that a community-based sanction is the most appropriate sanction for the following offenders: one, those convicted of misdemeanors; two, those convicted of nonviolent felonies, and that would include drug offenses; three, those who violate a condition of probation or some other community corrections sanction and whose violation is either a technical violation—it is noncriminal; they didn't report to their probation officer, for example—the violation is a misdemeanor, or a nonviolent felony.

Again, I want to underscore, this is a rebuttable presumption, but it is a presumption nonetheless. The presumption represents an important affirmation of the fact that nonviolent offenders can be meaningfully and, if need be, severely punished in the community.

Now you have several options from which to choose in establishing the structure of the Federal Comprehensive Community Corrections Act, but we encourage that, whatever structure you ultimately adopt, that you strive to avoid unnecessary duplication of State efforts in establishing their own comprehensive community corrections plans.

One way to do that would be through a technical assistance program and some funding to the States to facilitate the development of their own comprehensive plans. Under those plans, local comprehensive programs would be developed and the Federal Government would pay for Federal offenders to be punished in those local programs much like the Federal Government now pays for Federal offenders who are housed in local jails.

This intergovernmental cooperation that would occur under the Federal act represents a win-win-win situation for the Federal, State and local governments, and a very big win for American taxpayers.

Our second recommendation—I am going to be quite brief on this and not belabor it because I want to get to our third and final recommendation. We strongly call upon Congress to repeal mandatory minimum sentences and to enact no further ones in the future. They are simply ineffective; they result in unnecessary incarceration; they can cause unjust sentences because of their rigidity; they cause disparity in the sanctions which are imposed, and that often results in racial and ethnic disparity; and the adoption of

those mandatory minimums we believe has come from research that has gross methodological flaws. Any one of these reasons would be a sufficient reason to repeal mandatory minimums; put together, the failure to repeal mandatory minimums would really simply be inexcusable.

Our final recommendations are designed to bring some accountability into the process through which sentencing laws are enacted. First, we are recommending that before Congress ever enacts a law that will increase the length of a sanction, whether it is a community sanction or incarceration, or the number of people subjected to a certain sanction, that Congress be provided with and consider a correctional impact statement that tells Congress how much is this going to cost if we do this?

Second, the U.S. Sentencing Commission should be directed to prepare similar statements reporting the costs and effects of proposed changes in the guidelines.

Third, taking into account the information provided in these correctional impact statements, Congress should then take steps to ensure, if it decides to make changes, that the necessary resources are there to accommodate these changes. This is simply not happening today.

We commend for your consideration a law like that which is found in Tennessee. Tennessee has enacted a law under which, if a statute is passed and increases the length of imprisonment, if in that year funds are not appropriated to accommodate that increase, then the sentencing law is null and void.

That suggestion was not really well received by the subcommittee before which we appeared yesterday, and, to tell you quite frankly, it seems to me to be fiscal responsibility 101. If you want to do it, then we have got to pay for it, and I think the American citizens would want that kind of responsibility.

Finally, if we are unwilling to take that responsible step, at a minimum Congress should direct the U.S. Sentencing Commission to modulate the guidelines system so the system can work effectively within its capacity.

We commend all of these suggestions to you for your consideration. We are here ready and willing to assist you as you effect these much needed reforms in the Federal criminal punishment system.

I thank you.

Mr. HUGHES. Thank you, Professor.

[The prepared statement of Ms. Branham follows:]

PREPARED STATEMENT OF LYNN S. BRANHAM, PROFESSOR OF LAW, THOMAS M. COOLEY LAW SCHOOL, FORMER CHAIRPERSON, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, CORRECTIONS AND SENTENCING COMMITTEE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

We are pleased to appear before you today on behalf of the American Bar Association to discuss the severe problem of crowding in the federal prison system and some of the views of the American Bar Association on what can and should be done to redress this problem. My name is Lynn Branham. I am a professor of law at the Thomas M. Cooley Law School in Lansing, Michigan, former chairperson of the American Bar Association's Corrections and Sentencing Committee, and a member of the Commission on Accreditation for Corrections, which accredits prisons, jails, probation departments, and other correctional facilities and programs across the country. With me today is Alan Chaset, an attorney who practices law in Alexandria, Virginia and the incoming vice-chairperson of the American Bar Association's U.S. Sentencing Guidelines Committee. Mr. Chaset brings to us the benefit of expertise he obtained while working for the United States Sentencing Commission, the U.S. Parole Commission, and the Federal Judicial Center.

We would like to begin today by commending the subcommittee for its prudent decision to take a fresh look at the astronomical increase in recent years in the number of people that the federal government is incarcerating. We are hopeful that your endeavor will lead to the taking by Congress of the critical steps needed to make the federal criminal punishment system rational, cost-effective, and truly protective of the public's safety.

We were reminded of the urgency of the task confronting this subcommittee and Congress a few weeks ago when preparing for this hearing. We called the Federal Bureau of Prisons to get the most current statistics on the size of the federal prison population and were struck by the substantial increase in the population that had occurred even in the short time since we had last called the Bureau only two months earlier. That increase was and is due to the fact that the size of the federal prison population is now increasing by over two hundred inmates *each week*. This adds up to a need for over eight hundred additional beds a month, the equivalent of at least one prison. With each one of these "prisons of the month" costing millions of dollars of taxpayers' money to build and with each bed added to the federal prison system costing an additional \$20,072 a year on average in operating expenses, according to 1991 figures, the financial costs of the federal government's incarceration-driven sentencing policies are daunting to those of us who must foot the bill for those policies. But when we also consider that vast numbers of the individuals being sent to federal prisons can be punished more cheaply and effectively in the community and that, as we discuss later in our testimony, the incarceration of these individuals may actually be endangering the public's safety, the price we are paying in adhering to outdated policies of the past is truly shocking.

So are there steps that the federal government can take to stem the flow of prisoners that are literally flooding our federal prisons without compromising the goals of adequately punishing criminal offenders and protecting the public's safety? The

American Bar Association firmly believes that there are, and we proffer these recommendations to you.

First, the federal government should adopt a comprehensive community corrections act that contains the central components found in the ABA-developed Model Adult Community Corrections Act, a copy of which is appended to this statement. Earlier this year, the American Bar Association approved the third edition of the ABA Standards for Criminal Justice on Sentencing Alternatives and Procedures. One of the approved standards, Standard 18-2.2(c), calls on legislatures, both state and federal, to adopt comprehensive community corrections acts and cites the Model Adult Community Corrections Act as the type of Act that should be enacted by each jurisdiction.

The Model Adult Community Corrections Act is admittedly a state/local community corrections model whose provisions would have to be modified somewhat to fit the contours of the federal criminal justice system. But most of the essential and interrelated components of the Model Act can and should be included in a federal comprehensive community corrections act. We would like to briefly highlight just a few of those components.

First, the federal comprehensive community corrections act should ensure that a wide array of community-based sanctions is available so that district court judges can impose the most appropriate sanction on federal offenders. The community-based sanctions that should be available in any comprehensive community punishment system should generally include, but not be limited to, unsupervised probation, standard supervised probation, intensive supervision probation, community service, home

confinement with and without electronic monitoring, residential inpatient treatment programs, outpatient treatment, day reporting centers, means-based fines, and restitution. The sanctions listed above can be imposed individually or in combination with other community-based sanctions to reach the level of punishment and supervision needed under the circumstances. In addition, these sanctions can be used as part of a comprehensive and graduated punishment system to ease the reintegration into the community of offenders for whom incarceration was unavoidably necessary.

A point that bears emphasizing here is how important it is to discard and dispel the erroneous notion that these community-based sanctions are not and cannot be punishing. That these sanctions can be tough and demanding has been confirmed by a number of research studies that have revealed that up to a quarter of offenders given the choice between imprisonment and placement in an intensive supervision program in the community will opt to go to prison rather than be subjected to the rigors of community supervision. See, e.g., Joan Petersilia & Susan Turner, *Diverting Prisoners to Intensive Probation: Results of an Experiment in Oregon 31* (The RAND Corporation 1990).

Second, a group comprised of a wide array of criminal justice professionals and members of the public should develop a comprehensive community corrections plan that encompasses federal offenders. This group should include representatives from such key constituencies as prosecutors, defense attorneys, judges, law enforcement officials, corrections officials from both institutional and community corrections programs, and the public at large. The results of studies and the experience of community corrections programs across the country have confirmed that it is imperative that this planning group

be sufficiently broad-based to ensure that these key constituencies support the community punishment programs ultimately adopted.

There are several options from which Congress might choose in establishing the structure for the operation of this planning group. But whatever structure is ultimately adopted, we believe that it is important that it be designed to avoid unnecessary and costly duplication of state efforts in establishing their own comprehensive community corrections programs, and in fact, should be designed to encourage such efforts. One way in which to avoid such duplication is for the federal government to provide technical assistance and funding for the development of statewide comprehensive community corrections plans. These plans would be developed by the type of broad-based groups described earlier, would have to meet certain parameters outlined in the federal comprehensive community corrections act, and would need to ensure that community corrections programs established under the statewide plan are open to federal offenders. The costs of punishing federal offenders in these nonfederal community corrections programs would be borne by the federal government, much as the federal government now pays local governments to house federal offenders in local jails.

Such intergovernmental cooperation in the establishment and implementation of comprehensive community corrections programs would create a win-win-win situation for federal, state, and local governments and a big win for American taxpayers. The federal government would "win" by avoiding the burdens of establishing a federal bureaucracy in each district to implement comprehensive community corrections programs for federal offenders. States would "win" as they receive much-needed technical assistance in the

development of statewide comprehensive community corrections plans and seed money to begin implementing those plans. Local governments would benefit from the technical assistance and funding available under the statewide plan and from federal payments for federal offenders participating in local corrections programs, payments that could be used to defray the costs of those programs. And taxpayers would benefit from the more effective community corrections programs that could be developed and the money that could be saved by the pooling of governmental resources and the avoidance of duplicative programming.

Having worked for the last year with Peoria County, Illinois, a county struggling to redress its jail crowding problem in a state with no funded comprehensive community corrections act and virtually no technical assistance for counties trying to develop comprehensive community corrections programs, I cannot overemphasize to you what dire need there is for a cohesive technical assistance program on community corrections. This technical assistance program would reach down from the federal government through all of the states and into the communities that bear the burden of the effects of crime and in which the responsibility for punishing criminals is most appropriately vested. A focused and fine-tuned technical assistance program, I can assure you, will most definitely "play in Peoria" . . . and in the rest of the country as well.

Third, if, as we have recommended, the federal government combines its resources with the states in developing comprehensive community corrections programs, the federal community corrections act should require, as a condition of receiving federal

funding and technical assistance, that a state community corrections plan include the following components:

- (a) implementation of the plan at the local level by a broad-based community corrections board to ensure that the community corrections program is fully supported by the public and principal groups involved in the community's criminal justice system;
- (b) technical assistance and training to communities establishing or operating community corrections programs;
- (c) adequate funding of community corrections programs;
- (d) monitoring and evaluation of the plan's implementation to ensure that its purposes are being met and that it is being implemented consistently; and
- (e) education of the public about community-based sanctions.

If some other structural mechanism is adopted to develop comprehensive community corrections programs for federal offenders, the federal comprehensive community corrections act should still provide for the requisite local implementation of community corrections programs, technical assistance, monitoring, funding, and public education.

Finally, but quite significantly, the federal comprehensive community corrections act should establish a community-based sanction as the presumptive penalty for misdemeanants, felons convicted of nonviolent crimes, including drug offenses, and individuals who have violated a probation or other community corrections condition but whose violation was either non-criminal, a misdemeanor, or a nonviolent felony. This

presumption would, necessarily, be a rebuttable one. But the general rule of thumb would be that nonviolent offenders are to be punished in the community, thereby reserving scarce and expensive prison and jail space for violent offenders whose incarceration is necessary to protect the public safety -- a theme underscored by Attorney General Reno. It is clear of course that to effectuate this objective, and at the same time ensure that most nonviolent offenders are punished in the community, substantial changes in the federal sentencing guidelines would be needed.

The presumption found in the American Bar Association's Model Adult Community Corrections Act is an important affirmation of the fact that nonviolent offenders can be meaningfully, and if need be severely, punished in the community, and at less cost to American taxpayers, if a properly structured and adequately funded community punishment system for such offenders is in place. And if such a presumption were, as it should be, incorporated in the federal comprehensive community corrections act, and in turn in the federal sentencing guidelines, the impact on the crowding problem in the federal prisons, where more than 75% of the offenders are serving sentences for nonviolent crimes, would be dramatic.

Inclusion of the presumption in federal law would also have the important side effect of limiting the high costs of incarceration to those instances where their incursion is truly necessary and unavoidable. We have already mentioned the enormous financial costs of incarceration, but there are other costs of incarcerating people with which we should be concerned. One of those costs is the human toll of incarceration -- the suffering of families and loved ones and, yes, even offenders, who are separated from

each other because of the offenders' incarceration. While criminal offenders do not normally engender much sympathy, particularly from those of us who have been victimized by crime, the suffering caused by what we are talking about here -- *unnecessary* incarceration -- cannot be cavalierly ignored.

Another potential cost of the unnecessary incarceration of many nonviolent federal offenders is the risk that this incarceration may actually be endangering the public's safety. Studies comparing the recidivism rates of incarcerated individuals upon their release from prison with the recidivism rates of offenders with matching crimes and backgrounds who are punished in the community have revealed that the recidivism rates of those who have undergone incarceration are higher. See, e.g., Joan Petersilia, Susan Turner, & Joyce Peterson, *Prison versus Probation in California: Implications for Crime and Offender Recidivism* (The RAND Corporation 1985). It is not entirely clear at this point why the recidivism rates of released prisoners are higher. They may be higher because the prison experience inculcates or solidifies the antisocial values that nurture criminal conduct. Or they may be higher because released prisoners, often unable to find jobs and otherwise rejected by society, turn back to a life of crime because, in their minds, they have no choice. But whatever the reason for the higher recidivism rates of released prisoners compared to offenders with matching crimes and backgrounds who are punished in the community, these statistics should give us pause and remind us that the criminal sanctioning policies adopted by the federal government may actually be exacerbating the very problems they were designed to avert.

The American Bar Association's recommendation that Congress adopt a comprehensive community corrections act that establishes a presumption of community punishment for nonviolent federal offenders leads logically to the ABA's second recommendation for making the federal criminal punishment system more rational and cost-effective: mandatory minimum sentencing provisions should be repealed, and no additional mandatory minimum sentencing provisions should be enacted by Congress in the future. The ABA therefore supports enactment of H.R. 957, which would effectuate the long overdue repeal of federal mandatory minimum sentences.

The opposition of the ABA to mandatory minimum sentences is longstanding, dating back to 1968. The reasons for this opposition are many, including the following: First, mandatory minimum sentencing provisions often lead to the unnecessary incarceration of many nonviolent offenders, who, as mentioned earlier, can generally be punished more effectively and cheaply in the community.

Second, mandatory minimums produce an inflexibility and rigidity in the imposition of punishment that is unfitting to a system that touts itself as a justice system. Those who work in the trenches of the criminal justice system -- prosecutors, judges, defense attorneys, correctional officials, and others -- know only too well that criminal offenders cannot be lumped together into one all-encompassing category for criminal punishment purposes. While rules can, and in the opinion of the ABA, should be established that will generally determine the severity of the sanction or sanctions to be imposed on a criminal offender, there will always be some offenders who simply do not fit these general rules. To insist nonetheless that a statutorily mandated penalty be

imposed on such dissimilar offenders, regardless of the circumstances and regardless of the consequences, is to insist that the unjustness of a sentence in particular circumstances be ignored. In short, a "justice system" in which mandatory minimums play a central role simply cannot live up to its name.

Third, mandatory minimum sentences are ineffectual; they simply do not do what they purport to do -- guarantee that a particular penalty will be imposed for committing a specified crime. The United States Sentencing Commission reported in 1991 that over a third of the federal defendants whose criminal conduct should have triggered application of a mandatory minimum sentencing provision escaped the effects of these provisions. This finding comports with the results of studies of other mandatory minimum sentencing provisions across the country. See Michael Tonry, *Mandatory Penalties*, 16 *Crime and Justice: A Review of Research* 243 (University of Chicago Press 1993). It is not entirely surprising that this circumvention of mandatory minimum sentencing provisions is occurring, with the acquiescence and assistance of prosecutors and judges, when we remember the fundamental point mentioned earlier -- that mandatory minimum sentencing provisions, if fully enforced, will lead to inappropriate and unjust sentences.

Finally, the random way in which mandatory minimum sentencing provisions have been enforced has led to sentencing disparity, and what is particularly disturbing about this disparity is that it has racial and ethnic overtones. Both the United States Sentencing Commission and the Federal Judicial Center, in their studies of federal mandatory minimum sentencing provisions, found that white defendants were much

more likely than black and Hispanic defendants to avoid the effects of mandatory minimum sentencing provisions. In a country in which racial justice is both a goal and a necessity, these statistics should be of great concern to all of us.

Mandatory minimum sentencing provisions in sum often lead to unnecessary incarceration, which not only wastes taxpayers' money but also may endanger the public's safety. Mandatory minimum sentencing provisions lead to the imposition of inappropriate and unjust sentences, and at the same time make a promise of certain and severe punishment that they do not and cannot keep. They in addition cause disparity in sentencing which is inimical to a system which calls itself a criminal *justice* system.

With so many strikes against mandatory minimums, one might wonder why Congress has enacted so many mandatory minimum sentencing provisions in the past and why proposals for additional mandatory minimums continue to crop up in each legislative session. We are concerned that perhaps one reason for these developments has been the sweeping claims based on now discredited research that all we need to do to be safer from criminals is lock more people up in prison, where they will be unable to commit more crimes, or at least more crimes against the public. Despite the gross methodological flaws that experts have identified in the research upon which these claims are founded -- research which, disturbingly, was disseminated, and with great fanfare, by the Department of Justice during the prior administration -- the political outcry predicated on this research for more incarceration continues.

In addition to the fact that so much of the clamoring for more incarceration is based on skewed research results, there are other problems with the facile argument that

increased incarceration is what is needed to make us safer. One of the problems with this argument is that it fails to differentiate between types of offenders, simplistically suggesting that the incapacitation benefits of incarceration are the same whether we are talking about locking up a murderer or a drug offender, a pedophile or an embezzler, an armed robber or a shoplifter. Another problem with hyperbolic claims that increased incarceration will make us safer is that they ignore the marginal returns of increased incarceration. As the incarceration net is expanded, more and more marginal offenders with low repeat rates will inevitably be caught up in it, averting fewer crimes in general and fewer serious crimes in particular through incarceration's incapacitation effects. Finally, we must be mindful of the research mentioned earlier that suggests that even when incarceration has incapacitation benefits, those benefits may be outweighed by the increased number of crimes that released prisoners commit compared to the number of crimes they would have committed had they initially been punished in the community. In short, we need to be wary of simplistic and deceptive claims about the capacity of incarceration to make us safer.

The American Bar Association's final recommendations for reform that we would like to highlight today are designed to bring much needed accountability into the decisionmaking processes of Congress and the United States Sentencing Commission that directly affect how many individuals are in federal correctional institutions and programs. In recent years, there has practically been a shoving match between certain members of Congress trying to show how "tough" they are on crime by enacting laws to increase the number of people going to prison and the length of their incarceration.

Little, and often no thought, however, has gone into the effect that these changes in the sentencing laws would have on the federal budget and the ability of correctional officials to effectively manage the federal prison population. This failure to consider in advance the costs and effects of proposed changes in sentencing policies and to take the steps needed to ensure that these changes do not overwhelm the capacity of the federal prison system is a case of not just poor, but, quite frankly, irresponsible decisionmaking.

The American Bar Association therefore strongly urges Congress to immediately enact legislation requiring the preparation and consideration of correctional impact statements before legislation is enacted by Congress that would increase the number of people in federal correctional institutions or programs or the length of their sentences. (In fact, the ABA is on record as supporting the preparation of even broader "sentencing impact statements" that discuss the effects of pending sentencing legislation on the courts, prosecution resources, defense services, and other components of the criminal justice system.) In addition, Congress should direct similar consideration by the United States Sentencing Commission of the costs and effects of proposed changes in the federal sentencing guidelines before final decisions are made on those proposed changes.

Finally, taking into account information revealed by correctional impact statements, Congress should then take the steps needed to ensure that the necessary resources are made available to accommodate changes in sentencing or correctional policies that will affect the size of the federal prison or other correctional populations. Congress might, for example, consider following the example of the state of Tennessee, which has enacted a statute under which laws increasing the length of imprisonment will

be considered null and void if adequate funds to accommodate these increases are not included in the general appropriations act. See Tenn. Code Ann. § 9-6-119(f). And if Congress fails to take these steps, the United States Sentencing Commission should be directed to appropriately modulate the federal sentencing guidelines, as it already has the authority to do under 28 U.S.C. § 994(g), so that the federal correctional system can operate effectively within its capacity.

The steps that the American Bar Association has recommended today that Congress take -- the adoption of a federal comprehensive community corrections act, the repeal of mandatory minimum sentencing provisions, requiring the preparation of correctional impact statements before legislation increasing the number of people in federal correctional institutions or programs or the lengths of their sentences is enacted, and the allocation of adequate resources to accommodate any changes made in sentencing policies -- will go far towards bringing needed rationality and cost-effectiveness into the federal criminal punishment system while maintaining its commitment to protect the public's safety. These changes will also bring sorely needed accountability into the federal criminal punishment system -- accountability of offenders to their victims and to the community injured by their criminal conduct as well as accountability of Congress to the public whom it serves for the correctional and sentencing policies it adopts.

We believe firmly that the federal government can and should serve as a model to the rest of the country as to how to best address the problem of crime and the challenges of punishing criminal offenders. The sad truth, however, is that in recent

years the federal criminal punishment system has become the object of scorn and ridicule across the country, serving only as a model of how not to structure a criminal punishment system. By making changes in the federal correctional and sentencing systems like those we have recommended today, the federal government will assume the leadership role that it should, showing the country how legitimate concerns about crime and public safety can be rationally addressed. On behalf of the American Bar Association, we commend these recommendations to you for your consideration, and we offer you the assistance of the ABA as you work to effect these needed changes in federal sentencing and correctional policies.

We would now be happy to answer any questions you might have.

MODEL ADULT COMMUNITY CORRECTIONS ACT

(APPROVED BY THE AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES FEBRUARY, 1993.)

I. OVERVIEW**A. Goals And Objectives**

1. To enhance public safety and achieve economies by encouraging the development and implementation of community sanctions as a sentencing option;
2. To enhance the value of criminal sanctions and ensure that the criminal penalties imposed are the most appropriate ones by encouraging the development of a wider array of criminal sanctions;
3. To increase the community's awareness of, participation in, and responsibility for the administration of the corrections system;
4. To ensure that the offender is punished in the least restrictive setting consistent with public safety and the gravity of the crime;
5. To provide offenders with education, training and treatment to enable them to become fully functional members of the community upon release from criminal justice supervision;
6. To make offenders accountable to the community for their criminal behavior, through community service programs, restitution programs, and a range of locally developed sanctions; and
7. To foster the development of policies and funding for programs that encourage jurisdictions to minimize the use of incarceration where other sanctions are appropriate.

B. Definitions

1. **Community.** Any local jurisdiction, or any combination of jurisdictions, the government(s) of which undertake(s) joint efforts and shared responsibilities for purposes of providing community

corrections options in the jurisdiction(s) in accordance with the purposes and requirements of this Act.

2. **Community Corrections.** Any of a number of sanctions which are served by the offender within the community in which the offender committed the offense or in the community in which the offender resides.
3. **Incarceration.** Any sanction which involves placement of the offender in a prison, jail, boot camp, or other secure facility.

COMMENTARY

The goals and objectives set forth in Section I(A) of this Act reflect three broad purposes: more effective sentencing, more effective use of public resources allocated for correctional purposes, and more extensive involvement of local communities in developing and implementing correctional programs for offenders whose criminal conduct does not require utilization of scarce prison and jail space.

All too often, judges have in the past been faced with very limited sentencing options: either a sentence of incarceration in prison or jail, placement on unsupervised probation, or imposition of a fine without regard to the offender's financial means. In recent years, a number of innovative sentencing options have been developed in the United States, giving some judges a broader range of choice as they strive to impose sentences that are cost-efficient, effective, and responsive to public-safety concerns. The Model Act encourages use of these options, not only to help relieve problems of prison and jail crowding but to help achieve appropriate purposes of criminal sanctions. The community-based sentencing options authorized in the Model Act can be used to achieve the full range of sentencing purposes: punishment (or "just deserts"), deterrence (both specific and general), rehabilitation, and incapacitation.

II. SANCTIONS

- A. This Model Community Corrections Act provides for local implementation of the following community-based sanctions (the list is not intended to be exclusive of other community-based sanctions):
 1. Standard probation;
 2. Intensive supervision probation;
 3. Community service;
 4. Home confinement with or without electronic monitoring;
 5. Electronic surveillance (including telephone monitoring);

6. Community-based residential settings offering structure, supervision, surveillance, drug/alcohol treatment, employment counseling and/or other forms of treatment or counseling;
7. Outpatient treatment;
8. Requirement of employment and/or education/training;
9. Day reporting centers;
10. Restitution;
11. Means-based fines.

B. Definitions

1. **Standard Supervised Probation.** A judicially imposed criminal sanction permitting court supervision of the offender within the community.
2. **Intensive Supervision Probation.** An organized program of probation which includes a combination of conditions such as training, community service, home confinement, or counseling and treatment, and is characterized by frequent and close monitoring of the offender.
3. **Community Service.** A program of specific work assigned to the offender which substantially benefits the community in which the offense was committed.
4. **Home Confinement.** A judicially or administratively imposed condition requiring an offender to remain at home for some portion of the day. There are three types of home confinement:
 - a. **Curfew.** A type of home confinement requiring the offender to be home during established hours.
 - b. **Home Detention.** A type of home confinement requiring offenders to remain at home except during periods of work or study or other permitted absence; and
 - c. **Home Incarceration.** A type of home confinement requiring the offender to remain at home at virtually all times.
5. **Electronic Surveillance.** A means of utilizing telephonic or telemetry technology to monitor the presence or absence of an individual at a particular location from a remote location.

6. Community-based residential settings offering structure, supervision, surveillance, drug/alcohol treatment, employment counseling and/or other forms of treatment or counseling. A program of organized treatment or counseling designed to assist the offender in overcoming any psychological and/or physical conditions which may have contributed to his or her prior criminal behavior while also providing structure, supervision and/or surveillance.
7. Outpatient treatment. This option is identical to subsection 6 above with the exception that such treatment would be offered on an outpatient basis.
8. Requirement of employment and/or education/training. A judicially imposed requirement that the offender remain employed or participate in an educational training course as a condition of his or her sentence.
9. Day reporting centers. A center where an offender serving a community-based sentence in a community corrections setting would be required to report as a condition of his or her sentence.
10. Restitution. Reparation by the offender for personal or property damages incurred by the victim as a result of the offense.
11. Means-based fines. A monetary sanction imposed on an offender which is proportional to the crime(s) committed and the offender's ability to pay within a reasonable period of time.

COMMENTARY

Section II(A) of the Act lists a range of sanctions to become available as sentencing options under the Act. As is indicated, the list is not all-inclusive. The Act contemplates, facilitates, and encourages the further development of effective and cost-efficient community-based sanctions.

All of the community-based sanctions listed in Section II(A) have been tried in at least some American jurisdictions and some of them (e.g., day reporting centers and means-based fines) have a long history of successful utilization in other countries. See, e.g., S. Hillsman, J. Sichel & B. Mahoney, Fines in Sentencing: A Study of the Use of the Fine as a Criminal Sanction -- Executive Summary 5 (1984) (two-thirds of offenders in West Germany and one-half in England and Sweden are fined for committing crimes against a person). A growing body of research has found that these sanctions take a wide variety of forms in different communities and has begun to identify factors that are

essential for their successful implementation. See, e.g., N. Morris & M. Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System (1990); Freed & Mahoney, Between Prison and Probation: Using Intermediate Sanctions Effectively, 29 The Judges' Journal 6 (Winter, 1990); D. Parent, Day Reporting Centers for Criminal Offenders - A Descriptive Analysis of Existing Programs (National Institute of Justice 1990); Knapp, Next Step: Non-Imprisonment Guidelines, Perspectives (Winter, 1988); P. Hofer & B. Meierhoefer, Home Confinement: An Evolving Sanction in the Federal Criminal Justice System (1987); Intermediate Punishments: Intensive Supervision, Home Confinement and Electronic Surveillance (B. McCarthy ed. 1987); J. Petersilia, Expanding Options for Criminal Sentencing (1987); P. Du Pont, Expanding Sentencing Options: A Governor's Perspective (National Institute of Justice 1985).

The community-based sanctions listed in the Act share a number of advantages, including the following: (1) offenders, if employed in the community, can continue to support their families; (2) taxes can be collected on the earnings of these offenders; (3) offenders will be better able to pay restitution; (4) families can remain intact; and (5) offenders can avoid the criminogenic influences of prison or jail. In addition, the flexibility afforded by this array of sentencing options permits them to be used with a large and varied population of offenders. Some offenders, for example, could be required to perform community service and/or receive drug dependency treatment while also serving a period of home confinement.

The sanctions also can be both punitive and structured to meet offenders' rehabilitation needs and guard the public's safety. For example, intensive supervised probation ("ISP") provides for more frequent supervision and intensive treatment of offenders than is normally afforded by traditional probation programs. Day reporting centers are also a useful means of ensuring that offenders comply with the terms of their sentences. Such centers provide a central location where offenders can spend the day and attend classes; receive vocational training; participate in substance-abuse, family, and other types of counseling sessions; and undergo urinalysis tests for evidence of drug or alcohol use.

Although the Act does not address the use of community-based sanctions as conditions of parole, many of these sanctions, such as those of intensive supervision and day reporting centers discussed above, can also be used to provide parolees with the supervision and treatment needed to successfully complete their parole terms.

III. STATE CRIMINAL JUSTICE COUNCIL

- A. The Community Corrections Act shall be administered by a State Criminal Justice Council that has oversight responsibility for state criminal justice policies and programs. The Council shall be responsible for ensuring that

policies and activities undertaken by state or local governmental units or other organizations in furtherance of the purposes of the Act are consistent with those purposes and with the statewide community corrections plan required under Section III(D)(1) of this Act.

- B.** Not later than 90 days after the effective date of this Act, the governor shall appoint, and the legislature shall confirm, the 15 members of the Council as follows:
1. One member shall be a county sheriff;
 2. One member shall be a chief of a city police department;
 3. One member shall be a judge of a general jurisdiction trial court;
 4. One member shall be a judge from an appellate level court;
 5. One member shall be a county commissioner or county board head;
 6. One member shall be a city government official;
 7. One member shall represent an existing community corrections program;
 8. One member shall be the director of the department of corrections or his or her designee;
 9. One member shall be a county prosecutor;
 10. One member shall be a criminal defense attorney
 11. One member shall be the head of a probation department.
 12. Four members shall be representatives of the general public.
- C.** The governor shall ensure that there is a fair geographic representation on the state board and that minorities and women are fairly represented.
- D.** The Council shall:
1. Develop a plan for statewide implementation of the Act that incorporates the purposes and objectives of the Act; ensures consistency of community corrections programs and requirements with other applicable state laws and regulations; and establishes goals, criteria, timetables, and incentives for initiation of community corrections programs;
 2. Establish standards and guidelines for community development of plans to implement the Act in local jurisdictions, as described in Section IV of this Act;
 3. Review initial community plans, require revisions as necessary, and monitor implementation of approved plans to ensure consistency with the statewide plan;

4. Award, administer, and monitor grants, loans, or other state funding mechanisms that the State Legislature establishes for assisting communities in implementing their community corrections plans, as provided in Section VI of this Act;
5. Review community plans and their implementation at least annually to ensure consistency with the statewide plan and require modification of plans as necessary to ensure compliance with the objectives of this Act;
6. Evaluate annually the effectiveness of policies and programs carried out under the Act and report to the Legislature on evaluation findings;
7. Monitor and evaluate the effect of the Act's implementation on offenders of different races.
8. Take steps to ensure that the community corrections program is adequately funded by the legislature;
9. Provide technical assistance and training to provide community corrections services in local jurisdictions;
10. Provide guidance to local Community Corrections Boards, as defined in Section IV(A) of the Act, in educating the public concerning the purposes of the Act, the types of programs and activities to be undertaken under the Act, the possible impacts of the Act on local jurisdictions, and other matters that may assist the local Boards in establishing and carrying out their community corrections programs;
11. Maintain records on the number of offenders who met the eligibility criteria in Section V(1)(a) through V(A)(1)(c) but who were incarcerated.
12. Monitor the results of appeals of offenders who met the eligibility criteria in Section V(1)(a) through V(A)(1)(c) but who were incarcerated.
13. Assess user fees against communities that incarcerate eligible offenders based on the per-inmate incarceration cost formula described in Section VI(C)(1).
14. Hire an executive director, who shall serve at the pleasure of the Council.

- E. The Legislature shall appropriate such funds as are necessary for the Council to carry out its responsibilities under the Act, including funds to hire an executive director and necessary staff to implement the program. Appropriations shall be provided in a way and an amount to ensure program continuity and stability.

COMMENTARY

The provisions of Section III reflect the drafters' view that implementation of an effective, statewide community corrections program requires the active involvement of a broad range of policymakers, criminal justice practitioners from different institutions and agencies, and the general public. The State Criminal Justice Council contemplated by this Act is much like the state community corrections board established by the Michigan Community Corrections Act. That board is composed of a wide array of criminal justice professionals and members of the public. See Mich. Comp. Laws § 791.403. The Criminal Justice Council under the Model Act carries out much the same role as the board identified in the Michigan statute.

Although some states currently operate community corrections programs through established entities, such as probation and parole departments or departments of corrections, the objectives of a community corrections program are broader, and in some instances different from those of other criminal justice departments or agencies in a state. An entity that is separate from those departments or agencies would therefore generally be most able to coordinate implementation of a community corrections program among all affected departments and agencies. In addition, a Criminal Justice Council would be able to handle funding administration, training and education, local program oversight, and other responsibilities that often would not fall within the purview of other departments or agencies, but that are essential to the operation of a successful community corrections program.

It is possible, however, that in some states, existing bodies might be able to assume the implementation, administrative, coordinating, and oversight functions for a statewide community corrections program. Minnesota and Oregon, for example, administer community corrections programs through their Departments of Corrections. Oregon's community corrections program is actually a hybrid model. It allows for varying levels of local participation, ranging from local administration of all community corrections sanctions and supervision programs to centralized state administration of those sanctions and programs with local advisory input. Or. Rev. Stat. §§ 423.540 & 423.545 (1990).

In Section III(B) of the Model Act, a county sheriff is listed as one of the members of the Criminal Justice Council. The intent of the Act is to have the chief correctional officer from a county serve on the Council. Usually, this person would be

the sheriff. In those jurisdictions in which individuals other than the sheriffs are responsible for county corrections systems, i.e. the county jails, one of those individuals should be on the Council rather than a sheriff.

Although not required by this Act, jurisdictions should also consider adding members of the legislature as ex officio members of the Council. These legislators could be helpful advocates for the community corrections program within the legislature and could help to ensure that the program is properly funded. Other state officials, such as a parole board member and a member of the state sentencing commission, might also bring helpful expertise to the Council.

The development of a statewide community corrections plan by the State Criminal Justice Council, as provided for by Section III(D)(1) of the Model Act, is important to the furthering of the goals and objectives of the Act. A plan will result in the establishment of minimum standards, will ensure that there is some consistency in local program operations statewide, and will provide a means for encouraging community support of community corrections. In addition, the state plan will provide a means for gauging progress in the implementation of the Act and for measuring the effectiveness of both individual programs and the statewide community corrections model as a whole.

The broad range of Council functions set forth in Section III(D) necessarily requires staff to administer the programs. The staff would assist in providing technical assistance and training, monitoring and evaluating the implementation of the program in local communities, and ensuring sound fiscal management of appropriated funds. Provision is made for appropriation of funds to hire an executive director and staff to implement the program, as well as for funds for direct program operations at the local level. (Section III(E)). Because of the time required to design, build support for, and implement a community corrections program, as well as the time that must elapse before any assessment of program effectiveness is possible, a state legislature must commit itself to supporting the community corrections program over a period of time long enough to permit thorough, thoughtful, and coordinated planning.

IV. COMMUNITY CORRECTIONS BOARDS

- A. Every city and county in the state shall establish a community corrections program by applying individually or as part of a grouping designated as a "community," as defined in Section I of this Act, to participate in programs and activities, including grant and other financial assistance programs, authorized by this Act and the statewide plan described in Section III(D)(1) of this Act.

- B. Each community shall establish a local Community Corrections Board that shall be responsible for developing and implementing a community corrections plan for the community (including locating suitable sites for community correctional programs). Each Board shall be comprised, at minimum, of representatives of the following categories:**
- 1. Local prosecutor;**
 - 2. Local public defender;**
 - 3. Local member of the criminal defense bar;**
 - 4. Local judges from limited and general jurisdiction courts including courts with jurisdiction over criminal matters;**
 - 5. Local law enforcement official;**
 - 6. Local corrections official;**
 - 7. Local representative from the probation department;**
 - 8. Local government representative;**
 - 9. Local health, education, and human services representatives;**
 - 10. Nonprofit community corrections services provider;**
 - 11. Three or more representatives of the general public.**
- C. Each community shall ensure that minorities and women are fairly represented on the Community Corrections Board.**
- D. In accordance with such rules, regulations, or other policies as the State Council establishes under Section III(D) of this Act, each Board shall develop a comprehensive community corrections plan that, consistent with the objectives and requirements of the Act:**
- 1. Offers programs for the placement of offenders in the community rather than in correctional institutions; specifies the type(s) and scope of community-based sentencing options to be offered and the type(s) of offenders to be included in the program; describes the community's capacity to carry out the specified community-based sanction; and identifies the means by which the Board intends to provide the sentencing option;**
 - 2. Addresses projected program costs and identifies sources of funds, including grants, loans, or other financial assistance available through the Council, to meet those costs;**
 - 3. Provides for monitoring and annual reporting of program results to the Council;**

4. Provides for annual review of the plan and for its revision, as necessary or desirable;
 5. Includes a commitment to carry out the plan in cooperation and coordination with other governmental entities and to conduct the program in a manner designed to ensure public safety and the program's efficacy;
 6. Addresses the need for involvement and education of the community regarding the purposes and objectives of the Act generally and the local community corrections program specifically; and
 7. Identifies the extent to which its plan will affect the number of individuals who are incarcerated.
- E. Each Board shall submit its plan to the State Council for review. An approved plan shall serve as the basis for subsequent Board activity and for the Council's determination of the extent of funding assistance to be provided for community corrections in that Board's community.

COMMENTARY

The Model Act is intended to establish community corrections programs for all local jurisdictions so that qualified offenders in every part of the state can be placed in community corrections programs and so that criminal justice system responsibilities are borne by communities throughout the state. At the same time, however, geography, resources, or other constraints may make community corrections programs impractical or infeasible in some locales. The Act therefore permits jurisdictions to join together as a single "community" for purposes of the Act, provided that all jurisdictions in the community commit themselves fully to shared responsibility for and cooperative support of the local programs.

Because the success of community corrections on a broad scale depends upon community commitment and involvement, the Act places responsibility for decisions about local program operations with a local entity comprised of individuals who represent the diverse constituencies affected by community corrections program decisions. Although the community corrections board would not make offender placement decisions, it would determine the types and locations of community corrections programs and facilities in the community. It also would be responsible for generating and, through oversight activity, maintaining the necessary community support for community corrections in the jurisdiction(s) it represents.

The membership of community corrections boards may vary somewhat from jurisdiction to jurisdiction. For example, some jurisdictions do not have public defenders. The critical requirement, however, is that the community corrections board be comprised of a broad array of criminal justice professionals and members of the public.

The board's actions and decisions would be based upon a local plan containing sufficient detail to confirm that the planned program is in compliance with the Act and the statewide plan. The board would be accountable both to the community and to the state, for both monies spent and programs operated.

V. PROGRAM CRITERIA

A. Offender Eligibility

1. The following offender groups shall be eligible for sentencing to community-based sanctions:
 - a. misdemeanants;
 - b. nonviolent felony offenders, including drug abusers and other offenders with special treatment needs;
 - c. parole, probation, and community corrections condition violators whose violation conduct is either non-criminal or would meet either criterion "a" or "b" above had it been charged as a criminal violation;
 - d. offenders who, although not eligible under criteria "a" through "c" above, are found by the court to be the type of individuals for whom such a sentence would serve the goals of this Act. In making such a determination, the judge shall consider factors that bear on the danger posed and likelihood of recidivism by the offender, including but not limited to the following:
 - i. that the offender has a sponsor in the community;
 - ii. that the offender either has procured employment or has enrolled in an educational or rehabilitative program; and

- iii. that the offender has not demonstrated a pattern of violent behavior and does not have a criminal record that indicates a pattern of violent offenses.

COMMENTARY

The provisions of this section are intended to strongly encourage the sentencing of offenders who meet the eligibility requirements of Sections V(A)(1)(a)-(V)(A)(1)(c) to a community corrections program. The section is meant to comport with ABA Standard for Criminal Justice 18-2.2, which provides that "[t]he sentence imposed in each case shall call for the minimum sanction which is consistent with the protection of the public and the gravity of the crime."

VI. FUNDING MECHANISM

- A. **Eligibility:** A community will apply for state funding by submitting a community corrections plan to the State Criminal Justice Council. The plan will provide information on a community's demonstrated need for community corrections. The plan also will establish program criteria consistent with this Act. Once the Council has approved a proposed corrections plan, that community will be eligible to receive a grant payment for part of the plan's cost.
- B. **Funding**
 - 1. Communities will be allocated grant funds to ensure program continuity and stability.
 - 2. To allocate funds appropriated by the state to implement the Community Corrections Act, the Council will equitably apportion funds to communities.
 - 3. The Council will redetermine periodically each community's appropriate level of funding, taking into account the community's proven commitment to the implementation of this Act.
 - 4. The funds provided under this Act shall not supplant current spending by the local jurisdiction for any existing community corrections program.

[C. Chargeback provision

1. Commencing two years after the approval of a community's corrections plan, the Criminal Justice Council will charge each community a user fee equivalent to 75 percent of the per-inmate cost of incarceration for each offender who has met the eligibility criteria in Sections V(A)(1)(a) through V(A)(1)(c) but who has been either:
 - a. committed to a state correctional facility by a sentencing authority in the community; or,
 - b. committed by a sentencing authority in the community to a county or regional jail facility.
 2. The amount charged to a community under this Section shall not exceed the amount of financial aid received under Section VI(B).]
- D. Audit:** Every two years, the state's general auditor will audit all community financial reports related to Community Corrections Act projects.
- E. Continual Grant Funding:** To receive aid, communities must comply with the requirements established by this Act and the standards promulgated by the State Criminal Justice Council under it. A community corrections program will be evaluated two years after the approval of the community's correction plan and every year thereafter.
- F. Notice:** If a community fails to meet the standards of the Act, the Council shall notify the community that it has 60 days to comply or funding will be discontinued. The community shall have the opportunity to respond within 30 days after receipt of such notice.

COMMENTARY

The eligibility requirements found in Section VI(A) for state funding of community corrections programs will help ensure that community plans correspond to the basic goals of the Act. Further, by reviewing such plans, the Criminal Justice Council will become more aware of the variety of community corrections programs which exist within each community.

Adequate funding is essential to the successful implementation of any community corrections act. The funding mechanism included in Section VI(B) envisions state

funding of community corrections programs. Such funding would be based on each community's need. Determination of a community's financial need would be based on a variety of factors, such as: (a) the population of the community; (b) the percentage of the community's total population which is in prison or jail or on probation; (c) the community's per capita income; (d) the number of offenders from the community committed to correctional institutions for violent and nonviolent crimes; and (e) the availability, conditions, and capacity of community corrections programs, facilities, and resources. This Act does not attempt to resolve how these and other factors would be balanced; each state would decide on its own how to balance the factors and assess a community's financial need. See, e.g., Minn. Stat. § 401.06; Ohio Rev. Code Ann. § 5149.31-5149.36; Tenn. Code Ann. § 40-36-301 & 304-305; Tex. Crim. Pro. Code Ann. § 6166a-4.

The Act requires that the grants be allocated to ensure program continuity and stability. Ideally, this would involve multi-year grants by the legislature, particularly at the program's start, to allow time for its establishment. Three or more years of committed funds would be preferable. The Act recognizes that this may be neither feasible nor permissible under most jurisdictions' granting processes. This Act avoids identifying a minimum funding period for this reason. Instead it imposes a commitment on the jurisdiction to recognize that establishing a community corrections program is a multi-year undertaking requiring the long-term commitment of resources.

The chargeback provisions of Section VI(C) are a means of encouraging the development and use of community-based sanctions and of further ensuring that an offender for whom a community-based sanction or sanctions is appropriate will be so sentenced. The figure of 75% of the cost of incarceration as a charge to a community that fails to use community-based sanctions for eligible offenders is high enough to provide communities with a substantial incentive to punish those offenders within the community. See Ind. Code § 11-2-2-9 (1988). The actual amount of the fee would be calculated by multiplying 75% of the cost of incarcerating the inmate in a correctional institution by the length of the incarcerative sentence imposed. The fee would not be assessed against the community if, because of the results of an appeal, an offender sentenced to a period of incarceration is not actually incarcerated.

The chargeback provision provides communities with an incentive to develop and implement effective community corrections programs. The potentially harsh effect of the provision is ameliorated by the limit on the amount that may be charged back to the community under Section VI(C)(2). In addition, the chargeback provision does not apply until after communities have had time to develop their community corrections programs.

Some jurisdictions, notably Oregon, have avoided the use of a chargeback provision by adopting sentencing guidelines to ensure that community-based sanctions

are imposed on offenders who fall within the target population. Sentencing guidelines that govern the imposition of community-based sanctions can help ensure their appropriate use while avoiding the criticism often leveled at chargeback provisions that they penalize city and county governments for decisions made by judges over whom they have little or no control. The ABA Standards for Criminal Justice call for the adoption of sentencing guidelines to govern sentencing decisions. See Standard 18-3.1. If those guidelines include community-based sanctions, as is recommended by Section VII(D)(1) of this Act, reliance on the chargeback provisions of Section VI(C) would be unnecessary, which is why that section has been placed in brackets.

VII. SENTENCING DETERMINATIONS

A. Presentence Report

1. All presentence reports shall be required to specifically address whether a community-based sanction is a viable sentencing option.

B. Judicial Sentencing Statement

1. The sentencing judge must consider the community-based sanctions set out in this statute before sentencing any eligible offender as defined in Section V(A).
2. Where the judge has decided that a community-based sanction is inappropriate, the judge must state on the record at the time of sentencing that the court considered community correction sentencing options and must explain why such sentencing options were rejected.

C. Appellate Review

1. All individuals sentenced under this state's criminal statutes shall have a right of review of their sentence for conformity with the provisions of this Act, provided that such grounds for appeal are raised on direct appeal of the conviction.

D. Relationship Between Community Corrections Sanctions and Sentencing Guidelines in Jurisdictions with Sentencing Guidelines

1. The [state legislature] in those jurisdictions with sentencing guidelines shall appoint a committee for the purpose of fashioning

sentencing guidelines that incorporate community corrections sentences in a manner consistent with the provisions of this Act.

2. Under guidelines drafted pursuant to Section VII(D)(1), non-incarceration sanctions will be the presumptively appropriate sentence for offenders meeting the criteria of Section V(A)(1)(a)-V(A)(1)(c).

COMMENTARY

Section VII(A) requires that presentence reports include a discussion of whether a community-based sanction is appropriate in each case. This provision will ensure that parties involved in the sentencing process -- judges, probation personnel, prosecutors, and defense attorneys -- are aware of community-based sentencing options during the sentencing process.

Section VII(B) then encourages judges to take advantage of such sentencing options by requiring them to explain why they did not utilize a community-based sanction in sentencing an offender who fits within the target population as defined in Section V(A). This requirement will encourage judges to use the sentencing options set out in this Act so that, consistent with ABA policy, the sentence is the minimum sanction which is consistent with the protection of the public and the gravity of the crime.

Section VII(D) is included to accommodate those jurisdictions that either have in place or are enacting or authorizing concurrently with this Community Corrections Act a set of sentencing guidelines. Community corrections sanctions should be included in such guidelines and referenced by the nature of the current criminal conduct and the offender's criminal history, just as other sanctions are.

Any state sentencing guidelines should be consistent with the eligibility criteria in Section V(A). Application of the guidelines would then generally lead to a community corrections sanction when the offender has met the criteria in Section V(A)(1)(a)-V(A)(1)(c) and would permit a community corrections sanction when the offender meets the criteria of Section V(A)(1)(d).

Section VII(D) requires the incorporation of community-based sanctions into the sentencing guidelines of states which have them. The reference to the state legislature in Section VII(D)(1) has been placed in brackets because in some jurisdictions, the responsibility for drafting sentencing guidelines may not be the responsibility of the legislature. In those jurisdictions, Section VII(D)(1) can be modified to authorize whatever body is to be charged with the responsibility of drafting and recommending a set of guidelines to set about its task.

VIII. ENABLING PROVISION

- A. Judges with jurisdiction over misdemeanors and felonies are authorized to sentence eligible offenders as defined by Section V(A)(1) of this Act.**
- B. Judges with jurisdiction over misdemeanors and felonies are authorized to use the the sentencing options set out in Section II of this Act.**

COMMENTARY

These provisions recognize that there may be instances in which conflicts with preexisting statutes may limit or circumscribe the ability of courts to use the sentencing options included in this statute. These provisions make clear that courts with jurisdiction have the authority to use the sentencing sanctions created and authorized under this statute, notwithstanding any other provision of law.

Mr. HUGHES. Mr. Bredar, welcome. It is good to see you again.

STATEMENT OF JAMES K. BREDAR, FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF MARYLAND

Mr. BREDAR. Thank you, Mr. Chairman, and thank you for inviting me to appear.

As you noted, I am the Federal public defender for the district of Maryland, and I am very much before this subcommittee this morning as a practitioner. I have not conducted exhaustive academic research studies to support my views, and I suppose it is important to note from the beginning where I'm coming from. It is from my experience both as an assistant U.S. attorney, Federal prosecutor, for several years and then from my experience as a Federal defender.

I spend my days, for the most part, in court and in jails, and I think that experience leaves one with a special insight. It is the public defenders in this country who are the ones who really have the substantive contact with the Federal prison population or at least the people who become the Federal prison population. It is the public defenders who have the intimate conversations that, I think, reveal what it is that make most offenders tick, what motivates them, and what doesn't. So I commend you for being interested in hearing the views of one of us.

Having said that I am the practitioner and not the statistician, I do think it is necessary to begin with some very hard figures, figures I think you are aware of but need to be repeated and repeated and repeated, I think. That is that the Federal prison population has grown from approximately 23,000 in 1980 to almost 85,000 today and, as the chairman noted in the opening remarks, continues to grow at a rate of about 200 per week, as I understand it.

I think an even more disturbing statistic, one that was referred to by Dr. Blumstein a moment ago, is the incarceration rate in the United States, being in excess now of 400 per 100,000. I guess it is probably difficult for most people to get a handle on, is that a high number or is that a low number? Well, by comparison, other Western nations: Great Britain, a country that in the last 2 years has gone through a spasm of concern about the number of people that they are incarcerating, a great deal of interest, acts coming through Parliament and so forth designed to address the problem. Their incarceration rate, 97 per 100,000, less than one-quarter of ours. Other Western nations: France commits about 81 per 100,000. Even South Africa, a place that one doesn't normally make positive comparisons with in this area, 333 per 100,000.

These are disturbing numbers that I would think would cause alarm among policymakers responsible for oversight of our penal policy. It causes me, along with my experiences in court and in the jails that I work in, to conclude that it is time to rethink the policies that are driving the explosion in prison population. There are many that are behind it.

This morning, I would like to confine myself to two issues that I think are most disturbing. First, the mandatory minimum sentencing policy, particularly in drug cases, in my view, is way off the mark. Second, there is in this country an increased tendency to federalize State crimes, and this too is beginning to have its impact

on the Federal prison population and can be anticipated to have a greater and greater impact. I think we need to seriously consider this federalization movement from a penal standpoint: Is it good policy?

Returning to the mandatory minimums for a second, long ago when I was a college student—which probably doesn't seem like it could have been that long ago, knowing what my face looks like, but it was 15 years ago—in criminology class, I was taught there are four basic reasons why we sentence people. We sentence them to rehabilitate them, to deter them, to incapacitate them, and to punish them.

Now I don't know if that is right, I'm not sure that anyone knows, but it seems to have been the model that has guided us for many years, so I thought it might be useful to look at mandatory minimum sentencing for a moment against these four objectives.

Mandatory minimum sentencing in a way, I guess, has a superficial attractiveness, but it really doesn't assist in achieving any of these four objectives well. Look at rehabilitation. Mandatory minimum terms in Federal drug cases are, by definition, always lengthy, at least 5 years. Lengthy prison terms are simply incompatible with the notion of rehabilitation. When you lock somebody down for 5 years, 10 years, or 20 years, the normal person comes out of that experience in an institutionalized condition.

Institutionalized: They have learned to live by the law of the jungle, they learn to greet violence with violence, they have learned that you look out for yourself and no one else; concepts like generosity, love, these things, they are gone, they are not relevant in that kind of environment; we have trained that kind of thinking out of people whom we hold that long. Certainly when people emerge from this sort of sentence, they are not better able to function on the street than when they went in, they are worse, and I think that that has to be just fundamental learning.

The second principle: deterrence. We hear so much about deterrence, but, you know, I sit and talk with my clients, and I look at what they are really dealing with on the street before they ever get involved with drug trafficking. They exist in a climate of hopelessness inside most of the city environments where they come from, and, frankly, for many the drug trade is the only apparent avenue to material success. The prospect of lengthy incarceration doesn't dissuade them from this single path to material success that they perceive.

You can say, "Well, you are saying prison is terrible. Why doesn't it deter them." Well, it is paradoxical. I guess it is because their life outside of prison is also pretty terrible and the relative comparison between the two just isn't the same as it might be for you or me were we faced with the same choice, the same calculation.

The third objective of sentencing that I have always been told is what we are all about: incapacitation. You know, the purpose of incapacitation is to protect the public from offenders, but lengthy mandatory minimum sentences are being imposed on too many offenders. The majority of those caught in the net are not really dangerous people, and that may be a difficult concept for people to swallow when their whole exposure to the drug culture and the drug environment is "Miami Vice" and television programs and so

forth. But I'm telling you, as a former prosecutor, from having sat with these people for hours and days getting ready for trials and delving into their lives, some of them are truly predatory, scary, violent people, and they are going to have to be incapacitated, but many—the majority in my experience—just aren't, and I am sure that most of you would have a similar impression if you spent the time with them that I spend with them. So incapacitation, a legitimate objective of sentencing, is just completely being overused here by these mandatory minimum sentences. It is overkill.

Home detention with electronic monitoring, real supervised probation, these kinds of options are not being used nearly to the extent that they could be.

Finally we come to punishment. Well, society needs to punish people who break its laws; I accept that. But 5, 10, 20 years in these cases where people have not committed overtly violent acts, it is excessive. If you sit with offenders as they are receiving their sentences, you quickly learn that those who receive sentences of 8, 10, 12 months in prison, less than a year in prison, are just as depressed and upset and demoralized as those who get the sentences of 5 and 10 years.

In terms of the punitive impact, the sentence of 8, 10, 12 months, it has the impact, it connects, they feel the fear of incarceration. You know, interestingly, in my years of doing this, the one client of mine who had a heart attack immediately after he was sentenced had just received a term of 6 months imprisonment. It does get people's attention.

Another general problem with the mandatory minimums of which I am sure you are aware is that their strict correlation with the quantity of drugs involved is a very crude system indeed. So many other equally, if not more important, indicia of culpability are just ignored by this process that it is really shameful, it is really absurd.

I want to tell you about a case, and I'll be brief, but I think it is a good example of what is wrong. This happened 2 weeks ago. A guy named Carlos Rafael Hernandez in the Eastern District of Michigan was sentenced in a cocaine case, ordered to serve 20 years imprisonment, a mandatory minimum term. This was a very minor player in a large drug distribution conspiracy, but this man's role was that he, for a very short period of time, stored the drugs. He stored the drugs for the head of the conspiracy when the head guy found out that his house was going to be foreclosed on by a bank, and there were going to be people coming in and out of the house, and they needed to put the stuff somewhere for a short period of time. This guy agreed to do it. Sure, it's a criminal act; he shouldn't be involved with drugs, period. But that was the extent of his role.

When the conspiracy was broken up a few weeks later, everyone was arrested, Mr. Hernandez was picked up as well, and he was subsequently convicted. Mr. Hernandez got 20 years imprisonment, 10 years because of the quantity of drugs involved under our mandatory minimum law and then another 10 years on top of it because he had a prior conviction in 1988 in the Georgia State courts for the possession of 0.2 grams of powder cocaine, a crime for which he was ordered to serve 1 year on probation and ordered to pay a

fine of \$100. Now, because he had that criminal history, he got 20 years. The head guy in the conspiracy, the main guy, the guy who was making millions of dollars out of this criminal enterprise, only got 15 years, and he is the top guy. The system is turned on its head when that happens; it is just not fair.

Another policy is driving this growth in prison population, and it is this increased federalization of what heretofore have been State offenses. I think that this, too, is inappropriate. The increased imposition of Federal sanctions is counterproductive if the final objective of the process is the successful reintegration of the offender to the community.

States don't always get it right. They don't have their programs necessarily well funded, and sometimes they lack initiative. But the simple fact of the matter is, it is State and local government in our society that is best configured to deal with crime if the objective is to get the person out of a pattern of offending and back into the community as a contributing person.

The Federal Government is not good at that. They are good at meting out punishment. But look at what they otherwise do. They sweep people out of their communities and take them off to distant prisons and hold them there for a long time. It is almost like the British penal colony approach—you know, we just extract them and get rid of them. Well, these people are coming back, and the Federal Government is very poorly equipped and does a poor job of getting them ready to come back, and maybe that is what, as much as anything, is underlying a lot of our reoffending, our career offending, our repeat offenders.

It is State governments that run the hospitals and the treatment facilities where an offender can get drug treatment, which most of them need; it is State or local government which runs school districts which can run extension programs to help teach inmates real job skills, real living skills, simple basic things like the fact that you have got to get out of bed in the morning at the same time every day to be a responsible citizen and hold a job.

Housing problems, those are local problems, those are community problems and often contribute to offending. Those need to be addressed simultaneously. You basically get one chance. A person comes into the criminal justice system. Now is your time to connect with them. Sure, you have got to punish them, but you have also got to try to turn them around, and you have got to address these other problems that are at the root of their offending, or you are just going to see them again, and it may not be 5 years or 10 years because you have this great mandatory minimum sentencing law, but they are coming back, and they are going to come back in a condition ready to reoffend or at least be dependent on society because you haven't addressed the underlying problem. State and local government is best able to do that, because they are closest to the communities and to these people.

We are federalizing carjacking, we are federalizing more and more drug crimes, we are even federalizing the nonpayment of support orders. We must have a plan for how we are going to pay for the incarceration of all these people. I say take the money that was going to go to hold them in Federal prison, give it to the States

through some kind of program so that the States can breathe life into their community-based sanctioning programs.

The last thing I want to say is that I think there is a basic problem in that legislators design the sanctions in such a way that they, the legislators, would be deterred. But there is a huge gulf between legislators and the community of people to whom these sanctions are ultimately applied, and I guess that must be the explanation for why we keep going through this process of enacting laws that don't tend to dissuade people from offending, that don't break the cycle of offending.

Another thing I feel very strongly from my experience with people in these circumstances is that legislators chronically undervalue the pain of periods of incarceration, and I guess there is no substitute for either having done time or having spent a lot of time around somebody who has done time or is doing time to understand what it means. Eight months in prison is a long time; a year is a long time. Ten years is, in my view, something that should be imposed only when we need to do it to protect the public, to incapacitate somebody who is truly a predator.

I have spoken for too long. I'll cut it off there. Those are my views, Mr. Chairman.

Mr. HUGHES. Thank you very much, Mr. Bedar, for an excellent statement. All the statements were very good, and, without objection, they all will be made a part of the record.

[The prepared statement of Mr. Bedar follows.]

PREPARED STATEMENT OF JAMES K. BREDAR, FEDERAL PUBLIC DEFENDER FOR THE
DISTRICT OF MARYLAND

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to appear before you today to discuss present and future trends with respect to the federal prison population.

I wish to focus on two aspects of current penal policy which are contributing to the increase in the federal prison population and which, I believe, are counterproductive and do not serve the public's interests. Those policies are: (1) the application of mandatory minimum sentences in drug cases, which sentences have an enormous present impact on the federal prison population, and (2) the increasing "federalization" of state crime, which is having some present impact on the federal prison population and which is bound to have an enormous future impact if not reconsidered.

I am the Federal Public Defender for the District of Maryland. As you know, Federal Public Defenders are lawyers in the Judicial Branch of government who provide legal representation to the indigent criminally accused in the United States District Courts, in the United States Courts of Appeals, and in the Supreme Court. Seventeen lawyers serve on my staff in Baltimore and we represent approximately half of the criminal defendants charged in the District of Maryland. Nationally, there are approximately fifty Federal Defender offices which represent clients in most of the District Courts and in all of the Circuit Courts of Appeals.

As this Subcommittee examines federal prison population trends, and the policies driving those trends, it is appropriate

that you hear testimony from a Federal Public Defender because we Defenders, more than anyone else in the criminal justice system, spend time with and make substantive contact with the people who become the "federal prison population." Better than others in the process, we have a sense of what motivates offenders -- what does and does not affect their thinking, what does and does not affect their conduct.

From other witnesses who have appeared before the Subcommittee, you know that the federal prison population is skyrocketing. Just since 1980 the population has more than tripled, growing from 23,000 inmates to almost 85,000 inmates today. The Bureau of Prisons projects that the inmate population will exceed 100,000 as soon as 1997. Unless current sentencing policy is changed, the inmate population will continue to expand exponentially.

This is a bad trend which should alarm policy makers. The United States already has the highest incarceration rate among Western nations, at 426 per 100,000. I recently completed a consulting assignment in Great Britain where their government is convinced that the British incarceration rate is too high. They are committed to stabilizing and even reducing their prison population. Interestingly, their incarceration rate is only 97 per 100,000, less than one-quarter of that in the United States. For other Western nations, the incarceration rates are even lower: France 81 per 100,000, Australia 72 per 100,000, Japan 45 per 100,000, the Netherlands 40 per 100,000. Even the rate in

South Africa is lower than ours: 333 per 100,000. (Source: Penal Reform International, using data from the Council of Europe and the Australian Institute of Criminology.)

The American "get tough" penal policies of the 'mid and late 1980s, the cause of our current prison over-crowding crisis, were in response to real and sincere public outcry for more government action on crime. But the exploding federal prison population in the 'mid 1990s brings us to the day of reckoning. As the federal prison population streaks towards 100,000, and as the national statistic for the number of people locked up by both federal and state government shoots over one million, resource limitations and our concept of justice dictate that we reexamine certain sentencing policies now in place. Sentencing laws that make it illegal for judges to distinguish among offenders who have committed crimes that superficially appear to be similar have resulted in sentences that are totally out of proportion with actual offender culpability. Reconsideration is particularly warranted with respect to certain drug laws that require that all who are found guilty receive lengthy terms of imprisonment.

It is also time to reconsider the relative roles of the state and federal governments in addressing crime -- has the national government become too involved in an area where local government is best configured to deal with the problem? Are too many "state and local" offenders being extracted from their communities and swept into distant federal prisons? Does the increased "federalization" of state crime reduce the likelihood

that offenders will eventually be successfully reintegrated to their communities, because of the nature of federal sanctions? Are we simply "federalizing" more and more offenses when instead we should be helping states to better operate their penal systems, given that state government is inherently better organized to successfully deal with crime?

I am one who believes that federal penal policy is seriously off track. My concerns arise not from any academic studies that I have conducted and not from detailed research involving thousands of cases. I am a practitioner. For most of the last ten years my days have been spent in courtrooms and in jails, first prosecuting offenders and enforcing the law as an Assistant United States Attorney and then later, as a Federal Public Defender, representing and defending those charged with breaking the law. I have spent time with the victims of crime, consoling them and preparing them to testify against those who injured them. I have also spent time with the families of those accused of and eventually convicted of crimes. Most significantly, like other Federal Defenders I have spent hundreds of hours talking to and observing persons convicted of committing offenses. While my methods may not be scientific, I think I have a relevant insight.

I.

Every day United States District Judges impose mandatory minimum sentences of five, ten, and twenty years in drug cases where there is no evidence that the defendant used a weapon or

engaged in physical violence as part of his or her criminal act. So called "drug mules" are often defendants in this sort of case. My experience causes me to question the benefit to society of holding such offenders for five, ten, and twenty year terms. It costs \$20,000 to \$30,000 per year for the Bureau of Prisons to hold an inmate. And most would agree that when inmates are released from these lengthy terms they are far from being ready to contribute to society -- most are in a much worse mental state than when they entered prison and thus are likely to impose additional costs on society, either through dependency or by committing further offenses, soon after release. The costs of our current mandatory minimum sentencing policy are clear; what are the compelling benefits from the policy that cause us to not change it?

As a college student studying criminology, and later in law school, I was taught that the sentencing process was supposed to achieve four legitimate and accepted objectives: (1) rehabilitation, (2) deterrence, (3) incapacitation, and (4) punishment. From my perspective as a practitioner, none of these four sentencing objectives is particularly well served when the law mandates that lengthy sentences be imposed in almost every drug case.

(1) Rehabilitation: In the 1980s, Congress essentially abandoned rehabilitation as an unachievable sentencing objective. Today no one seriously contends that five or ten years of hard time will leave an ex-offender better equipped to deal with the

challenges of every day life. Teaching job and other life skills is no longer a top priority for the jammed Bureau of Prisons; even if it were, for an offender there must be some prospect of rejoining the community in the foreseeable future for there to be any reason to pursue and vigorously participate in a rehabilitative program.

When we sentence offenders to lengthy, mandatory terms of imprisonment, we are essentially "giving up" on rehabilitating them. Some offenders are so dangerous and so predatory that there is no other rational alternative. But most of my clients facing mandatory terms under our federal drug laws do not fall in this category. Since the adoption of the mandatory minimum sentencing structure, we have given up on attempting to rehabilitate those who could be rehabilitated.

When my clients are released after serving lengthy mandatory terms, they are hardened by the experience. Inmates refer to the condition as being "institutionalized." Long periods of incarceration in secure facilities condition inmates to survive in a violent, constantly dangerous environment. They learn to trust no one. They learn to look out for themselves first and foremost, and to only assist others who are capable of assisting them. Concepts of generosity, magnanimity and even love become totally foreign. They learn to greet violence with violence. They learn to live by the law of the jungle where only the strong survive. With respect to their needs for food, shelter, and clothing, they are conditioned to depend on the institution and

not themselves. Years of this experience does not leave them ready to function on the street when released. At best it leaves them ready for complete dependence on public assistance; at worst it leaves them ready to reoffend. The current federal mandatory minimum sentences of at least five years imprisonment serve no rehabilitative purpose and, when imposed on non-dangerous offenders, needlessly contribute to recidivism.

(2) Deterrence: Harsh, mandatory minimum sentences for drug offenses, together with increased interest in health and fitness generally, may be responsible for deterring some middle class and upper middle class individuals who are potential drug offenders. This segment of the drug offender population has grown smaller since the 'mid 1980s when mandatory minimum sentences first became applicable. With respect to this small set of those who trafficked in illegal drugs in the early 1980s, supporters of the mandatory minimum sentencing policies can probably claim success -- many have been deterred from committing drug crimes. This small minority who are deterrable (e.g. people with education, jobs and relatively stable homes -- people who "have a stake") are frightened away by the threat of relatively minor sanctions, provided that enforcement and apprehension are likely. The prospect of six months or one year in jail is sufficient to alter behavior among this group -- five year minimum mandatory sentences are complete overkill.

The lengthy, mandatory penalties have done nothing to deter the much larger scale drug use and trafficking among those in

lower socioeconomic groups. Conversations with my poorer and more disenfranchised clients about the deterrent effect of mandatory minimum penalties reveal the following: inner city life with no education, no job, poor housing and no prospects for improvement leads to hopelessness. Drug trade is an alternative which provides an avenue to some material wealth and status. Drug use itself provides some escape from the otherwise grim reality of life. To not be involved with drugs means to continue to exist in a grim and hopeless state, not terribly different from what my clients presumed prison would be like if they were caught and incarcerated. The threat of jail, even for five or ten years, simply is not that intimidating to someone who already finds life bleak and who thinks he has no future anyway. The threat of a prison term, whether short or long, will not dissuade them from becoming involved in drug trafficking when that lifestyle affords them access to material benefits that otherwise are unavailable. My foreign clients who have escaped the bleakness of life on the underside of Lagos or some other third world city by becoming drug mules are particularly ready to risk jail in order to advance their material condition.

It is my view that the vast majority of those currently involved in drug trafficking cannot be deterred by the threat of incarceration, no matter how lengthy.

Policy makers, in my view, have crafted sanctions in the drug area that would tend to deter them from offending, were they otherwise so inclined. The problem, of course, is that a huge

socioeconomic and psychological gulf separates those who design the sanctions from most of those to whom they are applied. The sorts of penalties that would deter a Justice Department lawyer or a member of Congress or one working on his or her staff are pretty much irrelevant in the thinking of the typical urban drug trafficker. Over the years, the penalties have been increased on the misguided assumption that at some point the sentence being risked will become massive enough to deter.¹ The reality is that the threat of incarceration, no matter how long, simply will not deter hopeless people.

(3) Incapacitation: Drug offenders are certainly incapacitated by mandatory minimum sentences. Rooted in the need to protect the public, incapacitation is one traditional objective of sentencing that, superficially, seems well served by the minimum mandatory policy. However, the difficulty here is that many who are being incapacitated for lengthy periods under current policy genuinely do not need to be separated from the public for such lengthy periods in order to insure public safety. Drug offenders involved in violent conduct may need to be isolated for lengthy periods, at least until they reach an age ('mid 40s?) when demographic data indicate they will be less dangerous. But mandatory minimum sentences are not serving the public's true interest in incapacitation of dangerous offenders when their sweep is so broad as to cause the incarceration of

¹I note below my sense that the full punitive effect of a sentence to incarceration is experienced when penalties of just 8 to 12 months are imposed.

thousands of individuals who pose no real violent threat. Instead, when applied to these offenders the mandatory minimum sentences amount to costly overkill. The "drug mules" again are a good example. These are people who generally have no violent conduct in their backgrounds. They usually have engaged in no violence during the criminal episodes that result in their incarceration. They are involved in drug trafficking for commercial reasons and sometimes to satisfy their own habits. The public would be safer if these people were diverted from the prison system early in their sentences, placed in treatment and job skills programs, and then monitored carefully in the community. In the representation of repeat offenders, I have seen many individuals whom I believe initially entered prison as non-violent, functional individuals, and who only after being released five or ten years later in the "institutionalized" condition discussed above became dangerous "career offenders."

(4) Punishment: The premier sentencing objective of the 1980s was punishment. The public's rising anger and frustration with crime evolved into a demand for the simple response of more punishment. I believe that this public clamor for punishment is the single greatest reason why the minimum mandatory sentencing policy came into being.

Our society believes that punishment is a legitimate objective in sentencing. Wholly separate from its interests in rehabilitation, deterrence and incapacitation, society seems to need to inflict some pain on those who themselves illegitimately

inflict pain and suffering. Society needs to see offenders receive their "just deserts." But I am dubious as to the punitive value of lengthy, mandatory minimum sentences. My experience with my clients is that incarceration for just eight to twelve months has enormous punitive impact. Most of my clients facing a year's incarceration are just as upset, depressed, and demoralized as those facing five or ten years. Among the many people I have accompanied through the sentencing process, the only one to have had a heart attack after hearing his sentence was facing a term of just six months. If punishment alone is the objective, one need not impose a five year sentence in a drug case to achieve the desired impact. In my view, legislators and others who have never served time undervalue the pain of periods of incarceration. While there is a paradoxical lack of deterrent effect from the prospect of such a sentence, I find that the actual experience of a loss of liberty for several months makes a powerful impression on most people, particularly first-time offenders. In my career I have seen little evidence to support the notion that some offenders just "know how to do time," or that they are able to do it "standing on their head." To serve a term of imprisonment, for most people, is to suffer.

There can be no question that lengthy sentences being imposed under our mandatory minimum sentencing policy, particularly in drug cases, are driving the current prison population explosion. When analyzed from the perspective of a practitioner, and when evaluated in the context of the four

traditional objectives of sentencing, mandatory minimums are exposed as bad public policy. The mandatory minimum policy is a poor replacement for the more discretionary system that preceded it, where sentences could be tailored to fit the characteristics of the offender and the true seriousness of the offense. Before mandatory minimums, sentences could be individualized to reflect the right mix of rehabilitative, deterrent, incapacitative and punitive elements for the particular offender. Now such individualized sentencing is impossible in drug cases and injustice frequently results.

Possibly the very worst quality of the mandatory minimum sentencing policy is that it so closely ties the length of the imprisonment term to the quantity of drugs involved in a particular case. Practitioners, be they prosecutors, defense attorneys or judges, all know that the quantity of drugs involved is but one of many indicia of the culpability of a particular offender. In this respect the mandatory minimum provisions are crude and frequently result in obvious unfairness. An example: On July 15, 1993, approximately two weeks ago, Carlos Rafael Hernandez, in case number 92-80733-02 in the United States District Court for the Eastern District of Michigan, was ordered to serve a mandatory minimum sentence of twenty years imprisonment for conspiracy and possession of cocaine with intent to distribute. Mr. Hernandez was a minor player who was brought into an existing drug distribution conspiracy at the last minute to store a large quantity of cocaine. The leader of the

conspiracy had learned that the house where his drug cache was stored was about to be foreclosed on by a bank, and he needed an alternative storage site. Other than storing the drugs for a short time, Mr. Hernandez had no involvement with this drug trafficking group. When the conspiracy was eventually broken up, Mr. Hernandez was arrested and charged.

Under our mandatory minimum sentencing law, the large quantity of drugs by itself required that Mr. Hernandez serve a sentence of at least ten years. In addition, because Mr. Hernandez had been convicted in 1988 in Georgia for possession of .2 grams of cocaine, an offense for which he received a fine of \$100 and a sentence to probation, the federal mandatory minimum law required that the minimum sentence be doubled, from ten years to twenty. Incredibly, the leader of the conspiracy who was deeply involved in drug trafficking over a lengthy period received a lower sentence of fifteen years as he had no prior drug convictions. A judge with sentencing discretion, who was not compelled to enforce mandatory minimum provisions, could have avoided this absurd imbalance and imposed sentences that fit the relative culpability of each offender. The mandatory minimum sentencing law precluded justice in this case.

I hope we are approaching a day when our sentencing policy will reflect more developed principles: First, most offenders will not be deterred by the threat of incarceration, because their life circumstances are not much better than prison life. Deterrence is not an achievable sentencing objective with respect

to the bulk of those at risk for drug offending. Long term incapacitation of truly dangerous offenders and rehabilitation of the less dangerous majority should be our main objectives because pursuit of these two sentencing objectives is the most cost-effective use of our limited penal resources. Since even short periods of incarceration are punitive, sentences imposed in pursuit of either the incarceration or the rehabilitation objective will simultaneously provide sufficient punishment. In most cases, the infliction of punishment need not be a separate objective -- it will be accomplished regardless.

Secondly, rigid rules such as mandatory minimum sentencing laws that limit judicial discretion serve no useful purpose. They should be abandoned. Some first offenders need stiff sentences; some second and third offenders do not, and they could be broken out of the cycle of offending if a proper, treatment-oriented sanction was applied. Cases and offenders must be sentenced one at a time -- each is unique. There is no substitute for judging -- judging by a human being. Mechanical sentencing rules that constrain judicial discretion are often the source of gross injustice.

II.

A second emerging policy of the government is contributing to the overloading of our federal prison system, and inappropriately so. This is the increasing trend toward "federalization" of what heretofore have been state offenses. Whether it is the recent "carjacking" statute or the so called

"dead beat dads" law designed to bring the federal government into the enforcement of child support orders, or whether it is the increased involvement of the Drug Enforcement Administration and the Justice Department in the investigation and prosecution of drug cases, new "federalization" initiatives are resulting or will result in added pressure on the Bureau of Prisons.

To have a chance of successfully dislodging a person from a cycle of offending, government must engage that person on many levels simultaneously when he or she moves through the criminal justice system. Particularly with respect to relatively minor drug offenses and matters like noncompliance with support orders, recidivism is likely unless government not only punishes the offender but also attempts to treat his drug problem, assists him in developing job and other basic living skills, and assists him in locating suitable housing. Although well-funded, the federal criminal justice system tends to be detached and distant from local communities and local resources. While good at meting out punishment, it does a poor job of providing drug treatment in the community, developing job skills and addressing housing needs. Local government, by contrast, is capable of the complete response, because it is already administering the local health facility where the defendant may receive treatment, operating a school system from which extension programs can train offenders, and operating the local housing authority which can provide shelter. Lack of funds, and in some instances lack of initiative, have caused state and local government to not achieve

their potential in reforming offenders. But reassigning the problem to the federal government is not the answer. Better funding for state corrections programs and better leadership at the state and local level resulting in more community-based sanctioning systems are what is needed.

The final objective of the criminal justice process in most instances should be the successful reintegration of the offender to the community. Not being an extension of the local community in the manner of local government, the federal government is poorly positioned and poorly equipped to achieve successful reintegration of most of its inmates. It is large, overly bureaucratic, and often holds its prisoners far from their homes, families and communities.

A recent case from the District of Maryland illustrates the difficulty the federal government has in responding appropriately to a relatively minor but nonetheless troublesome case:

Wendell Reynolds was found guilty in February, 1992, of the federal offense of stealing government property. In March, 1992, he was found guilty in a second, similar case, and he was ordered to serve sentences of six months and three months imprisonment, concurrently. In both cases Mr. Reynolds was caught "shoplifting" at military exchanges in order to support his heroin habit. When Mr. Reynolds was sentenced, the judge recommended that the Bureau of Prisons provide drug treatment to the defendant since it was clear that the drug habit was the

motivation for the stealing in these cases, and in several previous cases.

Instead of receiving drug treatment, the federal penal bureaucracy dealt with Mr. Reynolds as follows: Immediately after sentencing, he was taken into custody and lodged in the Baltimore City Jail for four weeks. Shortly after his sentencing, the Bureau of Prisons designated the Federal Correctional Institution at Petersburg, Virginia as the place of incarceration. However, after four weeks in the Baltimore City Jail, the defendant was not taken to FCI Petersburg. Instead, he was transferred to the Queen Anne's County Jail on the Eastern Shore of Maryland where he remained for one month. Next, the defendant spent more than two months in a Bureau of Prisons contract jail in Texas. Either before or after he was in Texas, he spent two weeks in the Federal Correctional Institution at Atlanta, Georgia. He also spent a week at the Federal Correctional Institution in El Reno, Oklahoma. Finally, approximately five weeks before his sentence was due to end, the defendant arrived at the Federal Correctional Institution at Petersburg where he was enrolled in a drug treatment program. The program consisted of a weekly support group meeting for those addicted to alcohol and narcotics.

In August of 1992, Mr. Reynolds was released from Petersburg. He emerged from prison to find that his mother was very ill and near death. While dealing with the stress of his mother's illness, and with his drug habit never having been

seriously addressed while in custody, Mr. Reynolds returned to heroin use and to theft to support it. A new federal theft case was filed against him in January, 1993, together with a petition seeking the revocation of his supervised release on the previous cases. While the new case was pending, Mr. Reynolds' spouse, his probation officer and his public defender together arranged for him to be admitted to a non-government drug treatment program in Maryland. The judge permitted the defendant to remain out of jail pending trial provided he resided at the hospital. The defendant successfully completed the private detoxification and treatment program and was moved to a residential drug treatment facility, in the community and outside of the hospital. When the defendant was convicted of the new offense, the judge wisely placed him on probation rather than returning him to the Bureau of Prisons, with the requirement that the defendant continue in the treatment program. To date, the defendant has remained drug free and has not been accused of any new theft offenses. He is working full time as a painter and continues to reside at the treatment program.

To the extent that success has been achieved in Mr. Reynolds' case, it has been achieved in spite of the federal criminal justice bureaucracy, not because of it. Mr. Reynolds is being reintegrated to his community in the manner followed by the best of state and local governments, when they have sufficient resources to fund their programs. If Mr. Reynolds' case had been properly handled from the outset, he would have received a short

term (30 days) in the local jail to "shock" him. Then, under the threat of a longer, suspended sentence, he would have been sent to a residential treatment program to address his heroin addiction. Next he would have been released to the community under close supervision, including monitoring for illegal drug use. All of this would have occurred in the county where he lives, so that alienation from his community could have been minimized. It is state and local government, and not the federal system, that is capable of applying this sort of community-based sanctioning program.

To the extent the Congress is enacting provisions making more and more conduct violative of federal law, one must assume that there are federal resources available to incarcerate and otherwise deal with the new "federal" offenders who will be prosecuted under these new statutes and sent to federal prison. I submit that it would be better public policy to stop this trend toward "federalization" of all state crimes and instead take the federal resources which would have been used to sanction these offenders and distribute them to the states. The states inherently are better positioned to successfully address criminal conduct.

Thank you for listening to my views on these important subjects. I hope that this Subcommittee will take a hard look at both mandatory minimum sentencing in drug cases and at the "federalization" trend. Real reform is urgently needed.

Mr. HUGHES. I think that the panel's theme is twofold: No. 1, the mandatory minimum sentences and the way they have been woven into the fabric of sentencing guidelines is a failure for a whole host of reasons that have been articulated; and, second, that in our effort to try to deal with crime we have begun to federalize so many offenses and we have destroyed much of the underpinning of the system—that is, the community networking that is so important—and we have removed them really from that support. And I am inclined to agree to a great extent with your assessment.

The clamor by the public for tougher sentences is a large part of what has occurred. I suppose in many respects we have failed to provide leadership in indicating that it was doomed to failure. Part of our problem is, we have not had good data, it seems to me, that focuses in on certainty as opposed to length. I have always believed that certainty is much more important, the certainty that you are going to get caught and the certainty that you are going to be punished.

I suppose that most legislators would be influenced, as I am, by any empirical data that would show, for instance, that aside from the incapacitation part of the four principles articulated by Mr. Bredar which we all received as Criminal Law 101—Rehabilitation, Deterrence, and Punishment—is all met by certainty, and if legislators, I think, could be persuaded—at least I would hope—that a 1-year sentence as opposed to a 10-year sentence is as effective in rehabilitation, or more so, as Mr. Bredar argues, in deterrence, and in punishment, I think we would move a long way in the direction that I think most of us want to move.

Second, with regard to the second part of the concern expressed by this panel, federalization of crimes, I think we have slowed that process down. I think the costs are part of that, but also I think that a lot of experts, a lot of concerned citizens, judges, nonjudges, academia, and victims are weighing in to encourage us to review what is happening.

Let me just ask as a first question, what is it that we can point to by way of hard data that suggests that premise, the first premise, that basically it is not how long of a sentence that is important, with the exception of incapacitation—obviously, if you put somebody in jail for life, then you have incapacitated them.

The question is not whether that makes sense and whether we are prepared as a society to pay for that cost, whether that is humanitarian, whether that makes good criminal justice policy, but what can we point to, hard data, that suggests that that principle is an overriding principle? That is, it is not a question of how long but whether or not you have provided certainty and that you could accomplish the same thing you want to accomplish with a 1-year term for, let's say, the instance you have just described, Mr. Bredar, on Mr. Hernandez. What do we have by way of data there that establishes that as a principle?

Mr. BLUMSTEIN. Let me just pick up on some of that, Mr. Hughes.

First, we should recognize that almost all criminal careers are finite. That is, people continue criminal activity and then tend to terminate, so that if we give them a very long sentence, in incapacitation terms, much of that is wasted. We have some rough estimates

of how long these criminal careers last, but much more work has to be done on that. If they are given a long sentence that runs well beyond when they would have terminated anyway, then that is a wasteful use of prison in incapacitation terms.

On the deterrent effects, more punishment should obviously be better, but more often the real issue is the tradeoff between, say, more people being sent for shorter times or fewer for longer times. Given a certain amount of prison capacity, say, 200 person-years, you can either send 200 people for 1 year or 10 people for 20 years.

Mr. HUGHES. But Mr. Bredar suggests there is a tradeoff there, that a long sentence basically reduces a person to an institutionalized person, so you are undercutting another aspect of the sentencing process, the goals you are hoping to achieve. Is there any substance to that?

Mr. BLUMSTEIN. I think the essence of his argument was that we are being counterproductive in terms of rehabilitation. We are not improving the behavior of the individual, but we are well likely to be making it worse. There are choices between what the effect of a sentence is on the individual sentenced as opposed to the general deterrence principle which relates to the effect of that threat of sentence on the public broadly.

But the research on deterrence reasonably consistently suggests that the certainty aspect of it, the likelihood of going to prison, is more effective than the duration aspect of it, so that both for incapacitation reasons as well as for deterrence reasons you want to do the tradeoff so that you use shorter sentences, but apply them more broadly.

Mr. Bredar's argument is important in that, if you are going to imprison somebody who isn't likely to have a long criminal career, which is the case of very many of these drug sellers, particularly in the urban ghettos where hopelessness is the major theme, then you are going to criminalize that individual who is otherwise pursuing the only route he knows to some kind of economic stability in an economy that is reading him out.

But that should be compared to rehabilitation effects, and his argument, which I think was a powerful one, suggests that it is counterproductive in terms of rehabilitation. That individual is going to come out worse, and so we have got to make the tradeoff between the social harm we do by enhancing the criminality of the individual who is going to come out at some point, and weigh that against any deterrent effects we may achieve.

Mr. HUGHES. Professor Branham, I read with great interest the proposed model program for community-based correctional options, is what it amounts to, and I wonder if you have had an opportunity to look at the legislation that I introduced and tacked on to the crime bill in 1990, the correctional optional grants program for the various States. Have you had a chance to look at that?

Ms. BRANHAM. I am familiar with it, sir, and I do understand that there is some technical assistance going to the States. One thing we were interested in is that that technical assistance be expanded to include assistance to the States in establishing these comprehensive community correction acts.

Mr. HUGHES. This actually was an effort to move the States to some model programs in the direction that I believe you want to

take us and which I think is desperately needed. I don't think we have developed the sentencing options for judges that we need to develop. That is part of the problem.

Ms. BRANHAM. Right. Not just to get a few more options out there but to get the structure that will make sure that those options are effective.

Mr. HUGHES. That is just as important, but that is what the grant program really was for, and I would invite you to take a look at that, and since we are apparently going to have another comprehensive crime bill move through the Congress, I would be very interested in hearing what we need to do to improve that.

Frankly, I think the only way that we are going to continue to test these ideas in the marketplace, that are working in many States, and provide some Federal leadership is through that type of model program, and if we can strengthen it in any way, I would like to hear any comments you might have, because I think it pretty much tracks what you want to do.

Ms. BRANHAM. OK. We can provide you with any specific assistance.

Mr. HUGHES. That would be helpful.

I have a number of other questions, but I am going to recognize the gentleman who was previously the acting Republican leader here in the subcommittee, Mr. Coble. The distinguished ranking Republican has just arrived. We are going to give him a little time to get his breath.

The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

As is not uncommon around here, I had another committee hearing I had to go to.

It is good to have you all with us.

The chairman mentioned the model Community Corrections Act—I think you were talking about that—proposed by the ABA. Now I think, folks, I am right when I say that the cost apportionment feature of that proposal has been left open. Do you all have any ideas how cost should be apportioned as opposed to State versus Federal, 50/50? Have you all had occasion to think about that?

Ms. BRANHAM. Sir, as I mentioned earlier in the testimony, the exact structure, which would include the percentage for funding, is something you have got a lot of options to follow.

The way this general framework would operate in practice, again, as I envision it, is technical assistance, going down to the States to help them set up Statewide Comprehensive Community Corrections Act plans and some seed money to help that planning office in the State capital set up the plan. That is limited assistance. We aren't talking about, you know, us going in and paying for the State's full program.

The statewide plan would then provide for the establishment in each community, such as Peoria, IL, that I'm working with right now, of a comprehensive community corrections plan that includes a day reporting center, residential drug treatment programs, intensive supervision probation, and so on.

Then what the Federal Government would do—and this is where, I think, the money comes in; you are going to either pay for the Federal offender in prison or somewhere else. If a Federal offender

participates in the local day incarceration center, the Federal Government would pay the price for that, just like you pay about \$50 a day right now to house that Federal offender in a local jail.

So there are two types of Federal disbursements we are talking about—the direct payment for a Federal offender, which you are going to pay for some place, either in prison or a less expensive community sanctioning program, and then some money for technical assistance which, I need to underscore, is so desperately needed by the States and the localities.

The exact percentage, no. Again, the structure, you have got a lot of options here.

Mr. COBLE. Let me ask each of you this. Others may want to contribute to this. Based upon your respective experiences, are there any programs or initiatives in the corrections area on the State level that you all believe to be working effectively and/or efficiently that perhaps our subcommittee could examine? Is there anything you want to share with us in that area?

Ms. BRANHAM. There are a number of programs that the committee can look at, and I hope you will look at, not just by calling in witnesses, but by going and observing some of these programs. I have noticed by working with Peoria County, IL, when we talk abstractly about these programs, it is like, "Well, what are they?" When you actually go to these programs and see what they are like, it is really very different.

But there is a very good intensive supervision probation program in Maricopa County. It was just evaluated by the General Accounting Office. The conclusion was, it was cost-effective—effective, again, from both the cost standpoint and in terms of the recidivism rates of offenders.

There is a day reporting center you might want to go up to Massachusetts and see. There are some good programs in Milwaukee.

Mr. COBLE. Where in Massachusetts?

Ms. BRANHAM. I think it is Hampton County, MA.

What we can do, if you are interested—

Mr. HUGHES. Provide it for the record.

Ms. BRANHAM. Right. For each one of the sanctions that are listed in the model act, we can give you a list, and hopefully, like I said, maybe you will get to actually see these programs.

Mr. HUGHES. The record will remain open.

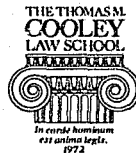
Ms. BRANHAM. Fine. That is what we will do. We will give you a list.

Mr. COBLE. I thought, Mr. Chairman, that might be of help to our subcommittee.

Ms. BRANHAM. OK.

[The information follows:]

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September 15, 1993

Honorable Congressman William Hughes
 Subcommittee on Intellectual Property
 and Judicial Administration
 U.S. House of Representatives
 207 Cannon House Building
 Washington D.C. 20515

Dear Congressman Hughes:

When I testified on July 29, 1993, on behalf of the American Bar Association before the Subcommittee on Intellectual Property and Judicial Administration about crowding in the federal prison system and ways to reduce that crowding, I was asked if I could provide a list to the subcommittee of some community corrections programs that demonstrate the broad potential of community corrections. You will recall that I not only agreed to furnish such a list to the subcommittee but that I urged the subcommittee to visit the sites of these programs to gain a full appreciation of how they work and their value as sanctioning programs. While there are a number of well-structured community corrections programs across the country, I have, after consulting with community corrections experts across the country, pinpointed several programs from whose review and observation I believe the subcommittee would most benefit. Set forth below are the names of these programs, a brief description of them, and the names of the individuals to contact if you want additional information about the programs. I am also enclosing other materials that more fully describe these programs.

1. Ramsey County, Minnesota.

Contact person: Robert Hanson, Director
 Adult Courts Division of the Ramsey
 County Community Corrections Department
 (612) 266-2300

Brief Description: Ramsey County, Minnesota is universally recognized as having one of the best and most comprehensive community corrections programs in the country. The range of programs in Ramsey County includes a pretrial screening and diversion program, intensive supervision probation, community work crews, a day reporting center, home confinement, and special treatment and sanctioning programs for drug offenders and individuals convicted of crimes involving domestic violence. One

particularly noteworthy aspect of the Ramsey County community corrections system is the concerted effort to ensure that many serious offenders who would otherwise be incarcerated are subject to sanctions in the community.

2. Maricopa County, Arizona.

Contact person: Norman Helber
Chief Probation Officer, Maricopa
County Adult Probation
(602) 506-7244

Brief Description: Maricopa County is another county well-known for its broad spectrum of community sanctions. These sanctions include day fines, intensive supervision probation, community service, day reporting, and special treatment programs for sex offenders. The county's intensive supervision program was recently favorably reviewed by the General Accounting Office. See General Accounting Office, Intensive Probation Supervision: Crime-Control and Cost-Saving Effectiveness (June, 1993).

3. New York Programs. A trip to New York City would afford the subcommittee the opportunity to observe three different types of community sanctions programs whose components might be particularly suited for adaptation by the federal corrections system and that are well-respected by community corrections experts - the Center for Alternative Sentencing and Employment Services (CASES), the Women's Prison Association and Home, Inc., and the New York Probation Department.

a. CASES

Contact person: Joel Copperman
Executive Director, CASES
(212) 732-0077

Brief Description: CASES serves as an example of the role that private entities can play in community corrections programs. CASES runs two programs - an intensive supervision and treatment program for otherwise prisonbound offenders and a community service program. CASES frequently hosts visitors from across the country for roundtable discussions with community corrections experts.

b. Women's Prison Association and Home, Inc.

Contact person: Ann Jacobs
Executive Director, Women's Prison
Association and Home, Inc.
(212) 674-1163

Brief Description: The Women's Prison Association runs several community-based sanctioning programs for female offenders. Among these programs are a community residential program for homeless women and a "day" reporting program. (The program also includes, when needed, evening and weekend reporting requirements.) Because of the Family Unity Demonstration Project Act, which was recently introduced in Congress, the subcommittee might be particularly interested in the association's foster care prevention services, which are designed to nurture the bonds between female offenders and their children.

c. New York Probation Department

Contact person: Frank Domurad
Deputy Commissioner for Administration
and Planning
New York City Probation Department
(212) 374-5681

Brief Description: The New York City Probation Department is garnering national attention as it modifies adult community supervision so that serious offenders, including violent offenders, can be punished in the community. The Edgecombe Day Treatment Center run by the department would probably be of particular interest to the subcommittee.

4. Dakota County, Minnesota.

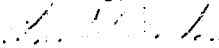
Contact person: Mark Carey
Director, Dakota County Community Corrections
(612) 266-2300

Brief Description: The Dakota County community corrections program differs from the others listed above because it is so very new. But if the subcommittee makes a trip to Minnesota to visit the Ramsey County program, it would be well worth the subcommittee's time to visit adjacent Dakota County or at least arrange a meeting with Mark Carey, the director of Dakota County Community Corrections. Dakota County has instituted an array of community corrections programs, including electronically-monitored home confinement, community work crews, and a victim-offender mediation program, and the county is in the process of creating a day reporting center. What particularly distinguishes the county's community corrections program from others, however, is a pilot project that it is about to implement under which judges will sentence offenders to an "intermediate sanctions continuum". A

risk assessment will then be conducted by professionals who will place the offenders in the least restrictive, least costly program commensurate with the offender's risk level. Since abiding by the requirements of a program will lead to offenders being placed in increasingly less restrictive programs, the pilot project will provide incentives for offenders to refrain from criminal activity and comply with community corrections conditions.

I hope that the above information proves helpful to your subcommittee. I would again encourage the subcommittee to further examine these programs through site visits. If your schedules permit you to visit only one site, then I would recommend that you visit either Ramsey County or Maricopa County because of the greater comprehensiveness of their programs. If I can be of any assistance to the subcommittee in setting up these site visits or in providing the subcommittee with additional information about these or other community programs, please do not hesitate to call me.

Sincerely,


Lynn S. Branham
Professor of Law

The Following Memorandum Describes the Programs of the Ramsey
County Community Corrections Department

Post-It™ brand fax transmittal memo 7871		# of pages 3
To: Lyndi Brancham: A report	From:	
CC: gave our dept. alternative on this	CC:	
	Subject:	
Fax # 517 334-5724	Fax #	

I N T E R O F F

From: Robert A. Hanson
HANSON R
Dept: Corrections
Tel No: 266-2301

TO: Joan C. Fabian

(FABIAN)

CC: George Courchane

(COURCHANE)

Subject: Programs available to the Adult Division Staff

-DOMESTIC ABUSE - A special unit of probation officers work with the Wilder Foundation and other treatment programs, as well as the Courts, ensures effective and fast follow-up on criminal court cases involving domestic abuse. Victims are notified of probation officer names and telephone numbers to report violations, and a special effort is made with the City Attorney's office to concentrate resources on repeat offenders. Treatment is mandated and Pre-Sentence Investigations (PSI's) are ordered on almost all cases.

-FAST TRACK DRUG - Cocaine related cases, given close supervision at 1/3 normal caseload sizes and coordinated via a dual dept effort between Human Services and Corrections for immediate chemical assessments and treatment placements. This program moves cases through court expeditiously and supervises offenders intensively.

-FCONNECT - A program for Cocaine addicted, custodial parents (usually female) who are on probation. This East-Side-of-St. Paul-based, three department program (Human Services, Nursing and Probation) team, spearheaded by probation, deals with the most difficult of client populations in an attempt to prevent repeating the cycle of chemical abuse and criminal activity in yet another generation.

-DAY REPORTING CENTER- Jail Alternative program used at sentencing, probation revocations, or early release from incarceration. It supports community probation services by providing a seven to eight weeks of program designed to provide an option for a sentencing judge, to probation officers at revocation time, or to the institution when doing reintegration planning. Heavily oriented towards employment and dealing with job readiness and other necessary life skills, it also deals with past criminal behavior, criminality and accepting personal responsibility for one's own behavior.

-STS - Jail Alternative. Operated in partnership with ReEntry Services (they provide the crew leaders and equipment) Court ordered Community work crews do public service projects with minor offenders who otherwise would have received incarceration sentences of 1-30 days. Probation staff co-ordinate all Court related functions.

-S.A.V.E. Sentencing Alternative Volunteer Employment program. Provides community work service on an individual basis. Started in 1976, this program deals with every nearly every non-profit program (over 500) in Ramsey County. It has been used by every judge on the bench and has provided thousands upon thousands of hours of service over the 17 year life of the program. It is a frequent sentencing option.

-HOME CONFINEMENT - Jail Alternative. Electronic Monitoring equipment used in a carefully controlled program of chemical testing, random spot visits and other community controls. Participants are screened according to judicially approved criteria and returned to the community under conditions of confinement. For use with sentences of 30 - 120 days. One third of eligible participants choose jail over this program due to it's strict "no drugs" enforcement standards.

-EMPLOYMENT PLUS - A program run in co-operation with the Wilder Foundation to support field caseloads and probation supervision by providing job training, job readiness, job searches and job follow-up among unemployed probationers. These offenders are beyond the need level that works effectively with the state employment offices. With caseload unemployment at 50%, this program is one key to successful community adjustment. Staff work with basic identification needs for required by the Immigration and Naturalization Service, as well as by state law. A complex and difficult program area.

-PRISM - Group supervision, educationally based program, for limited risk offenders. Teaching "Aids" awareness and prevention, dealing with criminal behavior, increasing restitution and operating very cost effectively, this program is a keystone in helping probation deal with the large caseloads that would otherwise overwhelm "regular" probation supervision.

-PATHFINDERS sex offender program - funded at considerable hardship by taking money from other program budgets, this program concentrates on the sex offender who willingly or unwillingly is required by the Court to attend sex offender treatment programming.

-Re-ENTRY WEST - This half way house provides a residential facility as an option to probation revocations or as a backup when a probation plan is in severe jeopardy. This male facility provided 24 hour supervision while new probation plans are being agreed to and set up.

-URINALYSIS PROGRAM - No condition of probation has grown as fast as drug testing. This is a major effort to ensure appropriate follow-up orders of the court are complied with and chemical abuse is discovered by supervising probation officers.

-12 STEP ORIENTATION PROGRAM (DWI). A highly innovative program worked in partnership with the bench, Alcoholics Anonymous, and the probation office staff. Hundreds of volunteers give of themselves and their time to orient persons convicted Driving While Intoxicated offenses to the purpose and availability of AA. The program makes use of the Spruce Tree Center and will soon expand to Government Center

West, due to the demand for its services.

-REENTRY METRO - the longest lived and only women's residential program in the state of Minnesota for Corrections system women. Dealing with children and special program for women, it is a part of the ReEntry half way house system consisting of ReEntry Ashland, West, and Metro.

-RESTITUTION SPECIALIZATION - Within the Community Services Unit, this misdemeanor high volume area collects nearly as much restitution as all other offender categories put together.

-ALPHA HOUSE - A residential program for sex offenders known for it's high quality and close work with Corrections staff. Usually full and operating with a waiting list. A Hennepin County program used by both counties.

-TWO DAY ANOKA (DWI) PROGRAM - Up to 1500 persons per year have gone to this program in lieu of jail/workhouse. Per Bench policy, each person convicted in Ramsey County of a misdemeanor DWI goes to this residential education program about drinking and driving. They pay a fee of \$80 for these two days and receive educational training about the effects of drinking and driving. This highly regarded program is a co-operative venture between the Anoka and Ramsey County probation offices. The program is self supporting to the county.

-ALPHA HUMAN SERVICES - A non-residential program for sex offenders based out of a Hennepin County facility, and just recently opening offices in Ramsey County.

LA OPPORTUNIDAD - UNCOOPERATIVE-SEX OFFENDER program. Just developing, this program deals with offenders who refuse to recognize their need for treatment but have court orders to attend.

La OPPORTUNIDAD - COMMUNITY RE-ENTRY program. This Hispanic based program concentrates on issues surrounding reintegration into the community of offenders with Hispanic backgrounds. The program staff is all bilingual and the program serves the metro area.



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Adult Courts Division
80 Kellogg Blvd. West, Suite 640-D
St. Paul, MN 55102-1657

Robert A. Hanson
Director
Adult Courts Division

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JAMES K. BREDAR
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RECEIVED

AUG 19 1993

FAX: 410 • 982-0872

August 5, 1993

Sub on Courts

Congressman William J. Hughes
 Chairman, Subcommittee on Intellectual
 Property and Judicial Administration
 207 Cannon House Office Building
 Washington, D.C. 20515

Subject: The Federal Prison Population:
 Present and Future Trends

Dear Congressman Hughes:

It was an honor to appear before you last week. I hope my testimony is helpful to the Subcommittee as you wrestle with the difficult federal sentencing issues before you.

During the hearing you asked me and the other panelists to provide you with information about existing programs that are community based and provide credible alternatives to incarceration. I referred you and the Subcommittee to various programs initiated by the Vera Institute of Justice, a non-profit criminal justice research organization in New York. Their CASES program (The Center for Alternative Sentencing and Employment Services) has been particularly successful in dealing with misdemeanants and low level felons.

The CASES program in New York City serves as a model of how the government could deal with low level drug felons who are convicted in the federal courts.

Since testifying before you last week I have spoken with Mr. Michael E. Smith, the President and Director of Vera. In the attached letter he invites you and your staff to review a recent report on the CASES program (enclosed) and then to pay a visit to the program in New York. I think you would find such a visit illuminating with respect to the question of what can be done, outside of prison, to break people out of a cycle of offending behavior.

You know that I think it is a grave mistake for us to be sentencing legions of first time drug offenders to mandatory minimum sentences in federal prison. The consequence of our current policy is that thousands of men and women are being swept out of their communities and into distant federal prisons where they serve lengthy sentences and make no progress toward rehabilitation. It is often impossible to successfully reintegrate these offenders back into their communities after service of mandatory five year terms. A Federal program modeled on CASES is a real alternative to our current defective policy.

I hope that you and your staff are able to accept the invitation to visit CASES in New York. I would be happy to make the arrangements for such a visit.

Very truly yours,



James K. Bradar
Federal Public Defender

Enclosures (As Described)

JKB:mm

cc: Ms. Jarilyn DuPont w/o enclosures
Mr. Michael E. Smith,
Vera Institute of Justice

AUG 4 1993

VERA INSTITUTE OF JUSTICE
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Jim Bredar
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Dear Jim,

I'm delighted that your testimony before Congressman Hughes and his Subcommittee was so well received — a new forum, but the same Bredar. And you were kind to cite Vera's work on alternatives to incarceration (ATI) and intermediate sanctions. We have spun the more mature ATI projects off — into the Center for Alternative Sentencing and Employment Services (CASES), while continuing with the development of some new models for intensive supervision of higher-risk defendants, and the replication of our rather successful introduction of the European "day-fine" system to a variety of U.S. court systems.

I enclose the most recent CASES report, because

- it nicely describes two robust ATIs, targeted at two distinct types of offenders,
- it should give others some confidence that ATIs, when properly designed and implemented, can enlarge a jurisdiction's capacity for just punishment and incapacitation, and
- it is a fine essay on what is required to mount and maintain ATIs that accomplish serious penal purposes and actually displace offenders from jail and prison.

Congressman Hughes and his staff might find the report a useful starting point for an exploration of what the states and localities have been doing to fill in the enormous gap between prison and perfunctory probation. But I have now witnessed four

separate visits to CASES by judges and correctional officials from four states, and I am persuaded that these field visits, and the interaction with the staff, and with the persons under CASES' supervision, are a powerful aid to understanding and provocation to useful thought.

So, you might want to extend to the Congressman and his staff my invitation to spend a day with us, probing CASES for the lessons it holds. If they take up the invitation, you are required to come too.

Best wishes.

Yours sincerely,



Michael E. Smith

Enclosure

Mr. BREDAR. Congressman Coble, I would refer you to several programs that have been piloted and administered by my former employer, the Vera Institute of Justice in New York, which have had terrific success in New York City. One of the programs—I have had no personal involvement with it other than to visit it—is called CASES (Center for Alternative Sentencing and Employment Services) and, again, it is the day center concept, an intensive educational employment, and treatment-oriented program. The participants do not actually reside at the program. It is run relatively inexpensively.

Mr. COBLE. Well, it has been good having you all with us.

Mr. Chairman, if I may ask one final question—actually, it won't be a question, it will be an opinion.

Mr. Bredar, in your comments when you gave your illustration where the kingpin was awarded a sentence of 15 years and an underling 20 years, I share your frustration about that. I think the sentence should be commensurate with the activity, and in your illustration it was not. But would that not be more of a problem as to how the U.S. attorney charged the defendants rather than the mandatory minimum?

Mr. BREDAR. Certainly the U.S. attorney has a great deal of discretion, but I am uncomfortable with a criminal justice system that relies entirely on prosecutorial discretion in order for justice to be achieved. There are too many vagaries out there, it is too important a subject, and I don't think that Congress does the right thing when they just delegate the responsibility entirely to officers like U.S. attorneys.

Mr. COBLE. I thank the panel, and I thank the Chair.

Mr. HUGHES. I might say before recognizing the distinguished gentleman from California, it is kind of ironic, we are developing sentencing guidelines to try and eliminate the disparity and the inconsistency in sentencing which was undermining the criminal justice system, and we end up with a system where the head honcho either walks or gets a lighter sentence than somebody who is on the fringe.

Mr. COBLE. Yes.

Mr. HUGHES. And, secondly, the disparity among the jurisdictions, among the U.S. attorneys' offices around the country, is vast in charging policies. I didn't realize it until I looked at some of the data. It is incredible.

The gentleman from California.

Mr. EDWARDS. Thank you, Mr. Chairman.

At a hearing yesterday held by the Crime Subcommittee chaired by Mr. Schumer, I asked the chairman of the Sentencing Commission, a Federal judge, this question: Since the Sentencing Commission is operating, is there any reason why we should have mandatory minimums? Although his testimony was rather equivocal, he gave me an unequivocal answer to this question. He said there was absolutely no reason for mandatory minimum sentences. Because you have the Sentencing Commission, that theoretically resolves all the problems of disparity.

But larger than that, Mr. Chairman and members of this panel, I compliment you on the work you are doing. The system is in great disarray. It is causing nothing but trouble in the Federal sys-

tem. We can't build the prisons fast enough. We have built 29 since 1980. They want lots more now. Each cell costs \$50,000, plus the enormous expense—over \$2 billion a year of feeding people 7 days a week, 365 days a year and providing for their medical care. Everything that you have said about the noneffect on crime is also true. The unfairness of these sentences are also clear now.

However, I warn you that Congress is a long way from moving on this, and the message that you are carrying is very important. It is part of a national movement now. I have watched it with great interest over the past 2 years, and great enthusiasm. Congress is way behind.

We had a former Attorney General here, a very recent one, and he said, "We want more mandatory minimums; we want more prisons." He sees nothing wrong in throwing the book at everybody who violates any law whatsoever, and forget rehabilitation.

So I am not going to ask any questions, because I have no disagreement with any of the witnesses. My only message is, keep up the good work because the country needs you.

Mr. HUGHES. I thank the gentleman.

The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I think one of my biggest concerns is, that while we all know that the system isn't working very well, no one has really come up with a concrete plan that can solve our problems.

One of the biggest things that concerns me—and I have spoken about this many times—is that there is no real effort to rehabilitate prisoners that really could be rehabilitated. The first or second time you get them in the dock, they are very eligible, except for the most violent types, to being rehabilitated, and I don't see that kind of an effort.

When you go into the prison work program, I don't care what kind of work you want them to do, you have segments from the public screaming against them taking their jobs. And, I know from talking to dozens and dozens of Federal judges, they don't like the mandatory minimum sentences. I would say that is probably not working except for the most violent types, and I don't think that you can protect the public enough from those people that are violent career criminals, and you have a bunch of them out there.

But I would like some ideas—and I missed some of your earlier testimony—about what you think we can do to make a change that helps the prosecutors manage their cases. Right now the courts have so many cases, they can't try them all. One of the things that helps them is, they make deals with people that are charged, who agree to turn state's evidence, and that cuts down on the volume of trials that you have.

If you don't have those high potential sentences, are you going to get that cooperation? I know that a man who is faced with a 40-year sentence will do an awful lot to get that cut down to 20 even though I heard someone say that the longer sentences don't scare them that much. They do. They very definitely will do anything to get them cut down.

Mr. Blumstein.

Mr. BLUMSTEIN. Mr. Moorhead, you have posed an impossible problem. We are now doing some crazy things. Tell us how to solve the problem.

One of the approaches we could pursue is to undo some of the crazy things, even though that may not fully solve the problem. Many problems are clearly difficult, but we ought to appreciate some of the difficulties we create for ourselves by imposing these mandatories.

Mr. Bredar talked about this incongruous relationship between the person storing the drugs and the one selling them. The judge had no choice given what was before him. When there is a mandatory, the court and the prison have to keep that individual in. That means if they don't have any room, they have got to make some choices and let somebody else out or not put that somebody else in. That is often done with people who are more violent than the drug sellers.

It is the imposition of the mandatories, particularly in drug cases, that is a futile effort to deal with a problem that no one has any clear solution to, but this strategy is making matters worse on other parts of the system. It is introducing inflexibility, it is distorting the coherence in a sentencing structure that the Congress intended by creating a Sentencing Commission. The mandatories that are ad hoc, introduced as an isolated piece of legislation with no concern for consistency with regard to other offenses. I wouldn't even mind that if it worked, because I think the drug offenses are serious problems to the Nation. But it is demonstrably not effective against them, and that is where we ought to do some thinking in terms of how we can be more effective, not merely respond to the public's clamor to "do something" and to be tough. Being tough on drugs, not only is not effective, but it hurts us in other aspects of our criminal justice system. There are much better ways to use that money for demand reduction that we are now pouring down the drain with the 60 percent of Federal prisoners in there on drug charges, without changing the number of transactions hardly a wit.

Mr. BREDAR. If I could join in.

Mr. MOORHEAD. Yes.

Mr. BREDAR. The effectiveness issue: How do you get to it? From where I come from, the problem is with our guiding principles, and I would urge all policymakers to reexamine the guiding principles, and I would strongly suggest that whatever is governing us now be tossed out and two basic principles be substituted in their place. These two sentencing objectives: incapacitation of the truly dangerous, the truly predatory; it has to be achieved; the public has to be protected. That is the number one objective. The number two objective is with respect to the majority who don't fall into the first category. Let's get about reintegrating these people to the community as productive citizens. There is no other word for it other than "rehabilitation," a term which itself should be rehabilitated. It is the most cost-effective approach; it is the only intelligent approach.

We went into this binge, this orgy, of incarcerating people in the eighties. We are obsessed with punishment, I guess, as the principal objective of the criminal justice system, and I think that is our problem. We are guiding the ship toward the wrong lighthouse. It isn't going to take us where we want to go.

Mr. MOORHEAD. What do you do with the Mr. A's who are going to spend most of their life in prison because they have stolen money from hundreds or thousands of elderly people in the savings and loan scandals, yet you know they will probably never commit another crime in the world when they get out? They are not dangerous. But how do you control their lives as a result of their crime and still not have them occupying a jail cell? If you make it easy on those white-collar criminals, then you come up against the complaint that people that have grown up in the very poor parts of town and become violent and are really dangerous to society, are being treated unfairly.

Mr. BLUMSTEIN. Mr. Moorhead, those white-collar criminals represent a very tiny fraction of the prison population. Nothing that has been said here argues to let them off the hook. Those are the people who are most responsive to the deterrent threat. They are the people, in Mr. Bredar's terms, who will respond to the threat of a sanction. I think one wants to keep those sanctions up. But they represent a tiny piece of the action, and I think deterrence works there; it doesn't work on drug selling, not that some people are not deterred, but as long as someone is there to replace them the crimes aren't averted.

Mr. MOORHEAD. But the goal is to take the drug seller and make him a nondrug seller when he gets out on the street, and I don't see those programs working in our jails or our prisons. Now how can you do that when you release them?

Mr. BREDAR. When people are locked down with the prospect of serving at least 5 years or at least 10 years in prison, they are not internally motivated to change. Society has given up on them; that is what the message of a 5- or 10-year sentence is. I see it day in and day out. They turn around and give up on themselves.

If you could have a more complex, slightly more sophisticated approach to such an offender, which is, "First and foremost, you broke the law and you are going to be punished; you are going to have to go to jail, lose your freedom for 8 or 12 months," that has impact. "But we are not going to stop there, we are going to go into the next phase and try to attack some of the underlying causes of your offending, your drug problem, your housing problem, your lack of job skills, your lack of life skills," and have that as the tail end of the package, not that different from the Federal boot camp program which, by the way, I am a proponent of. If you went down that road in a significant number of these cases instead of 5 and 10 years imprisonment, I think you have got a good chance, a very good chance.

Mr. MOORHEAD. What are you going to do with them in boot camp to rehabilitate them?

Mr. BREDAR. Well, the boot camp model, as most are probably aware, involves a sentence of usually about 30 months imprisonment, but only the first 6 months are actually served inside, the rest of it hangs over their head as a threat, I guess to indulge the deterrence notion, and then they are put into training programs and treatment programs. That is the rehabilitative process.

You have to reflect on where these people are coming from in terms of their basic life skills. The programming wasn't right from the beginning in so many of these cases, and people have got to be

taught how to function and be a contributor. When we don't do that in our correctional policy, we are not going to have any chance of changing the result.

Ms. BRANHAM. Congressman Moorhead, if I can address your desire to find a concrete plan of action, I do believe that the American Bar Association's proposal for a Federal Comprehensive Community Corrections Act is a concrete plan of action. It addresses one of the fundamental problems not only in the Federal punishment system but in still the majority of the punishment systems across the country—that our systems are either too lenient on the one hand or too stringent on the other. Either the offenders get a slap on the wrist and it is just ineffectual or they get unnecessary, extremely costly incarceration that also may be endangering the public safety.

Under the Community Corrections Act, again, a whole continuum of sanctions is established, so you have an array of 12 to 15 different sanctions to match the array of criminal behavior, because offenders just don't fall into two categories. What is nice about so many of those sanctions is they are productive and they can force the offender to participate in programs that may truly have a long-term impact on future criminal behavior.

The pet sanction that I really like—I think it holds a lot of promise; it still hasn't spread all across the country—is what we call the day reporting centers or day incarceration centers where the offender would be required, for example, "Show up at this place at 9 o'clock in the morning. If you have got a substance abuse problem, you have got to go through drug treatment. If you don't have your GED, you have got to get your GED. OK, you are done at noon. You go out in the community, you do urban renewal work, or you do some other type of community service work, or, if you have got a job, you go work at your job." The money that is earned if they are in the community can be used to pay taxes, support families, and so on and so forth. So, again, it is really a concrete plan of action.

Mr. HUGHES. We will have another round if the gentleman wants.

The gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Speaker—Mr. Speaker? How about that for a promotion?

Mr. HUGHES. I accept.

Mr. MAZZOLI. I have sat next to you for so long, I have just seen those leadership qualities.

Mr. Chairman, thank you for having the hearing today. It is a very interesting one, because it comes on the heels of yesterday's hearing in which we had a very different setting.

I think, Professor, you have to understand that the Crime Subcommittee yesterday had done quite a bit of serious study. The chairman himself, as he terms himself, has traveled a great deal on this subject from perhaps being almost in favor of abolishing mandatory minimums to coming very much away from that point to a point where fine-tuning of a—I think he used the term "safety valve"—in the egregious cases or something. But, the chairman didn't really necessarily feel that there was any need to abandon

mandatory minimums. And, I surely don't. I do not share the concerns of the panel on mandatory minimums.

I do think, however, there are several problems. And, I do think that there may be some prosecutorial overreach. I think one of the earlier panelists, and I believe my colleagues here have mentioned this, that Attorney General Reno has asked that the Justice Department have a panel on prosecutorial charging, the charging guidelines, so that there is uniformity around the country with the prosecutors on how they do things. And, I believe that might help to have uniformity. And, of course, we did hear of this problem of the 15 years for the low-level bottom feeder and the 10 years for the top-level person is very well a result of what information the top-level person could have given to the prosecutor in order to penetrate other gangs, or the Mafia, or some of these drug cartels. So, if you don't think—and you may not—that prosecutors ought to be able to do some of this dickering in order to attack other people and other cases, then obviously that doesn't look good. But, where there is some recognition that the prosecutors are working on other cases, then maybe having some disparity in that way is not all wrong.

I think that the testimony yesterday brought out rather interestingly enough—and it was pretty surprising at least to me—that only in 5 percent of the cases is a sentencing under the regular sentencing guidelines less than the mandatory minimum. In 95 percent of the cases, using regular sentencing guidelines—in effect, not going the route of mandatory minimum—yielded a higher sentence for the individuals than they would have been ordered through the mandatory—

Mr. BLUMSTEIN. May I comment on that?

Mr. MAZZOLI. Please, let me just conclude. This indicates that, of course, people even going through the regular sentencing route are being treated pretty heavily. And, they are being treated pretty heavily maybe, as Mr. Bedar says, because they are obsessed with punishment. I don't really think that any person on this panel, or in this Congress, is obsessed with punishment.

I support the gentleman from New Jersey, our chairman's point of view on boot camps, alternative sentencing, and diversion programs. I have supported every dollar that has ever been proposed for drug treatment, for intervention programs and drug education programs. I don't think that I am, I don't think that the members of the committee are obsessed with punishing people and trying to swing that sword around to wreak some kind of havoc or exact some kind of penalty or tribute. But I think that these are able to coexist.

Stern punishments fill our jails, fill our prisons. I think that is exactly as it ought to be. Get these people out of circulation. Put them on ice. At the same time, while they are in prison, have the programs that might help them when they are released out into society. Intervene ahead of time with young people so that they never wind up in the penitentiaries. Have programs so that they wind up in boot camps if they are the ones that would fit a profile.

I really think that there is no sentiment, in my judgment, for eliminating mandatory minimums. There is sentiment, and I think correctly, to try to see if there can be some tinkering with the mar-

gins of it to be sure that the egregious cases—and we had two or three of them yesterday—are handled. But, at the same time, to make sure that the people of America, who are demanding that the streets of the Nation be freer and be less violent, are given to know that those among us who are dealing in drugs and other kinds of inherently violent activities are, in fact, being put away.

I would lastly say—and then I would have any observations the panel would have—as I mentioned to the Federal judges yesterday, I cannot comprehend what it means to be a nonviolent drug offender. I think that that is an oxymoron. I think that the very nature of drug trafficking is, itself, inherently violent. It leads to violent acts. It leads people to become addictive who then carry out the pattern of violence in the street. It is not a pacific activity. It is not a benign activity. And they say, "Well, we'll take a low-level guy, the mules," who, incidentally, Mr. Chairman, in the Western District of New York, where they have, I think, both LaGuardia and JFK, like it or not, the Federal prosecutors there, under the declination rule, decline to put into mandatory minimum the mules.

We keep hearing about the jails and prisons of America filled with these low-level mule people. In the Western District of New York, they decline to use mandatory minimums with mules. Some challenge that as being too easy on drugs, but they have a resource problem. They have a set of priorities, and so the jails are not being filled with mules.

Again, I can't fathom how people can say there is such a thing as a kind of nonviolent drug activity.

Anyway, I have said my piece, Mr. Chairman, and used my few minutes. I just really don't think that mandatory minimums are all that bad. I think these are turf battles. I think there might be prosecutorial overreaches. There may be some need to have prosecutorial guidelines in the use of these minimums. But I just don't see that they should be changed.

Ms. BRANHAM. I have a couple of comments in response to the remarks. Is that all right?

There was the statement made that we should have stern punishment—i.e., send them to prison. I would like to reiterate that a community sanctioning program, if properly structured, does provide stern punishment. In the survey that I mentioned where the public went from wanting prison in 18 of the 23 cases down to 4, they wanted a community sanction for the three-time drug dealer, they wanted a community sanction for the second-time burglar, they wanted a community sanction for the person who had embezzled \$250,000.

To a second point that was made that we should consider a drug offense a violent crime; with all due respect, I strongly disagree with that. It is a bad crime; it is a harmful crime; it is not a violent crime. A lot of crimes can lead to violence. A purse snatching—that may lead to violence, but drug activity is not a violent crime. If it is, then I suspect—

Mr. MAZZOLI. Well, let me just say it this way. There is a causal connection. You cannot have a drug crime committed on the streets where somebody is blown away without having somebody even tote

the bag off the ship. I mean you cannot have that act without the intervention of the drug low life.

Ms. BRANHAM. But the person doing the blowing away is a violent criminal. Put that person away. Put that person away for a long time.

Mr. MAZZOLI. Anyone who allows a person to blow someone away is acting in violence.

Ms. BRANHAM. If drug activity is a violent crime, I suspect this room is filled with people who at some point in their lives have been violent criminals. I suspect that members of the panel have children, maybe grandchildren, that are violent criminals.

Mr. MAZZOLI. Are you suggesting that the people in this room have smoked pot or they have taken dope?

Ms. BRANHAM. Possibly. Possibly. I am not going to ask them.

Mr. MAZZOLI. You are saying that. It is a pretty stern charge.

Mr. CONYERS. Or Members themselves.

Ms. BRANHAM. I guess what I am saying is, a violent crime—

Mr. MAZZOLI. You want to play "show and tell," but, this is one Member who has never touched anything. But I am just saying, this is a terrible thing that you are indicting this room.

Ms. BRANHAM. I guess what I am being is, I am being realistic in saying that violence would import some threat of violence or actual physical harm to the person.

Mr. HUGHES. Before I recognize the gentleman from Florida, I don't understand the suggestion that in a high percentage of cases the minimum sentence was more than the mandatory minimum.

Mr. MAZZOLI. That was the evidence yesterday.

Mr. HUGHES. I know, but that is irrelevant because it is built into the fabric of the mandatory minimums. I mean it is irrelevant. What would you expect it to be?

Mr. CHASET. If I can address that point, I worked at the Commission at the time those guidelines were developed, and, in the drug area, basically what we did was to table the mandatory minimum, let's say at the amount for 5 years, and then we translated that to level 26.

Mr. HUGHES. Precisely.

Mr. CHASET. And the same—for the next higher amount—for 10 years, and then we just extrapolated. So clearly, the guidelines will reflect the mandatory minimums, and your statistics will say you are within there because we tried to reflect what Congress wanted.

Mr. MAZZOLI. I think it makes exactly the point that the jails are not being filled with people who get some big, heavy penalty hit at them through mandatory minimums. They would be in there for the same kind of hit under sentencing guidelines. Change the sentencing guidelines if you wish, or make other changes, but I am just saying it is not the mandatory minimums.

Mr. HUGHES. The fact of the matter is, though, that these sentences were established because we mandated that they use as a threshold the mandatory minimum, so it is built into the fabric. So when the General Accounting Office says that the minimum sentences are in many instances more than the mandatory minimums, well, that is because the mandatory minimums basically laid down the threshold.

Mr. CHASET. Mr. Hughes, there was one point that you had made earlier. If you would just permit me, I would like to disagree in part with that comment. You had indicated in the Sentencing Reform Act that one of the principal bases for change was to get similar offenders who commit similar crimes to be treated similarly. What we have under the mandatory minimums are dissimilar crimes committed by dissimilar offenders being treated similarly, and I think that is an abuse and a bastardization of the intent of Congress in the Sentencing Reform Act.

Mr. HUGHES. I thank you for that.

The gentleman from Florida. Thank you. You have been very patient.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

I found it interesting. As you know, you and I shared in the development of some of the laws we are discussing here today, so it has been interesting.

Let me ask a question based on a couple of thoughts that I have. One of them is that I certainly think there are some sentencing guidelines and some minimum mandatories that are inappropriate on the books today. I don't think there is any question about it, and I think that most of us looking at it would be able to pick out a few of those individually.

The question I am concerned about is the broad brush stroke with which this panel addresses thoughts of minimum mandatory sentences, and I want to be sure I understand how broad that brush is. If I am listening to you correctly, would you include in abolishing minimum mandatories minimum mandatories for violent criminals, for nondrug cases as well—in other words, all minimum mandatories—Professor Branham?

Ms. BRANHAM. Yes, the American Bar Association is opposed to all mandatory sentences.

Mr. MCCOLLUM. Why?

Ms. BRANHAM. Now let me give you an example. If there ever was a case for a mandatory minimum, it would be the case of murder. If somebody kills somebody, then send them to prison for life, absolutely no questions asked. When I worked in a prosecutor's office, I was told of a case involving a woman who had found some pictures revealing that her husband had sexually molested their children. She later methodically, deliberately killed him. It was murder. The grand jury didn't even indict her. Let's assume that they had indicted her appropriately. Could we say, absolutely, she must go to prison for life as opposed to 5 years, 10 years, 15 years, 20 years?

The problem with mandatories, again, is they are generic, they are across the board. There is a rigidity to them that, again, can lead to unjust results. So we are opposed to mandatories. But, of course, for these violent offenders a presumptive sentence of incarceration is appropriate.

Mr. MCCOLLUM. Let me ask the other panelists if you agree with Professor Branham that there should be no minimum mandatories for violent criminals or for anybody at all for any reason.

Dr. Blumstein.

Mr. BLUMSTEIN. My problem with the mandatories is that they derive from a process that is not trying to deal with the specifics

of individual cases nor with the coherence of a range of offenses and offenders in an array of sentencing policy. It derives from the passion of the moment that is usually associated with some heinous event and some political posturing to capitalize on that event.

Mr. MCCOLLUM. Do you agree, Mr. Bredar?

Mr. BREDAR. I think the problem is that for Congress mandatory minimums have become the device through which they express their feeling that certain crimes should receive lengthy punishment.

Mr. MCCOLLUM. But you are opposed to any minimum mandatories even for violent criminals.

Mr. BREDAR. Frankly, mandatory minimums in certain categories of offenses—armed crimes where people are actually wounded or killed—are much less troublesome.

Mr. MCCOLLUM. But you are opposed or not?

Mr. BREDAR. I generally am opposed on the grounds that it is a default on the fundamental principle of our system which is that judges, human beings do the judging, and that is the best we can do, and to try to say, well, these judges sometimes don't get it right and they make mistakes, and so we are going to take away their discretion and put in its place a system where there is no discretion and no capacity whatsoever for sensitivity—

Mr. MCCOLLUM. All right, I understand your principle, and I think there can be respectful disagreements and debate among people who look at the same facts, and I do respectfully disagree on that.

There is a study that I think is a very valid one that shows that offenses other than drug offenses where there have been targeted mandatory sentencing, that in prison populations there has not been a growth relative to admissions of those other offenses, other than drug offenses, in our system since 1960—in other words, that there is not a difference because of minimum mandatories in the areas other than drugs.

This same study that is out this spring says that you can look at the drug offense itself in two different ways. Besides looking at the fact that you have got these minimum mandatories in there, you just look at the proportion of drug offenses charged, period, because drugs have been so explosive in their growth, and that alone can explain the increased prison population, not necessarily the time any individual serves.

Now I happen to think that there is some justice and truth in the assertion that there are some crimes on the books—a crack case that I think Chairman Hughes and I certainly know about—where the minimum mandatory is highly inappropriate. There are perhaps minimum mandatories that are too high; maybe they ought to be 1 year instead of 10 years in some cases—things of that nature—but to simply throw out minimum mandatories, to me, throws out the objective of deterrence, and I do believe it does exist here.

I know, Dr. Blumstein, your theory here, but, to me, it is just like on deterrence. When you say it doesn't work on these people, yes, it doesn't work on some of the people you have described, I would agree, but the bottom line is, that is the same as the death penalty argument. The people who don't commit the crimes you

never know about. There are a lot of people, I think, who maybe are from a different socioeconomic stratum who are deterred by the fact that these penalties are on the books and that people do go to jail for these, and it is unfortunate that those on the lower end are the ones who go to jail.

But we can't measure. We have no way of knowing how many people we really are deterring from committing drug crimes. And I know, again, your bottom line is that we do not have a decline in drug trafficking, that somebody replaces everybody who goes out. I don't particularly buy that either because I see a bottom line net, if I am not wrong about this, in drug trafficking. Especially with regard to kids, we see a decline in usage, and I don't think that is all on the demand side.

So I have some real severe problems with the approach of the conclusions you reach to the extreme, but I certainly respect the bottom line issue that we may have some need to reform minimum mandates. I just have a problem with the idea that they are not effective or that we ought to throw the entire system out.

Mr. HUGHES. Would the gentleman yield to me?

Mr. MCCOLLUM. I would be glad to yield.

Mr. HUGHES. Part of the problem now, and I think what is right on point, is the fact that we don't have a uniform standard of mandatory minimums around this country because U.S. attorneys have devised their own ways of attempting to circumvent them, whether it be limited proof, whether it be filing a motion in court of substantial assistance or cooperation, or whether it be the declination policies we have in three districts which basically won't accept mandatory minimums, or in New York where they have said, with regard to couriers, "We won't implement them."

So what has happened—and it is somewhat turf, but, you know, we appoint judges to judge, as I think the point was well made. But now we have U.S. attorneys basically developing a patchwork of ways to circumvent mandatory minimums to avoid some of the hardships, which is kind of troublesome as a matter of policy.

Mr. MCCOLLUM. Well, it is certainly true, and I agree with you on the prosecutorial issue there.

I believe Dr. Blumstein is wanting to respond in some way over there anxiously, and my time is up, but for that—but, please, I don't want to keep you from doing it.

Mr. BLUMSTEIN. I just wanted to say, that eliminating the mandatory minimums does not eliminate the punishment. You have got sentencing guidelines, and the guidelines do in many cases call for a certain punishment, but those punishments are coherent with each other, and so the argument of eliminating the mandatory minimums, particularly those that go to 5, 10, 20 years, still will permit the opportunity for punishment for the crimes that appropriately warrant that kind of punishment. It does leave the escape hatch for the judge for those cases where the mandatory punishment might be particularly inappropriate.

Mr. MCCOLLUM. You and I are probably going to continue to have a disagreement over how much discretion we give to the judge and where we draw these lines. I guess I have been at this business long enough, maybe I have got my mind made up to some extent, not completely, but to the extent that I do. I believe that get-

ting rid of disparity is important. Even though the prosecutors are destroying some of that effort now, the remedy is there, not in the sentencing guideline area, where I think it is exceedingly important to have them. I really do think we need to take the key and lock some of these violent criminals up and throw it away, and that would be a tremendous asset to society for both incapacitation and deterrence. I do believe that.

Mr. BLUMSTEIN. I would be quite comfortable if we could make a deal. Leave the mandatories for the violent ones, and repeal them for the drug ones where they are so ineffective.

Mr. MCCOLLUM. Thank you very much.

Thank you, Mr. Chairman.

Mr. HUGHES. I don't think Mr. McCollum accepted that.

Mr. MCCOLLUM. No, I didn't say a word. I didn't say yes, I didn't say no.

Mr. HUGHES. The gentleman from Michigan.

Mr. CONYERS. Good morning to everyone on the panel, particularly the most frequent testifier before the Judiciary Committee across the years, Dr. Blumstein. Delighted to see you again. We are all at our same standards with refinements due to the experience that keeps coming in.

I want to commend the chairman in terms of the thrust of this discussion and underscore how important it is, as we have this bifurcation developing within the House of Representatives, that without this committee we would be moving in a very dangerous direction.

We are talking now ostensibly about the prison population and how this affects everything. But in a larger sense we can't do that because we have to reexamine so many faulty premises on which the whole criminal justice system itself is based that it becomes sort of apples and oranges, mandatory minimums, the violence or the nonviolence. You know, one of these days Don Edwards and I are going to get our vibes working on the majority of Members of the Congress, and they are going to actually go back and revisit uniform sentencing guidelines, as frightening as that may be to many members of the criminal justice community.

So I start off, Dr. Blumstein, with a comment you made about how this crazy system we are working in, that one way to begin—and we always have to begin modestly; these things do not occur in a revolutionary fashion within the legislative system—is that you stop doing crazy things. Incredibly enough, if you stop doing the wrong things, it will lead you sooner to a position to start doing positively good things. If you keep doing the wrong things trying to correct other mistakes, then you are digging a deeper hole.

If we can restrain ourselves collectively and really commit the experience that is in our system here for us to learn and absorb, I don't think we were born promandatory sentence or antimandatory sentence. I don't think there is some genetic disposition to the philosophies of criminal justice, they are developed, they are learned. We read or misread the experiences and the facts and come to various conclusions.

Now, what we are trying to do, this one panel that may be in some sense the most important Federal legislative panel that we

have got to do business with, is trying to understand how we move out of the present dilemma.

Well, everyone unanimously agrees that we are in a present dilemma. Differences quickly arise as to how we got there and even more as to how we get out. But the fact that we can have rational discourse is the beginning of hope, and that we are engaged in, and what I keep trying to do is build up a group of people that support a number of us in the Congress, and I am happy to report to you that the number of reasonable people toward criminal justice policies are improving in the Congress, which at one time there was great doubt about the direction this thing was ever going to go in, and it is based not just upon intelligence, but it is based upon experience. The facts don't lie; the stuff isn't working.

We therefore need to correct it, and in the correcting process, please, let's not worsen it, which has too frequently been the history of the criminal justice movement, certainly in my career. And so what we are trying to do here is based on a very obvious proposition that the prisons are bulging and under the present policies they are going to continue to bulge. As a matter of fact, statistically we could destroy the whole American economy just based on the criminal justice theories on which we are going. I mean just run the numbers out exponentially.

Michigan went bust under a fairly decent Governor because we were going to lock up everybody that violated the law, and we were going to lock them up good—I mean real good—with the incredibly unworkable notion that they will see that, "You will get locked up, and so therefore you will be deterred." I mean, what does it take?

Mr. Chairman, we could not even open up the prisons we went broke building because we didn't have the money to pay for opening them up and hiring the staff. They had to stay there. I mean that is not a philosophy or a point of view or liberal versus conservative. That is how bankrupt the notions are upon which we are predicating a huge section of American law, and we have now reached the point of no return that just dollars and cents requires that we revisit it, and that is what we are trying to do. Now how do we do it?

The one thing that many of you here in this chamber can help us do is get the notion out of our heads the notion that there have to be annual or biannual omnibus crime bills. This is an addiction, a legislative addiction, that is very, very costly.

Mr. EDWARDS. We need our fix.

Mr. CONYERS. Yes. We have to break this habit or begin to get control of it, and the way that you do that, even in medicine, is, you realize you have got a bad habit, so you do that. It seems like it is pretty routine: "Hey, where's the omnibus crime bill this year? I haven't had it yet. I mean about 30, 40, 50 new capital offenses are very much needed to deter these people where crime is not going down fast enough."

Mr. EDWARDS. If the gentleman will yield, I have bad news for him. It is being written behind closed doors.

Mr. CONYERS. As we meet, as we speak. I don't doubt that. I don't doubt that.

Let me stop here. The chairman has been very kind in giving me this amount of time. But let me, Chairman Hughes, invite re-

sponses from these four persons about anything that I said or did not say.

Mr. HUGHES. If there are any responses, quickly, because that is a vote on the floor.

Mr. CONYERS. If you are completely floored, I will understand. You can pass, and it will not be held against you.

Mr. BREDAR. Just very briefly I will go on record, Congressman Conyers, with your assessment that the day of reckoning is at hand. We addressed a lot of public concern in the eighties through these biannual bills which became law, and I suppose that kept the lions away for a while, but it was a very short-term strategy, and now here we are, and I don't think it can be postponed any more.

Mr. HUGHES. Morning in America.

I thank the gentleman from Michigan.

The panel has been an excellent panel. We have gone way over. I mean we have been almost an hour and three-quarters on this panel, and for a good reason. It has been a very, very good panel. Your statements, which are part of the record in full, were excellent, very comprehensive, and we thank you for your contributions today.

Thank you very much.

Ms. BRANHAM. Thank you.

Mr. HUGHES. The gentleman from Michigan has asked that his statement be inserted in the record, and without objection, it will be received.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, I commend you keeping this issue in the forefront of the nation's agenda. Hopefully we have begun a new chapter in re-examining two of the most critical issues confronting our criminal justice system today: Mandatory sentencing and its impact on the federal prison population.

PRISON OVERCROWDING

Prison overcrowding, and the lack of viable alternatives to sentencing, have further jammed our federal court dockets and placed undue hardships on our entire criminal justice system from top to bottom. Prisons and jails are operating at 170% capacity, and 42 states are under court order to reduce overcrowding.

Not long ago we woke up to the fact that we had created a judicial system that has captured almost a quarter (23%) of all African-American men—1 out of every 4, compared to 1 out of every 16 white men. There are still over more African-Americans in prison than there are in college.

While the incarceration rates for Whites have held steady around 300 per 100,000 since the early 1970's, the rate for non-whites have reached as high as 1088 per 100,000, over three times as high.

PLEAS FOR HELP FROM WITHIN

Mr. Chairman, hardly a day goes by in my office when I don't receive letters from inmates from all over the country asking me to help reform the mandatory minimums. They don't understand why in many instances they are serving longer terms than many more violent inmates. They don't understand how they can be rehabilitated when conditions are so crowded and often understaffed. They also don't understand why the prison population is so overwhelmingly Black and Hispanic when the drug trade in all its dimensions is a multi-racial enterprise. They all end with a plea to help—not so much for themselves but for others.

RACIAL DISPARITY IN SELECTIVE DRUG SENTENCING

Despite claims that minimum would establish an equal playing field, arrests and imprisonments still show a dramatically increased racially disparate impact as more African-Americans and Latinos than whites continue to go to prison.

The most graphic racial disparity in drug sentences is found in sentences imposed for possession of "crack" cocaine and "powder" cocaine. The Omnibus Anti-Drug Abuse Act of 1988 requires a mandatory sentence of five years for first time offenders for possessing more than five grams of "crack" cocaine. The minimum sentence for possessing the same quantity of "powder" cocaine is probation. The sentence for crack is 100 times greater than for powder cocaine.

This penalty in fact discriminates on the basis of race. 92.6% of all defendants sentenced for federal crack offenses were Black. All defendants sentenced for simple possession in 1992 are Black. This is outrageous.

INITIATING A NEW NATIONAL DEBATE

Today's testimony will add to the already overwhelming evidence that mandatory minimums is a major contributor to prison overcrowding. Our federal prison system cannot withstand another eight years of mandatory sentencing and the lack of viable alternatives to incarceration for non-violent and low level users. Many of us who have warned of disparate racial and economic disparities have unfortunately seen our warnings turned into reality.

The original goal of mandatory sentencing was to eliminate disparity in sentencing for similarly situated criminal acts. The goal was that two people who had committed the same crime would receive the same sentence. But in fact, the opposite is true.

According to the 1991 U.S. Sentencing Commission report, "The disparate application of mandatory minimum sentences in cases in which data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum..."

What we have discovered is that even with clear evidence of many disparities, many in the Congress choose to intentionally mis-interpret the facts. They fail to see beyond the press events where they announce their latest "winning maneuvers" to prove they are tough with crime.

All the getting tough on crime has not led to a reduction in crime. The fact is that after the camera lights go out the prison population is still hovering between 140% and 170% over-capacity.

Yesterday there was debate over whether prisoners sentenced before mandataries went into effect are being released early in order to make room for those convicted under mandatory sentences for lesser crimes. I hope this hearing can shed more light in this issue.

Today we have a system where the higher up you are on the totem pole in the drug and crime hierarchy, the greater your ability to bargain with prosecutors and the greater your chance of escaping a mandatory sentence. As a result we are seeing more hardened criminals and even some drug kingpins receiving lesser sentences than the low level drug couriers--the youngest, the poorest and the group with the least to gain and the most to lose.

SUPPORT FROM JUDGES

Today many prominent Federal judges have raised their voices in opposition to mandatory sentencing. Some have even declared that they will no longer preside over drug cases like Judges Jack B. Weinstein and Whitman Knapp of Manhattan who are refusing to hear drug cases in protest of federal sentencing guidelines and mandatory sentencing in particular.

Their reasons include the growing emphasis on arrest and imprisonment rather than prevention and treatment. They are just two among a growing number of judges who have watched sentencing laws enacted by Congress provide for little or no judicial discretion.

WHAT MUST BE DONE?

Now, the most important question, what can be done? It is clear that our prisons and judicial system are facing a crisis that is literally growing beyond our control. Trying to reverse such great disparity is a big challenge that will require bold new approaches and initiatives. My colleague Don Edwards' bill, H.R. 853, the Sentencing Uniformity Act, has offered one approach—repeal all mandatory minimums.

We must acknowledge to ourselves and the nation that mandatory sentencing has simply not worked. Getting tough on crime has not reduced crime. We must ensure that any future reform does not leave our prisons without viable alternatives to incarceration. We must also fill the gaping holes left by the war on drugs that perpetuated racial disparate impact within the judicial system.

Just as we are now reassessing many of our economically disastrous budgetary decisions from the 1980's we must now re-assess our disastrous judicial reforms. Many will try to label this review as being "soft on crime." Quite the contrary: It is hard to admit that we may have made a mistake and an even greater challenge to offer bold new initiatives and new approaches that take a more realistic and thoughtful approach to the problems of chronic crime, and the deadly drug trade.

This is not an academic exercise that is left to future administrations or future Congresses to resolve. This is a crisis that must be resolved in the 103rd Congress, by the members of the Judiciary committee, and by the people we have asked to come and help us find solutions to this crisis. Thank you for helping us meet this awesome responsibility.

Mr. HUGHES. Before I call the second panel, we are going to recess because that is a vote that is in progress, and we will be back in 10 minutes. The subcommittee stands in recess for 10 minutes.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

As I introduce the second panel, I wonder if the witnesses will come forward and take your seats as I introduce you.

The panel consists of Julie Stewart, Dr. Arthur Curry, Mrs. Pat Baca, and Jim Nolen.

Julie Stewart is the president of Families Against Mandatory Minimums—FAMM—a national group founded by her in 1991 after her brother was sentenced to a 5-year mandatory minimum Federal prison sentence for growing marijuana. FAMM presently has over 17,000 members and 55 chapters nationwide. Ms. Stewart has a B.A. degree in international relations from Mills College, was a flight attendant for Pan Am, and worked as the director of public affairs for the Cato Institute.

Dr. Arthur Curry is an associate professor at Bowie State University and associate superintendent for the Prince Georges County Public Schools. Dr. Curry received his bachelor of arts degree from Stillman College in Tuscaloosa, AL, in 1964; his master of science degree from Johns Hopkins University in 1975 and his doctorate of education in 1979 from Nova University. Dr. Curry served in Vietnam with the Army, has had extensive teaching experience, and has been active in community affairs his entire life. He has a son awaiting sentencing in Federal court.

Mrs. Pat Baca is a C.P.A. and a partner in a C.P.A. firm in Santa Fe, NM. She received her bachelor of business administration from the University of New Mexico in 1975. She served on the New Mexico State Board of Public Accountancy, appointed by Governor Garrey Carruthers. She became involved with FAMM due to the experiences of a family member.

Jim Nolen is a private businessman from Anniston, AL. He owns and operates the Nolen Oil Co., the Nolen Development Co., and Temporary Resources, Inc. He received his bachelor of science in industrial management from the University of Alabama in 1966 in Tuscaloosa, AL. He is active in a number of civic and community organizations. He, too, has a son who has recently been incarcerated in a Federal prison.

We have your statements, which, as you may have heard me tell the other panel, we have read. They are good statements. They will be made a part of the record in full, and we would like you to summarize and hit the high points for us, if you would.

Why don't we begin, first of all, with you, Ms. Stewart. Welcome.

STATEMENT OF JULIE STEWART, PRESIDENT, FAMILIES AGAINST MANDATORY MINIMUMS [FAMM]

Ms. STEWART. Thank you. Good afternoon, Chairman Hughes and Representative Edwards. You are the only two members here.

Yesterday I testified before the Crime and Criminal Justice Subcommittee on the issue of mandatory minimum sentencing. It was a very sobering experience, because I felt that many of the members of the subcommittee had closed minds coming into the meeting, and I was very disappointed by that. I am delighted to see that

the people that were here earlier really do seem to have some interest in this issue and want to see us move along the spectrum to find a solution to the prison crowding problem. So I am very appreciative that this experience will be more pleasant than yesterday's.

As you stated in my introduction, my brother is serving a 5-year sentence for growing marijuana, and he certainly deserves to be punished, and I don't have any problem with that. The problem is that 5 years is much too long for his crime and that 1 year would have been more than sufficient.

Mr. McCollum, in testimony last May, when Kathy Hawk spoke here, asked her if 1 year in prison would be sufficient for most non-violent offenders, and Dr. Hawk responded yes, that if the purpose is punishment, 1 year is enough.

I think that it is important to listen to her and to the panels that we had up here earlier today that work with these people every day and work on these issues every day and have the experience that is so valuable to the members of the committee. If 1 year of incarceration does the job, then we don't need to warehouse non-violent people for so many years.

I would also like to state for the record that I do think many drug offenses are nonviolent. My brother's offense is a perfect example. He was growing marijuana with two friends and an acquaintance. He was 35 years old. He had never been in trouble. He didn't own a gun; none of his friends did. They were growing the marijuana in a house that my brother owned but didn't live in. The two people who lived there, who got arrested with the marijuana, turned my brother in as the kingpin of this friendship operation. In exchange for their testimony, they both got probation. My brother got the full 5 years. Both of his friends had prior felony convictions.

But there was no violence involved in his crime. They would have harvested the marijuana, split it among themselves and hoped to each have 4 pounds which is not a tremendous amount of marijuana; it is certainly more than he needed to smoke. But it was not a violent crime, and there are many, many cases like this that come across my desk. We have over 7,000 cases of inmates serving sentences and more than 17,000 members who are friends, family, and concerned citizens who want to see some justice restored to the system. So I really beg to differ that all drug offenses are violent.

I think that it is impossible for anyone sitting in this room to really know what it is like to be in prison and to really understand how it could change us. We on this panel, and maybe the panel before us, have a little bit of an idea because we are close to it, but, as someone so astutely said on the last panel, the Members of Congress make sentences that would deter themselves, but they are not the majority of the people who are going to prison. Most people who go to prison do not have the advantages of the Members of Congress.

There are so many little influences that occur in prisons that change the person. I received a letter from an inmate who is serving a drug offense, and he wrote, "What kind of man will emerge after 17½ years in prison?" I think that question is so important, because they are coming back, and they are not going to be the

same person that they were when they walked in, and if we don't deal with them now in a more efficient and effective manner, we are going to have to deal with a lot of these people down the road.

A couple of other things. Incapacitation has come up in the earlier discussion, and one thing that didn't get mentioned: I am very much in favor of a lot of the alternative community correction services that are available or could be made available even in conjunction with a prison sentence. If my brother had gone to prison for 6 months and then 6 months community service, or however long, that would have been a perfectly fine sentence for him.

But something that is very important to think about is that a lot of these drug offenders who are serving nonviolent offenses, who have less than 10 years in prison, are at prison camps. There are no bars, there are no gates, there are no doors, there are no fences, there is no reason for them to not walk away, and if they are such a low threat to society that they don't need to have bars or fences or gates around them, why don't we have them in community correction situations, home arrest, home confinement? It doesn't make sense. I mean there is almost no purpose for camps. They could be replaced by other alternatives.

Also, I think the element of deterrence is important. Not many of the people I hear from even have heard that mandatory minimums exist until they get arrested. It can't be much of a deterrence if nobody knows about it. Perhaps some of the white-collar criminals are deterred, but I don't think very many drug offenders are.

Also, there are studies done by a professor here at American University that show that inmates who are over age 35, have lowered rates of recidivism. So, again, why are we giving people who are 35, 40, 50, or 60 years old sentences of 10 years and 20 years? It just doesn't make sense.

I am just rebutting some of the comments that were made earlier today. Unfortunately, most of the people that said them aren't in this room.

But I think that the public clamor to do something about drug crime is real, and I think that it is legitimate, but I doubt very seriously that any Member of Congress has ever received a letter from a constituent that says, "Please increase mandatory minimum sentences," or, "Please enact mandatory minimum sentences."

I worked at the Cato Institute for 3 years before starting FAMM. They wanted to legalize drugs, and none of them had ever heard of mandatory minimum sentences before. I don't think the average constituent has a clue what a mandatory minimum sentence is. What they want is someone to make laws that will, in fact, take the violent people off the street, which is exactly what the guidelines have done, or will do if we allow them to work.

As far as prosecutorial discretion, which certainly is a problem, in my testimony yesterday I gave lots of examples of how it has been abused. Mr. Mazzoli was saying earlier that he is concerned about it. It seems like a lot of the members here are. I think it is important to really look at that and think about who should have the discretion. Should it be a young prosecutor, or even an old prosecutor? Or should it be judges that have gone through the very strict Senate confirmation hearings and process and who are paid \$143,000 a year to use their judgment? I think these are questions

that are very important. Prosecutorial discretion is creating disparities that the guidelines were intended to get rid of, but just asking the prosecutors to change their charging policies is not the answer. I think the answer truly is to repeal mandatory minimum sentences, and we won't see a decrease in the prison population until we do that.

Thank you.

Mr. HUGHES. Thank you very much.

[The prepared statement of Ms. Stewart follows:]

PREPARED STATEMENT OF JULIE STEWART, PRESIDENT, FAMILIES AGAINST
MANDATORY MINIMUMS [FAMA]

Good morning, Chairman Hughes and members of the subcommittee. Thank you for inviting me to testify today on the problem of prison overcrowding.

The testimony that Dr. Kathy Hawk gave here two months ago provided you with the hard facts and figures about the exploding prison population. Today, I would like to give you a more personal view of who I see filling our federal prison beds, how prison affects them, and what can be done to alleviate prison overcrowding.

I founded the organization, Families Against Mandatory Minimums (FAMM), after my only brother, Jeff, was arrested for growing marijuana and sentenced to five years in federal prison, without parole.

I want to make it clear from the beginning, that I don't oppose prisons. Prisons provide society with a necessary service and can actually be a catalyst to changing peoples lives for the better. In fact, I've argued that my brother's arrest is the

best thing that could have happened to him because it was the wake-up call he needed to get his life on track. However, I strongly oppose the length of the sentence given to my brother, and to many other nonviolent offenders, and argue that far from being a catalyst to a better life, these sentences destroy any chance of a happier future.

In just over two years, FAMM has grown to nearly 18,000 members nationwide, roughly 7,000 of whom are in prison serving mandatory minimum sentences. The majority of the people we hear from are nonviolent offenders, most of whom are serving time for their first offense.

As this subcommittee knows, the reason these first offenders are getting such long sentences is because of mandatory minimum sentences for drug offenses. My first recommendation for reducing the prison population, is to support Rep. Edward's bill, the Sentencing Uniformity Act of 1993, and get rid of mandatory minimum sentences. The longer people stay in prison, the less benefit they derive from it.

During the last hearing on this issue, Rep. McCollum asked Dr. Hawk if one year in prison was long enough for most nonviolent offenders. Dr. Hawk replied that if the purpose is punishment, then it's probably long enough. There are studies that support Dr. Hawk's answer, showing that if anyone is going

to gain anything from a period of incarceration, it happens in the first 12-18 months. Thereafter, the inmate becomes bitter, frustrated, angry, and when you release him or her in 5, 10, 15 years or more, he is likely to be a walking time bomb. At the least, he will probably be a drain on society.

One year in prison would have been more than enough for my brother. I worry, as all relatives of inmates do, that Jeff will become hardened and institutionalized from his stay in prison. He's told me about some of the ways in which he has adapted to life in prison.

Three weeks ago I was in Spokane for a family reunion. For a year, Jeff had planned to attend the reunion by scheduling his first 12-hour furlough to coincide with the reunion date. A week before his furlough, the man who assigns jobs at the prison told Jeff that if he wanted his furlough, Jeff had to go back to the crummy job that he had held for six months when he first arrived at the prison. Jeff knew there was no point in explaining to the man that he had "earned" his furlough according to BOP policies and that it shouldn't be contingent upon his taking another job. So, he's now at the crummy job, which prevents him from attending the few classes that are offered at the prison.

During our many conversations, Jeff has given me other examples of how prison has changed him. Some of them are little

changes--the kind that would never occur to most of us. For example, losing your ability to communicate with people of the opposite sex.

After one year in an all-male facility at Sheridan, Oregon, Jeff transferred to a co-ed facility in Spokane, Washington. He told me that on the bus ride to Spokane, he sat next to a woman who was transferring from a prison in California. For the first two hours they didn't exchange a word. Jeff said he simply didn't remember how to talk to women. And when they finally did talk, she said the same thing.

It's a subtle change, but after many years in a single-sex facility it is probably a common obstacle. And when its added to the many other small changes that incarceration builds in each inmate, you've suddenly got a very different person than the one who walked into the prison. An inmate named Mario Cradle put it beautifully when he wrote to me and asked, "What kind of man will emerge after 17 1/2 years in prison?"

It's probably impossible for anyone in this room to fully understand what spending years in a prison will do to a person. Brent Hudman, another inmate who wrote me, described in a letter the conditions of the federal prison in Lompoc, California a few months after two inmates committed suicide. He writes, "Five months later, a riot broke out. I will not bore you with all of

the fights, stabbings, etc., but I will say this: the prisons of today are all overcrowded, tensions and mental stress run high, hostility towards the opposition can explode suddenly without warning. If you are not careful you can get stabbed for the littlest thing; taking someone's food, changing the TV station, owing \$2 on a bet, any of these small things can cost you your life."

Gratefully, most nonviolent offenders are not in maximum security prisons, but some are. Mark Young is serving a life sentence for his third drug offense. The first two occurred in his early twenties--trying to get a phony prescription filled at a pharmacy for a friend, and possession of quantities of quaaludes. The third offense was for a marijuana conspiracy, 20 years later, which cost him his life in prison at Leavenworth.

While I was writing this testimony, Mark's sister called me to say that he had phoned her several times during the day to report that a 22 year-old inmate had been beaten in the "shoe," which is isolation, and was now in "guardhouse 63 with IV's hooked-up to him." Whether this rumor is true or not, it has served as a spark, ready to ignite the inmates who are just getting over the last inmate death at the prison. Mark is fearful there will be another riot at Leavenworth. Because of the mandatory minimum sentence for third drug offenses, Mark Young, a nonviolent offender, is in the most violent prison in

the federal system.

Although Mark will probably never get out of prison again, many of the inmates who are incarcerated today will walk our streets again. If we want to stop those men and women from ending up back in prison, we'd better think very carefully about what length of sentence gets the message across without doing additional, unnecessary damage to the individual.

Eliminating mandatory minimum sentences is the single most important tool for controlling the present and future prison population. Second to that, I support Dr. Hawk's proposals to slash drug sentences, increase good time, and increase the use of intermediate sanctions. Under intermediate sanctions, I propose that stays in half-way houses be extended to 12-18 months, that bootcamps be offered to individuals with sentences as high as 78 months, and that urban work camps be established in more communities, with participants working on other than federal projects.

If instituted, all of these suggestions would help ease prison overcrowding. But the real problem remains: we have an albatross in our living room. We could move the furniture, chain it to the corner, put paper down to catch its mess, but in truth, the only action that will restore our living room to order, is to get rid of the albatross. The criminal justice system will be overburdened for as long as we have mandatory minimum sentences. Thank you.

MANDATORY MINIMUM CASES
from the FAMM Foundation files

Michael Irish is a 44 year-old carpenter from Portland, Oregon, married with two children. He is serving a 12 year sentence for conspiracy to import hashish. First offense.

Michael's role in this crime was to unload hashish from a boat to a truck. He was unaware of the operation until 72 hours before he unloaded the hashish. That's when the captain of the boat asked him if he would like to work for "three hours for as much money as you would earn in a year." Michael's wife had cancer two years earlier and her treatment wiped them out financially. Knowing that his family needed the money, Michael agreed to unload the boat load of hashish. His three hours of work are now costing him 12 years of his life.

Nicole Richardson is a 20 year-old from Mobile, Alabama, serving a 10 year mandatory minimum sentence for an LSD offense. First offense.

Nicole was a senior in highschool when she fell in love with Jeff, a small time dealer at a local bar. When Jeff was arrested, Nichole was charged with conspiracy to distribute LSD. Her crime was telling an informant in a taped phone conversation, where to find her boyfriend to finalize an LSD sale. Because she had no information to trade for a reduction in sentence, she is sitting in prison for ten years. Her boyfriend cooperated with the prosecutor and reduced his sentence to 5 years.

Marvin McCoy is a homeless, drug addict from Portland, Oregon. He is serving a 15 year sentence for aiding and abetting one crack cocaine transaction involving 22 grams. First offense.

Marvin was befriended by a government informant who was paid thousands of dollars to go to Portland and mingle with the black community and portray himself as a drug dealer. He provided Marvin with drinks, drugs, meals, and asked him to introduce him to cocaine sellers. Marvin made some introductions for him and his involvement, though minor, cost him 15 years of his life.

Mark Young is a 42 year-old from Indiana, serving a mandatory minimum sentence of life without parole for his third drug offense.

When Mark was 20 and 22, he was convicted of two minor drug offenses; trying to get a false prescription filled for someone else, and possession of quantities of quaaludes. Twenty years later he was convicted on a marijuana conspiracy. Mark falls into the "three time loser" category and although he is a nonviolent offender, he is now serving his life sentence at the most violent prison in the federal system--Leavenworth.

Patricia Williams is serving a ten year mandatory minimum sentence for possession of 120 grams of heroine. First offense.

Patricia was a heroine addict whose family died 15 years ago leaving her with a sizeable estate. For two years before she was arrested, a paid informant followed her waiting until she bought some heroine. The informant had a written contract guaranteeing her a percentage of assets seized from Patricia's arrest. After her arrest, Patricia was offered a substantially reduced sentence if she would testify against one particular person. She knew the person, but he had not been involved in her drug offense so she refused to testify against him. Patricia asks, "How many cooperators with a better grasp of their own self interest provide the carefully coached and solicited lie? In this way how many barely guilty, or at times innocent, people serve long sentences?" Among the assets seized from Patricia was a fully-occupied apartment building in Manhattan that she had purchased with her inheritance 13 years prior to her arrest and in which she never lived.

O. Maffett Pound is a 52 year old from Mississippi, who is serving a 20 year mandatory minimum sentence under the career criminal enterprise law. First offense.

For 20 years, Maffet owned and ran a lake-side resort in Mississippi, where he lived with his wife and kids. Between 1986 and 1989, he purchased approximately 300 pounds of marijuana for his consumption and to sell to friends. He was arrested after one of his buyers was arrested and turned him in. The buyer had a previous felony record and admitted in court that he had sold drugs for 15 years. In exchange for his testimony, the buyer was given immunity and allowed to keep his assets. Maffet was considered a career criminal because his offense occurred over several years, so he received the mandatory 20 year sentence. Maffet's wife was sentenced to 5 years in prison for knowing about his activities and not turning him in. She did not smoke marijuana.

Keith Edwards is a 20 year old from New York, serving a 10 year mandatory minimum sentence for possession with intent to distribute more than 50 grams of crack cocaine. First offense.

When Keith was 19 years old, he sold crack cocaine to a paid informant. The transaction was observed by numerous law enforcement officials. Instead of arresting Keith after the first buy, they set up four more buys from him, one within 1000 feet of a school. After Keith sold the informant a combined total of more than 50 grams of crack cocaine, he was arrested. The combined weight of 50 grams of crack, forced the judge to give Keith a ten year mandatory minimum sentence.

FAMM FACTS**PRISON OVERCROWDING**

* In 1992, America had 1.2 million people behind bars. The United States imprisons more of its citizens per capita than any other country in the world. Per 100,000 people, the United States imprisons 455, with South Africa in second place with 311. In other words, one in every 300 Americans is in prison--not jail, probation, or parole--but in prison. (*The Sentencing Project, Americans Behind Bars: One Year Later, 1992*)

* From 1980 to January 1993, the federal prison population grew by 57,000 inmates--from 24,000 to 81,000. At the current rate of incarceration, by 1995 the federal prison population will reach 100,470, and by the year 2000 there will be 136,980 people in federal prisons. (*Bureau of Justice Statistics, Sourcebook 1991, p. 679*)

* Convictions for federal drug offenses increased 213 percent between 1980 and 1990. (*Bureau of Justice Statistics, National Update, January 1992, p.6*)

* Drug offenders currently make up 57 percent of the federal inmate population, up from 22 percent in 1980. By 1995, nearly 70 percent of federal inmates will be drug offenders. (*Testimony by former BOP director, J. Michael Quinlan, given on February 26, 1992 to House Appropriations Subcommittee*)

* In 1990, more than half of the federal inmates serving mandatory minimum sentences were first offenders. (*Bureau of Justice Statistics, Sourcebook 1991, p.542*)

* Average federal sentences in 1990 for the following offenses were:
Drugs offenses: 6.5 years. Sex offenses: 5.8 years. Manslaughter: 3.6 years. Assault: 3.2 years. (*Bureau of Justice Statistics, Sourcebook 1991, p.532*)

EXCESSIVE TAXPAYER COSTS

* The average cost of incarcerating a federal prisoner is \$20,072 per year, or approximately \$55 per day. (*Bureau of Prisons, State of the Bureau 1991, Summer 1992*)

* To house, feed, clothe, and guard the 81,000 federal inmates, taxpayers pay a hefty \$4.5 million per day or \$1.6 billion per year.

* At the state level, taxpayers cover incarceration costs as high as \$6.8 million per day in California where over 100,000 people are behind bars at an average of \$25,000 per inmate per year. (*The California Republic, July 1991, p.9*)

* States spend more of their budgets on justice programs (6.4%) than on housing and the environment (3.8%) and nearly as much as they spend on hospitals and health care (8.9%) (*Bureau of Justice Statistics, Justice Expenditures & Employment, 1990, Sept. 1992*)

* The federal drug program budget for FY 1993 was \$12 billion. (*Office of National Drug Control Policy*)

* Federal spending for corrections increased 44 percent between 1989 and 1992, from \$1.5 billion to 2.2 billion per year. (*U.S. Budget FY 93, Part 1, p.198*)

* The Bureau of Prisons' authorized budgets increased 1,350 percent between 1982 and FY 1993, from \$97.9 million to \$1.42 billion per year. (*National Drug Control Strategy Budget Summary, 1992, p.212*)

* It costs more to send a person to federal prison for four years than it does to send him to a private university (tuition, fees, room, board, books & supplies) for four years. (*Sources: Federal Bureau of Prisons, The College Board*)

* Figures are not yet available for the tax revenue loss from former tax-paying inmates, or the increased cost of social services needed by inmates' families that were previously supported by the inmate.

PRISON CYCLE

Statistics show that people who have been in prison are more likely to have children who will end up in prison. Long mandatory prison sentences are sowing the seeds for the next generation of inmates.

- * More than half of the juveniles in state and local jails have an immediate family member who is a felon.
- * More than one-third of the adults in state prisons and local jails have an immediate family member who is a felon.
- * Relative to the general population, inmates are more than twice as likely to grow up in a single parent family. Seventy percent of juvenile offenders and 52 percent of adult offenders had one, or no, parent.

(Source: Bureau of Justice Statistics, Survey of Youth in Custody 1987, Profile of Jail Inmates 1989, Survey of Inmates in State Correctional Facilities 1986)

PUBLIC ATTITUDES

- * toward crime: 61% prefer attacking social problems, 32% want more prisons & law enforcement.
- * toward purpose of prison: 48% think it should rehabilitate, 38% think it should punish.
- * toward spending more money & effort in fight against illegal drugs: 40% prefer teaching the young, 28% work with foreign governments, 19% arrest sellers, 4% help overcome addiction, 4% arrest users.

(Source: Bureau of Justice Statistics Sourcebook 1991, pp.202, 210, 243)

U.S. SENTENCING COMMISSION FINDINGS ON MANDATORY MINIMUMS

- * Sentencing power has been transferred from the courts to the prosecutors. The Commission reports that, "Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised."
- * Mandatory minimum sentences create disparities based on race. Blacks and Hispanics are charged with and receive mandatory minimum sentences more often than whites. The Sentencing Commission reports that this racial disparity "reflects the very kind of disparity and discrimination that the Sentencing Reform Act...was designed to reduce." For defendants arrested for similar crimes, Blacks receive mandatory minimum sentences 68 percent of the time; Hispanics 57 percent of the time; and Whites, 54 percent of the time.

Crack cocaine sentences also cause race-based disparities. These sentences are 100 times greater than those for powder cocaine. Possession of 5.01 grams of crack, results in a five year sentence. It takes 500 grams of powder cocaine to get a five year sentence. In 1992, 92.5 percent of all defendants sentenced for federal crack cocaine offenses were Black. All of the defendants sentenced for possession of crack were Black.

- * Mandatory minimums are ineffective--low level participants receive mandatory minimums more often than top level kingpins. Street-level participants receive mandatory minimums 70 percent of the time; mid-level 62 percent of the time; and top-level importers, 60 percent of the time.
- * Mandatory minimums create "cliffs" in sentencing based on small differences in weight. Possession of 5.0 grams of cocaine requires a sentence of up to one year, but possession of 5.01 grams of cocaine requires a sentence of at least five years.

(Source: U.S. Sentencing Commission Report to Congress on Mandatory Minimum Sentences, August 1991, and U.S. Sentencing Commission Monitoring Data Files, April 1 - July 1992.)

COMPARATIVE OFFENSES

Keep in mind: Federal guidelines equate one marijuana plant to one kilo (2.2 pounds) of marijuana, regardless of the size of the plant at arrest. In LSD cases, the guidelines include the weight of the paper, or the sugarcube, or the orange juice in which the LSD is mixed, to determine the total drug weight on which sentencing is based.

Level 24: 4.3 years to 5.3 years

\$80 million worth of larceny, embezzlement, other forms of theft. Kidnapping abduction, unlawful restraint. 176 pounds of marijuana, 800 mg. of LSD, 400 grams (less than 1 lb.) of cocaine powder.

Level 26: 5.3 years to 6.6 years

Robbery with life-threatening injury.

220 pounds of marijuana, 1 gram (half the weight of one dime) of LSD, 500 grams (a little over 1 lb.) of cocaine.

Level 28: 6.6 years to a 8.1 years

Conspiracy or solicitation of murder.

880 pounds of marijuana, 4 grams (almost the weight of 2 dimes) of LSD, 8.7 pounds of cocaine powder.

Level 30: 8.1 years to 10.1 years

Kidnapping, abduction, unlawful restraint with ransom demand.

1540 pounds of marijuana, 7 grams (a little over 3 dimes weight) of LSD, 8.7 pounds of cocaine powder.

Level 38: 19.6 years to 24.4 years

Selling or buying of children for use in the production of pornography.

66,000 pounds of marijuana, 300 grams (approx. 3/4 lb.) of LSD, 330 pounds of cocaine powder.

(Source: U.S. Sentencing Commission Guidelines Manual, November 1, 1992)

SOME ORGANIZATIONS THAT OPPOSE MANDATORY MINIMUM SENTENCES

- The United States Sentencing Commission
- The Federal Courts Study Committee
- The American Bar Association
- Each of the 11 Judicial Conferences of Federal Judges
- The National Association of Criminal Defense Lawyers
- The American Civil Liberties Union

Mr. HUGHES. Dr. Curry, welcome.

STATEMENT OF ARTHUR CURRY, PH.D., SILVER SPRING, MD

Dr. CURRY. Thank you, Chairman Hughes, Mr. Edwards.

I come to you sort of reluctantly today, because the first 2 years my son was arrested I was a little bit too embarrassed to even speak about the circumstances that my family and my son faced. I consider it very, very important that you understand today why I am not here. I am not here to point fingers at prosecutors, at judges, not to mock the judiciary system. I am here to ask some questions and ask you to please rethink the mandatory minimum sentences as they exist today.

In my son's case, you are talking about a young man who had never had a criminal record, never been suspended from school, perfect attendance from middle school all the way through high school, a star basketball player, who ended up after graduation with the wrong group of people. He had an IQ of roughly 80 but wanted to be extremely competitive with his two sisters, one a graduate and now an accountant in Chicago and the other one a recent graduate of Carnegie Mellon in the area of public administration. Of all things, my son was a major in criminal justice when he was arrested.

To some extent, I am not arguing at all about the day he had in court. He chose to go before a jury. He was found guilty of one of four counts. I have no argument with that whatsoever. I do have an argument relative to, how can a then-19-year-old young, black, Afro-American male be looking at 25 to life in prison without parole? That is where my problem is.

I heard the testimony before relative to individuals who might say and might argue that, well, we need to lock them all up and throw away the key. I can tell you that in the 13 months that my son has been locked up, awaiting sentencing on the first of October of this year, the first 2 months he did not want to talk about the situation; he, too, was embarrassed. After about 3 months, he did begin to talk, and we began to discuss association. My son was guilty of walking that fine line between those individuals on the basketball court who were doing the right thing and those individuals who were involved in criminal activities.

I have noticed now, for the last 3 months, conversation becomes very, very difficult for him. Our phone conversations or my visits to him are much shorter, because I find we have less to talk about. It is very, very discouraging to work as an educator for 27 years, as a parent, as a Vietnam veteran, for a system that I defended, and at this particular time, other than this subcommittee, I have not been able to get the audience of even my elected officials on this subject.

I know drugs is a very, very tough issue. I don't condone the use of them. I have spent 13 of my 27 years in education as either a middle school or high school principal, most of that time in the inner city, working with youth, trying to let them know the dangers relative to drug involvement.

Interestingly enough, about 2 years ago I did conduct a little survey with two high schools. The total population of the two schools was approximately, I would guess, probably 2,000 students; over 90

percent of them had no idea of what mandatory minimums even meant, and if they are to be a deterrent, how then can we expect for it to be a deterrent when kids don't even know about it?

I guess my plea to you is: The judge will have no control. I expect my son to be sentenced to 25 years in prison. I think my son has learned his lesson. I know he has learned his lesson. But the mere fact is, I probably will never see my son again as a free man.

Thank you.

Mr. HUGHES. Thank you, Dr. Curry.

[The prepared statement of Dr. Curry follows:]

PREPARED STATEMENT OF ARTHUR CURRY, PH.D., SILVER SPRING, MD

Chairman Brooks and members of the Subcommittee on Intellectual Property and Judicial Administration thank you for allowing me to testify during these hearings on the Federal Prison Population: Present and Future Trends.

I consider it extremely significant that you understand first why I am not here. It is not my intent to point fingers or criticize judges and prosecutors nor mock the judiciary system of our country. My sole purpose today is to present my son's case to you as an example of why we should rethink the 1986 Anti Drug Abuse Act. In passing this Act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in the state courts to Federal courts, changing trials to a more favorable location for possible convictions, and using minor participants in an undercover capacity relative to other criminal investigations.

On the other hand, judges are bound by the mandatory minimum guidelines. They are forbidden to consider an individual as a minor participant, a nonviolent first time offender, nor a personality disorder that may contribute to one's involvement.

I must admit to you however, that I am frustrated and sometimes angered by a democratic system that I defended and promoted as a soldier in Vietnam, as an educator, as a parent, and as a black male in America. I was raised to believe that this system worked for everyone, regardless of race, gender, age, or religion. Now for the first time in my life when I need to use that system, I have found it almost impossible to get an audience with any elected representative.

My son, Derrick A. Curry, was arrested on December 5, 1990 at the age of 19 and charged with one count of possession with intent to distribute crack cocaine, one count of distribution of crack cocaine, and one count of conspiracy to distribute crack cocaine. He is the youngest of three children and my only son. His oldest sister is an accountant in Chicago and the other a recent graduate of Carnegie-Mellon in Pittsburg.

A complete background check was done by the F.B.I. and no evidence was found to support the contention that he was a major drug dealer. He owned no car; he drove an old Citation that belonged to his mother. He had no money and like most college students borrowed gas money routinely from his mother and me. He had no jewelry. He had no arrest record nor any involvement with the law prior to this incident. On the other hand, despite having an I. Q. of 80, he was a second year student at Prince George's Community College working toward, of all things, a degree in Criminal Justice.

The F.B. I. had conducted an investigation involving twenty-eight individuals for over five years. By the prosecutors own records, my son was determined to be a minor participant who was only involved the last six months of the investigation.

During the ensuing months, he was offered a plea agreement which called for him to plead guilty to the conspiracy count and agree to work in an undercover capacity in connection with other criminal investigations in addition to other terms and conditions. In exchange, it would be recommended to the court that he be sentenced to 10 years. My son turned down the plea agreement for two reasons. He did not feel that he was guilty and he did not want to work undercover.

Because of the large number of individuals involved and other legal implications, Derrick was tried separately. He also was the only one of the original 28 defendants found guilty of the conspiracy. One can't help but wonder with whom did he conspire.

My son will be sentenced on October 1, 1993. He is facing 25 years to life.

Please understand that I am not questioning the process of his trial or verdict. However, just as I believe in our system, I believe that the punishment should fit the crime. I am, therefore, questioning how a 19 year old boy could be facing 25 years to life for a minor role in a criminal investigation at best. He is not a mass murderer nor a drug lord. He is a young black male who made a bad decision. The issue is not good nor bad, but whether being wrong once in your youth legally should merit a life time in prison with no chance for parole nor a chance to prove you've learned from your mistake.

I can't help but believe that the members of Congress did not have Derrick Curry in mind when the 1986 Anti Drug Abuse Act was passed and we claimed victory in winning the war on drugs.

Mr. HUGHES. Mrs. Baca, welcome.

STATEMENT OF PATRICIA A. BACA, VIENNA, VA

Mrs. BACA. Thank you, Mr. Chairman and Congressman Edwards.

It is with great interest that I address you this day regarding the mandatory minimum sentences and prison overcrowding. It is not an easy subject to address as I, too, have experienced personally the heartaches and inconveniences that can be wrought on a family when one of its members is faced with a mandatory minimum sentence for drug involvement.

To give you some background on me, I would like to say that I am opposed to the use and/or sale of any illicit drugs. I believe that people who are involved with drugs should be punished and that our goal should be to have a strong nation that is free from the ravages caused by drug use and abuse. I am in favor of having prisons. However, I consider myself to be relatively enlightened, and I was not aware that there was anything such as mandatory minimums and that it only applied in certain crimes.

In late March of this year, I became aware of my nephew's case in which he was accused of conspiracy to manufacture methamphetamines. He believed in his own innocence and went to trial. He was convicted based on testimony from a person who entered a plea bargain in order to escape the harsh mandatory minimum sentence for himself. I wish to discuss the human side of what has happened and to explore what, if any, purpose has been served.

It appears to be impossible to build prisons fast enough to incarcerate all offenders. As overcrowding worsens, more violent prisoners will likely be freed while first-time, nonviolent drug offenders will not ever be eligible for parole and will be kept in prison. I believe that what has happened is that the hands of judges have been tied and the discretion has been relegated to prosecutors who can determine the sentence outcome by the wording of the indictment. We are seeing judges render decisions that they say are unfair but are required, and some judges have even refused to hear drug cases because they will not impose the sentence that would be required if a conviction is obtained. Justice would likely be better and more fairly served if we allowed the judges to do what they are appointed to do.

Many of the cases we are currently seeing on the various news programs feature people who were peripherally involved in drug usage or maybe just knew something was going on and didn't go to the authorities. These are people who marginally participated, if at all, yet they are in prison for 5, 10, or more years while the people who were more involved and testified against them received much lighter sentences. I believe that mandatory minimum sentences have created an incentive for persons to lie in order to make deals that will reduce their own probability of spending long periods in prison.

If a person has no prior criminal record and is involved in a minor way in an offense, I believe a relatively short term in prison will have a dramatic effect on that person. I believe a person without deep-seated criminal habits would figure out within the first

few weeks that it would not be worth the risk to replicate the behavior that had placed him in the current situation. If society feels it needs to punish someone for having made a mistake, I believe 6 months to 1 year would be ample punishment for most people.

Consider the cost for incarcerating these youthful offenders. I am not referring to cost of prison alone, although that is great. I want to consider many of the other costs. What of the young family that may be forced on welfare? What of the older family members who may have to jeopardize their own retirement possibilities in order to fund legal defense appeals, et cetera? What of the young children who are denied the opportunity to have their father in the home? What of the stigma placed on children during their early, formative years because their father is in prison?

My nephew has a wife and three young children. He is an engineer by profession and was gainfully employed and supported his family. He holds patents on mechanical devices he has invented for the towing industry. He has an employer who believes in him and stands ready to rehire him as soon as he is released. But if he is incarcerated for 20 to 25 years, which is what the probation officers recommended in his presentence report, his skills will be outdated and he, too, may be unemployable. There must be alternatives.

I wish I could speak as eloquently as the panel today, but my ideas are: House arrest for first-time offenders; I think it could be used in conjunction with periodic reporting and random checks; maybe some sort of electronic bracelet could be used, if needed; random drug testing could be used to be certain the offender is not using drugs. But save the harsher sentences for those people who are repeat offenders, who violate the terms of their alternative sentence, or who are violent offenders. Let's look at our justice system, and let's rationally weigh the crimes.

I have the headlines from the June 5 paper where two mothers in two separate areas killed their infants—smothering them, whatever—but they were given probation. One has to spend weekends in jail for 3 years. Is it fair that young mothers can kill their infants and get weekends in jail or probation for 5 years while a young drug offender is sent to prison for 5, 10, 20 years, even up to life, with no possibility for parole?

Many Federal judges are saying mandatory minimums need to be looked at. Let's give it the look it needs. I believe the public needs to be told that mandatory minimums did not work in the sixties and they do not appear to be working now. This does not mean being soft on crime, it simply means putting rationality and fairness back in the judicial process.

I would like to thank you for allowing just a common citizen who is personally affected by this to address your committee. I pray that you will reverse the consequences that are a result of what I perceive to be an ill-conceived requirement as it relates to youthful, first-time, nonviolent offenders, and allow the sentencing guidelines to be revised.

Mr. HUGHES. Thank you, Mrs. Baca.

[The prepared statement of Mrs. Baca follows:]

PREPARED STATEMENT OF PATRICIA A. BACA, VIENNA, VA

Mister Chairman and Honorable Members of the Committee, it is with great interest that I address you this day regarding mandatory minimum sentences and prison over-crowding. It is not an easy subject to address as I have experienced personally the heartaches and inconveniences that can be wrought on a family when a family member is faced with a mandatory minimum sentence for drug involvement. Those feelings are only intensified when there is doubt as to the validity of the charges and when it is seemingly apparent that a person has lied in order to reduce his own prison term and that he may have done so at the prompting of our government.

To give you some background on me, I would like to say that I am opposed to the use and/or sale of any illicit drugs. I believe that people who are involved with drugs should be punished and that our goal should be to have a strong nation that is free from the ravages caused by drug use and abuse. I am in favor of having prisons with prisoners being incarcerated for reasonable periods both to rehabilitate themselves and to protect society. I have always thought I was relatively politically astute and well-informed as to what was occurring in our society. I was not aware that there was anything such as mandatory minimum sentences and

that it only applied to certain crimes. Once I became aware of this situation, I've seen it all around me and smugly thought it was interesting that this had become such a hot topic just as I was getting involved in it. Well as I have become more involved, I see that it was in newspapers before, but I had just passed over those articles without ever registering what the human effect was. I am sure there are many others in that same situation. There is nothing like personal involvement to make one aware. As I speak to friends and acquaintances about this issue, they are all quick to say that a 20-25 year sentence really doesn't exist and that anyone will be out within just a short time. That too had been my opinion until now.

In late March of this year I became aware of my nephew's case in which he was accused of conspiracy to manufacture methamphetamine. Both he and my brother were embarrassed after the arrest and didn't want other families to know about it, so on the advice of the attorney who "thought nothing would come of it," they chose not to let family members know. He believed in his own innocence and went to trial. He was convicted based on testimony from a person who entered a plea bargain in order to escape the harsh mandatory minimum sentence for himself. I do not wish to discuss my nephew's case in any detail as we are in the legal process now and will be filing an appeal once a sentence has been handed down, which is scheduled for August 9, 1993. As I proceed with this testimony, I will refer to the accused in the masculine gender because that is

where I am coming from. I acknowledge that any accused could be, and often is, female.

What I do wish to discuss is the human side of what has happened and to explore what, if any, purpose has been served. It is my understanding that Kathleen Hawk, director of Bureau of Prisons, testified before your committee and pointed out that mandatory minimum sentences were largely responsible for the prison crowding problem. I am not an advocate of freeing all prisoners. However, based on my reading of the news articles (and I do understand that not all quotes are always entirely accurate), it appears to be impossible to build prisons fast enough to incarcerate all offenders. As over-crowding worsens, more violent prisoners will likely be freed, while first time, nonviolent drug offenders will not ever be eligible for parole and will be kept in prison.

I spoke with Senator Hatch's office in trying to get some background on why the US Sentencing Guidelines were set for such long periods. His staff walked me through the process that evolved, indicating that the US Sentencing Commission had established guidelines to insure that all persons committing equal crimes received equal and impartial treatment regardless of which jurisdiction they were in or who the Judge might be. Then prior to giving them a chance to really make a difference, Congressional action was taken with the legislation of mandatory minimum sentences. Because those imposed minimums were harsher, the

Guidelines were revised upward to avoid so great a disparity between the offense guideline and the mandatory minimum. Judge Hubert Will said on ABC's Nightline on July 14, that there is conflict between the guidelines and the mandatory minimums. I do believe it is noble to try to eliminate disparity between jurists and jurisdictions for similar crimes (this possibly could try to offset some of the actual or perceived discriminatory effects of our justice system as it relates to minorities); however, I believe that what has happened in reality is that the hands of Judges have been tied and the discretion has been relegated to prosecutors who can determine the sentence outcome by the wording of the indictment. We are seeing Judges render decisions that they say are unfair, but are required, and some judges have even refused to hear drug cases because they will not impose the sentence that would be required if a conviction is obtained. Justice would likely be better and more fairly served if we allowed the Judges to do what they are appointed to do, which is to hear the evidence and render verdicts (or instruct juries in rendering verdicts) and ultimately imposing sentence when there is a conviction. If some few Judges are not performing their duties, it would be better to replace a Judge than to have a law that cannot possibly take into consideration the individual facts in any given case. Nobody has ever said that life is fair, but our judicial system by definition should be fair. I do not believe it is fair to have a young, first-time, non-violent drug offender sit in prison for years or decades while

we have to release convicted murders and rapists to avoid prison overcrowding.

With all due respect, I've read of very few people or organizations that believe the current policy regarding drug offenders has had any significant effect on the drug supply or drug usage. I believe we will see a significant decline in drug use over a long period of time, just as we have seen a decline in cigarette smoking and alcohol use with more education as to the ills they cause. An educated society can make an enlightened choice to live better. Yes, it takes time for this to happen, but it does happen. I am not advocating legalization of currently illegal drugs, but I think there should be an effort to rehabilitate and reclaim lives rather than just to punish and hope the problem will go away.

Many of the cases we are currently seeing on the various news programs feature people who were peripherally involved in drug usage or maybe just knew something was going on and didn't go to the authorities or even were entrapped by over zealous law enforcement officers. These are people who marginally participated, if at all, yet they are in prison for 5, 10 or more years while the people who were more involved and testified against them received much lighter sentences. I believe that mandatory minimum sentences have created an incentive for persons to lie in order to make deals that will reduce their own probability of spending long periods in prison. I have talked with attorneys who say they

sometimes just advise their clients to plea even if they are not guilty, because "innocent until proven guilty" is often not the norm in drug related or sex abuse cases. Our "national fear" is drugs and we as a nation or as a jury do not always act rationally when drugs are the topic of the case. Other attorneys will not allow a person who has admitted guilt to enter a plea, because there is so much uncertainty as to what the outcome of the plea will be. With the advent of plea bargains and the fact that the uncorroborated testimony of an informant can be all that is required for a conviction, and with payments being made to informants upon the seizure of property, many innocent people are being jeopardized.

I believe that there are two types of drug offenders--those who have a propensity toward criminal activities and those who are just experimenting with freedoms and responsibilities or are tempted beyond their limits with the prospect of large sums of money. If a person has a propensity toward criminal activities, it is somewhat unlikely that even a lengthy prison term will change that. On the other hand, if a person has no prior criminal record and is involved in a minor way in an offense, I believe a relatively short term in prison will have dramatic effect on that person. I believe that a person without deep seated criminal habits would figure out within the first few weeks that it would not be worth the risk to replicate the behavior that had placed him in the current situation. If society feels it needs to "punish" someone for having

made a mistake, I believe six months to one year would be ample punishment for most people.

Consider the costs for incarcerating these youthful offenders. I am not referring to costs of prison alone, although that is great; I want to consider many other costs. What of the young family that may be forced on welfare? What of the older family members who may have to jeopardize their own retirement possibilities in order to fund legal defense and appeals etc? What of the young children who are denied the opportunity to have their father in the home? What of the stigma placed on children during their early formative years because their father is in prison?

My nephew has a wife and three young children. He is an engineer by profession and was gainfully employed and supported his family. He holds patents on mechanical devices he has invented for the towing industry. He has an employer who believes in him and stands ready to rehire him as soon as he is released; but if he is incarcerated for 20 to 25 years, his skills will be outdated and he too may be unemployable. I have watched my brother through this ordeal and I am here to report that the toll taken on him is phenomenal. My brother is a farmer as was our father. My brother is from a very small town in Texas and was somewhat naive about the judicial system. This is the town where my nephew was raised. My nephew is young and has been fortunate to have had good employment and to have been able to take care of his family and to lead a

relatively good life. This may actually have been to his detriment at trial, because many people on the jury did not understand how such a young person could have the life style he had attained if there wasn't drug money involved. Both my brother and nephew were perhaps naive and believed that the "good guys always win," and that if you "tell the truth justice will be served." Media hype, drug war campaigns and societal fears relating to drug issues mean that many ordinary citizens who are chosen for juries have been sensitized to the point where justice really cannot be served.

Conspiracy charges seem to be the thing prosecutors are going for and they are working with informants and/or accomplices to prove a conspiracy. Conspiracy should be very difficult to prove, because it takes both knowledge and intent. Faced with a mandatory minimum, a co-conspirator has the incentive to lie.

There must be alternatives. House arrest for first time offenders could be used with periodic reporting and/or random checks. Some sort of electronic bracelet could be used if needed. Random drug testing could be used to be certain the offender is not using drugs. Save harsher sentences for those people who are repeat offenders, who violate the terms of their alternative sentence, or who are violent offenders.

"Just say no" may not work as well as we would have hoped. I believe it is asking a lot of a young person growing up in the

inner city with few amenities of life and surrounded by a crime scene, to be able to reject the glamour offered by the large sums of money that can be made for "just making this delivery." The price may go up as you move into the suburbs, but the temptation is there. I grew up poor and I know what it is to have hand-me-down clothes and to not be able to do the things my friends at school did. But I had a family that had pride and instilled in me that I could become anything I wanted to become. Not all our youth of today have a home support system. Before you decide that a young man should be locked up for the better portion of his life, consider if there isn't a better answer. Personally I think we might be better off if we took the approach of showing young people where these illegal drugs are processed (filthy barns, back-alley tenements) and who is doing the processing (not skilled chemists, but unskilled people who have learned on the street) and letting them know the conditions under which much of the drugs are manufactured. I would think they might at least have second thoughts before putting that drug into their bodies.

Let's not entrap young people. Just as corporal punishment does not teach a child to not be violent, I do not believe our government agencies should be involved in dealing drugs--even with the noble idea that it may somehow reduce the supply. Instead allow prisoners who would be able to "get through" to young people to tell them of the bad aspects of drugs and to try to warn others

away from the course they were on. A form of "Scared Straight" might be good in talking about drugs as well.

Let's look at our justice system and let's rationally weigh the crimes. Yes drugs can kill just as surely as a person with a gun can kill. But murder and rape still are worse in my view because they are violent crimes and the victim has not contributed to his own demise. If a person overdoses on drugs, I believe he has at least some contributory negligence. Yet many murderers and rapists are being released early because the prisons are full and you can't let out that youthful, first-time, non-violent, low-level drug offender. Often those murderers and rapists will strike again.

Many Federal Judges are saying mandatory minimums need to be looked at. Let's give it the look it needs. I believe the public needs to be told that mandatory minimums did not work in the Sixties and they do not appear to be working now. This does not mean being soft on crime--it simply means putting rationality and fairness back in the judicial process.

Just as all Judges were not the same, there are punitive Prosecutors and there are fair-minded Prosecutors. It is unfair that the young prosecutor who is just beginning a career and wants to make a name for him/herself has so much control over the sentence a Judge must render.

In the tax arena where I work daily, I see what are perceived as "loopholes" being closed by dropping an "atomic bomb" law when a "fly swatter" law would have done just as well. I believe this same sort of over-reaction to the drug problem has occurred. In agreement with the July 14 segment on ABC Nightline, let's get rid of these "irrational, excessive, unjust, perhaps unconstitutional sentences" and make room for the career offenders.

If Congress intends to continue and even expand mandatory minimums as Senator Gramm has said, then maybe we should remove sentencing from the purview of Judges and just let it be a mechanical computation, which could be performed at an administrative level.

This issue seems to have the attention of Judges, the Bar, FAMM, Prosecutors, Defense attorneys and concerned citizens. I believe it needs a second look!

I would like to thank you for allowing a person who is personally affected by the mandatory minimum sentences to address your committee. I pray that you will reverse the consequences that are a result of this ill-conceived requirement as it relates to youthful, first-time, non-violent offenders and allow the sentencing guidelines to be revised to their original levels and give them the chance to do what was designed.

Albuquerque Journal 9/10

S. J. Mexico 9/10

Convicted drug criminals boost prison population

WASHINGTON — An increase in inmates convicted of drug crimes helped boost the nation's prison population to a new high of 883,593 at the end of 1992, the Justice Department reported Sunday.

The total number of federal and state prison inmates was up 59,460, a 7.2 percent increase, over the previous year, the Bureau of Justice Statistics announced. The federal prison population grew much faster than that of state prisons, up 12.1 percent to 80,259 inmates, while state prisons grew by 6.8 percent to 803,334, BJS said.

Drug Offenders Help Prison Ranks Swell to Record

By Carolyn Skorneck

THE ASSOCIATED PRESS

WASHINGTON — An increase in inmates convicted of drug crimes helped boost the nation's prison population to a new high of 883,593 at the end of 1992, the Justice Department reported Sunday.

The total number of federal and state prison inmates was up 59,460, a 7.2 percent increase over the previous year, the Bureau of Justice Statistics announced. The federal prison population grew much faster than that of state prisons, up 12.1 percent to 80,259 inmates, while state prisons grew by 6.8 percent to 803,334, the bureau said.

"Drug offenders were a major source for the increased number of prisoners," Acting bureau director Lawrence A. Greenfeld said in a statement.

Of all new court commitments to prison in 1990 — the last year for which the bureau had available data — almost one-third were drug offenders, up from 11.5 percent in 1977.

Ensuring adequate prison space for violent criminals has been a particular concern of Attorney General Janet Reno, who knew from 15 years as Dade County, Fla.'s top prosecutor that prison overcrowding can lead to premature release of violent inmates.

"The most important problem in America today is violence, and

people want those who hurt and maim and kill and brutalize put away and kept away for as long a time as they possibly can be," she told reporters recently.

The problem has led Reno to suggest the possibility of replacing some mandatory minimum sentences for nonviolent offenders with alternative sentences.

Federal prisons thus far haven't had to free inmates early because of overcrowding, which has occurred in some state prisons.

"But ... if we keep sending people to prison at the rate we're sending them to prison, we're going to have a tremendous shortfall in terms of monies necessary to open the prisons and then operate the prisons," she said.

Some states have given cases to federal prosecutors to ensure that the defendants, if convicted, will stay in prison and not be freed prematurely, she told a meeting of drug control policy experts Friday.

unity to help make the
USA truly one nation."
—Allen H. Neuharth
Founder, Sept. 15, 1982



Editorial Page
Thomas Curley
President and Publisher

Today's debate is on **DRUG LAWS**
and whether some sentences should be reduced.

End the unfairness in drug sentencing

OUR VIEW Federal and state governments ought to ease up on some of their harshest drug laws.

The U.S. Sentencing Commission may be about to alleviate an injustice — an unduly harsh sentence for drug possession.

On April 19, the commission will decide whether to ease a federal law that now demands a longer sentence for possession of \$5 worth of LSD than for attempted murder or rape.

Get nabbed with five doses of LSD on five sugar cubes, and you'll serve a mandatory 10 years' minimum. The minimum sentence for attempted murder: 6.5 years. For rape: 5.8 years.

That's just one of many absurdities in federal and state drug-possession laws that need fixing.

To curb drug use and drug-related violence in the 1980s, federal and state governments passed laws requiring harsh mandatory minimum sentences for drug possession. That hypervigilance has come at a stiff price — fewer resources for violent crime.

Drug-possession arrests increased

88% between 1980 and 1990, spurring the largest prison expansion in the nation's history. Now, one in four inmates — about 300,000, compared with 58,000 in 1983 — is awaiting trial or serving time for a drug offense, two-thirds of them for possession.

Keeping them all in jail costs \$6.1 billion a year. Their presence has strained the prison system beyond the bursting point. The result: Minor drug offenders on mandatory sentences have to stay put, so some violent criminals get out.

Meanwhile, many of the major drug dealers get to duck mandatory sentences by trading information for reduced charges. Small-time possession offenders have little to trade.

Do these harsh laws work? Not really. Drug use has gone down, but laws don't deserve all the credit. An aging population and health consciousness helped.

In the meantime, the focus on drug crimes has distracted the criminal justice system from worse offenses. Violent crime is increasing, but a decreasing proportion of violent criminals are being sent to prison.

The evidence is in: It's time to correct the injustices in the drug laws.

Don't slack off on drugs

USA Today

Page 12A Thursday, April 8, 1993

Review of drug sentences ordered

7/5/93
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By Dennis Cauchon
USA TODAY

Attorney General Janet Reno has ordered a Justice Department review of mandatory minimum drug sentences.

"It is revolution for an attorney general to say we need to review drug sentences because they are too long," says Rep. Charles Rangel, D-N.Y.

Rangel, chairman of the House Narcotics Control and Abuse Caucus, spoke with Reno Tuesday and said he will push a sentencing reform bill.

"There's going to be a big stink about this," Rangel says.

Reno said at a budget hearing last week mandatory sentences were a costly, unfair and ineffective way to deal with many drug offenders.

Her remarks — plus new support from key members of Congress — have invigorated the call for sentencing reform.

Many mandatory minimum drug sentences were passed in the 1980s as the Reagan and Bush administrations stepped up the war on drugs and pursued a "zero tolerance" policy.

The minimums and new sentencing rules stripped judges of most control over sentencing.

Result: The federal prison population swelled from 24,250 in 1980 to 84,000 today. Drug offenders made up 25% of inmates in 1980 vs. 60% today.

Prison costs and stories of unfair sentences have led to calls to change minimums. Judges, prison officials and the reform group Families Against Mandatory Minimums have led the fight.

Among actions:

► Rep. Charles Schumer, D-N.Y., will hold a drug policy summit Friday. The summit will include Reno, the nation's top drug experts and activists such as Jesse Jackson.

Schumer, head of the subcommittee dealing with drug laws, is a longtime supporter of mandatory minimums. But he says a "safety valve" is needed to protect first offenders.

► The U.S. Sentencing Commission — appointed by Bush and Reagan — has opposed mandatory minimums and is forming a task force to study mandatory minimums for crack cocaine.

But Bush drug czar Bill Bennett says mandatory minimums "have basically done the job and we should stay with them. We have laws because they are general, not because they are right in all cases."

4A WEDNESDAY, JUNE 2, 1993 USA TODAY

CAPITAL LINE

USA TODAY'S BRIEFING ON WASHINGTON

Aid to families and children hits record

Five million families got benefits under Aid to Families with Dependent Children in March — a record, according to the Health and Human Services Department.

AFDC rolls grew by 42,000 families between February and March, an unusually large month-to-month increase. Nearly all participants are single parents, most of them mothers. President Clinton has targeted the welfare program for overhaul.

The number of Americans on food stamps also jumped sharply in March to a record 27.38 million recipients.

Participation in AFDC has set records in all but two of the months since July 1989, when there were 3.76 million families on the rolls. Lately, the program has been growing by 15,000 to 20,000 families a month.

In March, the state-federal program reached 14.25 million parents and children under age 18, compared with 14.13 million individuals in February.

The states and federal government expect to spend \$22.3 billion on AFDC this year, up from \$17.24 billion in 1989 and \$13.8 billion a decade ago. Federal spending on food stamps is expected to add \$24 billion to the government's welfare costs this year.



WED./THURS., NOV. 25-26, 1992

Inmates' families also do time

By Dennis Cauchon
USA TODAY

JESUP, Ga. — Diane Spiker and her two children used to be a typical middle-class family.

Then her husband got a 12-year drug sentence.

Now, the family wanders from rural town to rural town, part of an itinerant community — women and children who follow their men around the prison system. It is a nomadic struggle to keep families together in face of poverty, social stigma and emotional pain.

The itinerant community — "inlites," as some of the women call themselves — is a growing side effect of the drug war.

A support group for the women, Families Against Mandatory Minimums, held rallies in 14 cities Tuesday to bring attention to inmate families separated during the holidays.

Since 1980, the prison population has swelled from 513,600 to 1.3 million. At the federal prison here, 89% of inmates are drug offenders. The average sentence is 10 years.

And since federal parole was abolished in 1987, the men do the entire sentence. If a woman wants to keep a family together, she hits the road.

"We're looked at as freaks because we've stayed with our husbands," says Christina Ledezma, whose husband has been moved five times in five years.

Each time, she has moved along with him, selling off a piece of furniture to pay for her move. She's down to little more than a bed and television.

Justice Department spokesman Paul McNulty says the inmate is responsible for his family's hardship, not the system.

"Our primary consideration is establishing appropriate penalties and maintaining public safety. Any other concern is secondary," he says.

The 1,500-inmate prison here has drawn about 25 to 50 inmate families to Jesup.

The women say their families are not welcomed. They often are denied apartments, auto insurance and jobs.

Most work for minimum wage at a sewing factory that makes Disney costumes. Only one of the 10 women interviewed has health insurance. All are in debt. None of the 10 is on welfare or food stamps.

Two groups offer support, activism

What two groups are doing to help inmate families:

► Families Against Mandatory Minimums, the largest prisoner advocacy group in the country, has 9,000 members and 30 chapters nationwide.

Founder Julie Stewart quit her job at a Washington think tank after her brother was sentenced to five years without parole for growing marijuana. She now works full time and unpaid for FAMM. Her goal: persuade Congress to change the sentencing laws.

FAMM's address: 1001 Pennsylvania Ave., NW, 200-S, Washington, D.C., 20004.

► Prison Fellowship, founded by Water-gate figure Charles Colson, has a program to deliver Christmas presents to the children of prisoners. One million children have a parent in prison.

Volunteers give up to three gifts: a toy, an article of clothing and something educational. Gifts cost less than \$15 each.

So far, 193,000 of 250,000 volunteers have been found.

To volunteer, write to Prison Fellowship, 1836 Old Reston Ave., Reston, Va., 22090 or call 1-800-338-HOPE.

"We're labeled 'drug dealers' wives.' But none of us have money stashed away like people assume," Ledezma says.

The U.S. Bureau of Prisons tries to keep inmates near their families. But it doesn't always work out. The Jesup prison has inmates from all 50 states.

The reasons for transfers are varied: crowding, the status of a case, a prisoner's safety or discipline.

Transfers are done without warning to inmates or families — for security reasons, prison officials say.

Carmen Lopez's fiancé was shipped in September to a prison in Florida. He may return to Jesup in a few months — or maybe not. "Do I move with him? Do I stay here where I have nothing? Or do I go home

to Miami?" she asks.

A sudden move means breaking a lease, losing a deposit, pulling the kids from school, finding a new job.

But not moving can cost more. Prisoners make collect phone calls. The women call the long-distance phone bill their "second rent."

Daily calls fill the gap between visits.

Prison rules limit most women to four visits a month.

"Visits are a privilege, not a right," says Gene Harris, prison spokesman. The prison has no program to help the families.

"They don't want us here," Maritza Forte says.

The prison's visiting room holds 180 people and 50 outdoors, weather permitting.

Since the prison is 50% over capacity, the visiting room is full on weekends and holidays.

On weekends, the women and children line up outdoors as early as 6 a.m. The prison lobby opens at 8 a.m.

When they get to the visiting room, the women rush to the vending machines with fistfuls of quarters to stock up on \$1.75 pizza slices and \$1.25 bagels.

Visitors can't bring food. The machines are empty by about 10 a.m.

"If you don't buy food right away, you and your kids go hungry all day," Lopez says.

Prison employees keep vending machine profits to pay for their Christmas party and other recreational activities.

On a Saturday, 30 or more children crowd the visiting room. There is a TV, but games and books donated for the children have been removed.

On the outside, the kids struggle, too. "Young children suffer extreme feelings of abandonment," says Laura Fishman, author of *Women At the Wall: Prisoners' Wives Doing Time on the Outside*.

Young children often wet the bed, cling to their mothers and throw tantrums, she says. As they get older, they have trouble behaving and studying.

This is all true at Jesup.

"Every one of these kids has problems," Ledezma says. "We're breeding the next generation of criminals."

"It's frightening to look into an 8-year-old's eyes and see a potential killer."

Judicial revolt over sentencing picks up steam

Jurists say guidelines not working

By Bruce Frankel and Dennis Cauchon
USA TODAY

A growing number of federal judges are in open revolt against the nation's sentencing laws in drug cases.

In Washington last week, federal district Judge Harold Greene declared 6-year-old sentencing rules unconstitutional and refused to impose a 10-year sentence on a 25-year-old repeat drug offender.

His action came a day after Republican congressional leaders threatened to impeach two federal judges in New York for refusing to hear drug cases.

Federal district judges Jack Weinstein and Whitman Knapp, whose senior or semi-retired status allows them to choose which cases they will hear, said they wouldn't preside over drug cases.

They cited frustration with drug policies and what they regard as harsh sentencing guidelines judges have been required to follow since 1987.

"The drug laws need to be reconsidered because they aren't working," said Knapp, 84. "We ought to wake up to



By H. Darr Besser, USA TODAY (1988 photo)

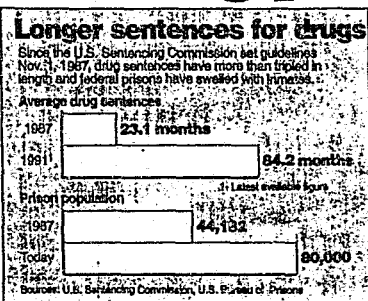
LATEST TO JOIN REVOLT: Federal district Judge Harold Greene declared 6-year-old sentencing rules unconstitutional.

that and see it's corrupting our whole system."

Weinstein, 71, said he'd had enough when sentencing guidelines compelled him to sentence a West African woman to 46 months for smuggling, and

to send a man with only one previous drug conviction to prison for 30 years.

"These two cases confirm my sense of depression about much of the cruelty I have been party to in connection



By Stephen Cooley, USA TODAY

with the war on drugs," he said. The government's focus on arrest and imprisonment — rather than prevention and treatment — is unfair, costly and unproductive, they said.

In his ruling, Greene, 70, said the guidelines "eliminate" the courts' "ability and duty to ... impose a sentence that has some rational link to conduct."

Greene earlier sentenced defendant Cornel Spencer to 10 years in prison for the possession of 8 grams of cocaine and heroin with intent to distribute — about one-third the prison term required under sentencing guidelines.

The guidelines, he said, violate constitutional rights of due

process and protection against cruel and unusual punishment.

Federal district Judge J. Lawrence Irving cited sentencing guidelines as a reason for resigning in 1990, and as many as 90 senior federal judges are refusing to take drug cases.

Federal prosecutors are reviewing Greene's ruling for a possible appeal. The Supreme Court and several appeals courts have rejected previous constitutional challenges.

Still, the judicial rebellion has taken a strikingly public turn, delighting some and infuriating others.

"What the judges did was great," said Julie Stewart of Families Against Mandatory



AP (1977 photo)

WEINSTEIN: Says two cases showed him rules were wrong.



AP (1986 photo)

KNAPP: The drug laws ... aren't working.

Minimums. "We need the people who see this day in and day out to voice their opposition."

Not so, said Notre Dame law professor G. Robert Blakey, a former Justice Department special prosecutor: "If they have objections to public policy, they should come to Washington as private citizens ... and picket. But they shouldn't picket in robes."

The guidelines were needed to correct "a 200-year record of abuse of discretion" by a racist and sexist judiciary that "favored women over men, and white middle class men over young blacks," said Blakey.

But even the U.S. Sentencing Commission, which sets federal sentences, agrees that many sentences should be cut, especially for first-time offenders

and minor players.

More than 17,000 people are serving federal drug sentences of 10 years or longer, while only 9% of offenders are management-level drug dealers.

"The U.S. attorney can make a deal with a bigshot, but the guy who's a mule and can't put his finger on any information, can't get a break," said Judge Spencer Williams, editor of the Federal Judges Association newsletter and among those no longer hearing drug cases.

"We have more persons in prison per thousand than any other country in the world," Williams said. "We're building prisons faster than we're building classrooms. And still the crime rates going up. The whole thing doesn't seem to be very effective."

Drug sentencing policies under increasing scrutiny

By Aaron Epstein
Knight-Ridder Newspapers

WASHINGTON — A few years ago, it was considered suicidal for a political figure to criticize the mandatory sentencing of minor drug offenders to long federal prison terms.

No longer.

For one thing, Attorney General Janet Reno, perhaps the most popular official in the Clinton administration, has ordered the Justice Department to review the fairness of federal sentencing policies established by the Reagan and Bush administrations.

Americans are sick of seeing violent criminals and other "bad guys" get off lightly while non-

violent first-time drug offenders who "got in with the wrong crowd" serve long prison terms, Reno told a Senate subcommittee recently.

And increasingly, members of Congress are wondering whether they erred seven years ago by enacting a law that mandates sentences based on the weight of drugs involved in a criminal offense.

For example, the law requires a minimum five-year prison term — without possibility of parole — for people who help to distribute more than 5 grams of crack, 500 grams of cocaine powder, 100 grams of heroin, 100 kilograms of marijuana or 1 gram of LSD. A gram is about half the weight of a dime

The law, an outgrowth of the Reagan administration's politically popular war on drugs, does not permit exceptions based on a defendant's background or prospects for rehabilitation.

As a result, federal prisons are jammed with drug violators. The inmate population has more than doubled in the past decade, to 70,000, and drug offenders make up 37 percent of the total, up from 22 percent in 1974.

Several leading members of the House and Senate Judiciary committees have called for reviews of federal sentencing laws.

Even Orrin G. Hatch of Utah, a tough-on-crime conservative and the leading Republican on the Senate Judiciary Committee, questions the wisdom of man-

datory minimum sentences. In a coming law review article, Hatch suggests that the law, while tying the hands of judges, enables prosecutors to dictate the sentence by determining what the criminal charge will be.

Kevin Driscoll, legislative director of the American Bar Association, which opposes the law, said, "There is growing concern that . . . the bigger fish are plea bargaining for lighter sentences while the little fish are getting the long prison terms."

Most members of Congress continue to believe mandatory terms are a deterrent to drug trafficking. But hundreds of federal judges — including many Reagan and Bush appointees —

criticize them as harsh and unjust.

Last month two highly respected jurists in New York — Whitman Knapp of Manhattan, 82, and Jack B. Weinstein of Brooklyn, 72 — joined dozens of other senior judges across the country in refusing to handle drug cases.

"I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade," Weinstein said.

Said Knapp: "Each day more money is spent and more people go to prison, but there are more drugs on the street. It makes no sense."

The U.S. Sentencing Com-

mission, which writes guidelines for federal judges, recently sought to relieve the harsh impact of mandatory prison terms for LSD offenders.

Since sentences are tied to the weight of the evidence, LSD placed on sugar cubes or heavy blotter paper has produced dramatically longer prison terms than has the same amount of LSD carried on light blotter paper.

So the commission approved an amendment that would assign the same weight for every dose (a small droplet) of LSD, regardless of the weight of the paper or sugar cube. The amendment will take effect Nov. 1 unless Congress disapproves.

Mr. HUGHES. Mr. Nolen, welcome.

STATEMENT OF JAMES S. NOLEN, ANNISTON, AL

Mr. NOLEN. Thank you, Chairman Hughes and Ms. Dupont, for allowing me to testify on short notice. As you know, I found out last Friday afternoon, about 4 o'clock, that you would allow me here to testify. I appreciate the opportunity very much.

I appreciate your time, and I will try not to vary from my prepared remarks, although, after attending the hearing yesterday, I was extremely depressed and concerned about the direction that things appear to be going up here. So last night over dinner I rewrote my remarks; spilled some spaghetti or something on it, and again this morning I got up early and rewrote it again, and so I'm extremely nervous. I hear people saying, well, I have nothing to be nervous about.

Mr. HUGHES. You take your time. You can't imagine how many times I've messed up in the last week.

Mr. NOLEN. Thank you. I appreciate that very much.

My son, John, is age 24. He, as you would expect me to say, is a great kid. He was convicted and sentenced to 70 months in prison for conspiracy to violate Federal narcotics laws. He is a first-time offender. He, unfortunately, has learning disabilities—plural. Included in the learning disabilities are dyslexia and an attention deficit disorder. These were documented from age 5. He had been working during 1992 at a center for developmentally mentally retarded citizens as a counselor, and, at the same time, he was attending college in Boulder, CO.

He initiated psychological medical treatment because of his own concern about his drug use, anxiety problems and other mental problems. He went to a psychiatrist who documented his diagnosis as major depression, anxiety, and drug addiction.

Ironically, the same month that he starts this treatment, he gets contacted by a childhood friend, someone he had known since he was 12 years old, who had become a dealer in narcotics and a confidential informant. This person is free. As long as he sets up others to be caught by the drug task force.

This person asked John to help him get some LSD. My son, as was stated by the prosecution, was a middle man between the confidential informant and the supplier. He was guilty. Congressman Mazzoli, he was guilty. He was a drug user. He utilized extremely poor judgment in trying to help his friend obtain drugs. His judgment was impaired by learning disabilities, his state of depression, and the prescribed medication he was taking.

I don't know if any of you have any experience with learning disabilities. I learned just yesterday, time and time again, many of the prisoners associated with FAMM have some form of learning disability. They may not have been diagnosed as having a learning disability; however, their family would certainly agree they were somewhat dysfunctional.

I would not have considered my family dysfunctional until I became involved in this situation with my son. I worked for a big, major corporation for 15 years—my son was transferred from city to city seven times in the first 12 years of his life. Every time he got transferred, he had to meet new friends. Because of his learn-

ing disabilities, he typically became friends with other kids who had similar problems. Because of peer pressures he became involved in drugs. When the going got tough, he could smoke a joint and his problems would go away. That was his way of coping with his learning problems. In addition to John's learning disabilities, his judgment was also impaired by the prescriptions that were given to him by an M.D., physician, psychiatrist, and this impaired his—I guess the bell means you guys have got to go, right?

Mr. HUGHES. In a few minutes. We have three votes. So we want to try to finish as much as we can.

Mr. NOLEN. OK.

The major point I am trying to make here is, this person had a mental deficiency. We did not argue mental deficiencies because we knew he was guilty; we pled guilty. We didn't realize the extenuating circumstances since he was going to a psychiatrist and a psychologist on his own, paying for it himself.

The other point I would like to make is that mandatory minimums have exact science applied to what level of punishment there should be. My son's involvement was LSD. The approximate amount of LSD—and I would like to pass these vials around to you if I could—was 0.3 grams of LSD that was involved. This is a major amount of LSD. I mean I didn't know what this was until this week, and I asked my local pharmacist to make up some distilled water with food coloring in it, so it would show what a gram was. Most people don't understand grams. The other vial is the mixture that the LSD was placed in, which was in a miniature Absolut bottle. So the full one is the mixture, and the 0.3 is the actual amount of LSD involved.

Again, I want to point out the exact science that these guidelines and these mandatory minimums have applied to sentencing people to prison. If they had sentenced him on the 0.3, his base level would have been 27 months. But because it was based on the mixture of 46 grams, the base level sentence is 10 years to life.

The Middle District judge of Alabama was visibly upset and moved by the testimony concerning John's circumstances. He didn't want to allow it in the beginning. He told the lawyer he was not going to hear it. He did agree to hear it, but I quote what he stated:

When I hear the kind of testimony that I heard here today, obviously I would like to sentence you to Mississippi Rehabilitation Center or to somewhere where you could get help and there wouldn't be the kind of punishment that I feel I am obligated to impose.

He listened to the assistant district attorney, who, again, is young, probably 28 years old, who mandated the judge could not deviate from the sentencing even though there was a motion of downward departure and that, therefore, he be sentenced to several years. The earliest that he can receive any release is 61 months, or 5 years.

As a father and as a citizen paying taxes, I am not in favor of going soft on crime. However, the punishment must fit the crime. John's need, like other kids like himself, is rehabilitation, so he will become a productive member of society. He is not a danger to society.

Second, incarceration is very costly to our Nation. Approximately \$21,000 per year. Mr. Mazzoli—if I could mention just one quick point.

Mr. HUGHES. We are going to have to recess. We will come back.

Mr. NOLEN. OK

Mr. HUGHES. If we don't start out now, we are going to miss that vote.

Mr. NOLEN. I will finish this after you get back, if that will be OK.

Mr. HUGHES. We will come back, and you can finish. We will give you whatever time you need to tell your story.

The subcommittee stands in recess probably for about a half-hour, because we have got a series of votes.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

I'm sorry for the interruptions and the delay, but, as you know, that is the process around here. We have to break when we have votes.

I know a number of the Members are going to attempt to get back, and I am telephoning the offices to try to get them back. But we will share a copy of the transcript with Members who are not here and try to pull out some of the salient facts in summary form and try to share them with the Members so that they understand your own personal stories, something that too often is not heard in the Congress.

Why don't we pick up where we left off. Mr. Nolen, you were testifying, and you may pick up there.

Mr. NOLEN. Yes, sir. Thank you.

I was talking about incarceration being very costly to our Nation. The figure that was used in my son's presentence report was \$21,000 a year. It cost me about \$21,000 a year to send my daughter to Emory University, and she is getting an education. So that money has a multiplier effect when it is spent in the public like that. It helps pay for professors to teach; they buy homes; they buy food, and on, and on, creating jobs at many levels. So, obviously, if we could spend that \$21,000 a year in a better way, educating and rehabilitating kids like John. Their testimony could be more valuable in preventing other kids from getting involved in drugs.

During the 10 months my son was awaiting sentencing—he pled guilty—that was a very difficult period, as you can imagine, because, what was going to happen? We spent over \$40,000 in legal fees trying to do everything we possibly could. We did not realize that the system was so unjust.

During this period of time, his testimony to other kids around him was beneficial, and they came to me and told me that it has helped them to stay off drugs.

I guess the last thing is that the mandatory minimums have taken our justice system out of the hands of human beings and established these standards that effect punishment based on weights. This is not in any way what I thought our justice system was all about. Someone should be able to weigh all the facts involved and make a determination as to what is going to be fair and just.

The point is that a better deterrent to getting involved in drugs than these mandatory minimums is the fear of getting caught not

the fear of the punishment but the fear of getting caught. If we spend more of our money on enforcement and rehabilitation. We can sentence them to 5 years or whatever of community service specifically in the area of drugs. Many of them will make excellent living witnesses as to the harmful effects of drugs.

Thank you very much.

Mr. HUGHES. Thank you, Mr. Nolen.

[The prepared statement of Mr. Nolen follows:]

PREPARED STATEMENT OF JAMES S. NOLEN, ANNISTON, AL

Mandatory Minimum Sentences are unfair and unjust. They do not allow for the individual's personal characteristics and the circumstances in each case to be properly considered. The most important factor in determining an individual's length of incarceration should not be based upon the weight of the substance involved. This creates cruel and unusual punishment when compared with other crimes.

JOHN NOLEN, A CASE IN POINT

On June 10, 1993, my son John, age 24, was sentenced to 70 months in prison for conspiracy to violate federal narcotics law. He is a first time offender with Learning Disabilities, Dyslexia, and an Attention Deficit Disorder. During 1992, he was working as a counselor for a center for the mentally handicapped and attending college in Boulder, Colorado. In an effort to turn his life around, he initiated treatment from a psychiatrist and a psychologist for "major depression", anxiety and drug addiction. At this very same time, a childhood friend, who had become a confidential informant, solicited John's assistance in obtaining LSD. John's involvement, as indicated in the Pre-sentence Report, was acting as a "middleman between a supplier and the confidential informant." He was guilty.

John utilized very poor judgment in trying to help his "friend" obtain drugs. His judgment was somewhat impaired by his

documented mental deficiencies, but could also have been impacted by prescribed anti-depression medications: Pamelor, Klonopin and Desipramine. John was taking these prescriptions following visits to the psychiatrist at the same time of the drug sting operation. The following was written by John in his August, 1992 diary: "It's time to take control of my life. From here on out I'm doing whatever it takes to develop myself to such an extent that I can radiate my knowledge etc. to others" (8/11). "Day #1 of sobriety. Lots of doubts in my mind as to whether or not I can last without the drugs. I saw the doctor today and he's going to try and help with some medication etc.... I'm just not sure about my feelings about anything at this point" (8/13). "I'm still off the drugs though (except) for what has been prescribed for me. Hopefully things will get better, I'm just lonely" (8/15).

The amount of LSD involved in this case was stated to be 46.481 grams. At the request of the drug task force, approximately .05 grams of LSD was in liquid form and packaged in a miniature Absolute vodka bottle. Unfortunately, the entire liquid was considered and treated as it were 46.226 grams of LSD. The effect of this weight resulted in John's Base Offense Level being 34, versus a Level 18 if only the actual LSD had been weighed. The Base Offensive Level of 34 carries a 10 year to life sentence, whereas, Level 18 is 27 to 33 months.

Due to John's pleading guilty and his complete acceptance of

responsibility for his actions, the Offense Level was decreased to 31. The guideline imprisonment range is 108 to 135 months. A motion for downward departure was made.

On June 10, 1993, United States Middle District of Alabama District Judge Truman M. Hobbs conducted the sentencing proceedings. Judge Hobbs became very visually upset and moved by the testimony concerning John's circumstances. Among other things, he stated, "When I hear the kind of testimony that I heard here today, obviously, I'd like to sentence you to Mississippi (Jackson Rehabilitation Center) or to somewhere where you could get help, and there wouldn't be the kind of punishment that I feel that I'm obligated to impose." Judge Hobbs comments revealed the continuing misapprehension and misunderstanding of the guidelines and sentencing process.

Unfortunately, Judge Hobbs felt he could not substantially deviate sentencing from the recommendation of the Assistant United States Attorney and sentenced John to 70 months. He will not be eligible for release until over five years are served (61 months).

As a father and a citizen, I am not in favor of going soft on drug crimes; however, the punishment should fit the crime. John's need, as for others like him, is rehabilitation so that he can become a productive member of society. Long prison sentences are not the solution. First-time offenders are put in close

association with hard-core criminals and drug traffickers. Incarceration is very costly to our nation -- approximately \$21,000 per year per inmate. I can send my daughter to Emory University for \$21,000 a year.

Our jails are overcrowded and we are forced, at the state level, to release violent offenders, including the most heinous such as murderers, rapists, and child molesters, who unfortunately receive shorter sentences than a person like John who minimally involves himself. Why do we sentence young people, like John, for such long terms of imprisonment rather than to rehabilitation and public service? More good could come out of their personal testimony to others about the high cost of drug use.

Based on psychological testing and examinations by a court respected psychologist, it was recommended that John "needs long term, extensive inpatient drug treatment, followed by extensive outpatient psychotherapy." The psychologist further stated that incarceration "would not serve a purpose in this case and it could be detrimental."

The VIII Amendment to the United States Constitution states that excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. John is currently looking down a long tunnel and the only light at the end is over 5 years away!

Mr. HUGHES. I want to thank all the members of the panel for their testimony.

I would like to find out a little more about each of the instances you described. Ms. Stewart, let's begin with you, your brother. How old was he when he was arrested?

Ms. STEWART. He was 35 years old.

Mr. HUGHES. Thirty-five at the time. Married?

Ms. STEWART. No, he was not married and does not have children. In that respect, I think he is one of the lucky inmates, because he doesn't have a family waiting for him to come back.

Mr. HUGHES. But no prior record?

Ms. STEWART. No.

Mr. HUGHES. And I think you indicated that he became associated with two others who were felons, who had previous convictions?

Ms. STEWART. They were friends of his from high school, and he had known them for a long time.

Mr. HUGHES. Did they actually participate in the growing of the marijuana?

Ms. STEWART. The three of them grew it equally. They were all equally culpable.

Mr. HUGHES. Where did the growing take place? Where was the area where the marijuana was grown?

Ms. STEWART. In a house outside of Spokane, WA.

Mr. HUGHES. In a house. And what quantity of marijuana?

Ms. STEWART. They were growing 375 marijuana plants. When they harvested them, they thought they would end up with about 4 pounds each of marijuana. But my brother was sentenced for 375 kilos of marijuana, because each plant, even though they were only 2 inches tall, are considered 1 kilo of marijuana each.

Mr. HUGHES. I see. That is how it was measured.

Tell me a little more about the previous convictions of his two associates. What were they convicted for?

Ms. STEWART. I don't know too much about them, other than they were both drug convictions. I think they had both been to prison. One of them had AIDS from intravenous drug use.

Mr. HUGHES. I gather that the property was owned or leased by your brother.

Ms. STEWART. My brother owned it or was purchasing it. It was not confiscated by the authorities because he had just bought it; he didn't have any equity in it whatsoever, so they did not forfeit it.

Mr. HUGHES. And I gather the two associates turned state's evidence?

Ms. STEWART. Yes, they did.

Mr. HUGHES. And both of them basically received suspended sentences?

Ms. STEWART. Probation.

Mr. HUGHES. Probation. Fines?

Ms. STEWART. Not to my knowledge, but I don't know for sure.

Mr. HUGHES. Why don't you get us some more information, if you can, if you have that readily available to you.

Ms. STEWART. I don't have it with me today, but I can provide it within the next couple of days.

[The information follows.]

Four people were involved in growing marijuana in a house my brother owned—my brother, two friends he had known since high school, and an acquaintance who was a friend of one of Jeff's friends. One of Jeff's friends set up the lighting in the house so the marijuana would grow. He received an 18-month sentence for his involvement. The other friend and his acquaintance, who actually lived in the house where the marijuana was growing, both had prior felony convictions. The friend had served time in a State prison for a drug conviction. The acquaintance had two prior robbery convictions and had served time in California. Both of these men received probation when they turned my brother over to the authorities.

Mr. HUGHES. Dr. Curry, why don't you tell us a little bit about your son's situation.

Dr. CURRY. My son was arrested on December 4, 1990. He was indicted along with 27 other people on charges of possession and conspiracy to distribute crack cocaine.

Mr. HUGHES. And he was 19 at the time?

Dr. CURRY. He was 19 at the time.

This was a 5-year investigation involving all of the individuals. My son only was known to the FBI and the other investigators the last 2 months of their investigation, meaning July and the first part of August.

In July he was alleged to have given, and found guilty of, an undercover police officer a half of a gram of crack cocaine for a friend of his. He was considered in the report by the prosecutors as a minor participant in the whole conspiracy case.

The other charge resulted from him driving a car that belonged to a friend of his to college, to Prince Georges Community College. Later that afternoon, they found the car to contain a half a kilo of crack cocaine under the passenger side in the front seat. He was convicted on that charge, giving the drugs to the undercover police officer, the crack cocaine that was in the car, and the conspiracy, and he was the only individual of the 28 that was convicted of the conspiracy, the reason being, he was tried last because he was considered a minor participant in this conspiracy and because it was a separate jury and the law allows for that.

Mr. HUGHES. Whose car was it?

Dr. CURRY. It was a friend of his.

Mr. HUGHES. Was he driving the car?

Dr. CURRY. He was driving the car earlier that day. In fact, they did not even know he was driving other than one of his textbooks and notebooks were in the car.

Mr. HUGHES. How many of the 28 went to trial?

Dr. CURRY. Out of the 28 individuals, all but 4 of them went to trial. The 4 decided to plead.

Mr. HUGHES. The 4 decided to plead guilty?

Dr. CURRY. Yes, to 10 years.

Mr. HUGHES. Did that include your son?

Dr. CURRY. No.

Mr. HUGHES. There were 5, including your son?

Dr. CURRY. Yes.

Mr. HUGHES. How about the other 23?

Dr. CURRY. The other 23 were found guilty of some of the charges. None of them was convicted of the conspiracy. Most of them dealt with either distribution or possession of drugs.

Mr. HUGHES. What was your son's relationship in this particular network, trafficking?

Dr. CURRY. From the pretrial report, he was indicated to be a minor participant in a conspiracy case involving 2 of the 28 people who he knew were playground, basketball, associates of his. The other people involved in the conspiracy he did not even know.

Mr. HUGHES. Who actually was the head of the group that was distributing crack cocaine?

Dr. CURRY. There were two individuals that were considered to be the drug kingpins. One was sentenced to life in prison; the other one is still awaiting sentencing.

Mr. HUGHES. They have not been sentenced as yet.

Dr. CURRY. Yes.

Mr. HUGHES. How about the other participants who were considered either minor or major participants? Give us some idea of what types of sentences they received.

Dr. CURRY. My son was the only one, according to the report, that was considered a minor participant in this conspiracy. All of the other individuals were considered to be major participants and received sentences anywhere from 10 years up to life. The majority of them were in the neighborhood of 17 to 25 years.

Mr. HUGHES. Were they all sentenced under the mandatory minimum sentences?

Dr. CURRY. Yes, sir.

Mr. HUGHES. No exceptions?

Dr. CURRY. No exceptions were made.

Mr. HUGHES. How old were the other offenders?

Dr. CURRY. The range of ages was approximately 18 up to about 27 years of age.

Mr. HUGHES. And what quantity of crack cocaine was being distributed? Any idea?

Dr. CURRY. Well, it was interesting because, you know, as you read the newspapers and you listen to the reports, every drug conspiracy case involves more and more drugs. This was considered a multimillion-dollar operation per year. However, when the FBI raided all of the homes, less than \$2,000 in cash was accumulated, and very, very few drugs, and only one weapon, and that was a shotgun.

Mr. HUGHES. Was this a neighborhood distribution network?

Dr. CURRY. Yes.

Mr. HUGHES. And where did it take place?

Dr. CURRY. It took place, the indictment indicated, in the District of Columbia and Maryland, and yet when it came time for the trial, it was switched, conveniently, to Baltimore, and I was told by the prosecutor that it was done because they tend to get more favorable sentences in Baltimore as opposed to the District of Columbia.

Mr. HUGHES. Do you have any idea of what the size of the reach of this network was, how many people they were servicing with crack cocaine selling, too?

Dr. CURRY. I don't know that. I don't have that information. I wasn't given that information.

Mr. HUGHES. Were there any others that were convicted that actually sold to an undercover agent?

Dr. CURRY. Most of them did, because the whole operation was based on a sting operation involving cellular telephones. The FBI gave a couple of the phones to individuals in this conspiracy and

then decided to wiretap the operation, and that is why it took so long. That is why it was a 5-year operation.

Mr. HUGHES. Mrs. Baca, I wonder if you can tell us a little more about your nephew—his age and the circumstances under which he was arrested and charged?

Mrs. BACA. My nephew is 31. I guess he just celebrated his 32d birthday now while he is in the jail unit at the Federal Correction Institute in Fort Worth and is awaiting sentencing there. We have engaged a new attorney, and just yesterday some new motions were filed even though he had already gone to trial and has been convicted. So I don't want to talk too much about the specifics of his case because I just don't know where all of that is going. There is a request for a hearing to address several issues that were probably poorly handled during the time of the trial.

My nephew is an engineer, as I told you. He has made several inventions, some of which he has gained patents for and has them in production and was receiving royalties for those.

Mr. HUGHES. What was the nature of the charge against him?

Mrs. BACA. The first charge was that he had entered into a conspiracy to manufacture and distribute methamphetamines. There was an additional charge against him of possession of a precursor chemical, and then there was a charge leveled that he had purchased a farm, because he had recently bought a farm in Texas, and the charge was that the farm had been bought for the purpose of manufacturing.

Mr. HUGHES. So they alleged that he was the chemist?

Mrs. BACA. They did not allege that he was the chemist, no.

Mr. HUGHES. Who were the coconspirators?

Mrs. BACA. There was one other man who was in his midforties, I believe. He was an older man. He was a welder by trade, and it was somebody that my nephew had first become acquainted with when he had worked on his cars for him. They had entered into a business arrangement whereby he was doing welding for a lot of the prototype designs that my nephew was designing.

After deciding to testify against my nephew and to include him in the conspiracy, he testified that he had been involved in the drug business with him, which, you know—the jury believed that; he was convicted of that. So I can't say what is going on there.

Mr. HUGHES. What happened to his coconspirator?

Mrs. BACA. He pled guilty. He was sentenced on June 7, I believe.

Mr. HUGHES. What was the sentence?

Mrs. BACA. He was given 10 years.

Mr. HUGHES. And your nephew was given?

Mrs. BACA. My nephew has not been sentenced yet. He is in a holding facility, awaiting sentencing, currently scheduled for August 9. However, with the filing of those new motions yesterday, I have just been advised that it is likely not to happen on August 9.

Mr. HUGHES. Any previous record?

Mrs. BACA. No previous record. Married with three young children. A good record as far as work. His employer sat at trial at all times and said he had never been aware of anything that would

have appeared that Cliff was involved in this. He stands ready to rehire him and has entered affidavits along that line.

Mr. HUGHES. Thank you.

Mr. Nolen, I think you have pretty much described your son. Apparently he has some mental retardation. I think you said he has an IQ of about 80?

Mr. NOLEN. No. My son's IQ is higher. He has learning disabilities—dyslexia and attention deficit disorder.

Mr. HUGHES. Can you describe a little more for us about the circumstances under which he was arrested for dealing in narcotics?

Mr. NOLEN. He was a middle man, as I understand it. He passed on information to a police informant.

Mr. HUGHES. He passed on information from someone working for a law enforcement agency?

Mr. NOLEN. His involvement was a little more severe than that. He came home for his birthday from Boulder, CO, and when he came home he went by Auburn University and saw a bunch of his friends, and he left a note at this particular guy's, the CI—the confidential informant's trailer, that he was in town and to give him a call. The confidential informant called my son's house at 11 o'clock at night on 2 or 3 nights, awakening me, and said, "Where's John? I got a note he was in town. I want to see him. You know, I haven't seen him in over a year or so." You know, he was really trying to find him, and, of course, since I had known the kid for about 12 years, I knew that they had been friends and so forth and didn't think anything about it.

Well, it turned out, my son did not get to talk with him while he was still back in Alabama, but when he got back to Colorado the confidential informant started to talk with him about getting some LSD sent. He initially sent him 100 dosages on blotter paper, and apparently that wasn't enough, so they got him to send more.

My son, again, would take his shirt off his back for anybody that asked for anything. He is not materialistic. He doesn't have any drive or ambition to be, you know, successful. He just is a good kid. A reference report from his employer at Carmel Community Living Corp. in Boulder, CO—I would like to introduce that statement.

Mr. HUGHES. Without objection.

Mr. NOLEN. It stated about his nature, and one sentence in the last of that is: "John Nolen worked and lived in this situation not for financial reasons, he could have easily made more money flipping burgers at McDonalds, but instead because he genuinely cared for the people he served."

[The letters follow:]

To Whom It May Concern:

John Nolen worked for Carmel Community Living Corporation (CCLC) from 10/8/91 until 9/19/92. CCLC is an agency which provides training and support services for 90 Developmentally Disabled adults living in apartments throughout our community. The needs of the people we serve vary from as little as 8-10 hours per week assisting with meals, grocery shopping and other daily life activities to 24 hour supervision and help in every area of life.

John worked as a live-in counselor providing 24 hour support for 2 developmentally disabled men with very serious needs. One consumer was a 30 year old man with behavioral issues that required constant supervision. The other man was a 70 year old who was in poor health and needed a tremendous amount of support to prevent serious illness.

John's job was a highly stressful position with few material rewards. This is a job that only certain, special people can do. The apartment is not only your workplace, it is also your home. You can't leave the stress at the office when you go home. To meet the daily responsibilities of the job an extraordinary amount of patience and compassion is needed. John Nolen worked and lived in this situation not for financial reasons, he could have easily made more money flipping burgers at Mc Donalds, but instead because he genuinely cared for the people he served.

Sincerely,

James Keller 5-14-93

James Keller
CCLC Program Coordinator

5375 WESTERN AVE.

BOULDER, CO. 80301

303-444-0573



5375 Western Avenue
Boulder, CO 80301
(303) 444-0373
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August 24, 1992

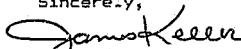
Naropa Institute Office of Admissions,

John Nolen will be a superior student while in your program and will make an excellent practitioner after he graduates. I've known John for 2 years. During that time he has been a training counselor for Carmel Community Living Program, working with Developmentally Disabled adults. For both of those years I was his programming supervisor. While here he demonstrated the ability to communicate with clarity and effectiveness with his clients, his co-workers, his client's families and with professionals from other agencies. He handles criticism in a mature manner and will incorporate the suggestions into his work. He is honest, straightforward and open about his feelings and thoughts.

Over the years John has shown great compassion and sensitivity to the needs of our clients. He has performed well during stressful and crisis situations and has been a strong advocate for our clients and their rights. John has taken the initiative to solve problems and shown great creativity in coming up with novel approaches to situations.

John has superior intellectual abilities. He will be one of your top students and will contribute much to your program. I have no doubt that after he graduates he will be a compassionate, professional and effective practitioner. I recommend him most highly and without any reservations.

Sincerely,


James Keller

Mr. HUGHES. Let me just back up a little. You indicated that your son had helped the confidential informant get other LSD packages.

Mr. NOLEN. Right.

Mr. HUGHES. And that was over what period of time?

Mr. NOLEN. About 4 weeks or so.

Mr. HUGHES. Was your son into LSD?

Mr. NOLEN. Yes, he was a user.

Mr. HUGHES. Did he sell it directly, or was it through a middle man again?

Mr. NOLEN. No. He was the middle man, if you will. The confidential informant, who was a childhood friend, contacted him for getting it, and my son knew a drug dealer or supplier. In my son's words, he was the supplier's only friend.

Mr. HUGHES. Was your son attempting to finance his own habit by selling?

Mr. NOLEN. No, not at all. In fact, on one of the tapes the prosecution even stated to us that my son said, "Hey, I'm not making anything out of this," and the CI said, "Well put something in it for yourself; you know, make a little bit for yourself." My son got a one-way ticket—this is how smart he was—a one-way ticket from Boulder, CO, to Montgomery, AL. As the psychiatrist had said, he was very lonely, very depressed, and he had been broken up from his girlfriend of 5 years for about a year, and this was an opportunity for him to come back to Alabama. So he accepted a one-way ticket from the drug task force for their entrapment—you know, their sting operation, if you will.

Mr. HUGHES. Finally, as I understand your testimony, it is that your son was basically convicted of 46.481 grams of LSD. That is because it was mixed with a substance—

Mr. NOLEN. Yes.

Mr. HUGHES [continuing]. When, in fact, it was 0.300 grams.

Mr. NOLEN. The total amount of LSD involved was 0.300 grams.

Mr. HUGHES. And the difference in sentence, utilizing that threshold, is a difference as between 27 to 33 months versus 120 months to life.

Mr. NOLEN. Correct.

Ms. STEWART. Could I just make one more comment that I think is important in my brother's case?

Mr. HUGHES. Surely.

Ms. STEWART. There was no reason for my brother's case to go into the Federal court. He did not cross interstate lines. The FBI, the DEA, no one was involved in his arrest; he was arrested by local authorities. I think this is something that Attorney General Reno has addressed, and certainly it needs to be looked at. I know there was some discussion about this earlier today, but there really are a lot of cases in the Federal system today that don't need to be there, and hopefully that trend has changed or is changing, as you stated.

Mr. HUGHES. Of course, a controlled substance offense is a violation of Federal law.

Ms. STEWART. Pardon me?

Mr. HUGHES. A violation of the Controlled Substances Act is a violation of Federal law.

Ms. STEWART. But it is also a violation of the State law.

Mr. HUGHES. Aside from the question of mandatory minimums, it still violates Federal law.

Ms. STEWART. Right, but there is no reason that it couldn't have gone into the State court as well.

Mr. HUGHES. That is true.

The gentleman from Kentucky.

Mr. MAZZOLI. Thank you, Mr. Chairman.

It is interesting, because Ms. Stewart gave very interesting testimony yesterday before the Crime Subcommittee. And, I think the fact was that Mr. Schumer indicated that the very same proportion of cases are removed to the Federal courts after mandatory minimum as before. In any event, once again the prosecutors—and I don't agree with them in each and every case certainly—are not apparently doing a whole lot more now about removing cases.

Mr. Chairman, Ms. Stewart and two other witnesses made really very poignant statements yesterday before the other panel, and it is really very troubling to me and very difficult. Clearly these are good kids, and they ran around with the wrong people, and they wound up in a very difficult situation.

I hope that you and others can fashion what again was referred to yesterday as a safety valve, some kind of a method by which these egregious cases can be somehow handled differently than they are today. It just provides a very difficult family setting.

It is unavoidable, however, if we look at the data that has been developed by the General Accounting Office, to say that even if—and I assume that the sons and daughters and brothers and relations that you all are testifying about—they had not gone into the mandatory minimum program, under the regular sentencing guidelines, they could have received even worse punishment.

So it isn't to say that mandatory minimums, in and of themselves, have created quite this terrible difficulty. Society, in its desire—and I think correct and righteous desire—to be protected from the ravages of the drug trade, has said that it is time to get tougher.

Now, in that process, unfortunately, certain people get caught in the trap that shouldn't be there. And, we hope we can spring the trap for some of them. I think it would be something that the chairman and many members of this committee, on both sides of the aisle, will be able to accomplish. But that trap is there for an understandable reason. Society has been tormented, society has been marauded upon and has been treated to the very worst possible treatment by the people who are into drugs either to sell them, move them, transport them, whatever. So it is understandable.

I don't share what one of the earlier witnesses said, that this is somehow an obsession for punishment. I don't think it is a matter of our being obsessed and somehow we have some avenging angel mentality here that we are going to mete out these Thor-like sentences. It isn't that at all. We know full well that innocent people get caught in the way. We know full well that not everyone who goes to jail is deterred. Some of them are practicing their crafts right in jail. We know that some of the people who go to jail are going to come out worse than when they went in. But we are trying to figure out what to do.

I mentioned to the earlier panel that so often this debate is framed "either/or." I don't think it is "either/or." I think we should do everything we can to continue mandatory minimums and sentencing guidelines, while springing the trap for those who shouldn't be in there. But, at the same time, we need to have all of the diversion programs that Chairman Hughes has talked about and worked on for so many years. I don't know why we are driven into competing camps. I think we are all part of the same effort.

I think it is also telling, and I am sure that FAMM recognizes that when it comes forward against mandatory minimums it is joining arms with defense attorneys and Federal judges and others who not only don't want mandatory minimums, they don't want sentencing guidelines. They want to go back to the days of unfettered discretion which got us into deep and serious trouble, which caused society to rebel, and which caused disparate sentences that actually were so grievous and were so painful to all of us. So, we said, "We have to have more uniform sentencing; it's wrong that a rich kid gets off scot-free because somehow he has got a better lawyer who makes a pitch to the Federal judge and the judge goes all goosey and wimpy and decides to let him off. And, the other guy, poor kid, no lawyer, or a public defender, gets the slammer forever." That is wrong.

So, unfortunately, you all are playing right into their hands and giving aid and comfort to the people who want to kill, not just mandatory minimums—and we can argue about how discrete and carefully crafted they are—but sentencing guidelines as well. So, their ultimate objective is to really upset the apple cart and go back to how it was pre-1984. And, I don't think that is anything—certainly anything I want. I can't speak for the panel or for the Congress, but it is certainly not anything I want, and yet that is exactly what you are trying to do.

Anyway, Mr. Chairman, I would just say it just hurts all of us to hear these cases. And, you have outlined how awkward they are, how difficult, how inconsistent they are, and how painful they are. And, I would join you in any way if we can find some way, short of eliminating mandatory minimums, that we might be able to handle these problems.

Ms. STEWART. If I could just respond to a couple of your comments, please, first of all, I don't think the judges said yesterday that they want to get rid of guidelines. I was quite impressed with Judge Walker's statement that he was strongly supportive of the guidelines, and he said we will never go back to the days of unfettered discretion.

Mr. MAZZOLI. I don't agree with you at all. He had to be pulled out, and pulled out, and pulled out. Mr. Schumer proceeded with that question four different times before Judge Walker finally allowed as if, you know, maybe they haven't. The Federal Judges Association has not at this point taken a vote.

Ms. STEWART. Right, but he made it quite clear——

Mr. MAZZOLI. He wasn't particularly ardently in favor of——

Ms. STEWART. He made it clear that if we polled the judges, that most of them would probably realize the guidelines are here to stay and don't oppose them so much.

You just said it yourself, even if we didn't have mandatory minimums, we would have very strict guidelines, which certainly begs the question then, why do we need mandatory minimums? Judges would not have unfettered discretion if we got rid of mandatory minimums, and you know that, and I know that, and the public doesn't know that, but the public doesn't know what the hell a mandatory minimum is to start with.

Mr. HUGHES. Just a matter of historic fact—if the gentleman would yield—the mandatory minimums, by and large, the ones in question, dealing with the Controlled Substances Act, were passed and adopted before the sentencing guidelines were implemented, and who knows what would have occurred if sentencing guidelines were in place, but that happens to be what occurred.

Ms. STEWART. Right.

Mr. HUGHES. Nobody contemplated—at least this Member didn't—I did not contemplate that once the sentencing guidelines were adopted that the mandatory minimums would drive policy as they did. I don't know that that was ever contemplated fully.

Ms. STEWART. I appreciate your saying that, because I think that is absolutely right. I don't know if any Members really understood what would happen. But I do think, again, it is a very important question. As I said earlier, how many of you have received letters from your constituents saying, "I want mandatory minimums"? What they want are safe streets, and what they want is to be able to be free of crime. They don't necessarily want some rigid black-and-white system that does not allow any of the gray area of human actions to be considered.

Thank you.

Dr. CURRY. I would like to respond to part of that also, especially the characterization of the rich kid getting away and the poor kid having to spend the rest of his life in prison. The same kind of a system exists right now, especially relative to the discrepancy between crack cocaine and powder cocaine.

Had my son been convicted of powder cocaine, the sentence would have been 10 times less than what it is for crack cocaine. It would appear to me that in that discrepancy, that if you want to really eradicate crack cocaine, you would eliminate the source for making crack cocaine, or the penalty would be greater there if we are looking for, you know, how to do the balancing kind of a thing.

Mr. MAZZOLI. Dr. Curry, if I could mention, yesterday we had statistics that were brought to us, announced by the chairman, that there are only 3,189 cases of the 38,000 prisoners who were sentenced to the Federal penitentiary in 1992. Only 3,189 of the 17,000 who were in there for drug offenses could be classified as first-time, nonviolent drug offenders with no aggravating role in the offense. Only 3,189 out of 17,000 could be called first-time, nonviolent drug offenders with no aggravating role in the offense.

Furthermore, of those 3,189 cases, only 12 percent are crack cases. Of the 3,100 cases of the nonviolent, first-time offenders, you are not talking about that many crack cases. And, yet again, the mythology has grown up that we are talking about crack cases exclusively and that we are talking about drug courier cases exclusively. And, we heard at our hearing, and I recited today, that

under the declination activities in the Western District of New York, almost all those drug couriers are not even brought up under mandatory minimum in the first place.

So, there is a lot of mythology here. And, I think along with the fact, as Chairman Hughes has said, sometimes mandatory minimum drove the sentencing guidelines as to those offenses. Mythology and lack of good data and knowledge about who is in the pokey after all are what is driving a lot of this discussion, I think.

Dr. CURRY. While I would concur with that, I still think that, you know, if it is only 10 lives, my son represents 1 of those, and I can't talk about statistics, what I can talk about is that individual case, and, to me, I cannot believe that Congress truly intended for my son to be looking at 25 years to life in prison for what he was convicted of.

Ms. STEWART. I think Mr. Mazzoli is mixing up the two mandatory minimums for crack cocaine and powder cocaine. What Dr. Curry was trying to explain was, why should crack cocaine get a different sentence than powder cocaine? That is a very different issue than what Mr. Mazzoli has just tried to rebut.

Mr. HUGHES. Would the gentleman yield to me further?

Mr. MAZZOLI. Certainly.

Mr. HUGHES. That particular amendment, unfortunately, was taken on the floor, and there was a lot of opposition to it on the floor, but it carried, and not a lot of thought was given to basically that particular threshold.

I think there is a lot of consensus—and I have talked to a number of Members—that some of these categories just don't make sense and we need to revise them, and I think there is general support for that.

Mr. MAZZOLI. I think you would find a lot of support for making discrete changes. Probably far less, if none at all, to eliminate mandatory minimums.

Mr. HUGHES. May I just say one additional thing? When you talk about 3,189 inmates, I say to my colleague from Kentucky, that basically is five prisons, 600-bed prisons. That is a lot of people. One thing: we can't get good data. I have been trying to get better data from the Bureau of Prisons—

Mr. MAZZOLI. I agree with you.

Mr. HUGHES [continuing]. So we can have better data, but the charging policies vary, and not all are charged with conspiracies, and trying to find out who are first-time offenders is very difficult. We are trying to get better data so we can make better decisions.

But I will tell you what I see happening, and I have spent 29 years in criminal justice in one way or another. I see throughout this country, particularly in the State systems, cutting people loose eight and nine times, particularly youthful offenders. They come in, and they don't believe they are going to go to jail, so we have lost that element of certainty. They don't distinguish between the Federal and State systems generally, and I don't really believe that the average person committing drug offenses understands that there are mandatory minimums out there.

I believe that that is probably true, that they don't know, and I also am very concerned because I have always been persuaded that there comes a point when a lengthy sentence becomes counter-

productive for one reason or another, undercutting rehabilitation, for instance, because they do become institutionalized. That has been my experience over the years.

So I think what we need to do, as the gentleman from Kentucky has suggested, is attempt to look at what we have done in a much more scientific fashion, and to try to deal with the basic inequities. It seems to me no system is going to survive where you permit the kind of inconsistency we have throughout our system today, because U.S. attorneys have been very creative in trying to deal with the problems, and the reason that judges—and, true, it is somewhat turf, but I happen to believe that the judges have a legitimate complaint. They are appointed or elected, depending on the system, to judge individual cases, and we have taken that discretion away from them, and that results in a form of discrimination; that results in inequities, horror stories. I don't think a judge visits me in any given month when he doesn't have a story to tell me, anecdotal, but it seems to me that we can learn from that.

So I think the bottom line is that most of us at this point know we need to take another look at it. I am not so sure that we are at that point where this Congress will support a repeal of all mandatory minimums. I am not so sure that that is doable. But the very fact that we are looking at it, attempting to craft some responses to deal with a system that doesn't appear to be working very well, has to be good news.

So we have to thank you for your contributions, because you present the human dimension, and we appreciate that very, very much. So if there is no further testimony or questions, we thank you for your testimony. Those of you who have come a long distance, we thank you very much.

That completes the hearing for today, and the subcommittee stands adjourned.

[Whereupon, at 2:14 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER FROM HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, TO KATHLEEN HAWK, DIRECTOR, FEDERAL BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE, JUNE 14, 1993

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MAJORITY—225-3951
MINORITY—225-4950

June 14, 1993

Ms. Kathleen Hawk
Director, Federal Bureau of Prisons
320 First Street
Washington, D.C. 20534

Dear Ms. Hawk:

Thank you for your appearance at the May 12th hearing concerning prison population issues. Due to the excellent attendance by so many Members of the Subcommittee, a number of questions were left unasked. Several Members also requested additional information not available at the hearing. The following questions need response for the hearing record. I also would appreciate it if the follow-up information requested by the Members would be directed to the Subcommittee.

1. The Bureau's Fiscal Year 1994 Budget Request indicates that, even with the opening of several new facilities, operations will be conducted with approximately 1,600 fewer personnel. Could you explain specifically where these personnel cuts are being made and what operations will be directly affected?
2. What is the present staff to inmate ratio and how has this changed over the past 10 years?
3. What is the percentage of personnel in management type positions versus those personnel who deal directly with inmates on a daily basis?
4. In the past few years, Congress has added to the Bureau's ability to utilize alternative punishment options. These have included "boot camps" and community corrections including halfway house placements, home confinement and electronic monitoring.

-- According to information contained in the Bureau's Fiscal 1994 Budget Request, there are 4,000 inmates, as of March 4, 1993, confined in the 33 community corrections centers located throughout the U.S. What is the usual length of stay for these inmates?

-- The budget request indicates that there are 431 inmates now in home confinement which includes those on electronic monitoring. This number seems low. Can you explain why there are

not more in home confinement?

-- How many inmates have been referred directly to home confinement from an institution since the program was implemented?

-- Have any inmates who have completed boot camp been released from the Bureau's jurisdiction prior to the completion of their sentenced time?

-- What value does the Bureau believe the intensive "boot camp" experience provides if the early release incentive provided for in the statute is not used?

5. What are the eligibility requirements for inmates to be assigned to an Urban Work Camp? Were the 205 inmates presently in Urban Work Camps assigned to these work camps a full 18 months before the end of their sentence?

6. How many inmates sentenced under the "old laws" are presently in the Bureau of Prisons?

7. Please elaborate on the definition of violent inmate given in testimony by explaining the exact criteria used to determine a violent inmate.

8. There are articles and studies that indicate that racial tension in prisons has become more pronounced in the last few years. Has the Bureau experienced this problem in the federal prisons and what has been done to address it or to avoid it becoming a problem? Has the Bureau continued to experience problems with gang members in the federal prisons?

9. In the 102nd Congress, I sponsored legislation that required a prison impact statement for all crime bills considered by Congress. The bill became part of the Omnibus Crime Control Act of 1991 which did not become law. How do you think such a law would help the Bureau?

10. Your written testimony and your testimony given at the hearing provided one scenario under which approximately 1,612 inmates potentially could be immediately eligible for diversion to alternative sentences and in future years up to 10% of the population might be similarly eligible. The explanation on how this number was arrived at was not provided in full due to the need to explore other issues raised. Please provide detail on the policy decisions made and the standards used to arrive at these estimated numbers. Please also detail what policy decisions would

hava to be made in order to implement the scenario?

11. In your hypothetical concerning the increase of "good time" and applying it retroactively, 4,000 inmates would be immediately eligible for release. Please provide in more detail the criteria used to determine eligibility in order to arrive at the 4,000 estimate.

12. There have been a number of state prison riots and incidents bordering on riots in the past few months (Ohio, Michigan). In April, the Bureau had an inmate sit-down in Oakdale following the suicide of an inmate. While the incident in Oakdale ended peacefully, the Ohio prison riot resulted in a number of deaths including guards. Does the increased population alone increase the chance of such incidents in the federal prisons or are other factors more significant? Please explain what these factors might include.

13. Have inmate assaults increased in the past ten years either inmate to inmate or inmate to guard? Please provide details.

14. Please provide the number of inmate or other lawsuits presently pending against wardens, other personnel or the Bureau itself and provide a breakdown of the type of lawsuits these involve.

15. Please provide the number of lawsuits against personnel or the Bureau resolved in the past five years. Explain whether the resolution was in favor of the Bureau or the inmate or other party and the amount of damages involved, if any, in each lawsuit.

The following information was requested during the hearing by various Members.

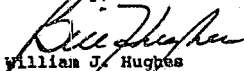
1. Provide more information as to exactly what constitutes a low level trafficker and what constitutes violence?
2. Information was provided which indicated that 59% of prisoners released are non-repeat offenders. Of the remaining 41% can you provide information on the type of repeat crimes and how many are multiple repeat offenders?
3. What percentage of the repeat offenders were on parole or probation when the repeat offense was committed?
4. Does the presence of a weapon always compel a determination that an inmate is considered a violent offender?

5. Can you quantify the percentage of those non-citizen criminals in federal prison who also are drug abusers?

6. Of the 39,500 identified as a subgroup potentially eligible for alternative sanctions, how many of these were not drug offenders? Please provide a breakdown of their offense category.

Thank you for your attention to these questions. If you have any questions about this letter or the hearing, please do not hesitate to contact Jarilyn Dupont with the Subcommittee on Intellectual Property and Judicial Administration.

Sincerely,



William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration

WJH:jd

APPENDIX 2.—LETTER FROM SHEILA F. ANTHONY, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, TO CHAIRMAN WILLIAM J. HUGHES, OCTOBER 12, 1993, IN RESPONSE TO HIS LETTER OF JUNE 14, TO KATHLEEN HAWK, DIRECTOR, FEDERAL BUREAU OF PRISONS



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 12, 1993

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property
and Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This is in response to your letter concerning the oversight hearing on prison population and trends held on May 12, 1993. Your letter proposed a number of followup questions regarding the Federal Bureau of Prisons, and the following are our responses to the issues raised.

Section I

Question 1: The Bureau's Fiscal Year 1994 Budget Request indicates that, even with the opening of several new facilities, operations will be conducted with approximately 1,600 fewer personnel. Could you explain specifically where these personnel cuts are being made and what operations will be directly affected?

Answer 1: The reductions in positions and workyears have been spread proportionally among Bureau programs. Most of the reductions can be absorbed by the delay in FY 1994 activations due to funding below our request.

Question 2: What is the present staff to inmate ratio and how has this changed over the past 10 years?

Answer 2: The table that follows presents inmate-to-staff ratios for Fiscal Years 1981 through 1997. This information shows that the average staff-to-inmate ratio increased from 1981 through 1987 and then declined through 1991. Our staff-to-inmate ratio began to increase in 1992 and we estimate that it will continue to do so through 1994, then decline again.

**Federal Prison System
Inmate to Staff Ratio
FY 1981 Through FY 1997**

	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993 ¹	1994 ¹	1995 ¹	1996 ¹	1997 ¹
Inmate Population (End Of Year)	26,195	28,133	30,214	32,317	36,001	41,506	44,194	44,119	51,153	58,021	64,131	70,670	79,963	85,470	92,297	98,730	106,174
Correctional Staff (007)	4,108	4,136	4,155	4,359	4,823	5,063	5,484	5,712	7,297	8,229	10,190	10,377	11,037	11,407	13,305	15,245	16,652
Inmate/Correctional Staff Ratio	6.38	6.80	7.27	7.41	7.46	8.20	8.06	7.72	7.01	7.05	6.29	6.81	7.24	7.49	6.94	6.48	6.38
Total Staff ²	9,113	9,079	9,085	9,532	10,441	10,876	11,257	11,760	15,240	17,471	22,100	23,461	24,990	25,860	30,077	34,388	37,515
Inmate to Total Staff Ratio	2.87	3.10	3.33	3.39	3.45	3.82	3.93	3.75	3.36	3.32	2.90	3.01	3.20	3.31	3.07	2.87	2.83

¹ 1993 through 1997 Represent Estimates.

² Represents Authorized S&E Positions.

Question 3: What is the percentage of personnel in management type positions versus those personnel who deal directly with inmates on a daily basis?

Answer 3: Current on-board strength of the Bureau is 24,104. Of this figure, 1,175, or 4.9 percent, are managers¹. However, many of these individuals do, in fact, deal directly with inmates on a daily basis. If we were to exclude from our calculations managerial staff in institutions (these individuals have daily and direct contact with inmates in both policy and practice and are equally responsible for and trained in inmate supervision, security, and control), the remaining management staff (i.e., in Central Office, Regional Offices, and Staff Training Centers) numbers 543, or 2.3 percent, of BOP staff.

Question 4a: What is the usual length of stay of an inmate in a BOP contracted CCC?

Answer 4a: As of March 31, 1993, the median length of stay by category of offender was:

Institution Pre-Release Transfer: 123 days*
 ICC (Boot Camp): 430 days*
 Direct Court Commitment: 149 days
 Supervision Violator Cases (includes parole, probation, and supervised release): 120 days

* In these cases, length of stay includes the period of time placed on home confinement.

Question 4b: Can you explain why there are not more inmates on home confinement?

Answer 4b: We believe that significant improvement has been made in placing appropriate cases onto home confinement. On March 31, 1993, there were 418 inmates in this category, compared to 298 on March 31, 1992. This is a relatively new initiative and we feel that progress is being made. It is also important to note that public safety is always of utmost importance in determining the suitability of an inmate for placement on home confinement. Therefore, we screen potential candidates very closely.

U.S. Probation and the BOP had agreed some time ago that the BOP would make CCC beds open, at the BOP's expense, to supervision cases. Conversely, U.S. Probation would make their home

¹ In accordance with the definitions of manager set forth in 5 U.S.C. 7103(a)(10) and the Supervisory Grade Evaluation Guide, managers are defined as those employees who manage complex functions, influence policy, or are considered representatives of management.

confinement programs (all of which are monitored electronically) open to BOP inmates. U.S. Probation has experienced severe budget constraints and has been unable to make this very labor-intensive program available to inmates as expected. Therefore, the majority of inmates on home confinement are supervised by our contract CCC's without the use of electronic monitoring. Only a small percentage of the approximately 400 inmates on home confinement are being electronically monitored through U.S. Probation.

By statute, home confinement is limited to the last 10 percent or 6 months, whichever is less, of an inmate's sentence. We fully intend to significantly expand the use of home confinement, and we are in the process of developing procedures to accomplish this goal.

Question 4c: How many inmates have been referred directly to home confinement from an institution since the program was implemented?

Answer 4c: Very few cases are placed directly onto home confinement. We have not tracked this specific information because it has never been one of our goals to "bypass" the CCC. In most cases, placing someone directly onto home confinement would not follow the rational continuum of pre-release planning. We have incorporated into our policy the latitude to place an inmate directly onto home confinement from an institution, but it was never our belief that this practice would take place on a large scale.

Most recently, we have begun to establish a targeted home confinement date for all inmates placed in a CCC, but even then not all cases are deemed suitable. Placement on home confinement requires a place to live and a job. For those who do not meet both these conditions, CCC placement is used until the two requirements are met. Most offenders who meet those requirements directly from the institution are those serving short sentences, whose length of placement on home confinement is limited by the "10-percent rule."

Typically, only in remote and rural areas where CCC services are not available would we make a concerted effort to place a pre-release inmate directly onto home confinement. Furthermore, this could only occur if U.S. Probation made the electronic monitoring resource available to us.

Question 4d: Have any inmates who have completed boot camp been released from the Bureau's jurisdiction prior to the completion of their sentenced time?

Answer 4d: No. In the past, this option was considered but rejected because of concerns about releasing an inmate before the court-imposed sentence was completed, and our belief that sentencing courts and U.S. Attorneys would take strong exception to such a practice. However, we have recently revisited this issue and now believe the enabling statute can be interpreted to give us this early release authority. Therefore, we are currently considering a range of alternatives.

Question 4e: What value does the Bureau believe the intensive boot camp experience provides if the early release incentive provided for in the statute is not used?

Answer 4e: It is hoped that the inmates designated to the ICC will receive motivation, education, life skills, and drug abuse treatment to help them become productive, law-abiding citizens in their communities. For those with a history of drug abuse, the time spent in a CCC provides them with an opportunity to establish a drug-free lifestyle in a community setting prior to their release from custody.

At the same time, and most importantly, not until we are able to complete our detailed research and evaluation of the program will we be able to pass judgment on the ultimate outcomes of this pilot program.

Question 5a: What are the eligibility requirements for inmates to be assigned to an Urban Work Camp?

Answer 5a: The eligibility requirements for the Urban Work Cadre are stated in BOP Program Statement 5250.01, dated January 19, 1993. They are:

- Community custody;
- Projected release date within 10 to 18 months;
- No outstanding Parole Commission action or pending hearings;
- No convictions of institution disciplinary violations within the past 12 months;
- Medically cleared for regular duty status with no medical or psychological restrictions;
- Satisfactory participation in or completion of any financial obligations under the Inmate Financial Responsibility Program;
- No detainer or unresolved pending charges;
- Clearance for transfer (if necessary);

- No "public safety factors" (e.g., no past or present convictions for violent criminal offenses or sex offenses, no managerial or non-peripheral role in a high-severity drug offense);
- No prior employment by or relationship with the host agency;
- Completion of the form "Conditions of Participation in the Urban Work Cadres," which includes permission to reveal the criminal record to the host agency, agreement to be subject to urinalysis, and agreement to the rules and conditions of the program.

Question 5b: Were the 205 inmates presently in the Urban Work Camps assigned to these camps a full 18 months before the end of their sentences?

Answer 5b: The average length of stay for an Urban Work Camp inmate (as of March 31, 1993) was 382 days. Of this, we would expect that approximately 202 days would be spent working for the host agency and approximately 180 days in the regular CCC program.

Question 6: How many inmates sentenced under the "old laws" are presently in the Bureau of Prisons?

Answer 6: As of June 26, 1993, 15,556, or 22 percent, of the sentenced population were sentenced under the "old laws."

Question 7: Please elaborate on the definition of violent inmate given in testimony by explaining the exact criteria used to determine a violent inmate.

Answer 7: An inmate is considered violent if his/her instant offense was violent (robbery, weapons, homicide, manslaughter, assault, kidnapping, rape), if a weapon was possessed or used in the current offense, if a weapon had been used in a previous offense, or if he/she had committed a violent offense in the past.

Question 8: There are articles and studies that indicate that racial tension in prisons has become more pronounced in the last few years. Has the Bureau experienced this problem in the federal prisons and what has been done to address it or to avoid it becoming a problem? Has the Bureau continued to experience problems with gang members in the federal prisons?

Answer 8: While racial differences are a fact of Federal prison life (38.8 percent of inmates in medium- and high-security facilities are African American and 26 percent are Hispanic), we do not believe that racial tension in Federal prisons has become significantly more pronounced in the last few years. We endeavor to maintain open lines of communication with inmates of all races

and to isolate, identify, and respond to legitimate inmate needs, without regard to the race of the inmates involved. At the same time, we are committed to affirmative action for and diversity among staff and recognize that it is important for inmates to be able to deal with staff who can respond effectively to the composition of the inmate population.

While the number of traditional prison gang members remains relatively stable, we are experiencing a fairly rapid influx of individuals who belong to street gangs such as Crips, Bloods, and Black Gangster Disciples. The increased number of individuals associated with these gangs and other so-called "security threat groups" has resulted in an increased incidence of inmate-on-inmate violence. The Bureau closely monitors these groups and endeavors to share quality intelligence about them with all staff who have a legitimate "need to know." We are actively training key staff regarding management strategies for newly emerging security threat groups. When necessary, disruptive members of security threat groups are removed from institutions and placed in other Bureau facilities in an effort to maintain an appropriate population balance. Those whose behavior poses the greatest threat are often placed in the U.S. Penitentiary in Marion, Illinois, our most secure facility. When necessary, individuals who require separation and who cannot be safely housed in Bureau facilities are placed in State institutions on a contract basis.

Question 9: In the 102d Congress, I sponsored legislation that required a prison impact statement for all crime bills sponsored by Congress. The bill became part of the Omnibus Crime Control Act of 1991 which did not become law. How do you think such a law would help the Bureau?

Answer 9: Under the bill, the Attorney General would be responsible for furnishing prison impact statements to Congress: (1) by March 1 of each year, reflecting the cumulative impact of all relevant changes in the law taking effect during the preceding calendar year; and (2) within 7 days of any congressional request for information relating to a pending measure or matter that might affect the number of defendants processed through the Federal criminal justice system.

We support the objective of providing Congress more information on the potential impact on the prison population of enactment of pending legislation. The Bureau of Prisons currently attempts to provide this information and its fiscal implications to Congress when major crime legislation is introduced. The provision in question would provide a formal structure for such comments. However, we note that any request from Congress for such a statement would have to be responded to by the Attorney General, in consultation with the Sentencing Commission and the Administrative Office of the Courts within seven days. Even if

the Department did not have to consult with these other entities, the seven day time frame is not feasible. We would request that the period be changed to a more realistic time frame, at least thirty days. While the Bureau would make any population and budgetary projections as quickly as possible, we typically would need considerably more than seven days to do accurate analyses.

Question 10: Your written testimony and your testimony given at the hearing provided one scenario under which approximately 1,612 inmates potentially could be immediately eligible for diversion to alternative sentences and in future years up to 10 percent of the population might be similarly eligible. The explanation on how this number was arrived at was not provided in full due to the need to explore other issues raised. Please provide detail on the policy decisions made and the standards used to arrive at these estimated numbers. Please also detail what policy decisions would have to be made in order to implement the scenario?

Answer 10: To estimate the potential "divertable" population, we started with a pool of all current offenders whose primary offense was a drug or "white collar" (fraud, income, counterfeiting, embezzlement) offense. We then excluded offenders who were considered violent (using the same definition as in the answer to question 7), all offenders who had a prior prison commitment, "white collar" offenders if the total property value of their offense was greater than \$250,000, and drug offenders if their drug quantity was at least 400 grams of cocaine, 25 kilograms of marijuana, 80 grams of heroin, or 1 gram of "crack" cocaine. The drug amounts and property value are used to define the upper limit for the lowest offense-severity rating used by the Bureau of Prisons in its inmate classification system and are consistent with, although not identical to, U.S. Sentencing Guideline levels. We also estimate that if these same criteria were applied to an admission population, about 10 percent of these offenders could be diverted.

To implement diversion for this limited number of defendants, the U.S. Sentencing Guidelines would have to be modified to allow sentences of probation. Under current guideline policy, there are only a few "zones" in the sentencing table where a sentence of probation or a "split" sentence of prison and probation is allowed.

Question 11: In your hypothetical concerning the increase of "good time" and applying it retroactively, 4,000 inmates would be immediately eligible for release. Please provide in more detail the criteria used to determine eligibility in order to arrive at the 4,000 estimate.

Answer 11: In our proposed "good time" scenario, we did not put any restriction on who could earn additional good time. If

additional good time were to be considered for Federal prisoners, we would favor an approach that would establish restrictions concerning which inmates could qualify for additional good time and under what conditions additional good time could be earned. The Bureau prefers limiting additional good time to offenders whose instant offense is not a serious violent or serious drug offense, a sex offense, or a violation of public trust. Furthermore, additional good time would have to be earned by participation in programs (e.g., work, education, drug abuse treatment).

Question 12: There have been a number of state prison riots and incidents bordering on riots in the past few months (Ohio, Michigan). In April, the Bureau had an inmate sit-down in Oakdale following the suicide of an inmate. While the incident in Oakdale ended peacefully, the Ohio prison riot resulted in a number of deaths including guards. Does the increased population alone increase the chance of such incidents in the federal prisons or are other factors more significant? Please explain what these factors might include.

Answer 12: Increasing an inmate population beyond the design capacity of a facility can be expected to increase tension within that institution, but increased population alone cannot be identified as the sole reason for incidents or disturbances in an institution. Open communication between staff and inmates, responsive institution management, the provision of quality food and medical services, correctional programs (including work), and the involvement of community volunteers within an institution all serve to mitigate problems that can arise from institution crowding. Additionally, Regional and Central Office oversight, guidance, support, and responsiveness to institution staff also assist in lessening the impact of crowding.

Question 13: Have inmate assaults increased in the past ten years either inmate to inmate or inmate to guard? Please provide details.

Answer 13: The following table details the number and rate of assaults for Fiscal Years 1983 to 1992. The rate of assault per 1,000 inmates generally declined between 1983 and 1992. The increase shown in 1992 is due in large part to a definitional change described in the note accompanying the table. However, as the note also indicates, the 1992 increase cannot be completely attributed to changes in reporting; some portion of the trend is due to increases in actual assaults.

ASSAULT STATISTICS FY 1983 - FY 1992

YEAR	AVERAGE DAILY POP.	INMATE-ON-INMATE ASSAULTS						INMATE OR STAFF ASSAULTS					
		TOTAL	RATE PER 1,000 INMATES	W/WPN	RATE PER 1,000 INMATES	W/WPN	RATE PER 1,000 INMATES	TOTAL	RATE PER 1,000 INMATES	W/WPN	RATE PER 1,000 INMATES	W/WPN	RATE PER 1,000 INMATES
1983	29,718	344	11.6	229	7.7	115	3.9	218	7.3	45	1.5	173	5.8
1984	31,394	358	11.4	199	6.3	159	5.1	311	9.9	51	1.6	260	8.3
1985	33,834	309	9.1	192	5.7	117	3.5	206	6.1	39	1.2	167	4.9
1986	39,008	374	9.6	227	5.8	147	3.8	231	5.9	31	.8	200	5.1
1987	42,627	336	7.9	190	4.5	146	3.4	173	4.1	35	.8	138	3.2
1988	43,835	296	6.8	147	3.4	149	3.4	141	3.2	24	.5	117	2.7
1989	47,804	401	8.4	175	3.7	226	4.7	159	3.3	21	.4	138	2.9
1990	55,542	460	8.3	166	3.0	294	5.3	187	3.4	31	.6	156	2.8
1991	61,404	531	8.6	194	3.2	337	5.5	205	3.3	37	.6	168	2.7
1992	67,225	617	9.2	221	3.3	396	5.9	529	7.9	83	1.2	446	6.6

NOTE: The information on assaults is drawn from Correctional Services and, until the end of 1991, reflected "significant" assaults. In January of 1992, a memorandum was sent to all Correctional Services administrators and captains which stated that all 101 (attempted or actual aggressive assault) and 224 (attempted or actual simple assault) assaults, no matter how minor, must now be reported. Based on this change in reporting requirements, one would anticipate a substantial increase in reports of assaults for 1992. This, in fact, is reflected in assault data for 1992, which show an increase from 1991. While the increase in assaults for 1992 is largely explained by this change in reporting requirements, analysis of Discipline Hearing Officer findings does show some actual increase in assaults during 1992. The average daily population figures for FY 83 - 91 were extracted from the September BOP Monthly Report of Mandates (#70.53); beginning with FY 92, this information is now extracted from the September BOP Sentry Report of Inmate Mandates (#J1PPB1982).

W/WPN = With Weapon W/O/WPN = Without Weapon

Question 14: Please provide the number of inmate or other lawsuits presently pending against wardens, other personnel or the Bureau itself and provide a breakdown of the type of lawsuits these involve.

Answer 14: The information in Question 14 and 15 has been extracted from quarterly reports that are prepared for the Director of the Bureau of Prisons on a quarterly basis for each fiscal year since fiscal year 1991. The quarterly reports contain both a numerical tracking of litigation and a list of significant lawsuits and, therefore, do not include descriptive information on every lawsuit. Also, our current litigation tracking system does not track the resolution of specific case types in the manner you requested, but tracks resolution of cases against staff in general and against the Bureau. To obtain the information you requested would require a manual search of our litigation files. (Currently, we are in the early stages of implementing a software system which, in addition to other features, will have the capability to track Bureau litigation nationwide.) However, we can provide this information if the Subcommittee feels it is necessary.

Suits pending against Bureau personnel	1,648
Suits against the Bureau	1,896
Habeas Corpus	513
Federal Tort Claims	347
Total number of lawsuits currently pending against the Bureau ²	6,867

Question 15: Please provide the number of lawsuits against personnel or the Bureau resolved in the past five years. Explain whether the resolution was in favor of the Bureau or the inmate or other party and the amount of damages involved, if any, in each lawsuit.

Answer 15: The following information was extracted from the quarterly reports. As implied above, numerous other cases have been dismissed, but are not listed on the quarterly report because they are of a routine nature and not significant enough to report to the Director. This information would have to be made available through a manual search of files.

² This total number of lawsuits includes not only the above-listed cases, but also other types of cases, such as contract claims or employee matters.

1991

Whitley v. United States	Tort claim settled for \$150
Marin v. United States	Tort claim - medical malpractice - settled for \$365,000
Pope v. United States	Tort claim settled for \$80,000
Hassain v. United States	Tort claim settled for \$2,500
Mills v. United States	Tort claim - court awarded \$89,000
Carreon v. United States	Tort claim settled for \$5,000
Barnes v. Rison	Tort claim settled for \$2,500
Taylor v. United States	Tort claim - judgment entered for plaintiff for \$15,000
Jordan v. Graves, et al.	Judgment in favor of employee
Williams v. Matthews	Case dismissed in favor of defendants/BOP employees
Desimone v. Wilkinson	Dismissed in favor of defendants/BOP employees
McCarthy v. Henman	Dismissed in favor of defendant/BOP employee
Johnson v. Belaski	Dismissed in favor of defendant/BOP employee
Wagner v. Williford	Dismissed in favor of defendant/BOP employee
Drummond v. Quinlan	Dismissed in favor of defendant/BOP employee
Rewald v. United States	Tort claim - medical malpractice - settled for \$53,000
Houston v. Thornburgh	Ruling in favor of defendant/DOJ employee
Pitchford v. United States	Tort claim - settled for \$70,000

Shitta v. United States	Ruling against United States, no damages
Conley v. United States	Tort claim settled for \$4,000
Holley v. United States	Tort claim - medical malpractice - \$400,000 judgment against United States
Barnes v. Rison	Bivens case settled for \$2,500
Whitehead v. United States	Tort claim settled for \$7,500
Mayley v. United States	Tort claim - medical malpractice - settled for \$225,000
Granja v. United States	Tort claim - dismissed in favor of United States
Lustre v. MCC Miami, et al.	Dismissed in favor of BOP
Lato, et al v. Attorney General, et al.	Dismissed in favor of BOP policies
Miller v. Thornburgh	Dismissed in favor of defendant/DOJ employee
 <u>1992</u>	
Shouse v. DOJ	EEO claim settled for \$32,500
Hazime v. Sauvey	Tort claim and Bivens - medical malpractice - settled for \$50,000
Lester v. Thornburgh	Ruling in favor of defendant/DOJ employee
Fleschig v. United States	Tort claim - dismissed in favor of United States
Walker v. United States, et al.	Ruling in favor of defendant/BOP employee
Georgakis v. United States	Tort claim - medical malpractice - ruling in favor of United States
United States v. Lail	Motion to enforce plea agreement - ruling in favor of inmate defendant

Floyd v. Meese, et al.	Tort claim - medical malpractice - settled for \$10,000
Castaneda v. Miller	Dismissed in favor of defendant/BOP employee
Bailey v. United States	Judge found against United States for \$243,000
Gaggi v. Lansing	Tort claim settled
Chisolm v. United States	Judge found against United States for \$750
Nazelrod v. DOJ	Dismissed in favor of United States
Apatano v. United States	Tort claim settled for \$3,250
Vallade v. United States	Tort claim settled for \$250
Forte v. United States	Tort claim settled for \$50,000
Rivera v. United States	Tort claim - medical malpractice - settled for \$1.3 million
Naderman v. United States	Tort claim - medical malpractice - settled for \$5,000
Butler v. United States	Tort claim settled for \$400
Bailey v. United States	Judgment against United States for \$258,450
Dune v. United States	Tort claim, dismissed in favor of United States
McKoy v. Brennan	Dismissal in favor of defendant/BOP employee
Cochrane v. Southerland, et al.	Settled - job reinstatement and \$702 in back pay
Perez v. United States	Tort claim - medical malpractice - settled for \$12,000
Moore v. United States	Settled for \$200
Campbell v. United States	Tort claim settled for \$65

Abodeely, et al. v. United States v. St. Luke's Hospital	Tort claim - medical malpractice - settled for \$22,500
Lamb v. Barr	Plaintiff/BOP employee granted promotion and \$5,000 award
Cameron v. Thornburgh, et al.	Bivens claim - ruling in favor of defendant/DOJ employee
Evans v. Wolfe, et al.	Tort claim and Bivens action - jury verdict in favor of defendant/BOP employee
Bartsch v. BOP	Bivens claim - ruling in favor of defendant/BOP employee
Mears v. United States	Tort claim settled for \$126.98
Buhl v. Herschberger	Tort claim settled for replacement pair of sneakers
Khalig v. United States	Tort claim settled for \$225 and government eyeglasses
Hernandez v. United States	Tort claim settled for \$250
Sanchez v. United States	Bivens action and tort claim settled for \$3,000
Friedman v. Meese	Class action suit - settled by agreement to remove asbestos at FCI Danbury

1993

Caraballo-Sandaval v. Honsted	Dismissed in favor of defendant/BOP employee
Rego v. United States	Dismissed in favor of United States
Gonzalez v. Henman, et al.	Dismissed in favor of defendant/BOP employees
Dauksza/Rutledge v. Warden	Dismissed in favor of defendant/BOP employees

Margiotta v. BOP	Tort claim settled for \$150
Christian v. United States	Tort claim - medical malpractice settled for \$75,000
Young v. Keohane	Tort claim settled for \$500
Higdon v. United States	Tort claim - medical malpractice - settled for \$12,000
Madison v. United States	Tort claim - medical malpractice - settled for \$10,000
Jennings v. Mitchell, Hamby, Johnson	Judgment against defendants/BOP employees for \$156,000
Peterson v. Bogan	Dismissed in favor of defendant/BOP employee
Shuell v. DOJ	Dismissed in favor of United States
Glass v. United States	Dismissed in favor of United States
Young v. United States	Tort claim - medical malpractice - settled for \$70,000
Meade v. United States	Tort claim - medical malpractice - settled for \$35,000
Santos v. United States, et al.	Tort Claim settled for \$100,000
Young v. Quinlan	Tort claim settled for \$8,000
Manual v. Thornburgh	BOP employee awarded \$35,000 and reinstated
Stewart v. BOP	Settlement for \$79,000
Sheptin v. United States, et al.	Tort claim - Bivens - settled for \$3,500
Cardiff Circle Association v. United States	Tort Claim settled for \$25,000
Smith v. Lam	Bivens case - settled for \$100
Gladson v. United States Penitentiary	Dismissed in favor of United States

Section II

Question 1: Provide more information as to exactly what constitutes a low level trafficker and what constitutes violence?

Answer 1: A low-level drug trafficker is an individual who maintains a peripheral role in a drug offense involving drug quantities that do not exceed those described in the attached "Offense Severity Chart" (see next page). Ordinarily, this offender has no pending charges; a sentence of 15 years or less; no history of escapes within the last 10 years; and no violence within the last 5 years. The typical low-level drug offender maintains the capacity of a courier or off-loader.

By Bureau of Prisons policy on inmate classification, severity of violence is defined according to the degree of seriousness that resulted in a conviction or finding of guilt:

Minor Violence: Aggressive or intimidating behavior that is not likely to cause serious bodily harm or death (simple assault, fights, domestic squabbles, etc.).

Serious Violence: Aggressive or intimidating behavior that is likely to cause serious bodily harm or death (aggravated assault, intimidation involving a weapon, incidents involving arson or explosives, rape, etc.).

Question 2: Information was provided which indicated that 59 percent of prisoners released are non-repeat offenders. Of the remaining 41 percent can you provide information on the type of repeat crimes and how many are multiple repeat offenders?

Answer 2: The following table details the type of crimes committed by repeat offenders at their first rearrest in a sample of 1987 releaseses.

Frequencies for First Recidivating Offense

Rearrest Offense	Profile: Number & Percent of the Sample in Each Category	
	N	percent
Drugs	(122)	24.8
Parole Violation	(75)	15.3
Larceny	(59)	12.0
Assault	(33)	6.7
Robbery	(25)	5.1
Traffic	(21)	4.3
Fraud	(20)	4.1
Burglary	(18)	3.7
Forgery	(17)	3.5
Weapon	(17)	3.5
Stolen Property	(11)	2.2
Flight Escape	(10)	2.0
Other	(9)	1.8
Obstruction of Justice	(8)	1.6
Public Peace	(8)	1.6
Motor Vehicle Theft	(7)	1.4
Tax	(4)	0.8
Manslaughter/Homicide	(4)	0.8
Trespassing	(3)	0.6
Obstruction of Courts, Etc.	(3)	0.6
Liquor	(3)	0.6
Sexual Assault	(2)	0.4
Arson	(2)	0.4
Property Damages	(2)	0.4
Sex Offenses	(2)	0.4
Family	(2)	0.4
Gambling	(1)	0.2
Kidnapping	(1)	0.2
Embezzlement	(1)	0.2
Bribery	(1)	0.2

Missing Information = 9

Question 3: What percentage of the repeat offenders were on parole or probation when the repeat offense was committed?

Answer 3: It is estimated that 90 percent were under supervision at the time of the repeat offense. Of the total sample, 490 releasees (40.8 percent) recidivated within 3 years of release. Of these, 247 (50.4 percent of those who recidivated) were rearrested or had parole revoked only once, 78 recidivated twice, 48 three times, 24 four times, 12 five times, 11 six times, 11

seven times, and 10 who had more than seven and up to as many as fifteen times recidivated. The total number of arrest charges or parole revocations are described in the following table:

For those who recidivated in the 1987 release sample, the number and percent of all recidivating events (i.e., rearrests or parole revocations):

Offense	Number	Percent
MANS./HOMICIDE	8	0.777
SEXUAL ASSAULT	4	0.389
ASSAULT	75	7.289
ROBBERY	44	4.276
BURGLARY	47	4.568
LARCENY	140	13.605
AUTO	24	2.332
ARSON	4	0.389
KIDNAPPING	1	0.097
FORGERY	44	4.276
FRAUD	44	4.276
EMBEZZLEMENT	1	0.097
STOLEN PROPERTY	20	1.944
PROPERTY DAMAGE	5	0.486
DRUGS	258	25.073
SEX OFFENSE	2	0.194
FAMILY	3	0.292
GAMBLING	1	0.097
LIQUOR	9	0.875
OBSTRUCT POLICE	17	1.652
FLIGHT ESCAPE	22	2.138
OBSTRUCT COURTS, ETC	8	0.777
BRIBERY	1	0.097
WEAPON	45	4.373
PUBLIC PEACE	17	1.652
TRAFFIC	33	3.207
TRESPASSING	12	1.166
TAX	4	0.389
OTHER	5	0.486
PAROLE REVOCATION	131	12.731
TOTAL	1029	100.000

NOTE: Total does not sum to 490 because, as indicated, some persons recidivated more than once.

Question 4: Does the presence of a weapon always compel a determination that an inmate is considered a violent offender?

Answer 4: If the presence of a weapon in the instant offense is described in the defendant's pre-sentence investigation, then we do characterize the offender as violent.

Question 5: Can you quantify the percentage of those non-citizen criminals in federal prison who also are drug abusers?

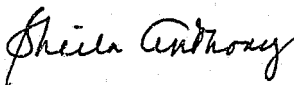
Answer 5: According to an inmate survey of sentenced prisoners conducted in June 1991, 16 percent of the non-citizens reported using drugs regularly, while 13.8 percent had admitted using drugs in the month before their arrest. Among citizens, 48 percent reported regular drug use and 35.8 percent reported using drugs in the month before their arrest.

Question 6: Of the 39,500 identified as a subgroup potentially eligible for alternative sanctions, how many of these were not drug offenders? Please provide a breakdown of their offense category.

Answer 6: In addition to a pool of 39,508 drug offenders from which 1,164 were selected as potentially divertable, a pool of 4,267 "white collar" offenders was selected. This pool contained embezzlement, fraud, forgery, counterfeiting, and income tax offenders. Of these offenders, we calculated that 448 could be diverted.

I trust this is fully responsive to your questions. I would be happy to provide you with any additional information, or to elaborate on any of these responses.

Sincerely,



Sheila F. Anthony
Assistant Attorney General

**APPENDIX 3.—AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH
MINIMAL CRIMINAL HISTORIES, U.S. DEPARTMENT OF JUSTICE, FEB-
RUARY 4, 1994**

An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories

United States Department of Justice

Executive Summary

Recent years have been marked by dramatic increases in the Federal prison population and in the number of Federal defendants sentenced for drug law violations. This report takes as its focus drug offenders with a minimal or no prior criminal history whose offense did not involve sophisticated criminal activity and whose offense behavior was not violent. We refer to this person as a "low-level" drug offender. This shorthand is adopted for purposes of convenience, and not to suggest any policy conclusions or assessments about the seriousness or harm resulting from drug offenses. The purpose of the analysis is to gain a more solid foundation of knowledge to inform criminal justice policy decisions.

The study started with a group of offenders selected from computerized records used by the U.S. Sentencing Commission and the Bureau of Prisons. A sample was identified on the basis of automated information about prior convictions, violence in the current offense, and level of sophistication of the instant offense. However, once the sample was identified, more in-depth record searches (including paper records with considerably more detail and National Crime Information Center records) disclosed more specific information about criminal histories as well as the functional role individual offenders played in their offenses.

It should be noted that there are at least two fundamental approaches to the sentencing of drug law offenders. One approach emphasizes the harm associated with the amount of drugs involved in the offense. Indeed, mandatory-minimum penalties for drug offenses have this premise. A second approach recognizes that in addition to the harm associated with the quantity of drugs, there are other important sentencing factors including the offender's role, and the risk he or she poses to the community. This report does not endorse or recommend one approach above the other. Rather it provides information on risk and role for the consideration of policymakers.

The major findings of this study are:

A substantial number of drug law violators who are sentenced to incarceration in Bureau of Prisons custody can be classified as "low-level". Using one set of criteria which limited offenders to no current or prior violence in their records, no involvement in sophisticated criminal activity and no prior commitment, there were 16,316 Federal prisoners who could be considered low-level drug law violators. They constituted 36.1 percent of all drug law offenders in the prison system and 21.2 percent of the total sentenced Federal prison population.

If we further restricted the population to those offenders with zero criminal history points (according to U.S. Sentencing Commission rules), there were 12,727 Federal prisoners who could be considered low-level drug law violators. They constituted 28.2

percent of all drug law offenders in the prison system and 16.6 percent of all sentenced prisoners.

The average sentence of the low-level drug law offender group was 81.5 months, which means that, under Guideline sentencing, these individuals will serve, on average, at least 5½ years before release from prison.

Even with a liberal interpretation of criminal justice contact (where criminal justice contact was defined as an arrest regardless of disposition), the majority of low-level offenders had no prior recorded contact with the criminal justice system. The data do not reflect criminal justice contacts outside the United States. Therefore, criminal justice contacts for non-citizens may be under-reported.

Based on the study sample, two-thirds of low-level drug offenders currently in the Bureau of Prisons received mandatory-minimum sentences.

Even among low-level drug offenders, sentences have increased 150 percent above what they were prior to the implementation of Sentencing Guidelines and significant sentencing legislation which established mandatory-minimum sentences for primarily drug and weapons offenses.

Among the low-level offenders, 42.3 percent were couriers or played peripheral roles in drug trafficking.

Low-level drug law violators are much less likely than high-level defendants to reoffend after their release from prison and, if they do recidivate, they are unlikely to commit a crime of violence. Furthermore, the length of their incarceration does not positively or negatively influence their recidivism. These conclusions were based on a review of the research literature.

Even for low-level defendants, the most significant determinant of their sentence was drug quantity. The defendant's role in the offense had only a small influence on the length of the eventual sentence.

When examining the importance of demographics in sentencing outcomes for low-level offenders, citizenship was a significant factor even after accounting for most factors involved in sentencing.

Throughout the report, we distinguish among the role a defendant played in the drug scheme, the amount of drugs involved in the offense, and risk (i.e., the likelihood someone will reoffend and whether their new offense would be a crime involving drugs or violence). We based our evaluation of risk to a great extent on the criminal history of the defendant. Past research has consistently shown that prior record is the best determinant of future criminal involvement. Role in the offense was intended to portray the defendant's function in the drug

scheme. The concept of functional role was developed by the U.S. Sentencing Commission (USSC) and has been used in their research. We originally coded 17 categories consistent with the USSC categories; however, we found that among the non-violent drug offenders with minimal criminal histories, high-/mid-level dealer, money launderer/manufacturer, street-level dealer, courier, and peripheral role were the primary categories necessary to understand the defendant's involvement in the drug offense. As a result of this coding effort, some offenders originally defined as low-level, were found to have relatively sophisticated roles.

In several sections of this report, we contrast "low-" and "high-level" offenders. This distinction is a relative one. We used certain criteria to define a low-level offender pool and anyone who did not meet these criteria were categorized as higher level. This remaining pool of higher-level offenders does not imply these are all extremely risky defendants. This remaining group spans some defendants who are similar to the low-level pool and some who are very dissimilar. As a shorthand, throughout this paper, instead of referring to low- and higher-level we adopt the convention low- and high-level.

The study shows that even with a conservative definition of risk, which, along with other constraints, limited the target population to defendants with no past arrest of any kind, regardless of the disposition (conviction, not guilty, dismissed, no information), there were still a substantial number of low-level offenders. We used National Crime Information Center (NCIC) "rap sheets" as the basis for assessing past criminal justice contacts. This database does not report criminal justice contacts in other countries. Therefore, it is possible that we have under-represented the past criminal justice contacts of non-citizens. Nevertheless, by using the broad definition of criminal justice contact as any arrest, we also probably overestimated the past criminal histories of both U.S. citizens and some non-citizens.

Almost all of the analyses in this report distinguished between U.S. citizens and non-citizens. Our purpose was to develop the information based on citizenship in the event that specific policy has to be written for the low-level non-citizen offender. Without going into the details of our analyses, it seems clear that low-level non-citizens received longer sentences than their U.S. counterparts. However, we found no racial or gender trends in the sentencing of low-level drug law violators.

This paper demonstrates that mandatory-minimum prison sentences for specific drug amounts have had a profound influence on the structure of Sentencing Guidelines. Not surprisingly, drug quantity is, by far, the most important determinant of sentence length. Even after adding role adjustments or departure results into the sentencing equation, drug quantity was still the dominant determinant of sentence length. We have shown that drug defendants with minor functional roles (e.g., courier or peripheral role) still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme. This suggests that one possible mechanism to further calibrate sentences (upward or downward) would be to increase the effect of Guideline adjustments for role.

Additionally, the data from this study confirmed that Federal drug offenders, even those with

minor or no past criminal behavior, are receiving much longer sentences than they were prior to the 1986 Anti-Drug Abuse Act, which established most of the mandatory-minimum penalties for drug trafficking and importation, and the implementation of Sentencing Guidelines. In many cases, defendants are receiving a prison sentence when, previously, they would have received probation. This study showed that these defendants were clearly culpable and some of them were convicted of offenses involving large quantities of drugs. Nevertheless, as the research literature shows, at least for the low-level defendants, a short prison sentence is just as likely to deter them from future offending as a long prison sentence.

Long sentences do serve important criminal justice goals such as retribution and incapacitation of the offender. Long sentences may also have instrumental value in promoting general deterrence and in encouraging defendants to cooperate with prosecutors in some cases. However, long sentences may entail certain costs. If sentences for drug crimes, especially those involving relatively small amounts of drugs and in which the defendant had a peripheral role are perceived as too harsh, this perception may diminish the value of long sentences for crimes considered more serious, such as those involving violence. Long sentences for low-level offenders also have the effect of increasing the use of expensive prison bed space. The Bureau of Prisons calculates it costs approximately \$20,000 per year to house a Federal offender. Some might argue that these resources could be used more efficiently to promote other criminal justice needs such as providing more money for additional police in our communities.

An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories

Overview

In this study, we have examined information on low-level drug law violators. By low-level drug law violators, we mean, essentially, non-violent, offenders with minimal or no prior criminal history whose offense did not involve sophisticated criminal activity¹ and who otherwise did not present negative characteristics which would preclude consideration for sentence modification. Our purpose in this analysis was to gain a more solid foundation of knowledge to inform criminal justice policy decisions. In order to accomplish this task, we have produced a report in eight sections.

In section I, we discuss the scope and purpose of the study. Sections II, III, and IV describe the low-level population in considerable detail. Section II contrasts the low- and high-level inmate populations confined in the Bureau of Prisons in June 1993. Based on a sample of 767 offenders, section III highlights the low-level offender's role in the drug offense, criminal record, and information on violent behavior in past or current offenses. Section IV looks at an even smaller sample (126 offenders) and provides a description of a study in which Department of Justice staff wrote brief narratives on selected offender cases. Sections V and VI examine the potential recidivism of the low-level population if alternative or shorter sentences were imposed. Section V has a brief discussion of the recidivism of a low-level offender population released in 1987. Section VI discusses the relationship between time-served and recidivism based on previous research. Section VII compares sentences before and after implementation of U.S. Sentencing Guidelines and mandatory-minimum sentences for drug offenses. Section VIII examines the relationship between a defendant's role in the offense, the risk he or she poses to the community, and the quantity of drugs involved in the offense. A summary of each section appears below.

Section I. This section briefly states the scope of the study which was designed to provide information relevant to policy considerations for low-level drug offenders. We do not recommend specific sentencing or charging policies and practices. These policy decisions must be made on the basis of the sometimes competing goals of criminal justice, namely retribution, justice, rehabilitation, incapacitation, general deterrence, specific deterrence, law

¹ When we selected offenders from the Bureau of Prisons (BOP) database, we excluded offenders with any indication of sophisticated criminal activity. BOP policy defines sophisticated criminal activity for a drug offense as an offender who "was a principal figure or prime motivator in the criminal organization or activity, including an individual who acted alone or directed the illicit activities of a criminal organization." This definition obviously overlaps with the Sentencing Guideline definition of "aggravating role."

December 9, 1993

enforcement utilities, and fiscal constraints. However, because mandatory-minimum sentences for drug trafficking and importation have a pervasive effect on Guideline sentencing structure for drug offenses, any discussion of policy affecting drug offenders must consider the effect of these penalties on prison sentences. In this paper, we distinguish risk, defined as the probability an offender will commit a new offense after release and whether that offense will be violent, from drug quantity involved in the crime. This is consistent with Federal Sentencing Guidelines which calculate criminal history (risk) and offense severity separately. One approach to sentencing drug offenders is to make drug quantity the primary sentencing factor. An alternative approach for low-level drug law offenders could decouple or weaken the relationship between drug quantity and sentence length that currently exists and increase the influence of other sentencing factors. This is not to suggest that sentences will necessarily or should be lowered, but that other sentencing factors such as role in the offense might be given greater weight.

Section II. Based upon one set of criteria used in this study, the analysis found that as of June 1993, there were 16,316 Federal prisoners who could be considered low-level drug law violators. They constituted 36.1 percent of all drug law offenders in the prison system and 21.2 percent of the total sentenced Federal prison population. The average sentence of the low-level drug law offender group was 81.5 months, which means that, under Guideline sentencing, these individuals will serve, on average, at least 5 $\frac{1}{4}$ years before release from prison.

Even using rather conservative criteria of risk based on the arrest records of offenders, we found that 30.3 percent of drug trafficking defendants sentenced in FY 1992 and 21.4 percent of drug offenders currently in Bureau of Prisons custody could be considered low-level. We excluded quantity of drugs involved in the offense from our low-level calculations, which is consistent with the way the U.S. Sentencing Commission (USSC) separately treats criminal history (risk) and offense level.

While the primary comparison made throughout this report is between low- and high-level drug offenders, in most of our analyses we also compare citizens and non-citizens. We did this because of the possible policy decisions that may require information based upon citizenship; however, as the data showed, while low-level U.S. citizens and non-citizens shared similar criminal backgrounds, citizenship also had a pronounced effect on differences between offenders with regard to marital status, substance abuse, and other characteristics.

Section II first compares low- and high-level drug offenders on a number of demographic and behavioral characteristics. Then, for both policy considerations and because of the striking differences between citizen and non-citizen drug law offenders on a number of important characteristics, citizens are compared with non-citizens for the entire Bureau of Prisons drug offender population. Following that, comparisons are made between low- and high-level citizens and between low- and high-level non-citizens.

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Contrasts Between Low- and High-Level Drug Law Offenders. The most distinctive differences between the low- and high-level groups were the following: the low-level group was disproportionately female (13.9 percent of the low-level and 5.9 percent of the high-level group were women) and disproportionately non-citizens (43.3 percent of the low-level and 21.3 percent of the high-level group were non-citizens).

Members of the low-level group were less likely to have regularly used drugs at least once a week for one month at any time in their lives (33.9 percent of the low-level and 44.7 percent of the high-level group were self-reported users).² The low-level group had a lower rate of prison misconduct overall and a substantially lower rate of serious misconduct, which includes assaults, escape attempts, and drug possession or use (15.6 percent of the low-level and 27.8 percent of the high-level group had at least one misconduct incident and 2.5 percent of the low-level and 8.7 percent of the high-level group had serious misconduct incidents). The low-level group was more likely to be married (45.8 percent of the low-level and 40.8 percent of the high-level group were married). The low-level group was somewhat younger than the high-level group (29.8 percent of the low-level and 25.7 percent of the high-level group were less than 30 years old at admission to prison). The low-level group was slightly more likely than the high-level group to have at least 12 years of education and to have been employed full time prior to their incarceration than members of the high-level group (73.8 percent of the low-level and 72.6 percent of the high-level group had at least 12 years of education and 68.9 percent of the low-level and 65.6 percent of the high-level group were employed full time prior to their present incarceration).

Contrasts Between Citizen and Non-Citizen Drug Law Offenders. Of the 31,991 confined drug law violators who were U.S. citizens, 28.9 percent (9,258) were low-level drug law violators. And among the 13,207 non-citizen drug law violators, over half (7,044) were low-level offenders. The average sentence of low-level drug law violators who were U.S. citizens was 78.8 months, while for low-level non-citizens, the average sentence length was 85.0 months. Since the great majority of these offenders were sentenced under the U.S. Sentencing Guidelines, the U.S.-citizen group will serve, on average, 5½ years before release

² Throughout this report, we use different definitions of "drug abuse." In some cases, we refer to regular use. In other cases, we refer to drug dependence or whether a defendant was under the influence of drugs at the time of his or her arrest. The proportion of offenders who have a drug abuse problem can vary widely depending on the definition one adopts. In this report, we are simply trying to demonstrate the relative difference in drug use among different types of defendants. The Bureau of Prisons has adopted a rigorous definition of drug abuse that depends on a clinical diagnosis of a substance abuse problem. Under that definition, about 30 percent of BOP inmates have a moderate to severe problem and require treatment. That definition should not be confused with the various drug abuse definitions that appear throughout this paper.

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while, non-citizens will serve an average of 6 years.

Non-citizen drug law offenders were predominantly from Mexico (31.6 percent), Colombia (23 percent), Cuba (9.8 percent), the Dominican Republic (6.7 percent), Jamaica (5.5 percent) and Nigeria (4.7 percent). Non-citizen drug law violators were also more likely to be married and less likely separated or divorced (55.1 percent of the non-citizens were married compared to 37.7 percent of the citizens). Furthermore, of the small proportion of drug law defendants who did graduate from college, a greater percentage of non-citizens were more likely to have received college diplomas; however, U.S. citizens were more likely than non-citizens to have had some high school education or to have graduated from high school. Non-citizen drug law violators were also more likely to have been employed at the time of arrest and to have others dependent upon them, yet to have earned less both legitimately and illegitimately the year before arrest. Non-citizen drug law offenders were much less likely to be drug users or dependent on drugs (15.7 percent of the non-citizens compared to 50.7 percent of the citizens were self-reported substance abusers).

Contrasts Between Low- and High-Level U.S. Citizens. Focusing on U.S. citizens, we see that the low-level group had a disproportionate number of women (16.3 percent of the low-level group were women, compared to 6.4 percent of the high-level group). The low-level group also had a lower percentage of persons charged with prison misconduct than did the high-level group (15.3 percent of the low-level and 28.5 percent of the high-level group had any misconduct charges while in prison). Serious misconduct (i.e., assaults, escape attempts, drug use) was also lower among the low-level group than among the high-level group (2.8 percent of the low-level group had been charged with a serious misconduct compared to 8.8 percent of the high-level group). Finally, the low-level group had a smaller percentage of self-reported substance abusers than the high-level group (45.3 percent of the low-level and 52.9 percent of the high-level group could be categorized as self-reported substance abusers).

Contrasts Between Low- and High-Level Non-Citizens. Among low-level non-citizens, there were a disproportionate number of women (10.8 percent of the low-level and 4.1 percent of the high-level group were women). Compared to high-level non-citizens, low-level non-citizens were less likely to be separated or divorced (14.8 percent of the low-level and 19.2 percent of the high-level group were separated or divorced); were less likely to have been employed in a full-time job (71.6 percent of the low-level and 75.1 percent of the high-level group were employed full-time prior to incarceration); were less likely to be reliant on illegal income (4.4 percent of the low-level and 9.5 percent of the high-level group had income from illegal sources); were less likely to have a history of substance abuse (12.9 percent of the low-level and 17.6 percent of the high-level group were substance abusers); and were less likely to have a record of prison misconduct (14.7 percent of the low-level and 25.1 percent of the high-level group had any prison misconduct). Additionally, only 2 percent of the low-level group had any serious misconduct (i.e., assaults, escape attempts, drug use), compared to 8.2 percent of the high-level group. Lastly, among the low-level group, there were

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relatively more Mexicans, Colombians, Nigerians, and Ghanians, and fewer Cubans and Jamaicans, than in the high-level group.

Section III. Because some information, particularly on Guideline sentencing issues and past criminal history, is not recorded in the Bureau of Prisons automated database, we supplemented our information with a sample of 767 offenders who were in the custody of the Bureau in June 1993 and were sentenced in 1992. Based upon the sample of 767 offenders representative of low-level drug law violators, we coded information on the defendant's functional role in the offense, weapon use, gang activity, and the type(s) and amount(s) of drug(s) involved in the offense from files kept by the U.S. Sentencing Commission (USSC). We also coded the FBI's National Crime Information Center (NCIC) "rap sheets" on every offender, and combined these data with data from USSC and Federal Bureau of Prisons automated files.

According to USSC data, 33 percent of our sample did not receive a mandatory-minimum penalty; 33 percent received a 5-year and 33 percent a 10-year mandatory-minimum prison sentence for a drug offense. The remaining 1 percent received either a 1-year or more than a 10-year mandatory prison sentence.

In this more in-depth review of low-level drug law cases, we found few instances of violence, street gang membership, or weapons use associated with the drug offense either from the paper records (judge's statement of reasons, pre-sentence report, guideline worksheets, plea agreements, Government's version of the offense), or the rap sheets. Using the rap sheets, we coded any arrest, regardless of disposition (i.e., not guilty, dismissed, conviction, no information). Using this criterion, we found 77 percent of non-citizens and 60 percent of U.S. citizens had no NCIC arrest record. NCIC does not contain criminal justice contacts in countries other than the United States. For that reason, the NCIC recorded arrests of non-citizens probably under-represents their criminal history. On the other hand, by using the broad definition of criminal justice contact as any arrest, regardless of disposition, we are probably over-representing the past criminality of both U.S. citizen and non-citizen defendants.

We also found that 95 percent of non-citizen drug law violators had no prior arrest for a violent offense and 88 percent had no prior arrest for a drug offense. Among U.S. citizens, 89 percent had no prior arrest for a violent offense and 78 percent had no prior arrest for a drug offense.

We also examined the extent to which offenders with a score of zero Guideline criminal history points had any NCIC arrest record. Among non-citizens with no criminal history points, 82 percent had no prior arrest of any kind, 97 percent had no arrest for a violent offense, 92 percent had no arrest for a drug offense, and 89 percent had no arrest for other than a drug or violent offense. Among U.S. citizens with zero criminal history points, 71

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percent had no prior arrest of any kind, 91 percent had no arrest for a violent offense, and 86 percent had no arrest for a drug offense. Furthermore, among non-citizens, 18 percent had an arrest for an offense other than a drug or violent crime.

There was a significant difference in the types of roles U.S. citizens and non-citizens played in the drug offense. Most U.S. citizens could be characterized as dealers, while most non-citizens could be characterized as couriers or "mules" or having even more peripheral roles.

Section IV. Based upon a subsample of 126 offenders, two groups of Department of Justice staff wrote short narratives on the same defendants. This analysis was intended to be more contextual and descriptive than the analyses portrayed in sections II and III. One group used USSC records to cull information, while the other called the Assistant U.S. Attorneys involved in the cases to gather their information and to develop an understanding of the particular cases which went beyond the USSC records. We summarize our findings below primarily in the form of impressions rather than data. Because we are making generalizations in this section based on only 126 cases, we must emphasize that further systematic research should be conducted to confirm or disconfirm our impressions.

In reviewing these cases closely, it was clear that there was little doubt as to the culpability of these defendants. Moreover, there were few defendants who had a record of violence or a gang affiliation. What emerged was a variety of fact patterns and circumstances. There were some cases when individuals had rather minimal roles in the drug offense, but the drug amount was so high as to result in a long mandatory sentence.

In some cases, the defendants played minimal roles in large drug operations which extended many months or even years into the past. It was also evident that although the study group members did not have a prior commitment record, some had extensive juvenile and/or adult arrest records, suggesting that their lack of prior commitment may have been a matter of their good fortune. Some of these individuals also had a history of illegal drug activity as part of their arrest record.

Section V. Based on a study of 1987 BOP releasees, persons with similar criminal backgrounds to low-level drug law offenders had about half the recidivism rate (20 percent) of the entire release group (40.7 percent recidivism). Recidivism was defined, in this study, as any arrest or supervision revocation within 3 years of release. When an offender was arrested, the offense was typically a drug law violation and rarely involved violence. The study also found that, unlike the present group of low-level drug law offenders who will serve, on average, 5¾ years of their sentence, the comparable 1987 releasee served, on average, less than 1½ years.

In a complementary study of all non-citizens released in the first 6 months of 1987 who were drug law violators and who met the USSC criteria for a criminal history category I, it was

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found that these offenders were even less likely to recidivate than their U.S.-citizen counterparts. Although many of these non-citizen offenders were deported after serving a prison sentence, even non-citizens released to supervision in the United States were less likely to reoffend than similar U.S. citizens.

Section VI. In this section, we review the research literature that examines the fundamental relationship between time-served and recidivism. Citing previous research conducted in jurisdictions including the Federal and State prison systems, the evidence clearly shows that the amount of time a defendant serves does not have an impact on his or her likelihood of re-offending.

Section VII. In this section, we compare sentences for low-level drug law violators sentenced in 1985 and those sentenced in our 1992 sample. In this analysis, sentences are compared among defendants with the same criminal history points and similar drug quantities. When the data are categorized into 19 groups, depending on the quantity of drugs involved in the offense, the analysis shows that in almost every group, sentences for the 1992 sample are longer than sentences for 1985 drug law violators. On average, sentences have increased 146 percent for offenders with zero criminal history points -- from 24.9 to 61.2 months, and by 140 percent for offenders with one criminal history point -- from 28.3 to 68 months. This section also shows that far fewer defendants receive probation under new sentencing policies than they did in 1985.

In section VII, by assuming that sentence length indicates the criminal justice system's view of the relative harm caused by an offense, we demonstrate that drug trafficking has been elevated above almost every serious crime except murder. Among offenders with a category I criminal history score, sentence lengths for offenders convicted of drug trafficking were higher than sentence lengths for offenders convicted of kidnapping/hostage taking, robbery, assault, arson, firearms, and racketeering/extortion. We demonstrate that in 1986, the relative harm (measured as the ratio of time served for one offense to time served for a second offense) of robbery to drug trafficking was almost 2 to 1. In 1992, that ratio was 1.26 to 1.

Section VIII. Section VIII compares the drug quantities involved in the offense for high-level dealers, street-level dealers, couriers, and defendants with a peripheral role. The data show that almost 77 percent of all defendants in the low-level sample of 767 offenders were convicted of offenses involving a large enough quantity of drugs to trigger a mandatory-minimum penalty. Regardless of the functional role a defendant played in the drug scheme, the drug amounts involved in the offense are similar across the roles. After applying Guideline adjustments and downward departures, there is a great deal of overlap in the distribution of sentences among high-level dealers, street-level dealers, couriers, and those with a peripheral role.

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An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories

Section I. Purpose and Scope of the Study

Recent Federal Prison Population Growth

Since 1980, the Federal prison population has more than tripled, rising from 24,000 to more than 90,000 in early December 1993. Moreover, it is projected that by the year 2000 the prison population will reach 130,000. Much of this increase has taken place in the last few years, driven by the new sentencing laws which have provided for longer prison sentences, set mandatory-minimum sentences for certain offenses such as drug law violations and offenses involving weapons, abolished parole, and substantially reduced prison good time credit. Since the end of 1988, when the full impact of these new laws was realized, the prison population has grown by an average of over 650 inmates per month, or enough to fill one medium size institution with each new month.

The emphasis on drug offenses has dramatically changed the composition of the Federal prison population. In 1980, 18 percent of Federal prisoners were drug law violators. By the end of 1988, this figure was 46 percent, and currently it is 60 percent. The latter percentage translates to approximately 46,000 Federal prisoners who are confined for drug law violations, many of whom are first-time offenders.

According to the U.S. Sentencing Commission, 28,754 individuals were sentenced to Federal prisons in 1992 under Guideline sentences. Of these, 14,622 were convicted of drug trafficking offenses, and, of this latter group, 9,007 were Sentencing Commission Criminal History Category I offenders (i.e., individuals with zero or one "countable"³ prior conviction(s)). Thus, drug law violators with minimal criminal histories accounted for almost one-third of the 28,754 Guideline-sentenced cases in 1992.

Study Purpose

This study was undertaken to enhance our understanding of the "low-level" offender population. We use "low-level" as a label in a relative sense. The offenders we have targeted in this study are less likely to be violent, and as the information in the recidivism section of this report demonstrates, are less likely to reoffend following release from prison than "higher

³"Countable" criminal history points refer to points assigned to the prior conviction record of the defendant according to Guideline rules. These rules are defined more precisely in section III of this report.

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level" offenders who commit drug law or other violations. However, this study does not make recommendations on sentence lengths or whether probation or prison is a preferred sanction. These considerations must be made with respect to the goals of criminal justice policy planners.

We also recognize that one of the essential problems in developing sentencing policy for drug law defendants is the extent to which drug amount should influence the sentencing decision. The past practices study conducted by the U.S. Sentencing Commission⁴ found that prior to the implementation of Sentencing Guidelines, drug weight was the most influential factor in a judge's sentencing decision. Under current sentencing practices, drug weight is still the most influential factor in sentencing. However, due to mandatory-minimum sentences, drug quantity establishes a "floor" precluding prison sentences below a certain level for trafficking and importation of all drugs, and for possession of crack cocaine.

Those who advocate the primacy of drug weight in the sentencing decision argue that the harm to society of a drug offense is proportional to the type and quantity of the drugs involved. Those who advocate that other sentencing factors should play a significant role in the sentencing decision argue that personal responsibility or culpability should be an essential factor in the sentencing process. Since both points of view have merit, the issue is the extent to which drug quantity or culpability should affect the sentencing decision. Stated in these terms, the issue is more a matter of degree than fundamental differences in sentencing approaches. However, under current sentencing practices, culpability, defined as role, can only enter the sentencing equation under limited circumstances. For example, culpability can affect sentences if mandatory-minimum penalties do not apply, if mitigating role adjustments do not lower sentences below a mandatory-minimum penalty, or if aggravating role leads to an increased sentence. In this study, we conducted an evaluation of the defendant's functional role in drug trafficking to enhance our understanding of defendant culpability.

There are some who argue that drug trafficking is inherently violent. Indeed, the research literature indicates there is evidence that violence is systemic to the illegal drug market.⁵ For

⁴Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, United States Sentencing Commission, June 18, 1987.

⁵The research by Paul J. Goldstein has demonstrated that 39 percent of all homicides in a New York City sample in 1988 were a result of violence systemic to drug trafficking. Goldstein distinguishes systemic violence, which is primarily a feature of the illicit market, from psychopharmacological or economic-compulsive violence. The former is violence associated with the psychopharmacological effects of drug inebriation or drug withdrawal. The latter is violence associated with economic crimes to finance drug use. Goldstein has found that when there is psychopharmacological violence, it is usually as a result of alcohol, while economic-compulsive violence is not common. For a bibliography of Goldstein's

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the purposes of criminal justice, it is important to understand and document the extent to which an individual has been violent or is likely to be violent. Therefore, it is necessary to distinguish between the concepts of an inherently violent drug market and of risk to the community posed by individual drug offenders. The study's focus on risk was intended to assist our understanding of the relationship between drug offenses and recidivism, especially violence, and to document the extent of the violence in both the offender's instant offense and in the offender's criminal history.

Competing Criminal Justice Policy Goals

Because drug offenses constitute particularly serious crimes, consideration of criminal justice policy goals becomes all the more challenging. There are many such goals to be evaluated. There are retributive and justice goals. These goals emphasize punishment commensurate to the crime. There are instrumental goals. Among these are the incapacitative, rehabilitative, general and specific deterrent effects of criminal justice policy. Some have emphasized the importance of mandatory-minimum sentences and longer Guideline sentences as leverage in gaining cooperation from defendants to assist the Government in making cases against other criminals. There is also the practical goal of designing a Federal criminal justice policy that will not pose an excessive economic burden on taxpayers.

To put this study in perspective, the information we gathered cannot answer questions about the relative merits of these diverse, and in some cases, competing goals. The scope of this study was to shed light on characteristics of this "low-level" offender population so that criminal justice policy planners can make informed decisions in the context of relevant criminal justice goals.

Because mandatory-minimum sentences for drug trafficking and importation have a pervasive effect on the Guideline sentencing structure for drug offenses, any discussion of policy affecting drug offenders (whether they are low- or high-level offenders) must confront the effect of these penalties on prison sentences. As we show later in this paper, almost two-thirds of low-level drug offenders currently confined are serving mandatory-minimum prison sentences. It is worth emphasizing that drug quantities, as a result of the incorporation of mandatory-minimums into the Sentencing Guidelines, are the single most important determinant of the drug offender's sentence length. If policy planners were to consider sentence reductions for the low-level offender population, then a strategy would have to be developed to decouple or weaken the link between drug amounts and prison sentences. Throughout this paper, we often refer to the effect or impact of Sentencing Guidelines. This

published work consult "Drugs and Violence in America", United States Sentencing Commission, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States, Washington, D.C., June 16-18, 1993, pp. 96-98.

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is a shorthand for referring to the effect of Sentencing Guidelines in combination with mandatory-minimum penalties.

Sections II through VIII

The remainder of this paper considers several definitions of low-level offender and characterizes the target population on the basis of demographics, social history, sentencing characteristics, criminal history, role in the offense, and drug quantities involved in the instant offense. The information is intended to provide policymakers with as precise a picture of the low-level offender as is possible and to represent the risk to the community if sentences were reduced for these offenders.

There are seven additional sections to this report. In section II, we attempt to show how many offenders currently under the jurisdiction of the Bureau of Prisons (BOP) could be affected by a policy focusing on low-level drug offenders. We define the low-level group and present data that come primarily from automated BOP records. The data contrast the low- and high-level populations. Throughout this report, almost all comparisons of risk also focus on distinctions between U.S. citizens and non-citizens.⁶

In section III, our purpose is to gain further insight into the low-level inmate population by 1) limiting our interest to offenders sentenced in FY 1992, and 2) supplementing our information with data from the U.S. Sentencing Commission automated records and from other information we coded directly from paper records the Commission keeps in their files. Because coding data from files is labor intensive and time consuming, we restricted our analysis to a statistical sample of 767 low-level offenders.

In section IV, we describe the analysis of an even more limited sample of 126 offenders. Staff wrote brief narratives in response to a set of protocol questions designed to elicit information on the circumstances of the offense with respect to violent behavior, role, aggravating or mitigating circumstances, criminal history, gang affiliation, and information on departure status. Seven defendants from each of 18 judicial districts were chosen at random. A summary of these findings is described in section IV.

In section V, we review evidence on the likelihood that low-level offenders will recidivate. We present these data to show the relative risks of releasing low- versus high-level offenders.

⁶ The distinction U.S. citizen versus non-citizen is made without attempting to draw the line between legal and illegal alien. Because illegal alien is a status determined by the Immigration and Naturalization Service and that determination is typically made after an offender completes his or her sentence, BOP files have no information on which inmate or what proportion of inmates will be determined to be an illegal alien.

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In section VI, we briefly present data on the relationship between time-served and post-release outcome. We present this information to show that the current best evidence is that length of stay of imprisonment, after adjusting or controlling for other factors that predict recidivism, is not related to reoffending. In other words, for many offenders, shorter or longer sentences have no impact on recidivism.

In section VII, we compare the differences in sentences for low-level offenders using information from defendants sentenced in 1985, prior to implementation of Guidelines, and similar defendants sentenced in 1992.

In section VIII, we present data on the relationship between functional role (the active role a defendant played in the drug crime) and the amount of drugs involved. We present these data for several reasons. The data show that there is very little difference in the quantity of drugs involved when looking at the functional roles of offenders. Because drug quantity is the primary determinant of sentences under the Guidelines, on this basis alone defendants having different roles, whether peripheral or central to the drug scheme, are likely to have received similar sentences.

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Section II. "Low-Level" Drug Offenders

In this section, we draw upon Bureau of Prisons and U.S. Sentencing Commission data to represent the potential low-level target population and then, using Bureau of Prisons data exclusively, portray characteristics of the low-level population. In subsequent sections, we add more information to our analysis; however, the size of our study population gets smaller and smaller as we sacrifice sample size for more refined and contextual information. BOP automated data are used to represent the potential target group of low-level offenders among inmates currently in Bureau of Prisons custody. USSC data are used to represent the number of Guideline-sentenced defendants who were sentenced in FY 1992 and who may qualify as low-level. Thus, the BOP data represent a cross-section of these offenders and the USSC data represent a cohort. To the extent that low-level offenders have shorter sentences than high-level offenders, a cross-section will indicate a smaller pool of low-level candidates over some given time period.

In the next several paragraphs, we use different definitions of risk to show what proportion of the current Bureau of Prisons drug offenders and what proportion of offenders convicted of drug trafficking in 1992 under Sentencing Guidelines might qualify as low-level. In each case, we add more restrictions to pare down the pool of drug defendants to less risky subpopulations. This serves two purposes. It shows how different criteria can be applied to define a low-level subpopulation. It also shows how large a difference there might be between these different populations after applying different criteria of risk.

Figure 1 shows the number and percentage of offenders who might be considered low-level based on BOP data. Each line in the stacked bar graph shows how large the low-level pool would be, depending on the restrictiveness of the low-level criteria. Obviously, as we add restrictions, this low-level pool will decrease. The top of the stacked bar shows the entire Bureau of Prisons sentenced drug law violation population in June 1993 -- 45,198 offenders. Each stack below represents the number and proportion of the drug law population that meets the different additional low-level criteria.

In the topmost low-level bar, we define low-level drug law violators as any individuals who meet the following criteria. First, they must be sentenced individuals who have been convicted of a drug offense. In addition, if they are U.S. citizens, they must have no record of prior commitment, no history of violence, no detainer filed against them, no significant record of a public safety factor risk⁷ (other than a long sentence length), and no known record

⁷ Public safety factors are defined by the Bureau of Prisons Program Statement on Security Designation and Custody Classification as any factor "which requires increased security to ensure the protection of society." These factors include membership of a security threat group, use or possession of a firearm which was intended to influence the commission

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of sophisticated criminal activity. For non-citizens, the selection criteria are the same except that information on detainer is not used and the public safety factor indicating deportable alien is disregarded. This population is 36.1 percent of all drug law violators, or 16,316 offenders.

If we add a further restriction that low-level defendants cannot exceed a Guideline-determined criminal history category I, the target population becomes 32.1 percent of all drug law violators, or 14,522 offenders. Restricting the group further to zero Guideline-defined criminal history points results in 28.2 percent, or 12,727 offenders. Further restricting offenders to no prior violent- or drug-related arrests (we define this later) results in a proportion of 23.4 percent, or 10,551 offenders. Finally, if we restrict this group to only those offenders who had no recorded arrests, the resulting pool becomes 21.4 percent of drug law violators, or 9,673 offenders.

Figure 2 uses USSC data and portrays the eligible pool of low-level offenders as the proportion of defendants whose major Guideline offense was § 2D1.1, drug trafficking, and who were sentenced in FY 1992. When the U.S. Sentencing Commission provided these data to us in March of this year, the Commission had recorded 13,511 defendants sentenced under Guideline § 2D1.1 for FY 1992. Of these, the stacked bars show the eligible low-level pools as the following restrictions are added: category I criminal history points, 63.2 percent, 8,535 offenders; no conviction under 18 U.S.C. § 924(c), a mandatory-minimum penalty for a weapons offense, 54.2 percent, 7,328 offenders; no aggravating role adjustment, 49.7 percent, 6,712 offenders; zero criminal history points, 39.8 percent, 5,381 offenders; no prior arrest for a violent or drug crime, 33.0 percent, 4,461 offenders; and, finally, no prior arrest of any kind, 30.3 percent, 4,090 offenders.⁸ The low-level pools using prior arrests are

of an offense, an offense involving aggressive sexual behavior, including child pornography and child prostitution, and an offense indicating a significant threat to a Government official.

⁸ Recently, the U.S. Sentencing Commission provided the Department of Justice with additional data on drug defendants sentenced under Federal Sentencing Guidelines in Fiscal Year, 1992. These data include all defendants sentenced under Chapter Two, Part D of the Guidelines manual. The percentages based on all Part D drug defendants versus those based on only §2D1.1 defendants are very similar. For example the data below shows that 50.7 percent of all defendants sentenced under Chapter 2 Part D met the following criteria: criminal history category I, no weapon involved in the offense, and the defendant played no aggravating role in the offense. For defendants sentenced under §2D1.1 meeting these criteria, the percentage was 49.7 percent.

I. Defendants sentenced under Chapter Two, Part D of the Guidelines Manual: 16,684

II. Defendants sentenced under Chapter Two, Part D of the Guidelines Manual who met the following criteria:

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zero criminal history points
 no weapon involved in the offense
 defendant played no aggravating role in the offense

6,897 (41.3 percent of the total number of drug offenders sentenced under the guidelines in FY '92)

III. Defendants sentenced under Chapter Two, Part D of the Guidelines Manual who met the following criteria:

criminal history category I (includes offenders with zero and one criminal history points)
 no weapon involved in the offense
 defendant played no aggravating role in the offense

8,459 (50.7 percent of the total number of drug offenders sentenced under the guidelines in FY '92)

IV. Defendants sentenced under Chapter Two, Part D of the Guidelines Manual who were convicted of a statute carrying a mandatory-minimum penalty: 9,212

V. Defendants sentenced under Chapter Two, Part D of the Guidelines Manual who met the following criteria:

sentenced under a mandatory-minimum statute
 zero criminal history points
 no weapon involved in the offense
 defendant played no aggravating role in the offense

3,198 (34.7 percent of the total number of drug offenders sentenced under the guidelines in FY '92 upon conviction for a statute that carried a mandatory-minimum penalty)

VI. Defendants sentenced under Chapter Two, Part D of the Guidelines Manual who met the following criteria:

sentenced under a mandatory-minimum statute
 criminal history category I (includes offenders with zero and one criminal history points)
 no weapon involved in the offense
 defendant played no aggravating role in the offense

3,984 (43.2 percent of the total number of drug offenders sentenced under the guidelines in

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estimates based on a sample we represent in section IV.

As we indicated, the cohort representation indicates a greater low-level pool than the cross-section because low-level offenders have shorter sentences, are released sooner, and therefore are not as likely to show up in a cross-section. Even the most restrictive definition of risk still yields a low-level cohort which is 30.3 percent of drug trafficking defendants sentenced in FY 1992 and 21.4 percent of offenders currently in Bureau of Prisons custody. Although we have left drug quantity out of our low-level calculations, this is consistent with the way the U.S. Sentencing Commission separately treats criminal history (risk) and offense level.

Characteristics of Low-Level Drug Offenders in the Bureau of Prisons Current Population

Using the most inclusive definition of low-level BOP offenders, we developed information on these defendants which are presented in tables 1 through 4.⁹ The information is presented on

FY '92 upon conviction for a statute that carried a mandatory-minimum penalty)

⁹Profile information for sentenced Federal offenders was obtained from two sources. The primary source is the automated online SENTRY system which provides operational and management information including basic background, prison sentence, and programmatic information on inmates confined in BOP and contract facilities. At the time the information was gathered for this study (June 1993), there was a total of 76,835 sentenced inmates in BOP and contract facilities.

The second information source is a 1991 interview survey of a stratified sample of 6,572 Federal inmates which was conducted by the U.S. Census Bureau under contract with BOP. Besides collecting demographic information on respondents, the survey covered such topics as work history, prior criminal record, use of weapons, and drug use history. The information gathered from the survey was used to project population profiles and response distributions for the total sentenced BOP population which, at the time of the survey, was 54,006.

One may question the use of inmate self-reported information for purposes of describing drug law offenders in this report. However, by drawing upon demographic information provided by survey respondents, it was possible to actually match many of these inmates in the SENTRY system and then to verify the information provided by them as to current offense and prior criminal record. The correspondence between self-reported and officially recorded information was so high as to greatly enhance our confidence in the veracity of self-reported information, and we feel comfortable in the use of this material in this report.

Differences do exist between the two information sources. One is current to June 1993 and

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both low-level and high-level drug law violators, the latter group being composed of sentenced drug law violators who were excluded by the selection criteria from the low-level category. In addition, a distinction was made between drug law violators who are U.S. citizens and the growing number of non-citizen drug law violators.¹⁰ This was necessary because of the often substantial differences in background characteristics and other factors which distinguish these two groups of offenders. Indeed, the analysis was made more complicated because the differences between U.S.-citizen and non-citizen drug law violators frequently were greater than differences between high- and low-level offenders. Another reason for separating U.S. citizens from non-citizens is that policy implications for handling a non-citizen offender population may be different than for a U.S.-citizen group.

A summary of the information presented in tables 1 to 4 follows:

- Table 1 presents information on sentence length and offense severity. Of 76,835 sentenced inmates in the BOP in June 1993, 45,198, or 58.8 percent, were confined for drug law violations.
- 70.8 percent of drug law violators were U.S. citizens and 29.2 percent were non-citizens.
- 28.9 percent of U.S. citizen drug law violators met the low-level criteria and 53.3 percent of non-citizen drug law violators met the low-level criteria. In actual numbers, 9,258 U.S.-citizen and 7,044 non-citizen drug law violators fell into the low-level category.
- Among U.S. citizen drug law violators, the average sentence for high-level

the other dates to 1991. Also, the 1991 survey projections are restricted to BOP facilities only and do not include contract facilities where many non-citizens are housed. These differences are not critical to our interests, particularly since we will rely on SENTRY information for our numerical estimates of low-level and high-level drug law violators and will only draw upon the 1991 survey information to add to the description of these populations.

¹⁰ In 1980, there were 946 sentenced non-citizens in BOP custody. In September, 1993, there were 17,283 sentenced non-citizens. As a percentage of the BOP sentenced population, non-citizens were 4.3 percent of that population in 1980 and were 22.4 percent of the sentenced population in September, 1993. Although these sentenced non-citizens were not exclusively drug law violators, over 80 percent of the non-citizens in BOP custody in 1993 were sentenced for drug offenses.

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offenders was 138.9 months, while for low-level offenders, the average sentence was 78.8 months. For non-citizen high-level and low-level offenders, the sentences were 156.9 and 85.0 months, respectively. Since the vast majority of those confined are "new law" cases, we can estimate that low-level drug law violators who are U.S. citizens will serve, on average, 5½ years before release while low-level non-citizens will serve 6 years on average.

▫ Among high-level U.S.-citizen drug law violators, 17.1 percent had integral or managerial roles (greatest severity category in table 1), while among low-level U.S. citizens, 0.3 percent had played an integral or managerial role in the offense. Among high-level non-citizen drug law violators, 28.4 percent of the high-level and 0.9 percent of the low-level offenders had assumed integral or managerial roles in the drug offense.

▫ Table 2 shows that among both U.S.-citizen and non-citizen low-level drug law offenders, females were over-represented.

▫ Table 2 also shows that in the low-level non-citizen category, Mexicans, Colombians, Nigerians, and Ghanians were over-represented while Cubans and Jamaicans were under-represented.

▫ Regarding other background items in table 2, differences tended to be greater between U.S. citizens and non-citizens than between high- and low-level drug offenders. Thus, a higher percentage of non-citizens were married and a lower percentage were separated or divorced than among U.S. citizens. Non-citizens were more likely to have graduated from college or have had some college experience than U.S. citizens; however, non-citizens were also less likely to have finished high school than their U.S.-citizen counterparts. Non-citizens were also more likely to have been employed at the time of their arrest and to have had others dependent upon them, yet they tended to have earned less money during the year before their arrest and were less likely to have obtained illegal income.

▫ Table 3 presents a series of items related to drug and alcohol use. There are four conclusions to be drawn from this table:

▫ Many of the U.S. citizens confined for drug law violations are themselves drug users and drug dependent. Thus, 50.7 percent of the U.S. citizen group stated they regularly used drugs (i.e., once a week or more for at least a month), 38.2 percent said they had used drugs in the month prior to their arrest, and 16.1 percent said they were under the influence of drugs at the time of arrest.

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- As one moves from high-level U.S. citizens to low-level non-citizens, there is a decrease in the use of and dependence on drugs. Among U.S. citizens, for example, 52.9 percent of high-level drug law violators had regularly used drugs while among low-level violators the figure was 45.3 percent. Among non-citizens, 17.6 percent of high-level and 12.9 percent of low-level offenders regularly used drugs.
- The decrease in drug use was greatest between U.S. citizens and non-citizens. While 50.7 percent of the U.S. citizen group had used drugs regularly, among non-citizens, the figure was 15.7 percent.
- The drug of choice in all cases is marijuana, followed by cocaine. Among high-level U.S. citizens, for example, 39.0 percent were regular users of marijuana and 23.8 percent regularly used cocaine. For low-level non-citizens, 7.8 percent regularly used marijuana and 5.8 percent regularly used cocaine.
- Table 4 presents information on prison experience. It shows that while the majority of low-level drug law offenders who are U.S. citizens are kept in minimum-security facilities (i.e., prison camps), few low-level non-citizens are so housed.¹¹
- Table 4 also reflects that low-level drug law violators were more likely to have a better adjustment record as measured by frequency and type of disciplinary report. Lastly, low-level drug law violators who were U.S. citizens were more likely to have received a prison furlough while few low-level non-citizens received such consideration.

If we were to quickly summarize the data in tables 1 through 4 for U.S. citizens, we would point mainly to the greater concentration of female offenders in the low-level group, and the better prison adjustment record of this group, but we would also stress the involvement of many of these individuals in the drug culture as evidenced by their drug use and dependence.

In the case of non-citizens as a group, we start with people primarily from Central and South America with often more intact family backgrounds, but poorer earnings. These individuals also are less likely themselves to be drug users. Within the non-citizen group, low-level drug law violators were disproportionately female and also more likely single and less likely separated or divorced relative to high-level non-citizens. The low-level group had even poorer earnings and were even less likely to use drugs. Finally, they had a better prison adjustment record.

¹¹ As a matter of policy, the Bureau of Prisons does not ordinarily house non-citizens in prison camps. These minimum security facilities do not have fences or a perimeter security.

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In subsequent sections, we will focus on smaller samples representative of the low-level population in order to evaluate in greater detail their criminal histories, past violence, and other contextual information.

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Section III. Sample of 767 Low-Level Drug Offenders

This section focuses in more detail on the possible past criminal history or violence of the offender. The selection of this sample is described in Appendix A. The sample represents low-level drug offenders who were confined in Bureau of Prisons facilities in June 1993 and who were sentenced in 1992. The sample represents information culled from both BOP and USSC automated data and from the coding of additional information from sentencing records maintained by the Commission. Although coding is labor intensive, and, between BOP and USSC automated records there was a great deal of information already available, it was still necessary to code information on drug amounts involved in the conviction, weapons use, functional role, and other important variables not contained in either electronic data set. The coding form used to collect this additional information can be found in Appendix D. We used a coding scheme developed by the Commission to gain an understanding of the functional role the defendant played in the drug offense.

This sample was chosen from a larger file of 5,099 defendants who met the low-level criteria. This file included both defendants who received mandatory-minimum penalties and those who did not.¹² The sample of 767 is very representative of the larger data set of 5,099.¹³ Table 5 shows the percentage of defendants in the sample who received mandatory-minimum penalties according to USSC records. Of the sample, 33.0 percent received no mandatory-minimum penalty, while 33 percent received a 5-year mandatory-minimum penalty and another 33 percent received a 10-year mandatory-minimum penalty. Citizens were slightly more likely to receive the mandatory-minimum than were non-citizens.

Violence in the Instant or Past Offense and Criminal History

Although the cases in this sample were selected by using Bureau of Prisons automated data to explicitly exclude any offenders who had violence in prior recorded criminal activity or their

¹² We did not restrict this sample to offenders who received mandatory-minimum penalties because one of the purposes of this study was to assess level among defendants who currently receive prison sentences. The penalties for all drug defendants have increased as a result of reconciling drug Guidelines with drug quantities specified in statutes containing mandatory-minimum penalties. Thus, many defendants who previously would have qualified for a sentence of probation now receive prison sentences as a consequence of this reconciliation. Therefore, it was necessary to sample offenders who did not receive mandatory-minimum prison sentences, but who nevertheless received prison sentences.

¹³ Although the sample of offenders was 767, some of the information collected on these defendants was missing. Therefore, in subsequent sections where data are presented in tables, the number of defendants will vary depending on which data items are being considered.

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current offense, an attempt was made to record any additional indication of possible current or past history of violence either from U.S. Sentencing Commission automated data, material contained in USSC files, or from NCIC recorded criminal histories.

Guideline Criminal History Points and Categories

Tables 6 and 7 represent the criminal history categories and criminal history points recorded in the USSC database on defendants in the sample. These data are based on the pre-sentence investigation recommendations to the court. In most cases, the court adopts these recommendations or modifies them only slightly. As can be seen in table 6, 93.4 percent of non-citizens and 85.5 percent of citizens fell into criminal history category I of the U.S. Sentencing Guidelines. Table 7 indicates that 86.8 percent of non-citizens and 72.1 percent of citizens had zero criminal history points while 6.6 percent of non-citizens and 13.4 percent of citizens had one "countable" criminal history point.¹⁴ According to the U.S. Sentencing Guidelines, defendants having zero or one criminal history point fall into criminal history category I.

Weapons Use in Current Offense

Using Bureau of Prisons data, we tried to screen out any defendant who may have used a weapon in the current offense. However, we also verified our screening procedure by coding pre-sentence investigations for weapon use and by merging our data with an indicator in the USSC database that records whether a defendant was convicted of 18 U.S.C. § 924(c) which carries, at a minimum, a 5-year mandatory consecutive sentence for use or possession of a firearm if the instant offense is a crime of violence or drug trafficking crime. Table 8 indicates that of the 767 offenders in our sample, 3 non-citizens and 4 citizens had a 924(c) conviction. When we coded presentence investigations for weapons use, we used a fairly liberal definition. Among citizens, 4.3 percent of their codefendants had possessed a weapon. Among non-citizens, 2 percent had codefendants with a weapon. There were no instances in which the possession of a weapon was used as a threat or resulted in bodily harm. In fact, among non-citizens, we could find no mention of a weapon in 95.2 percent of the cases, while for citizens there was no mention of a weapon in 87.8 percent of the cases.

¹⁴ "Countable" criminal history points according to Guideline rules found in § 4A1.1 and application notes do not include a sentence for "a foreign conviction, a sentence imposed for an offense committed prior to the defendant's 18th birthday unless it resulted from an adult conviction, and a sentence imposed more than 15 years prior to the defendant's commencement of the instant offense unless the defendant's incarceration extended into this 15-year period."

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Gang Membership

Another indication of violence was the possible link of an offender with a gang. We coded two variables in relation to gang activity. The first variable indicated whether the offender had any association with a gang. Thus, if there was any connection to a cartel or organized gang, we indicated gang association. A second variable was coded if gang membership was relevant in the current offense. Among the sample of 767 defendants, only 13 (1.8 percent) had any indication of a relationship to a gang. In some of these cases the relationship was tangential. In 15 of the 767 cases (2.1 percent), there was an indication that the drug crime was related to gang activity. Citizenship had no influence on these indicators.

Possible Violence in a Secondary Offense

Another indication of possible violence in the instant offense was the extent to which a conviction offense other than the primary drug conviction indicated violent criminal activity. This information appears in table 9. Using the USSC data on a secondary conviction offense, we found that there were only a few secondary offenses that were not drug statute violations. These offenses included income tax violations (four offenders), money laundering (one offender), racketeering (two offenders), and administration of justice offenses such as accessory after the fact (two offenders). These data clearly indicate, there was little or no violence in any secondary conviction offense.

NCIC Arrest History

Department of Justice analysts ran National Crime Information Center (NCIC) criminal history checks on all 767 defendants in the sample. The "rap sheets" were then coded and the following information was recorded for every arrest: date of arrest, NCIC offense code, disposition (not guilty, dismissed, conviction, turned over to another agency, no information), type of sentence (e.g., probation or prison), months of sentence, and whether the defendant was under any kind of criminal justice supervision when the arrest occurred.

In the present analysis, we coded an arrest regardless of its disposition. This was the most inclusive measure of criminal justice contact we could use. This, of course, included defendants whose charges were dismissed, who were found not guilty, and for whom there was no disposition. We counted every arrest as one "prior." In addition, we separately calculated arrests involving violent offenses,¹⁵ arrests for prior drug offenses, and arrests for other than violent or drug offenses.

¹⁵ We counted the following offenses as violent: homicide, manslaughter, kidnapping, rape/sexual assault, robbery, simple or aggravated assault, arson where a life was endangered, extortion where a person was threatened with injury, and weapons offenses.

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The "prior" arrest distributions are represented in table 10. As depicted in table 10, 66.7 percent of the offenders had no indication of any prior arrest. Another 13.9 percent had 1 previous arrest, 6.3 percent had two arrests, and 4.4 percent had three arrests. The remaining 8.7 percent had from 4 to 14 prior arrests.

Among defendants in the sample, 91.1 percent had no indication of a previous violent offense and 5.3 percent had one arrest for a violent offense. Of the total sample, 82.1 percent had no previous arrest for a drug offense, while another 10.4 percent had one previous arrest for a drug offense. Finally, among defendants in the sample, 78.4 percent had no arrest for a crime which could be categorized as an offense that was neither violent nor drug-related.

The most common response for an NCIC recorded arrest was that no information was available on the disposition of the arrest. For example, although we found that 8.9 percent of the offenders in this sample had a prior arrest for a violent offense, there was no information on disposition in 53.7 percent of the violent arrests. There was a not guilty finding in 2.8 percent of the violent arrests, a conviction in 17.6 percent of the violent arrests, and a dismissal in 25.9 percent of the violent arrests. Thus, we were only able to verify that 1.6 percent of the total sample was convicted of a violent offense (computed as 1.6 percent verified conviction for a violent arrest = 17.6 percent convicted x 8.9 percent violent arrest).

This pattern of dispositions for drug offenses was 0 percent not guilty, 21.1 percent conviction, 28.5 percent dismissal, and 50.4 percent no information. For other than drug or violent offenses, the pattern was 2.2 percent not guilty, 25.9 percent conviction, 21.8 percent dismissal, and 50.2 percent no information. Thus, we were able to verify a conviction for 3.8 percent of the drug arrests and 5.6 percent of arrests for other than a drug or violent offense.

One approach to coding this data would have been to assume that for every case in which there was no information on the disposition of the arrest, the actual disposition occurred in the same proportions as the not guilty, dismissed, and conviction findings. This assumption would have meant that 46 percent of arrests resulted in a conviction. Rather than make this assumption, we simply counted every arrest as evidence of a criminal justice contact and called it a "prior," an assumption which overstates the extent of the defendant's criminal history.

Tables 11 through 13 represent the arrest histories separately for U.S. citizens and non-citizens. As can be seen from table 11, U.S. citizens (39.8 percent) were more likely to have a recorded arrest for any crime than non-citizens (23.3 percent). As shown in tables 12 and 13, U.S. citizens were also more likely than non-citizens to have been arrested for a violent crime (11.5 percent versus 4.9 percent) and for a prior drug crime (21.6 percent versus 12.2 percent). Although there are obvious reasons for the differences in arrest information between citizens and non-citizens, it is clear that some information is available through NCIC on prior criminal activity among non-citizens. Furthermore, for violent and drug-related offenses,

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neither U.S. citizens nor non-citizens had an extensive prior arrest record regardless of the disposition.

Some proposals for modifying mandatory-minimum penalties for drug offenses have been predicated on the lower categories of criminal history points assigned through the application of Guideline rules.

As an example, we looked at the recorded arrest histories of offenders in the sample who had zero prior countable criminal history points. We found that 76.1 percent had no prior arrests. Another 11.9 percent had one prior arrest. For those offenders with zero criminal history points, 93.5 percent had no prior arrest for a violent offense, 4.4 percent had one prior arrest for a violent offense, and the remaining 2.1 percent had two or three prior arrests for a violent offense. Looking at prior drug arrests, 88.6 percent of the sample who had zero criminal history points also had no prior arrests for a drug offense. Another 7.5 percent had one prior arrest for a drug offense. Looking at other than drug or violent offenses, for offenders with zero criminal history points, 82.4 percent had no prior arrest for "other" offenses. Of this sample 9.9 percent had one arrest and 3.7 percent two arrests for an "other" offense.

Table 14 depicts this information for U.S. citizens and table 15 for non-citizens. For non-citizens, 81.9 percent had no prior NCIC recorded arrests of any kind. Furthermore, for non-citizens, close to 97 percent had no recorded violent arrests, 92.4 percent had no recorded drug arrests, and 89 percent had no "other" arrests. For U.S. citizens who had zero criminal history points, 70.7 percent had no NCIC recorded arrest of any nature. Furthermore, for U.S. citizens, 90.7 percent had no recorded violent arrests, 85.6 percent had no recorded drug arrests, and 81.7 percent had no recorded "other" arrests. It is clear that even with this liberal interpretation of criminal justice contact, the great majority of non-citizens and even the majority of U.S. citizens do not have recorded prior criminal justice contact.

Functional Role in the Offense

One of the interests in the study of non-violent, "low-level" drug offenders is the extent to which their role in the drug crime warrants adjustments for aggravating or mitigating roles. Sentencing Guidelines allow for a 2-, 3-, or 4-level increase in offense level depending on the extent to which a defendant was an organizer, leader, manager, or supervisor of a criminal activity (§ 3B1.1). Similarly, a defendant's offense level can be decreased 2 to 4 levels depending on minor or minimal participation in the criminal activity (§ 3B1.2). For research and policy development purposes, the U.S. Sentencing Commission has developed an alternative coding scheme for categorizing role according to the function of the defendant in the activity or scheme. A list of these functional roles appears in table 16 along with the percentages found in the sample by Department of Justice staff. A description of each

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function appears in Appendix B.

As can be seen in table 16, the offender's function was related to citizenship status. While most defendants operated as couriers or mules (34.7 percent), street-level dealers (22.1 percent), or mid-level dealers (20.4 percent), U.S. citizens were more likely to be mid- or street-level dealers (23.0 and 29.5 percent respectively) than non-citizens (16.4 and 11.0 percent respectively). Non-citizens were more likely to be couriers or mules (50.8 percent) than U.S. citizens (23.9 percent).

In order to simplify further analyses and because some of the functional role categories had very few offenders, we collapsed the original 17-level variable into 6 levels: high-level dealer, mid-level dealer, street-level dealer, manufacturer/financier (includes pilot/boat captain, manufacturer/mill manager, financier, money launderer, bodyguard), courier (includes courier and mule), and peripheral role (includes renter/storer, moneyrunner, off-loader, gofer/lookout/deckhand/worker, enabler, and user only).

Using this collapsed set of categories of functional role, we found that for non-citizens the following proportions resulted: high-level dealer, 4.7 percent; mid-level dealer, 16.4 percent; money launderer/manufacturer, 7.7 percent; street-level dealer, 11.0 percent; courier, 50.8 percent; and peripheral role, 9.4 percent. For U.S. citizens, the functional roles resulted in the following percentages: high-level dealer, 2.9 percent, mid-level dealer, 23.0 percent, money launderer/manufacturer, 12.3 percent, street-level dealer, 29.5 percent, courier, 23.9 percent, and peripheral role, 8.5 percent. It is obvious from this representation of functional roles that U.S. citizens are more likely to be street-level dealers than non-citizens, and non-citizens are much more likely to be couriers than their U.S.-citizen counterparts. In any event, even if we assume the importance of the street level dealer's role in drug trafficking, about 60 percent of non-citizens and 32.4 percent of citizens served as a courier or played an even more peripheral role in the drug trafficking scheme.

Our sample was originally screened to eliminate offenders who could be categorized as participating in sophisticated criminal activity by Bureau of Prisons policy or who had received an aggravating role adjustment through the application of the U.S. Sentencing Guidelines. Nevertheless, Department of Justice staff coded 27 cases (3.6 percent) as high-level dealers, and 28 cases (3.8 percent) as manufacturers, categories which many would consider as warranting an aggravating role adjustment. There are several reasons why there might be a discrepancy between the coding of these significant functional roles and the fact that these defendants did not receive an aggravating role adjustment.

Department of Justice staff were relying on the pre-sentence investigation to make their judgment about functional role. In many cases, there was not a great deal of information to distinguish high- from mid-level dealers. It was often difficult to infer how significant the defendant was in the drug distribution network. In all cases, even high-level dealers in this

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sample were purchasing drugs from "higher-level" dealers before wholesaling or redistributing the drugs. Among the manufacturers, 16 of the 28 (57.1 percent) grew marijuana and were for the most part the primary or only manufacturers involved in the offense. In the other 12 cases, it was not always clear whether the offender was the only or the most important organizer, manager, supervisor, or leader in the drug manufacturing offense.

Guideline Departures, Mitigating Role Adjustment, and Citizenship

Table 17 indicates the extent to which citizens and non-citizens are likely to receive a guideline departure.¹⁶ Table 17 shows that 10 percent fewer departures occurred for non-citizens than for citizens. There was a large difference between citizens and non-citizens in substantial assistance departures. Among citizens, 27.3 percent of our sample received 5K1.1 departures. Among non-citizens, 12.7 percent received 5K1.1 departures. Although non-citizens tended to receive downward departures more often than citizens (7.6 versus 3.3 percent), downward departures were infrequent relative to 5K1.1 departures.

Table 18 shows the relationship between mitigating role adjustment and citizenship. In this case, non-citizens were more likely to benefit from mitigating role reductions. A higher proportion of non-citizens received downward adjustment for roles and were much more likely to receive a four point reduction than citizens (20.4 versus 4.5 percent respectively).

Functional Role, Guideline Departures, and Citizenship

In this section, we examine the relationship between functional role, Guideline departures, citizenship, and sentence length. By doing this analysis, we hope to gain a better understanding of the practice of departures for low-level drug defendants. Because departures may have a significant effect on sentence length and only a motion by the Government for substantial assistance can result in a sentence below a mandatory-minimum penalty, it is important to understand the extent to which departures are used.

We looked at the extent to which a defendant received a Guideline departure depending on his/her functional role in the offense. Table 19 depicts the relationship between functional role

¹⁶There are essentially two types of Guideline departures. The court can depart from a guideline sentence when it finds circumstances "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines..." 18 U.S.C. § 3553(b). The court may also depart from the guidelines "upon motion of the Government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." United States Sentencing Commission Guidelines Manual, 1992, §5K1.1, p. 329.

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and departure status where downward and 5K1.1 departures have been collapsed into one category. Table 19 demonstrates that in this sample, mid-level dealers were most likely to receive a departure (36.1 percent), followed closely by offenders with a peripheral role (35.9 percent), and high-level dealers (30.8 percent). However, even 23.2 percent of couriers, 23.4 percent of money launderers/manufacturers, and 19.8 percent of street-level dealers received departures.¹⁷ This data demonstrates that even defendants who have much less important roles than the organizers of drug distribution networks still manage to qualify for departures, including substantial assistance. This corroborates a similar result found by the U.S. Sentencing Commission in their study of functional roles in relation to higher-level drug transactions.¹⁸

Tables 20 and 21 represent the relationship between functional role, citizenship, and departure status. For non-citizens, 28.6 percent of high-level dealers, 27.7 percent of mid-level dealers, 13.6 percent of money launderers/manufacturers, 9.7 percent of street-level dealers, 17.8 percent of couriers, and 30.8 percent of defendants with peripheral roles received a downward or 5K1.1 departure. For citizens, 33.3 percent of high-level dealers, 40.0 percent of mid-level dealers, 27.3 percent of money launderers/manufacturers, 22.1 percent of street-level dealers, 30.8 percent of couriers, and 39.5 percent of defendants with peripheral roles received a downward or 5K1.1 departure. In this sample, it is clear that U.S. citizens performing any role were more likely to receive a downward departure than their non-citizen counterparts. For several functional roles the differences were substantial.

We also analyzed the extent of downward departures by computing the difference between the sentence imposed on the defendant and the bottom of the Guideline range identified by the court in the statement of reasons for imposing a sentence or in the pre-sentence report. This analysis showed that when defendants received departures, there was no statistical difference among citizens or non-citizens in the number of months of their departures. However, there were differences in departures among defendants having different functional roles.

On average, among those offenders who received departures, high-level dealers received 71.1-month departures; mid-level dealers received 48.9-month departures; financiers/manufacturers received 84.2-month departures; street-level dealers received 25-

¹⁷ The following proportions of defendants received downward and 5K1.1 departures by functional role: high-level dealers, downward - 2.9 percent, 5K1.1 - 27.9 percent; mid-level dealers, downward - 3.4 percent, 5K1.1 - 32.7 percent; money launderers/manufacturers, downward - 2.9 percent, 5K1.1 - 20.5 percent; street-level dealers, downward - 3.7 percent, 5K1.1 - 16.1 percent; couriers, downward - 7.6 percent, 5K1.1 - 15.6 percent; peripheral roles, downward - 3.1 percent, 5K1.1 - 32.8 percent.

¹⁸ Addendum to the Drug/Role Working Group Report, April 1, 1993, U.S. Sentencing Commission.

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month departures; couriers received 30.8-month departures; and defendants with peripheral roles received 68.6-month departures.¹⁹

Thus, although couriers were the most likely to receive a departure, on average, they received 30.8-month reductions in their sentences. Mid-level dealers who were next most likely to benefit from a departure, received, on average, 48.9-month sentence reductions. Defendants with peripheral roles who received departures also received substantial sentence reductions, especially considering their sentences were, on average, lower than defendants having other roles (couriers were the one exception). Generally, the higher the functional role, the higher the sentence reduction due to a departure. Defendants with a peripheral role, however, also received sizable sentence reductions due to a departure.

Table 22 shows the relationship between sentence length, functional role, and citizenship. Except for couriers, citizens in every other functional role were more likely to receive a lower sentence than their non-citizen counterparts.

Functional Role and Mitigating Role Adjustment

Among the 767 defendants in this sample, approximately two-thirds received mandatory-minimum penalties. Because mitigating role adjustments cannot be used to reduce a sentence below a mandatory-minimum, it is possible that pre-sentence reports and sentence calculations in such cases do not fully reflect the mitigating role adjustment for which the defendant might otherwise qualify. Bearing this in mind, the data represented in this section may underestimate the extent to which defendants have played a minor or minimal role in the offense.

Table 23 represents the relationship between functional role and mitigating role adjustment. Table 23 shows that within functional role, offenders with a peripheral role were the most likely to receive the mitigating role reduction (43.9 percent). In addition, 40.5 percent of couriers, 21.8 percent of money launderers/manufacturers, 12.1 percent of street-level dealers, 5.3 percent of mid-level dealers, and even 3.7 percent of high-level dealers received a downward adjustment for mitigating role. Tables 24 and 25 represent this same information by citizenship.

¹⁹ Although we used a statistical procedure (Analysis of Variance) to evaluate the extent to which citizenship and collapsed functional role influenced the amount of departure, in some categories there were very few defendants. We can be confident in our conclusions that citizenship did not influence the amount of departure and that collapsed functional role was a significant determinant. However, some of the estimates of the average length of departures are based on too few cases to be confident in the precision of those estimates. We present the averages for descriptive purposes.

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Citizens were less likely to receive a mitigating role reduction than non-citizens (18.8 versus 32.1 percent). Non-citizens were most likely to receive a mitigating role adjustment for a peripheral (50.0 percent), courier (47.4 percent) or money launderer/manufacturer (26.1 percent) functional role. Among U.S. citizens, although they were generally less likely to receive a mitigating role reduction, when they did, the reduction followed roughly the same pattern as non-citizens. Those with peripheral roles (39.5 percent), couriers (30.8 percent), and money launderers/manufacturers (20.0 percent) were most likely to receive the reduction.

Functional Role, Mitigating Role, and Other Factors That Determine Sentence Length

A multivariate analysis was undertaken to simultaneously assess the influence of citizenship, functional role, mitigating role reduction, and other characteristics related to sentencing. In this analysis, we examined the influence of drug amount (in marijuana-equivalence weights), criminal history points, whether the defendant pled, whether the defendant received a 5K1.1 motion, age, gender, race, marital status, employment status at the time of arrest, two categories of mitigating role (yes, no), and five categories of functional role (high- and mid-level dealer combined, street-level dealer, launderer/manufacturer, courier, and peripheral).

These analyses are represented in Appendix C. Three different models (A, B, and C) are presented. The difference between Model A and B is that a variable representing employment at the time of arrest was added to the latter model. Model C includes the employment variable and an interaction term which represents the combined effect of marital status and employment. The analyses showed that drug amount has, by far, the most influence on a defendant's sentence length. This is not surprising given that Guideline offense level is most affected by drug quantity. In addition to drug amount, the following characteristics resulted in a longer sentence: trial, non-citizen status, and whether one was a money launderer/manufacturer or mid- or high-level dealer. The following characteristics resulted in a lower sentence: a 5K1.1 departure, mitigating role adjustment, and whether functional role was courier or peripheral. Characteristics having no effect were: total criminal history points, age, gender, race, and marital status. Criminal history points were probably not significant because there was very little variation in the number of points because of the way our sample was chosen.

When employment was added in Model B and the interaction term of marital status and employment was added in Model C, the effect of whether the defendant was a mid- or high-level dealer became stronger.

This analysis confirmed that non-citizens received somewhat longer sentences even after we accounted for their functional role, their mitigating role adjustment, and other background characteristics. Clearly, one of the major differences is the fact that non-citizens were much less likely to receive 5K1.1 substantial assistance departures.

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Section IV. Sample of 126 Cases Coded by Department of Justice Staff

The second subsample consisted of 126 cases which, besides the analysis described above, were examined in even greater detail. Because we were primarily interested in defendants who received mandatory-minimum-sentences, we chose a sample that guaranteed such a selection.

For each of these cases, Department of Justice researchers reviewed documents that the U.S. Sentencing Commission collects and uses to create its monitoring database. These documents include pre-sentence reports (PSR), a judge's statement of reasons for specific sentences, any plea agreements between the Government and the defendant, and Guideline worksheets if they were not already incorporated into the PSR. Occasionally, the Government's version of the offense was included in the file.

A protocol was developed by Department of Justice staff and appears in Appendix A. The protocol allowed two groups of staff to write brief narratives which focused on the role played by the individuals in their offense, whether the individual was involved in a larger drug or other illegal operation, background characteristics, mitigating or aggravating factors in the offense, and whether or not the defendant provided substantial assistance to prosecutors. While one group of staff completed these protocols based on USSC documentation, the other contacted the Federal prosecutors involved in these 126 cases and using the same protocol obtained the same information from Assistant U.S. Attorneys (AUSA). The purpose of this exercise was to compare information contained in AUSA files with similar information kept by the U.S. Sentencing Commission. If we found correspondence between these records, it would bolster our confidence in the information culled from USSC files used in the larger study.

Eighteen judicial jurisdictions were chosen for this project, with 7 cases selected from each jurisdiction.²⁰ Of the 126 cases selected, 86 were taken from the first sample of 767, along with 40 additional cases so that each jurisdiction surveyed had 7 cases.

Both groups of staff involved in this part of the study also coded functional role using the USSC scheme. In comparing these assessments, there generally was a fair amount of agreement in that, when differences were found, the roles assigned tended to differ by only

²⁰ The 18 jurisdictions were Central District of California, the D.C. District Court, District of Delaware, Southern District of Florida, Northern District of Iowa, Northern District of Illinois, District of Kansas, Western District of Kentucky, District of Maine, Western District of Michigan, District of Montana, Eastern District of North Carolina, District of New Jersey, Eastern District of New York, Southern District of New York, Northern District of Ohio, District of South Carolina, and Northern District of Texas.

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one category level (on a ranked scale of involvement), such as mid- versus street-level dealer. Those staff who worked with the Federal prosecutors were more inclined to assign a higher role to defendants than the other group, but there were also cases when this was reversed, and there were only a few cases when the disparity in role assignment was substantial.

This analysis was intended to be more contextual and descriptive. It gave staff an opportunity to describe some of the more qualitative features of the cases. Because we are making generalizations in this section based on only 126 cases, we must emphasize that further systematic research should be conducted to confirm or disconfirm our impressions of these cases.

We can start by briefly noting some of the things we did not find. Among the cases examined, there were few instances of violence, gang membership, or weapons associated with the drug offense. These are factors that should have been part of the initial screening process in identifying low-level drug law offenders. Nonetheless, it is noteworthy that they were seldom present in any part of the overall criminal activity involving low-level drug law violators. Among the 126 cases in the second study group, there were 17 instances when weapons—almost always firearms—were found, 10 of which involved the defendant while 7 involved codefendants. Generally, however, these were cases in which the weapon was incidental to the offense and usually had no bearing on the charges brought or the sentence imposed.

In reviewing these cases closely, it was clear that there was little doubt as to the culpability of these defendants. What emerged was a variety of fact patterns and circumstances. There were some cases when individuals had rather minimal roles in the drug offense, but the drug amount was so high as to result in a long mandatory sentence.

In some cases, the defendants played minor roles in large drug operations which extended many months or even years into the past. It was also evident that although the study group members did not have a prior commitment record, some had extensive juvenile and/or adult arrest records, suggesting that their lack of prior commitment may have been a matter of their good fortune. Some of these individuals also had a history of illegal drug activity as part of their arrest record.

In general, because there was a fair amount of agreement between the interpretation of the records kept by AUSA's and the U.S. Sentencing Commission, we had increased confidence in the information we gathered from USSC records for our sample of 767 offenders.

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Section V. Post-Release Adjustment of "First-Time" Drug Law Violators

In sections V and VI, we review past research related to recidivism. This research is used to contrast the risk that low-level offenders pose relative to other inmates released from Federal prison.

Harer (1993) undertook a 3-year followup of 1,205 Bureau of Prisons inmates released to the community during the first 6 months of 1987. The study group included 236 drug law violators whose criminal history category, using the Sentencing Commission classification scheme, was 1, (i.e., essentially, first-time offenders). Harer found that the recidivism rate for these first-time drug law violators was 19.1 percent, or well below the overall failure rate of 40.7 percent for the total study group. Table 26, part I, shows the relationship between criminal history category in the sample and the proportion of defendants who were rearrested or had their supervision revoked within a 3-year period after release. It is clear from table 26 that lower criminal history category defendants were much less likely to recidivate than the higher risk category defendants. Table 27 breaks down criminal history into the USSC point scheme. As can be seen in table 27, offenders who received zero criminal history points were less likely to recidivate than those with one point. Generally, the higher number of points, the higher the likelihood of recidivating.

The differences between the lowest and highest number of criminal history points with respect to recidivism was quite remarkable. Those with zero criminal history points were likely to fail 18.3 percent of the time. Those with 11, 12, or 13 points were likely to fail 77.0 percent of the time.

Harer also found that when reason for failure among the Category I drug law offenders was considered, none of the 45 individuals who failed following release from prison were charged with a serious crime of violence such as robbery or murder. Instead, half the failures were arrested for drug sale or possession, 14 percent for larceny, theft, or fraud, 12 percent for DWI, 6 percent for simple assault, and 19 percent for technical parole violations or miscellaneous non-violent offenses.

Many Federal drug law violators are non-citizens who have been arrested for smuggling drugs into this country or who otherwise were engaged in illegal drug activities. For the most part, these non-citizens were excluded from Harer's followup analysis, since the study considered inmates either directly released to the community or through halfway house placement, while non-citizen drug law violators are instead likely to be deported or, if they do achieve community release, may do so only after first being transferred to Immigration and Naturalization Service (INS) custody.

In order to determine what happens to these individuals following imprisonment, Harer undertook a second followup study, this time examining all Category I non-citizen drug law

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violators who were released from BOP custody during the first 6 months of 1987. He found that of the 574 cases identified, 61, or 10.6 percent, were rearrested or had a parole revocation action in the United States during the 3-year followup period.

Among the 574 cases, 220, or 38.3 percent, were released directly to the community on parole or mandatory release; 28, or 4.9 percent, were immediately deported; and 326, or 56.8 percent, were released to INS custody (or, in 2 cases, to Drug Enforcement Administration (DEA) custody) for further processing and eventual deportation or release to community. Harer found that those released to the community had a failure rate of 14.5 percent, those immediately deported had a failure rate of 10.7 percent (presumably after reentering the U.S.), and those released to INS (or DEA) had a failure rate of 8.0 percent.

These findings indicate that, like Category I U.S.-citizen drug law violators, Category I non-citizen drug law violators had a very low failure rate. Although their lower recidivism rate might be attributed to the deportation, the fact remains that at least as far as this country is concerned, the non-citizen group had very few individuals who failed within 3 years following release from BOP custody. Moreover, this finding is reinforced by the indication that very few of those who did fail committed crimes of violence.

The claim is sometimes made that official arrest records underestimate the actual rate of reoffending. Therefore, it can be argued that the recidivism rates reported for the 1987 study group under-represent the rate of actual criminal behavior among this group. While this is undoubtedly true, several considerations should be kept in mind when trying to assess unmeasured recidivism for this group.

First, regarding serious violent crimes, especially homicide and, to a somewhat lesser extent, robbery, arrest statistics have been shown to be reasonably accurate measures of actual offending behavior.²¹ It is these serious violent crimes that the public and criminal justice policy planners are primarily trying to prevent through imprisonment. Second, the majority of the low-level drug traffickers in the 1987 study group were released on parole supervision, increasing the likelihood that either any new offending or violation of parole conditions would be officially recorded.²² Third, rearrest is used here as a measure of reoffending, not reconviction, where reconviction presumably would be a better measure of the actual offending or, at least, a better measure of the person's criminal culpability. In many State

²¹ For example, see Hindelang, Michael 1978. "Race and Involvement in Common-Law Personal Crimes." American Journal of Sociology. 78:360-370; Sampson, Robert J. 1987. "Urban Black Violence: The Effect of Male Joblessness and Family Disruption." American Journal of Sociology. 93:348-382.

²² Petersilia, Joan, and Turner, Susan 1993. Intensive Supervision For High-Level Probationers. Santa Monica, CA: Rand.

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systems, less than 54 percent of all felony arrests result in a conviction.²³ In other words, an arrest charge does not necessarily mean a conviction will occur and, therefore, that the person charged actually committed the offense. Fourth, and finally, probability theory tells us that many, if not most, undetected reoffending was committed by those releasees who were arrested; therefore, the criminal history score which is used to predict who will recidivate, also predicts those who will commit undetected offenses.

To summarize, while it is possible that our measure of recidivism underestimates the actual rate of reoffending by study group members, we should remember that (1) our measure has been shown by other research to be a good measure of serious violent reoffending; (2) the majority of the study group members were placed on parole supervision, increasing the likelihood of detecting any new offense; (3) rearrest and parole revocations are used to measure reoffending, not reconviction, therefore, the recidivism measure used may actually inflate the rate of criminal involvement; and (4) probability theory tells us that the recidivists will account for the majority of any undetected reoffending among these releasees.

²³ Rosen, Richard A. 1984. Applying Offender Based Statistics to the Analysis of Criminal Justice Processing. Albany: Office of Program Development and Research, New York State Division of Criminal Justice Services.

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Section VI. The Effect of Prison Time Served on Post-Release Recidivism

The great majority of recidivism studies of State prison releasees and all studies of Federal prison releasees report that the amount of time inmates serve in prison does not increase or decrease the likelihood of recidivism, whether recidivism is measured as a parole revocation, rearrest, reconviction, or return to prison.²⁴ One of the most recent studies of recidivism among State prison releasees was conducted by Allen Beck and Bernard Shipley, two researchers at the Bureau of Justice Statistics in Washington, D.C.²⁵ Beck and Shipley examined rearrests and reconviction among prisoners in 11 States who were released from prison in 1983. Regarding the effect of time served in prison, they found that, "The amount of time served by prisoners on their most recent offense before their release in 1983 was not associated with an increased or decreased likelihood of their rearrest" (p. 9) within 3 years of release.

Since at least the 1950's, the Federal Bureau of Prisons Office of Research and Evaluation has continually examined recidivism predictors, including time served, for Federal prison releasees. Time served in prison has never been found to decrease, or increase, the likelihood of recidivating either when time served is examined alone in relation to recidivism, or when controls are introduced for demographic variables (including age), education, work experience, prior arrests, convictions, and incarcerations, drug and alcohol dependency, and post-release living arrangements.²⁶

²⁴ See, for example, Schmidt, P., and A. D. Witte 1988. Predicting Recidivism Using Survival Models. New York: Springer-Verlag; Beck, Allen J. and Bernard E. Shipley 1989. "Recidivism of Prisoners Released in 1983." Bureau of Justice Statistics: Special Report. Washington, DC; Department of Justice. Beck, James L., and Peter B. Hoffman 1976. "Time Served and Release Performance: A Research Note." Journal of Research in Crime and Delinquency, July 1976.; Harer, Miles D. 1993. Recidivism Among Federal Prison Releasees in 1987. Washington, DC: Federal Bureau of Prisons.

²⁵ Beck, Allen J. and Bernard E. Shipley 1989. "Recidivism of Prisoners Released in 1983." Bureau of Justice Statistics: Special Report.

²⁶ Because both marital stability and post-release income are strongly related to reduced likelihood of recidivating, anything, including a long prison term, that erodes marital stability or reduces employability will likely increase recidivism.

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Section VII. Comparison of Sentences Before and After Guideline Implementation Controlling for Drug Amount and Criminal History Points

To gain additional perspective on Guideline sentences, in this section, we compared sentences for low-level drug offenders sentenced in 1985, prior to the Guidelines, with sentences received by defendants in our 1992 sample. We compared 1985 and 1992 sentences for offenders having the same number of criminal history points and drug quantities.²⁷

Tables 28 and 29 compare sentencing outcomes for low-level drug offenders sentenced in fiscal year 1985 with our sample of drug offenders sentenced in fiscal year 1992.²⁸ Table 28

²⁷ We conducted multiple regression analyses separately for the 1985 and 1992 defendants who were sentenced to prison. We used the log of prison term in months as the dependent variable in all of the regression models. For the 1985 group, explanatory variables were introduced for the log of the drug amount (marijuana equivalency in Kgs); trial versus a guilty plea; whether the defendant was helpful to the prosecutor or not; age at sentence; gender; and marital status. In addition to the explanatory variables used for the 1985 group, the model for the 1992 group also included explanatory variables measuring U.S. citizenship and a set of variables (dummy coded) measuring functional role in the drug offense. For the 1985 group, the R-square (explained variance) for the full regression model (the model that included all of the explanatory variables) was 0.2402 and for a model that excluded only the drug amount variable the R-square was 0.0905. Therefore, we see that drug amount accounted for 62 percent of the explained variance in the full model (i.e., $(0.2402 - 0.0905)/0.2402$). Using this measure of explanatory importance, we see that drug amount is, by far, the most important variable for explaining prison time served for those in 1985 who were sentenced to prison. Similarly, for the 1992 group, the R-square for the full model was 0.4099 and the R-square was 0.2014 for the model from which the drug amount variable was excluded. Therefore, 51 percent of the explained variance in the full model may be accounted for by the drug amount variable alone (i.e., $(0.4099 - 0.2014)/0.4099$). These regression analyses help justify comparing the 1985 and 1992 sentences for drug law violators controlling for drug amount alone. For the remaining variables predicting prison term we will assume that they are distributed randomly across drug amount categories both in 1985 and 1992. The extremely low correlations between each of these explanatory variables and the drug amount variable (always less than .10) for both the 1985 and 1992 groups, support this assumption.

²⁸ The data for the 1985 sentenced offenders were obtained from the United States Sentencing Commission and are the same data used in evaluating the impact of Sentencing Guidelines on the Federal Prison Population (see, Supplementary Report on The Initial Sentencing Guidelines and Policy Statements, United States Sentencing Commission, June 18, 1987). The Sentencing Commission obtained these data from the Administrative Office of the U.S. Courts and the Federal Bureau of Prisons.

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shows sentencing outcomes for persons with zero criminal history points and table 29 has outcomes for persons with one criminal history point. Sentences in each table are grouped by 19 drug weight categories representing marijuana equivalency weights in kilograms (Kg's) corresponding to each of the 19 offense severity scores based on drug weight. The equivalency weights were computed using tables in the 1992 United States Sentencing Commission Guidelines Manual.

The two top shaded rows in tables 28 and 29 indicate the two categories of drug quantities under the Guidelines for which a defendant could receive straight probation, i.e., probation without any period of confinement. Because only defendants in the lowest two drug weight categories were eligible for probation in 1992, we can see that most of the defendants who received probation in 1985 would be precluded from a sentence of probation in 1992 by the restrictions imposed by the Guidelines.

The tables demonstrate the increased number of low-level drug offenders sentenced to prison in 1992, rather than to probation. Overall, 17.7 percent of offenders with zero criminal history points (table 28) and 16.0 percent of those with one criminal history point (table 29) received probation in 1985. Even though we selected the 1992 sample based upon offenders receiving prison sentences, it is clear from tables 28 and 29 that in 1985, many defendants having the same criminal history points and similar drug quantities to those receiving prison in 1992 received probation in 1985.

The shaded rows in tables 28 and 29, beginning with the row where the marijuana equivalent rate was between 100 and 400 kilograms, represent drug quantities that trigger mandatory-minimum penalties. Tables 28 and 29 demonstrate the importance of mandatory-minimum penalties in current sentencing practices. Furthermore, tables 28 and 29 demonstrate that offenders sentenced to prison in 1985 served considerably less time in prison than the 1992 group. Overall, members of the 1985 group who went to prison having zero criminal history points stayed, on average, 24.9 months (table 28) while those with one criminal history point, stayed, on average, 23 months (table 29). By comparison, all of the 1992 group were sentenced to prison and will serve, on average, 61.2 months for those with zero criminal history points and, on average, 68.0 months for those with one criminal history point, assuming they do not forfeit any prison good time.

Another way to contrast sentences is to compare sentence lengths among different offense categories. By doing this, we gain a sense of the criminal justice system's view of the relative harm caused by various offenses. A precise comparison would equate circumstances of the offense. That type of comparison is beyond the scope of this study. Instead, we compared the sentences prior to and after the implementation of Sentencing Guidelines by adjusting for the proportion of defendants receiving a sentence of probation. This was important because far fewer offenders receive a sentence of probation now than was the case prior to the Guidelines. Another important consideration is the modification of time served

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that resulted from parole decision-making prior to the Guidelines. Rather than compare sentences, a fairer comparison is between time served prior to and after the implementation of Sentencing Guidelines. Whereas offenders now serve at least 85 percent of their sentence under the current sentencing structure, offenders often served 33 percent of their sentence prior to the Sentencing Guidelines.

Making these adjustments, we found that in 1986, robbery defendants served, on average, 44.8 months, while defendants convicted of a drug offense served, on average, 23.1 months. If we gauge the relative harm of robbery to drug crimes by forming the ratio of the two, we find that the harm value of robbery was 1.93 that of drug offenses. By contrast, in 1991, the relative harm of robbery (90.8 months time served) to drug offenses (71.8 months time served) was 1.26.

Table 21 in the U.S. Sentencing Commission's 1992 Annual Report lists the average and median sentence lengths of offenders convicted in 1992 by criminal history category (p. 63). For criminal history category I offenders, the following median sentences are listed by offense: murder, 170 months; drug trafficking, 60 months; kidnapping/hostage-taking, 57 months; robbery, 51 months; arson, 36.5 months; racketeering/extortion, 36 months; assault, 24 months; and firearms, 15 months. As a result of mandatory-minimum sentences and their raising Guideline penalties, the relative harm of drug trafficking has been elevated above that of almost every serious crime other than murder.

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Section VIII. The Relationship Between Functional Role and Drug Quantity for Defendants With Zero or One Criminal History Point(s)

Throughout this paper, we have used a definition of risk that is independent of drug quantity. In previous sections, we have reviewed evidence that suggests that low-level drug law violators may be good candidates for possible sentence modifications. Regardless of risk, some might argue that drug quantity, by itself, should be a sufficient reason for a longer prison sentence. Indeed, the Guidelines are premised on the relationship between drug amounts and sentences ranging from probation to life imprisonment. One way to reconcile shorter (or longer) sentences or alternative sanctions with large drug quantities is to allow reductions (or increments) depending on the role in the offense. Again, the Guidelines explicitly allow for these adjustments with mitigating and aggravating roles.

To gain additional insight into the relationship between role and potential sentencing alternatives, we developed information to show the distribution of drug quantities by functional role. In this instance, functional role was collapsed into four categories: high-level dealer, street-level dealer, courier, and peripheral role. High-level dealer included the previously collapsed categories of mid-level dealer and money launderer/manufacturer. We collapsed these categories to have a sufficient number of cases. We used 19 drug quantity categories corresponding to the U.S. Sentencing Commission's 19 levels of offense severity based on marijuana-equivalent drug amounts. In this analysis, we had to exclude offenders convicted of drug offenses in which stimulants or hallucinogens were the primary drugs. These cases were excluded because the precise stimulant is required to translate drug amount into marijuana equivalency and the precise drug was not recorded. Table 30 and figure 3A (a box and whisker plot of these numbers) represent the relationship between functional role and drug quantities for offenders with zero or one criminal history point(s).

One may have expected that larger drug quantities would be associated with the higher level functional roles. This was not the case. Instead, what table 30 and figure 3A show is that the distribution of the amount of drugs is the same across the different functional roles. If there is a difference, street-level dealers were involved with less drug quantities than high-level dealers, couriers, or those with a peripheral role. In fact, those with a peripheral role were involved with more drugs than couriers and street-level dealers and almost as much as high-level dealers.

The shaded portions of table 30 also indicate that only the first two rows correspond to drug quantities associated with the possibility of probation. The bottom shaded rows beginning with the "100 < 400" marijuana equivalence in kilograms indicate which drug quantities trigger a mandatory-minimum penalty. Table 30 also shows that offenders with zero or one criminal history point(s) are generally involved with sufficient drugs to trigger a mandatory-minimum penalty. Of all the defendants represented in table 30, 76.7 percent had sufficient drug amounts to warrant a mandatory-minimum penalty.

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If defendants were sentenced exclusively on the basis of drug amounts, it is clear from table 30 and figure 3A that all defendants regardless of their role would receive, on average, the same sentence. If functional role is a valid basis for sentence modifications, we would expect to see some relationship between functional role and the guideline sentence whether or not there was a departure. Even if a defendant did not receive a departure, his or her guideline range would be modified downward or upward depending on functional role. Of course, for those defendants whose adjustments were trumped by mandatory-minimum penalties, only so much adjustment could occur.

In figure 3B, we represent the lower value of the final guideline range recommended by the court after criminal history points and all adjustments were applied. As can be seen in figure 3B, there was movement in the distributions toward a reordering by functional role. Except for peripheral role, higher level functional roles were associated with higher guideline ranges.

Figure 3C represents the distribution of sentences by the four functional roles after downward and substantial assistance departures were applied. Figure 3C shows that sentences for peripheral role and high-level dealer came down relative to their Guideline range minimum. Sentences for couriers and street-level dealers also came down, but not as significantly.

Figures 3A, 3B, and 3C together demonstrate the following: regardless of the functional role a defendant played in the drug scheme, the drug amounts involved in the offense are similar across the roles. Guideline adjustments tend to mitigate the influence of drug quantity on the Guideline range and role becomes more important in the sentence. Departures (downward and 5K1.1) tend to adjust sentences associated with peripheral roles downward more than courier, or street-level roles; high-level dealers also tend to have their sentences adjusted downward due to departures.

One implication of these data is that prospective sentencing legislation or Guideline changes that would permit modification of sentences could rely on functional role to provide further downward or upward adjustments.

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TABLE 1: Sentence Length and Offense Severity of High and Low-Level U.S. Citizen and Non-Citizen Drug Law Violators, June 1993.

Sentence Length and Offense Severity	ALL BOP		Drug Law Violators							
			U.S. Citizen				Non-Citizen			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
Total ¹	76,835	100.0	22,733	100.0	9,258	100.0	6,163	100.0	7,044	100.0
1. Sentence Length										
Less than 2 years.....	9,700	12.6	756	3.3	797	8.6	75	1.2	406	5.8
2 to 5 years.....	16,160	21.0	3,615	15.9	2,482	26.8	669	10.9	1,656	23.5
5 to 10 years....	23,027	30.0	11,626	51.1	3,752	40.5	1,967	31.9	3,011	42.7
10 to 20 years...	18,935	24.6	7,222	31.8	2,011	21.7	2,554	41.1	1,774	25.2
20 to 30 years...	5,314	6.9	1,905	8.4	153	1.7	578	9.4	147	2.1
30 to 40 years...	3,162	4.1	688	3.0	42	0.5	201	3.3	38	0.5
40 or more years.....	2,111	2.7	536	2.4	21	0.2	139	2.3	12	0.2
Mean Months.....	121.9	-	138.9	-	78.8	-	156.9	-	85.0	-
5 year sentence..	7,713	10.0	2,301	10.1	1,354	14.6	510	8.3	1,198	17.0
10 year sentence.....	4,944	6.4	1,804	7.9	684	7.4	527	8.4	559	7.9

¹Total reflects total population confined and not necessarily total response for each item.

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Sentence Length and Offense Severity	ALL BOP		Drug Law Violators							
			U.S. Citizen				Non-Citizen			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
2. Offense Severity²										
Lowest or Low Moderate.....	8,737	14.0	3,021	14.9	1,013	13.8	265	4.7	208	4.0
Moderate.....	25,928	41.8	9,010	44.6	4,229	57.6	2,289	40.9	3,326	64.5
High.....	12,643	20.4	4,725	23.4	2,077	28.3	1,448	25.9	1,576	30.6
Greatest.....	14,756	23.8	3,451	17.1	22	0.3	1,590	28.4	46	0.9

Source: SENTRY database, Federal Bureau of Prisons

²Offensive severity refers to most serious current offense. Offenses such as counterfeiting - under \$2,000 and tax violations are considered lowest level offenses while murder, kidnapping, and aircraft hijacking fall in the greatest severity level. In the case drug law violations, the lowest severity level applies to persons whose drug possession was for personal use while the greatest severity applies to persons who maintained an integral or managerial role in a drug offense involving large quantities of drugs. The middle scale ratings are determined by the amount of drugs involved in the offense.

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TABLE 2: Demographic and Other Background Characteristics of High and Low-Level U.S. Citizen and Non-Citizen Drug Law Violators, June 1993.

ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
Total¹	76,835	100.0	22,733	100.0	9,258	100.0	6,163	100.0	7,044	100.0
1991 Survey Total²	54,006	100.0	16,166	100.0	6,502	100.0	4,900	100.0	3,535	100.0
1. Sex										
Female.....	6,271	8.2	1,460	6.4	1,506	16.3	254	4.1	763	10.8
Male.....	70,564	91.8	21,273	93.6	7,752	83.7	5,909	95.9	6,281	89.2
2. Race/Ethnicity										
Hispanic.....	19,407	25.3	3,425	15.1	1,888	20.4	4,300	69.8	4,890	69.4
Non-H. White.....	31,124	40.5	9,630	42.4	4,301	46.5	769	12.5	1,816	11.6
Non-H. Black.....	24,205	31.6	9,477	41.7	2,953	31.9	959	15.6	1,206	17.1
Non-H. Other.....	2,019	2.6	201	0.9	116	1.3	135	2.2	132	1.9
3. Age										
24 or less.....	7,012	9.1	2,217	9.8	1,195	12.9	303	4.9	519	7.4
25 to 30.....	12,572	16.4	3,572	17.3	1,839	19.9	945	15.3	1,310	18.6
30 to 35.....	14,618	19.0	4,152	18.3	1,758	19.0	1,290	20.9	1,639	23.3
35 to 40.....	13,936	18.1	3,940	17.3	1,525	16.5	1,303	21.1	1,385	19.6
40 to 50.....	18,902	24.6	5,570	24.5	1,996	21.6	1,615	26.2	1,558	22.1

¹Total reflects total population confined and not necessarily total response rate for each item.

²Same as above.

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ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
50 to 60.....	7,397	9.6	2,204	9.7	748	8.1	376	9.3	506	7.2
60 or more.....	2,398	3.1	678	3.0	197	2.1	131	2.1	127	1.8
4. Marital Status										
Married.....	20,225	37.9	5,790	36.4	2,632	40.8	2,695	55.2	1,914	55.1
Widowed.....	952	1.8	226	1.4	75	1.2	66	1.4	85	2.4
Separated or Divorced.....	14,757	27.7	4,578	28.8	1,518	23.5	937	19.2	513	14.8
Never Married....	17,382	32.6	5,325	33.5	2,220	34.4	1,190	24.4	964	27.7
5. Citizenship (Non-Citizens Only)										
Total Non- Citizens.....	17,282	100.0					6,163	100.0	7,044	100.0
Mexico.....	6,456	37.4					1,863	29.3	2,310	32.8
Colombia.....	3,363	19.5					1,211	19.6	1,831	26.0
Cuba.....	1,523	8.8					895	14.5	395	5.6
Dominican Republican.....	1,009	5.8					442	7.2	449	6.4
Jamaica.....	882	5.1					474	7.7	252	3.6
Nigeria.....	726	4.2					141	2.3	476	6.8
Canada.....	212	1.2					81	1.3	57	0.8
Haiti.....	189	1.1					74	1.2	96	1.4
Panama.....	147	0.9					68	1.2	49	0.7
Guyana.....	122	0.7					71	1.1	34	0.5
Ghana.....	119	0.7					18	0.3	92	1.3
Venezuela.....	118	0.7					43	0.7	58	0.8

U.S. Department of Justice

ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
Italy.....	113	0.7					52	0.8	35	0.5
Pakistan.....	100	0.6					30	0.5	53	0.7
Other.....	2,203	12.7					700	11.4	854	12.1
6. Education (1991 Survey)										
Less than High School.....	5,056	9.4	1,384	8.6	475	7.3	1,024	21.0	764	21.8
Some High School.....	7,647	14.2	2,699	16.8	1,116	17.2	617	12.7	265	7.6
High School Graduate.....	24,009	44.7	7,385	46.0	2,817	43.5	1,941	39.9	1,385	39.6
Some College.....	11,982	22.3	3,699	23.0	1,532	23.6	760	15.6	701	20.0
College Grad.....	5,005	9.3	892	5.6	543	8.4	523	10.8	384	11.0
7. Employment (1991 Survey)										
Full-Time.....	35,044	65.4	10,057	62.7	4,354	67.2	3,636	75.1	2,523	71.6
Part-Time.....	3,518	6.6	1,216	7.6	397	6.1	364	7.5	367	10.4
Occasional.....	1,283	2.4	424	2.6	163	2.5	139	2.9	67	1.9
Looking for Work.....	5,382	10.0	1,755	10.9	622	9.6	518	10.7	341	9.7
Not Looking for Work.....	8,335	15.6	2,578	16.1	944	14.6	185	3.8	226	6.4
8. Income (1991 Survey)										
0 to \$4999.....	9,600	17.8	2,686	16.6	1,364	21.0	1,017	20.8	1,040	29.4
\$5,000 to \$9,999.....	7,242	13.4	2,036	12.6	978	15.0	901	18.4	587	16.6

U.S. Department of Justice

ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
\$10,000 to \$19,999.....	11,583	21.5	3,681	22.8	1,518	23.3	1,183	24.2	986	27.9
\$20,000 to \$49,999.....	10,303	19.1	3,050	18.9	1,558	24.0	907	18.5	421	11.9
\$50,000 or more.....	5,813	10.8	1,887	11.7	499	7.7	246	5.0	78	2.2
Unknown.....	9,461	17.5	2,825	17.5	585	9.0	645	13.2	423	12.0
9. Income from Illegal Sources (1991 Survey)										
Most.....	5,713	10.6	2,285	14.1	677	10.4	214	4.4	55	1.6
Some.....	2,489	4.6	975	6.0	347	5.3	112	2.3	53	1.5
Very Little....	2,229	4.1	914	5.7	382	5.9	139	2.8	44	1.3
None.....	43,575	80.7	11,992	74.2	5,097	78.4	4,436	90.5	3,380	95.6
10. Support Others (1991 Survey)										
Yes.....	36,050	66.8	10,727	66.4	4,270	65.6	3,960	80.8	2,885	81.6

Source: SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 3: Drug and Alcohol Use of High and Low-Level U.S. Citizen and Non-Citizen Drug Law Violators, June 1993.

ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
1991 Survey Total¹	54,006	100.0	16,166	100.0	6,502	100.0	4,900	100.0	3,535	100.0
1. Drug Use History										
Ever Used Drugs..	32,301	60.1	11,649	72.6	4,446	68.6	1,704	34.9	944	26.8
Regularly Used ² ...	22,586	42.0	8,488	52.9	2,937	45.3	860	17.6	456	12.9
Used Month Before Arrest.....	17,066	31.8	6,363	39.7	2,242	34.6	768	15.7	416	11.8
Used a Needle....	7,476	13.8	2,579	16.0	563	8.7	25	0.5	10	0.3
Under Influence of Drugs at Time of Arrest.....	8,994	16.7	3,482	21.5	1,000	15.4	316	6.5	198	5.6
Crime was for Money for Drugs..	5,324	9.9	1,956	12.1	599	9.2	155	3.2	76	2.1
2. Drug Regularly Used³										
Marijuana.....	17,154	31.8	6,298	39.0	2,262	34.8	522	10.7	276	7.8
Cocaine.....	10,098	18.7	3,853	23.8	1,519	23.4	477	9.7	204	5.8

¹Totals reflect total population confined and not necessarily total response for each item.

² For drugs, regular use is once a week or more for at least a month.

³ For drugs, regular use is once a week or more for at least a month.

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ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
Crack.....	2,600	4.8	959	5.9	343	5.3	49	1.0	39	1.1
Heroin/Opiates..	4,962	9.2	1,718	10.6	267	4.1	55	1.1	48	1.4
All Other.....	7,071	13.1	2,608	16.1	809	12.5	26	0.5	41	1.2
3. Past Treatment for Drug Use										
Yes.....	6,937	12.8	2,694	16.7	776	11.9	71	1.4	21	0.6
4. Alcohol										
Regularly Used... ⁴	9,132	16.9	2,994	18.5	873	13.4	428	8.7	209	5.9
Under Influence of Alcohol at time of Arrest...	5,906	10.9	1,356	9.6	416	6.4	322	6.6	266	7.5

Source: SENTRY database, Federal Bureau of Prisons

⁴For alcohol, regular use is daily or almost daily in year prior to arrest.

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TABLE 4: Institution Security Level and Prison Adjustment Record or High and Low-Level U.S. Citizen and Non-Citizen Drug Law Offenders, June 1993.

ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
Total¹	76,835	100.0	22,733	100.0	9,258	100.0	6,163	100.0	7,044	100.0
1991 Survey Total²	54,006	100.0	16,166	100.0	6,502	100.0	4,900	100.0	3,535	100.0
1. Institution Security Level										
Minimum.....	17,739	25.4	5,212	24.0	5,798	69.8	344	5.9	782	13.3
Low.....	15,635	22.4	4,763	21.9	1,132	13.6	1,737	29.6	2,825	48.0
Medium.....	22,308	31.9	8,002	36.8	576	6.9	2,901	49.5	1,299	22.1
High.....	5,817	8.3	1,320	6.1	17	0.2	309	5.3	31	0.5
Administrative...	8,349	12.0	2,460	11.3	787	9.5	574	9.8	947	16.1
2. Individual Security Level										
Minimum.....	24,068	31.4	6,297	27.7	7,776	84.2	355	5.8	979	13.9
Low.....	27,679	36.1	7,765	34.2	1,167	12.6	3,358	54.5	5,743	81.6
Medium.....	16,919	22.1	6,654	29.3	265	2.9	2,049	33.3	295	4.2
High.....	8,063	10.5	2,015	8.9	26	0.3	397	6.4	24	0.3

¹Total reflects total population confined and not necessarily total response rate for each item.

²Total reflects total population confined and not necessarily total response rate for each item.

U.S. Department of Justice

ITEM	ALL BOP		Drug Law Violators									
			U.S. Citizens					Non-Citizens				
			High Level		Low Level		High Level		Low Level			
			#	%	#	%	#	%	#	%	#	%
3. Disciplinary Reports Within Last Year												
None.....	47,636	76.8	15,207	75.3	6,219	84.7	4,445	79.5	4,462	86.5		
1.....	8,459	13.6	3,050	15.1	789	10.7	759	13.6	492	9.5		
2 or more.....	5,969	9.6	1,950	9.7	333	4.5	386	6.9	202	3.9		
4. Type of Disciplinary Report¹												
None.....	44,967	72.4	14,442	71.5	6,143	83.7	4,188	74.9	4,400	85.3		
200 to 400 level in last 2 years..	10,507	16.9	3,982	19.7	994	13.5	948	17.0	653	12.7		
Any 100 level in last 10 years....	6,590	10.6	1,783	8.8	204	2.8	456	8.2	103	2.0		
5. Prison Program Participation (1991 Survey)												
Organizations....	22,486	41.8	6,407	39.8	2,952	45.5	2,403	49.3	1,587	45.0		
Education.....	31,191	58.0	9,314	57.9	3,935	61.0	3,538	72.5	2,695	76.1		
Vocational Training.....	15,827	29.4	4,700	29.2	1,676	25.9	1,652	33.9	1,025	29.1		
Counseling.....	6,209	11.6	1,697	10.6	570	8.8	346	7.1	334	9.5		

¹Disciplinary reports received by Federal offenders are classified from 100 to 400 level in terms of severity. Disciplinary reports in the 100 level are of greatest severity, while 200-level are high severity, 300-level are moderate, and 400-level are low moderate.

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ITEM	ALL BOP		Drug Law Violators							
			U.S. Citizens				Non-Citizens			
			High Level		Low Level		High Level		Low Level	
			#	%	#	%	#	%	#	%
Furloughs.....	2,586	4.8	801	5.0	768	11.9	56	1.1	46	1.3
6. Family Contact Weekly or More Often (1991 Survey)										
Telephone.....	18,612	45.7	6,104	49.1	2,835	48.7	1,624	40.7	854	30.9
Mail.....	15,597	38.4	4,893	39.5	2,117	43.8	1,588	40.0	949	34.6
Visiting.....	2,570	6.3	801	6.5	417	6.6	223	5.6	183	6.6

Source: SENTRY database, Federal Bureau of Prisons

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TABLE 5: MANDATORY MINIMUM SENTENCE LENGTH IN MONTHS BY CITIZENSHIP						
MONTHS	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
No Mandatory Minimum	111	36.51	142	30.67	253	32.99
12-Months	0	0.00	2	0.43	2	0.26
60-Months	90	29.61	161	34.77	251	32.72
120-Months	99	32.57	151	32.61	250	32.59
180-Months	1	0.33	9	0.00	1	0.13
240-Months	2	0.66	4	0.86	6	0.78
360-Months	0	0.00	1	0.22	1	0.13
Life	0	0.00	1	0.22	1	0.13
Missing	1	0.33	1	0.22	2	0.26
Totals	304	39.63	463	60.37	767	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

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TABLE 6: CRIMINAL HISTORY CATEGORY BY CITIZENSHIP						
C.H. CATEGORY	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
I	284	93.42	396	85.53	680	88.66
II	12	3.95	45	9.72	57	7.43
III	8	2.63	19	4.10	27	3.52
IV	0	0.00	2	0.43	2	0.26
Missing	0	0.00	1	0.22	1	0.13
Totals	304	39.63	463	60.37	767	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

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TABLE 7: CRIMINAL HISTORY POINTS BY CITIZENSHIP						
POINTS	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
0	264	86.84	334	72.14	598	77.97
1	20	6.58	62	13.39	82	10.69
2	4	1.32	17	3.67	21	2.74
3	8	2.63	28	6.05	36	4.69
4	6	1.97	8	1.73	14	1.83
5	1	0.33	11	2.38	12	1.56
6	1	0.33	0	0.00	1	0.13
7	0	0.00	0	0.00	0	0.00
8	0	0.00	2	0.43	2	0.26
Missing	0	0.00	1	0.22	1	0.13
Totals	304	39.63	463	60.37	767	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

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TABLE 8: CONVICTION UNDER 18 § 924(C) BY CITIZENSHIP						
924(c)	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
No	301	99.01	459	99.14	760	99.09
Yes	3	0.99	4	0.86	7	0.91
Totals	304	39.63	463	60.37	767	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
 SENTRY database, Federal Bureau of Prisons

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TABLE 9: SECONDARY OFFENSE BY CITIZENSHIP						
OFFENSE	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
Drugs: Trafficking	297	97.70	450	97.19	747	97.39
Drugs: Comm. Facl.	5	1.64	4	0.86	9	1.17
Drugs: Possession	0	0.00	2	0.43	2	0.26
Tax	1	0.33	3	0.65	4	0.52
Money Laundering	1	0.33	0	0.00	1	0.13
Racketeering	0	0.00	2	0.43	2	0.26
Admininstra- tion of Justice	0	0.00	2	0.43	2	0.26
Totals	304	39.63	463	60.37	767	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

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TABLE 10: NUMBER OF DEFENDANTS WITH ANY PRIOR ARREST, A PRIOR ARREST FOR A VIOLENT CRIME, A PRIOR ARREST FOR A DRUG CRIME OR A PRIOR ARREST FOR ANY CRIME OTHER THAN A DRUG OR A VIOLENT OFFENSE

Total Number of Prior Arrests			Number of Arrests for a Violent Offense			Number of Arrests for a Drug Offense			Number of Arrests for a Crime Other than a Drug Crime or Violent Offense		
No.	Frequency	%	No.	Frequency	%	No.	Frequency	%	No.	Frequency	%
0	505	66.7	0	699	91.1	0	630	82.1	0	601	78.4
1	105	13.9	1	41	5.3	1	80	10.4	1	88	11.5
2	48	6.3	2	18	2.3	2	22	2.9	2	36	4.7
3	33	4.4	3	5	0.7	3	16	2.1	3	15	2.0
4	20	2.6	4	2	0.3	4	12	1.6	4	14	1.8
5	17	2.2	5	1	0.1	5	3	0.4	5	7	0.9
6	8	1.1	6	-	-	6	2	0.3	6	3	0.4
7	6	0.8	7	1	0.1	7	1	0.1	7	-	-
8	2	0.3				8	-	-	8	3	0.4
9	1	0.1				9	-	-			
10	4	0.5				10	-	-			
11	3	0.4				11	1	0.1			
12	4	0.5									
13	-	-									
14	1	0.1									

Source: National Crime Information Center, FBI

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TABLE 11: NUMBER OF DEFENDANTS WITH A PRIOR ARREST BY CITIZENSHIP						
NUMBER OF PRIOR ARRESTS	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
0	230	76.67	275	60.18	505	66.71
1	32	10.67	73	15.97	105	13.87
2	11	3.67	37	8.10	48	6.34
3	8	2.67	25	5.47	33	4.36
4	7	2.33	13	2.84	20	2.64
5	3	1.00	14	3.06	17	2.25
6	2	0.67	6	1.31	8	1.06
7	1	0.33	5	1.09	6	0.79
8	0	0.00	2	0.44	2	0.26
9	0	0.00	1	0.22	1	0.13
10	3	1.00	1	0.22	4	0.53
11	1	0.33	2	0.44	3	0.40
12	1	0.33	3	0.66	4	0.53
13	-	-	-	-	-	-
14	1	0.33	0	0.00	1	0.13
Totals	300	39.63	457	60.37	757	100.00

Sources: National Crime Information Center, FBI
SENTRY database, Federal Bureau of Prisons

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TABLE 12: NUMBER OF DEFENDANTS WITH A PRIOR ARREST FOR A VIOLENT OFFENSE BY CITIZENSHIP						
NUMBER OF PRIOR ARRESTS	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
0	289	95.07	410	88.55	699	91.13
1	6	1.97	35	7.56	41	5.35
2	6	1.97	12	2.59	18	2.35
3	1	0.33	4	0.86	5	0.65
4	1	0.33	1	0.22	2	0.26
5	0	0.00	1	0.22	1	0.13
6	-	-	-	-	-	-
7	1	0.33	0	0.00	1	0.13
Totals	304	39.63	463	60.37	767	100.00

Sources: National Crime Information Center, FBI
SENTRY database, Federal Bureau of Prisons

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TABLE 13: NUMBER OF DEFENDANTS WITH A PRIOR ARREST FOR A DRUG OFFENSE BY CITIZENSHIP						
NUMBER OF PRIOR ARRESTS	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
0	267	87.83	363	78.40	630	82.14
1	19	6.25	61	13.17	80	10.43
2	4	1.32	18	3.89	22	2.87
3	3	0.99	13	2.81	16	2.09
4	8	2.63	4	0.86	12	1.56
5	3	0.99	0	0.00	3	0.39
6	0	0.00	2	0.43	2	0.26
7	0	0.00	1	0.22	1	0.13
8	-	-	-	-	-	-
9	-	-	-	-	-	-
10	-	-	-	-	-	-
11	0	0.00	1	0.22	1	0.13
Totals	304	39.63	463	60.37	767	100.00

Sources: National Crime Information Center, FBI
SENTRY database, Federal Bureau of Prisons

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TABLE 14: NUMBER OF PRIOR ARRESTS, ARRESTS FOR VIOLENT OFFENSES, ARRESTS FOR DRUG OFFENSES, AND ARRESTS FOR OTHER THAN VIOLENT OR DRUG OFFENSES FOR U. S. CITIZEN DEFENDANTS WHO RECEIVED ZERO CRIMINAL HISTORY POINTS

Total Number of Prior Arrests			Number of Arrests for a Violent Offense			Number of Arrests for a Drug Offense			Number of Arrests for a Crime Other than a Drug Crime or Violent Offense		
No.	Frequency	%	No.	Frequency	%	No.	Frequency	%	No.	Frequency	%
0	232	70.73	0	302	90.69	0	285	85.59	0	272	81.68
1	46	14.02	1	21	6.31	1	34	10.21	1	39	11.71
2	19	5.79	2	7	2.10	2	8	2.40	2	8	2.40
3	11	3.35	3	3	0.90	3	4	1.20	3	5	1.50
4	6	1.83	Total	333	100.00	4	0	0.00	4	4	1.20
5	6	1.83				5	-	-	5	4	1.20
6	2	0.61				6	1	0.30	6	1	0.30
7	3	0.91				7	-	-	Total	333	100.00
8	0	0.00				8	-	-			
9	1	0.30				9	-	-			
10	1	0.30				10	-	-			
11	-	-				11	1	0.30			
12	1	0.30				Total	333	100.00			
Total	328	100.00									

Sources: National Crime Information Center, FBI SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 15: NUMBER OF PRIOR ARRESTS, ARRESTS FOR VIOLENT OFFENSES,
ARRESTS FOR DRUG OFFENSES, AND ARRESTS FOR OTHER THAN VIOLENT OR DRUG OFFENSES
FOR NON-CITIZEN DEFENDANTS WHO RECEIVED ZERO CRIMINAL HISTORY POINTS

Total Number of Prior Arrests			Number of Arrests for a Violent Offense			Number of Arrests for a Drug Offense			Number of Arrests for a Crime Other than a Drug Crime or Violent Offense		
No.	Frequency	%	No.	Frequency	%	No.	Frequency	%	No.	Frequency	%
0	213	81.92	0	256	96.97	0	244	92.42	0	235	89.02
1	25	9.62	1	5	1.89	1	11	4.17	1	21	7.95
2	8	3.08	2	2	0.76	2	3	1.14	2	3	1.14
3	5	1.92	3	1	0.38	3	3	1.14	3	2	0.76
4	6	2.31	Total	264	100.00	4	3	1.14	4	2	0.76
5	1	0.38				Total	264	100.00	5	-	-
6	2	0.77							6	1	0.38
7	-								Total	264	100.00
8	-										
9	-										
10	0	0.00									
Total	260	100.00									

Sources: National Crime Information Center, FBI
SENTRY database, Federal Bureau of Prisons

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TABLE 16: FUNCTIONAL ROLE IN DRUG OFFENSE BY CITIZENSHIP						
ROLE	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
High Level Dealer	14	4.68	13	2.90	27	3.61
Pilot/Boat Captain	4	1.34	4	0.89	8	1.07
Mid-Level Dealer	49	16.39	103	22.99	152	20.35
Street-Level Dealer	33	11.04	132	29.46	165	22.09
Manufacturer	1	0.33	27	6.03	28	3.75
Financier	1	0.33	0	0.00	1	0.13
Money Launderer	1	0.33	5	1.12	6	0.80
Bodyguard	2	0.67	2	0.45	4	0.54
Broker	14	4.68	17	3.79	31	4.15
Courier	72	24.08	77	17.19	149	19.95
Mule	80	26.76	30	6.70	110	14.73
Renter/Storer	4	1.34	6	1.34	10	1.34
Moneyrunner	2	0.67	1	0.22	3	0.40
Off-Loader	5	1.67	4	0.89	9	1.20
Worker/Gofer	15	5.02	19	4.24	34	4.55

Continued on next page ...

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TABLE 16: FUNCTIONAL ROLE IN DRUG OFFENSE BY CITIZENSHIP (CONTINUED)						
ROLE	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
Enabler/ Passive	2	0.67	6	1.34	8	1.07
User Only	0	0.00	2	0.45	2	0.27
Totals	299	40.03	448	59.97	747	100.0

Source: Sentence Monitoring database, U.S. Sentencing Commission

U.S. Department of Justice

TABLE 17: DEPARTURE STATUS BY CITIZENSHIP						
DEPARTURE	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
No Departure	232	79.73	315	69.23	547	73.32
Upward	0	0.00	1	0.22	1	0.13
Downward	22	7.56	15	3.30	37	4.96
Substantial Assistance	37	12.71	124	27.25	161	21.58
TOTALS	291	39.01	455	60.99	746	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 18: MITIGATING ROLE REDUCTION BY CITIZENSHIP						
ROLE REDUCTION	NON-CITIZEN		CITIZEN		ROW TOTAL	
	Number	Col. Percent	Number	Col. Percent	Number	Col. Percent
-4	62	20.39	21	4.54	83	10.82
-3	3	0.99	3	0.65	6	0.78
-2	31	10.20	63	13.61	94	12.26
None	208	68.42	376	81.21	584	76.14
Totals	304	39.63	463	60.37	767	100.0

Sources: Sentence Monitoring database, U.S. Sentencing Commission
 SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 19: COLLAPSED FUNCTIONAL ROLE BY DEPARTURE								
ROLE	NONE		UPWARD		DOWNWARD/SUBSTANTIAL ASSISTANCE		ROW TOTAL	
	Number	Row Percent	Number	Row Percent	Number	Row Percent	Number	Col. Percent
High Level	18	69.23	0	0.00	8	30.77	26	3.58
Mid Level	94	63.95	0	0.00	53	36.05	147	20.25
Money/Manufacturer	59	76.62	1	1.30	17	22.08	77	10.61
Street	130	80.25	0	0.00	32	19.75	162	22.31
Courier	192	76.80	0	0.00	58	23.20	250	34.44
Peripheral Role	41	64.06	0	0.00	23	35.94	64	8.82
Totals	534	73.55	1	0.14	191	26.31	726	100.00

Source: Sentence Monitoring database, U.S. Sentencing Commission

U.S. Department of Justice

TABLE 20: COLLAPSED FUNCTIONAL ROLE BY DOWNWARD DEPARTURE STATUS
FOR NON-CITIZENS

ROLE	NONE		DOWNWARD/SUBSTANTIAL ASSISTANCE		ROW TOTAL	
	Number	Row Percent	Number	Row Percent	Number	Col. Percent
High Level	10	71.43	4	28.57	14	4.90
Mid Level	34	72.34	13	27.66	47	16.43
Money/Manufacturer	19	86.36	3	13.64	22	7.69
Street	28	90.32	3	9.68	31	10.84
Courier	120	82.19	26	17.81	146	51.05
Peripheral Role	18	69.23	8	30.77	26	9.09
Totals	229	80.07	57	19.93	286	100.00

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 21: COLLAPSED FUNCTIONAL ROLE BY DEPARTURE STATUS FOR CITIZENS								
ROLE	NONE		UPWARD		DOWNWARD/SUBSTANTIAL ASSISTANCE		ROW TOTAL	
	Number	Row Percent	Number	Row Percent	Number	Row Percent	Number	Col. Percent
High Level	8	66.67	0	0.00	4	33.33	12	2.73
Mid Level	60	60.00	0	0.00	40	40.00	100	22.73
Money/Manufacturer	40	72.73	1	1.82	14	25.45	55	12.50
Street	102	77.86	0	0.00	29	22.14	131	29.77
Courier	72	69.23	0	0.00	32	30.77	104	23.64
Peripheral Role	23	60.53	0	0.00	15	39.47	38	8.64
Totals	305	69.32	1	0.23	134	30.45	440	100.00

Source: Sentence Monitoring database, U.S. Sentencing Commission

U.S. Department of Justice

TABLE 22 AVERAGE SENTENCE LENGTH IN MONTHS BY FUNCTIONAL ROLE AND CITIZENSHIP

FUNCTIONAL ROLE	CITIZENSHIP					
	Citizen			Non-Citizen		
	Average	N	S.D. ¹	Average	N	S.D.
High-Level	113.3	13	96.0	159.5	14	85.0
Mid-Level	75.1	103	45.6	93.8	49	54.5
Launderer/ Manufacturer	79.7	54	53.2	104.1	23	79.5
Street-Level	69.8	131	47.8	80.5	33	67.5
Courier	65.4	107	44.5	61.4	152	40.3
Peripheral	62.5	38	61.8	88.5	28	50.0

¹. N represents the number of defendants average sentence was based on; S.D. is the standard deviation for the distribution.

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 23: COLLAPSED FUNCTIONAL ROLE BY MITIGATING ROLE (SENTENCING GUIDELINES)						
ROLE	MITIGATING ROLE				ROW TOTAL	
	NO		YES		Number	Col. Percent
	Number	Row Percent	Number	Row Percent		
High Level	26	96.30	1	3.70	27	3.61
Mid Level	144	94.74	8	5.26	152	20.35
Money/Manufacturer	61	78.21	17	21.79	78	10.44
Street	145	87.88	20	12.12	165	22.09
Courier	154	59.46	105	40.54	259	34.67
Peripheral Role	37	56.06	29	43.94	66	8.84
Totals	567	75.90	180	24.10	747	100.00

Source: Sentence Monitoring database, U.S. Sentencing Commission

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**TABLE 24: COLLAPSED FUNCTIONAL ROLE BY MITIGATING ROLE
FOR NON-CITIZENS**

ROLE	MITIGATING ROLE				ROW TOTAL	
	NO		YES		Number	Col. Percent
	Number	Row Percent	Number	Row Percent		
High Level	13	92.86	1	7.14	14	4.68
Mid Level	49	100.00	0	0.00	49	16.39
Money/Manufacturer	17	73.91	6	26.09	23	7.69
Street	30	90.91	3	9.09	33	11.04
Courier	80	52.63	72	47.37	152	50.84
Peripheral Role	14	50.00	14	50.00	28	9.36
Totals	203	67.89	96	32.11	299	100.00

Sources: Sentence Monitoring database, U.S. Sentencing Commission
SENTRY database, Federal Bureau of Prisons

U.S. Department of Justice

TABLE 25: COLLAPSED FUNCTIONAL ROLE BY MITIGATING ROLE FOR CITIZENS						
ROLE	MITIGATING ROLE				ROW TOTAL	
	NO		YES		Number	Col. Percent
	Number	Row Percent	Number	Row Percent		
High Level	13	100.00	0	0.00	13	2.90
Mid Level	95	92.23	8	7.77	103	22.99
Money/Manufacturer	44	80.00	11	20.00	55	12.28
Street	115	87.12	17	12.88	132	29.46
Courier	74	69.16	33	30.84	107	23.88
Peripheral Role	23	60.53	15	39.47	38	8.48
Totals	364	81.25	84	18.75	448	100.00

Sources: Sentence Monitoring database, U.S. Sentencing Commission
 SENTRY database, Federal Bureau of Prisons

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TABLE 26: PART I. RECIDIVISM RATES BY CRIMINAL HISTORY CATEGORY FOR DRUG TRAFFICKERS IN THE 1987 RELEASE STUDY GROUP RELEASED IN THE UNITED STATES

Criminal History Category (Score in Parentheses)							
	I	II	III	IV	V	VI	Total
	(0-1)	(2-3)	(4-6)	(7-9)	(10-12)	(13+)	
Failed Percent	45 19.07	17 35.42	22 40.00	23 51.11	12 80.00	19 73.08	139 32.71
Successful Percent	191 80.93	31 64.58	33 60.00	22 48.89	3 20.00	7 26.92	286 67.29
Total Percent	236 55.53	48 11.29	55 12.94	45 10.59	15 3.53	26 6.12	425 100.00

PART II. MEDIAN TIME SERVED IN MONTHS FOR CITIZEN DRUG TRAFFICKERS IN THE 1987 RELEASE STUDY GROUP BY CRIMINAL HISTORY CATEGORY ¹.

Criminal History Category							
	I	II	III	IV	V	VI	Total
Median Months Served	16.8	18.7	16.3	12.4	12.7	12.6	16.4

¹ All persons in the 1987 Study Group were sentenced under the Old Law.

PART III. MEDIAN TIME SERVED IN MONTHS FOR DRUG TRAFFICKERS SENTENCED UNDER THE GUIDELINES IN FISCAL YEAR 1992 -- ADDITIONAL MONTHS THEY WILL SERVE COMPARED TO OLD LAW OFFENDERS, AND NUMBER AND PERCENT SENTENCED, BY CRIMINAL HISTORY CATEGORY

Criminal History Category							
	I	II	III	IV	V	VI	Total
Median Months They will Serve ¹	51.0	51.9	61.2	74.0	81.2	138.4	
Additional Months Under New Law	34.2	33.2	44.9	61.6	68.5	125.8	
Number Sentenced in FY 1992. Percent	9,007 62.3%	1,937 13.4%	1,819 12.5%	732 5.1%	350 2.4%	614 4.3%	14,459

¹ Estimated by reducing the median sentence by 15 percent, the maximum available good time, because some inmates may have good time taken away because of prison misconduct this will slightly underestimate the actual median time served.

Source: Harer, Miles D. "Recidivism Among Federal Inmates in 1987: A Preliminary Report, Bureau of Prisons, 1993

U.S. Department of Justice

TABLE 27: RECIDIVISM ¹ RATES BY CRIMINAL HISTORY POINTS FOR DRUG TRAFFICKERS IN THE 1987 RELEASE STUDY GROUP RELEASED IN THE UNITED STATES															
	0	1	2	3	4	5	6	7	8	9	10	11	12	13	Total
Failed Percent	36 18.27	9 23.08	6 28.57	11 40.74	3 27.27	8 36.36	11 50.00	10 45.45	4 44.44	9 64.29	4 66.67	4 100.00	4 80.00	19 73.08	138 32.47
Success- full Percent	161 81.73	30 76.92	15 71.43	16 59.26	8 72.73	14 63.64	11 50.00	12 54.55	5 55.56	5 35.71	2 33.33	0 00.00	1 20.00	7 26.92	287 67.53
Total Percent	197 46.35	39 9.18	21 4.94	27 6.35	11 2.59	22 5.16	22 5.16	22 5.16	9 2.12	16 3.29	6 1.41	4 0.94	5 1.18	26 6.12	425 100.00

¹ Recidivism was defined as rearrest or parole revocation within three years of release.

Source: Harer, Miles D. "Recidivism Among Federal Inmates in 1987: A Preliminary Report, Bureau of Prisons, 1993

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TABLE 28: SENTENCING OUTCOMES FOR LOW LEVEL DRUG OFFENDERS SENTENCED IN FISCAL YEAR 1985 AND THOSE SENTENCED IN FISCAL YEAR 1992 BY DRUG AMOUNT FOR THOSE WITH ZERO CRIMINAL HISTORY POINTS							
FY 1985						FY 1992 SAMPLE	
Marijuana Equivalent Kgs	Number Sentenced	Number Receiving Probation	Percent Receiving Probation	Number To Prison	For Those Sentenced To Prison, Mean Months Served	Number Sentenced To Prison	Estimated Mean Months in Prison *
< .25	9	3	33.3	6	1.9	5	38.3
.25 < 1	15	7	46.7	8	11.4	0	NA
1 < 2.5	31	21	67.7	10	16.3	0	NA
2.5 < 5	8	0	0.0	8	9.9	0	NA
5 < 10	10	2	20.0	8	5.0	4	32.5
10 < 20	474	140	29.5	334	12.4	3	27.2
20 < 40	195	40	20.5	155	9.1	20	22.5
40 < 60	153	40	26.1	113	20.0	17	22.0
60 < 80	88	6	6.8	82	26.1	19	29.7
80 < 100	64	17	26.6	47	17.6	27	35.4
100 < 400	711	200	28.1	511	22.1	118	45.3
400 < 700	361	44	12.2	317	22.1	54	47.5
700 < 1000	101	6	5.9	95	22.7	42	61.9
1000 < 3000	305	9	2.9	296	33.9	80	77.1
3000 < 1 mil.	491	15	3.2	476	30.1	41	83.9
1 mil. < 3 mil.	376	22	5.8	354	59.5	21	95.0

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TABLE 28: SENTENCING OUTCOMES FOR LOW LEVEL DRUG OFFENDERS SENTENCED IN FISCAL YEAR 1985 AND THOSE SENTENCED IN FISCAL YEAR 1992 BY DRUG AMOUNT FOR THOSE WITH ZERO CRIMINAL HISTORY POINTS (CONT.)							
FY 1985					FY 1992 Sample		
Marijuana Equivalent Kgs	Number Sentenced	Number Receiving Probation	Percent Receiving Probation	Number To Prison	For Those Sentenced To Prison, Mean Months Served	Number Sentenced To Prison	Estimated Mean Months in Prison *
3 mil. < 10 mil.	64	6	9.4	55	59.5	20	123.8
10 mil. < 30 mil.	6	0	0.0	6	70.4	8	148.6
> 30 mil	2	1	50.0	1	17.9	14	120.8
TOTAL	3461	612	17.7	2849	24.9	493	61.2

* Estimated by taking 85 percent of prison sentence.

Source: Enhanced sample of convicted offenders sentenced in FY 1985. Refer to "Supplementary Report on the Initial Sentencing Guidelines and Policy Statements," U.S. Sentencing Commission, 1987.

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TABLE 29: SENTENCING OUTCOMES FOR LOW LEVEL DRUG OFFENDERS SENTENCED IN FISCAL YEAR 1985 AND THOSE SENTENCED IN FISCAL YEAR 1992 BY DRUG AMOUNT FOR THOSE WITH ONE HISTORY POINTS							
FY 1985						FY 1992 SAMPLE	
Marijuana Equivalent Kgs	Number Sentenced	Number Receiving Probation	Percent Receiving Probation	Number to Prison	For Those Sentenced To Prison, Mean Months Served	Number Sentenced To Prison	Estimated Mean Months in Prison *
< .25	21	13	61.9	8	4.6	1	34.9
.25 < 1	0	0	0.0	0	NA	0	NA
1 < 2.5	23	14	60.9	9	16.3	0	NA
2.5 < 5	2	2	100.0	0	NA	0	NA
5 < 10	0	0	0.0	0	NA	0	NA
10 < 20	145	29	20.0	116	18.2	0	NA
20 < 40	67	6	9.0	61	15.7	1	20.4
40 < 60	76	21	27.6	55	12.5	5	33.7
60 < 80	10	0	0.0	10	18.9	3	30.9
80 < 100	5	2	40.0	3	10.7	4	23.4
100 < 400	91	1	1.1	90	29.7	16	49.7
400 < 700	45	2	4.4	43	30.8	9	50.4
700 < 1000	7	0	0.0	7	59.7	0	NA
1000 < 3000	58	5	8.6	53	28.3	11	88.2
3000 < 1 ml1.	108	22	20.4	86	53.0	9	88.0

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U.S. Department of Justice

TABLE 29: SENTENCING OUTCOMES FOR LOW-LEVEL DRUG OFFENDERS SENTENCED IN FISCAL YEAR 1985 AND THOSE SENTENCED IN FISCAL YEAR 1992, BY DRUG AMOUNT FOR THOSE WITH ONE CRIMINAL HISTORY POINTS
(CONT.)

FY 1985						FY 1992 SAMPLE	
Marijuana Equivalent KGs	Number Sentenced	Number Receiving Probation	Percent Receiving Probation	Number To Prison	For Those Sentenced To Prison, Mean Months Served	Number Sentenced To Prison	Estimated Mean Months in Prison *
1 mil. < 3 mil.	26	10	38.5	16	46.7	3	80.8
3 mil. < 10 mil.	43	10	23.3	33	31.7	6	86.1
10 mil < 30 mil.	10	0	0.0	10	32.0	3	204.0
> 30 mil.	0	0	0.0	0	NA	2	85.0
TOTAL	737	118	16.0	619	28.0	73	68.0

* Estimated by taking 85 percent of prison sentence.

Source: Sample of 767 defendants sentenced in 1992. Sentence Monitoring Database, U.S. Sentencing Commission

U.S. Department of Justice

TABLE 30. THE RELATIONSHIP BETWEEN COLLAPSED FUNCTIONAL ROLE AND DRUG QUANTITY

Marijuana Equivalent Kgs	Functional Role								Row Totals	
	High-Level Dealer		Street- Level Dealer		Courier		Peripheral		Number	Percent
	N	Pct	N	Pct	N	Pct	N	Pct		
< .25	15	6.58	12	8.51	2	0.86	5	8.33	34	5.14
.25 < 1	0	0.00	2	1.42	0	0.00	0	0.00	2	0.30
1 < 2.5	1	0.44	0	0.00	0	0.00	0	0.00	1	0.15
2.5 < 5	1	0.00	1	0.71	0	0.00	0	0.00	2	0.30
5 < 10	1	0.44	2	1.42	2	0.86	0	0.00	5	0.76
10 < 20	0	0.00	2	1.42	0	0.00	1	1.67	3	0.45
20 < 40	4	1.75	11	7.80	10	4.29	1	1.67	26	3.93
40 < 60	6	2.63	7	4.96	9	3.86	2	3.33	24	3.63
60 < 80	4	1.75	4	2.84	14	6.01	3	5.00	25	3.78
80 < 100	11	4.82	7	4.96	12	5.15	2	3.33	32	4.83
100 < 400	41	17.98	37	26.14	30	12.60	10	16.67	118	17.51
400 < 700	23	10.05	23	16.43	16	6.72	5	8.33	67	10.05
700 < 1000	14	6.14	14	10.14	11	4.64	3	5.00	42	6.31
1000 < 3000	43	18.86	14	10.14	15	6.32	15	25.00	87	13.05
3000 < 1 mil.	23	10.09	10	7.25	16	6.72	1	1.67	50	7.47
1 mil. < 3 mil.	14	6.14	6	4.36	3	1.26	3	5.00	26	3.91
3 mil. < 10 mil.	13	5.70	3	2.18	3	1.26	3	5.00	22	3.33
10 mil < 30 mil.	5	2.19	1	0.71	1	0.42	1	1.67	8	1.20
< 30 mil.	9	3.95	3	2.18	2	0.86	6	10.00	19	2.87

Source: Sample of 767 defendants sentenced in FY 1992. Sentence Monitoring database, U.S. Sentencing Commission.

Figure 1
Drug Law Offenders Currently Sentenced
Cross Section ("Snapshot" of BOP Drug Law Offenders, June 1993)

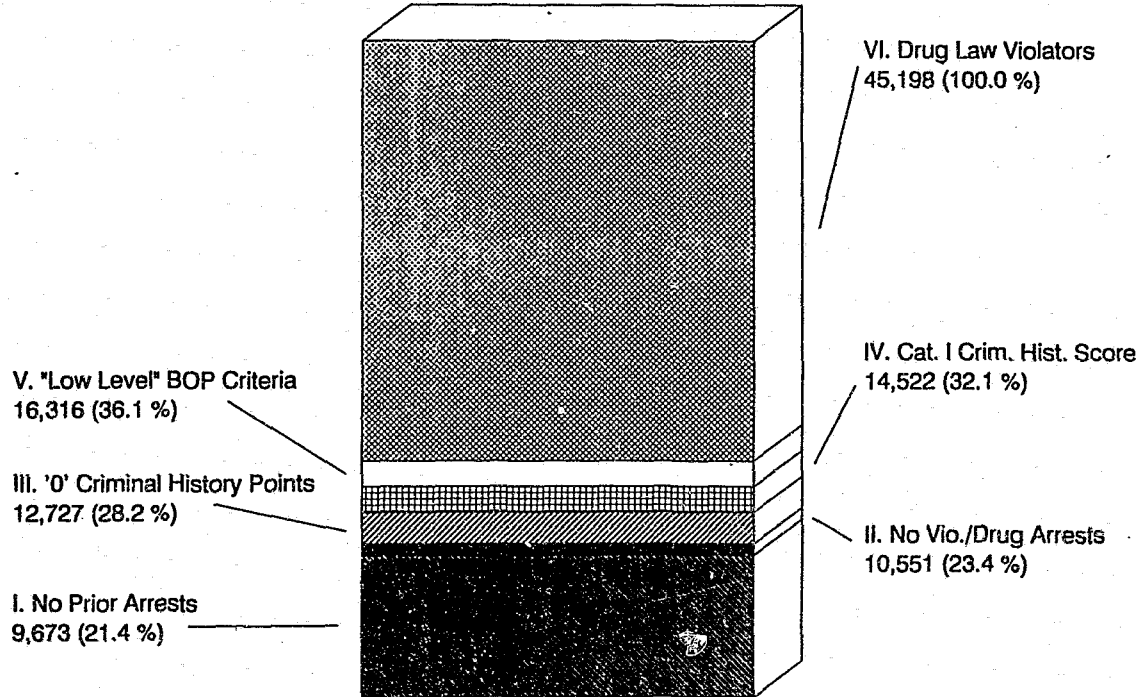
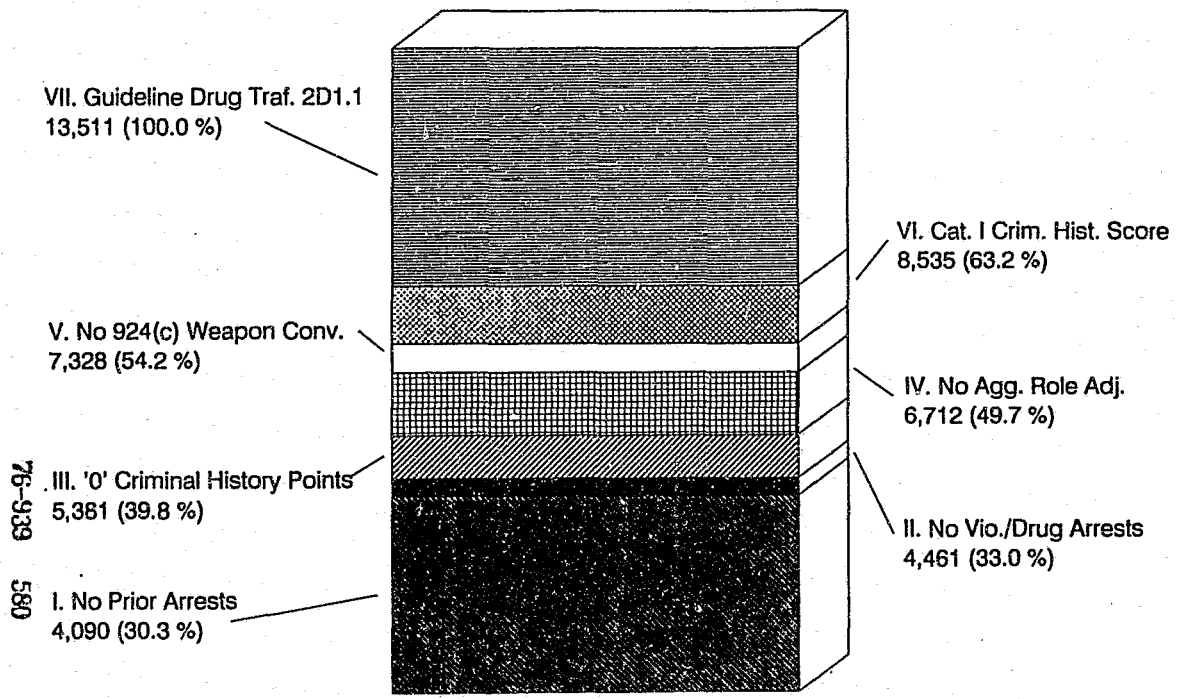


Figure 2
Guideline Drug Law Offenders Sentenced
Fiscal Year 1992 Cohort



76-939

580

FIGURE 3A

Drug offense severity levels for defendants having different functional roles.

DRUG SEVERITY

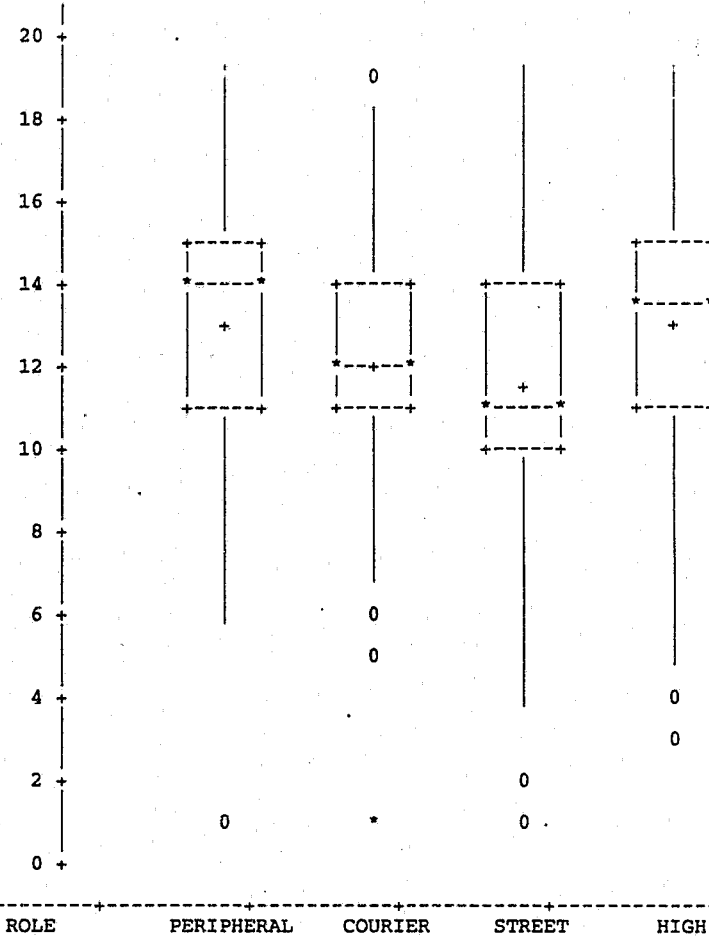


FIGURE 3B

Guideline minimum sentences (in months) for defendants having different functional roles.

GUIDELINE MINIMUM SENTENCE

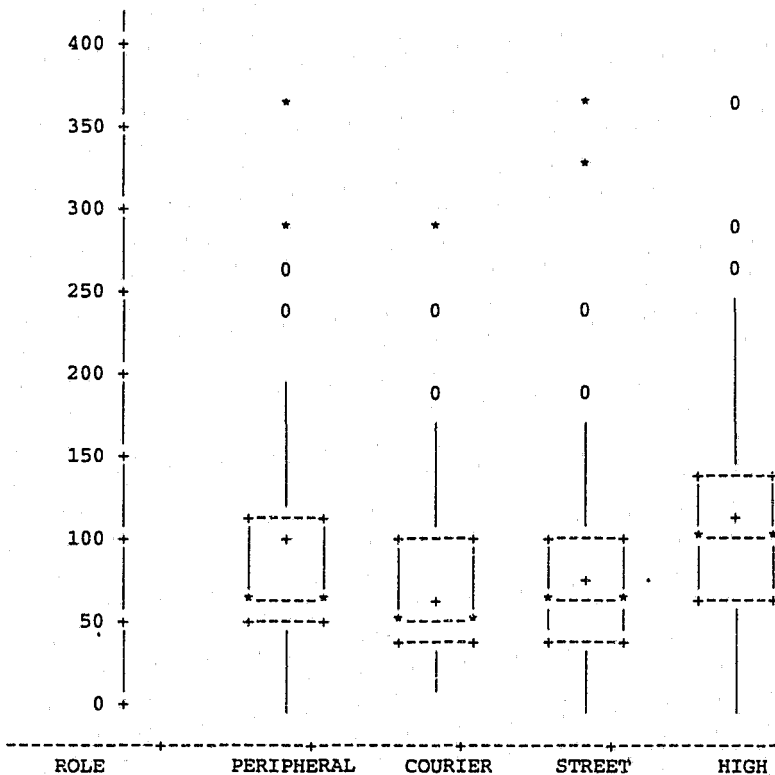
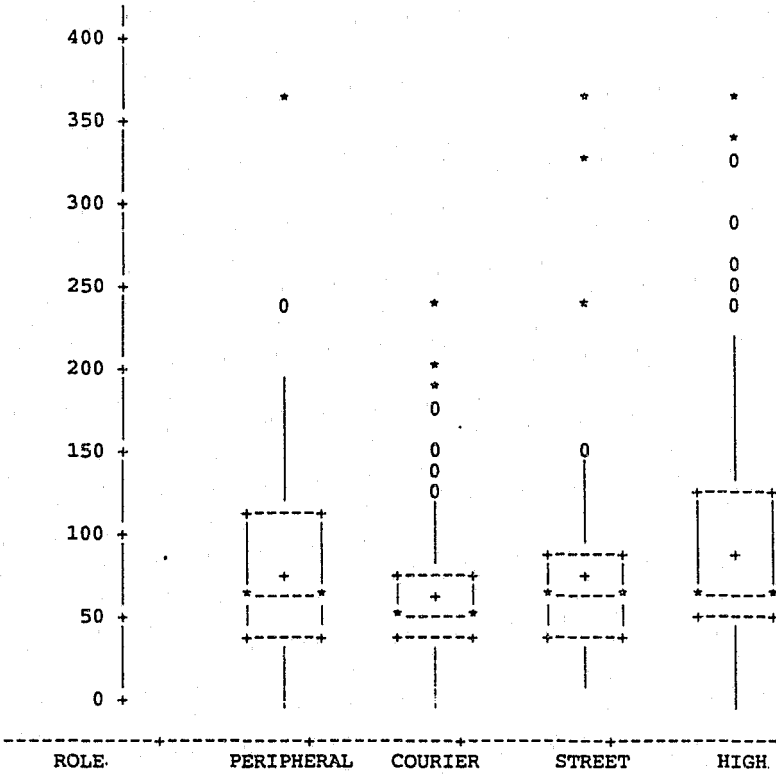


FIGURE 3C

Average prison sentence (in months) for defendants having different functional roles.

AVERAGE PRISON SENTENCE



December 9, 1993

Appendix A.**Sample Selection**

A sample of "low-level" drug offenders was selected by running against the Bureau of Prisons automated file of inmates (SENTRY). Prior to this sample selection, the Office of Research and Evaluation (ORE) used criteria similar to those referenced below to generate descriptive statistics on "low-level" drug offenders. In June 1993, there were 76,835 sentenced inmates in both Bureau and contract facilities monitored by the BOP. Of those sentenced offenders, 45,198 (59 percent) were convicted of drug offenses. Of sentenced drug offenders, 16,316 (36.1 percent) were considered "low-level" drug defendants. For the present analysis, the following sample selection criteria were used to select inmates from the BOP automated files.

Drug Offense Conviction: Includes only those inmates whose instant offense included a drug offense.

No Previous Commitments: Includes only those inmates who have no documented history of a commitment of any length from a prior conviction. Juvenile or YCA adjudication records were used unless expunged or vacated.

Sentenced in 1992: Includes only those inmates who had their sentences imposed in 1992. This criterion was chosen as a practical matter. The U.S. Sentencing Commission records which were used to code the data are only readily available through 1991. Department of Justice staff also expressed a concern that AUSA's records were not readily accessible for defendants sentenced in earlier years.

No Record of a Firearm in the Instant Offense: Excludes those inmates whose current offense involved the possession of a firearm and it is apparent that firearms were intended to influence the commission of the offense. An inmate was excluded if a weapon was not necessarily used in the offense but was in close proximity (e.g., in the inmate's vehicle or residence) to the inmate when he/she was apprehended.

No Record of Previous Violence: Excludes those inmates who have a prior record of violence, including prior institutional behavior, prior conviction offenses, or any other information implying violent past behavior. Juvenile or YCA adjudication records can be used unless expunged or vacated.

This selection resulted in 6,554 inmates. After deleting inmates who were sentenced prior to implementation of the Sentencing Reform Act (SRA), 6,302 offenders remained. This data set was merged with data from the U.S. Sentencing Commission. There were matches on 5,855 offender. Two additional selection criteria were applied to the data based on USSC information:

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Aggravating Role: Excludes those inmates who received an adjustment under the guidelines for an aggravating (important) role in the offense.

Mandatory-Minimum Sentence: Includes only those inmates who were convicted of an offense that carries a mandatory-minimum penalty.

After applying the aggravating role criteria and excluding defendants with missing data as well, 5,099 inmates remained. Of those 5,099 offenders, 32.5 percent (1,657) had no indication of a mandatory-minimum penalty. Thus, there were 3,442 offenders remaining in the data set after all the above criteria had been applied. In order to supplement our knowledge of these cases, two samples were selected from the data set. Offenders were sampled using judicial district and citizenship as sampling strata, i.e., inmates were proportionally sampled based on those two criteria. Sample 1 included defendants from the pool of 5,099 who did and did not have a mandatory-minimum penalty indicated. This sample contained 767 offenders.

In addition, 7 cases were randomly selected from 18 districts. This sample (Sample 2) was restricted to mandatory-minimum cases only; however, most of the offenders overlapped with Sample 1. There were only 40 offenders in sample 2 who were not in sample 1. These offenders were from districts represented in sample 2 which had fewer than 7 offenders represented in sample 1.

For the first samples 1 and 2, a code sheet was filled out which included information not contained in automated files. These data included marital status, employment history, drug abuse, types and amounts of drugs pertaining to the instant offense, gang affiliation, and whether a weapon was possessed or used in the current offense. For the 126 cases from the 18 jurisdictions in addition to the coding form, a protocol was filled out by two groups of Department of Justice staff. The protocol asked for responses to the following questions:

1. With what offense or offenses was the defendant charged?
2. How many other defendants were there in this case?
3. In broad terms, describe the nature of case against this defendant and his/her co-defendants, e.g. "buy bust", undercover buy, "cold hit", Title III, historical conspiracy, violent crime initiative, or other (refer to the indictment if necessary).
4. What role did the defendant play in the organization or scheme?
5. Describe the defendant's specific conduct.
6. Using the attached descriptions, specify the defendant's "role in the offense."
7. What brought this case to your attention and influenced you to charge the defendant in this case (and with a mandatory minimum offense)?
8. Describe the defendant's background, including the following characteristics, if applicable:
 - a. The extent and nature of past criminal activity, charged or uncharged, including juvenile offenses, if known.
 - b. The nature of past and present criminal associations, including any involvement with gang or organized criminal activity.

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c. Any history of charged or uncharged violence (with or without firearms) or association with violent individuals.

9. Was there anything incriminating or aggravating about this defendant that was not taken into consideration at sentencing and not made part of the record to your knowledge?
10. Was there anything mitigating or sympathetic about this defendant that was not taken into consideration at sentencing and not made part of the record to your knowledge?
11. Did the defendant provide substantial assistance? If so, what was the extent of the departure? Was the departure based on a 5K1.1 or a Rule 35 motion?
12. Did the trial judge comment upon the application of the mandatory minimum sentence in this particular instance?
13. Do you have any additional comments about this defendant?

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Appendix B.

Explanation and Coding Scheme for Role in the Offense

Indicate the most serious (not necessarily the primary) specific function or task performed by the defendant in the criminal activity.

High-Level Dealer/Importer: Purchases or imports drugs near the top of the drug distribution chain, and distributes drugs to other high-level or mid-level dealers; or leads, directs, or otherwise runs a significant drug organization.

Pilot/Boat Captain: Transports a large cargo of drugs in a boat or an airplane .

Mid-Level Dealer: Distributes large quantities to other mid-level dealers or to street-level dealers. This category includes "spot" dealers who are the "owners" of a specific street corner or spot and distribute drugs to street level dealers.

Street-Level Dealer: Distributes small quantities directly to the user.

Manufacturer/Mill Manager: Manufactures a controlled substance and /or manages and oversees a packaging operation called a mill.

Financier: Provides money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs.

Money Launderer: Arranges for or assists in concealment, transportation, and laundering of drug-related proceeds.

Bodyguard/Strongman/Debt Collector: Provides physical and personal security for another participant in the criminal activity; collects debts owed, or punishes recalcitrant persons or competitors.

Broker/Steerer/Go-Between: Arranges for two parties to buy/sell drugs, or directs potential buyer to a potential seller.

Courier: Transports or carries drugs with the assistance of a vehicle or other equipment. Includes situations where defendant, who is otherwise considered to be a crewmember, is the only participant directing a vessel (e.g., a go-fast boat) onto which drugs had been loaded from a "mother ship."

Mule: Transports or carries drugs internally or on their person, often by airplane, or by walking across a border. Also includes a defendant who only transports or carries drugs in baggage, souvenirs, clothing, or otherwise.

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Renter/Storer: Provides, for profit/compensation, own residence or other's, structures (barns, storage bins, buildings), land, or equipment for use to further the criminal activity.

Moneyruiner: Transports/carries money from the purchase or sale of drugs in the criminal activity.

Off-loader/Loader: Performs the physical labor required to put large quantities of drugs into storage or hiding or onto some mode of transportation.

Gofer/Lookout/Deckhand/Worker/Employee: Performs very limited, low-level function in the criminal activity (whether or not ongoing); includes running errands, answering the telephone, receiving packages, packaging the drugs (e.g., millworker), manual labor, acting as lookout to provide early warnings during meetings, exchanges, or off-loading, or acting as deckhand/crewmember on vessel or aircraft used to transport large quantities of drugs.

Enabler (Passive): Plays no more than passive role in criminal activity, knowingly permitting certain unlawful criminal activity to take place without affirmatively acting in any way to further such activity; may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as "a favor" (without compensation); may include the rare case of a "passenger" or one of two "drivers" of a vehicle transporting drugs, where the defendant is almost certainly unaware of the presence of drugs in the vehicle.

User Only: Possessed small amount of drugs apparently for personal use only; no apparent function in any conspiratorial criminal activity.

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Appendix C

Variable	Explanation of Variables
LPRISON	log of prison sentence (in months)
INTERCEP	intercept of equation
LSTDDRUG	log of drug amount in marijuana equivalence weight
TOTCHPTS	total criminal history points
TRIAL1	trial = 1, plea = 0
HELP	substantial assistance = 1, otherwise 0
AGE	age in years
MALE	male = 1, female = 0
BLACK	black = 1, white = 0
CITIZEN	U.S. citizen = 1, non-citizen = 0
SPOUSE	married or common law = 1, otherwise 0
HIGHMID	high- or mid-level dealer = 1, otherwise 0 ⁴⁰
STREET	street-level dealer = 1, otherwise 0
MONMANF	money launderer/manufacturer = 1, otherwise 0
COURIER	courier = 1, otherwise 0
FEMPLOY	employed = 1, not employed = 0
SPS_WRK	interaction of marriage and employment

⁴⁰ The referent vector for all four functional role dummy variables was peripheral role.

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Appendix C. Cont'd.

Model: A Dependent Variable: LPRISON

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	14	124.10872	8.86491	28.948	0.0001
Error	558	170.87959	0.30624		
C Total	572	294.98832			
Root MSE		0.55339	R-square	0.4207	
Dep Mean		4.06594	Adj R-sq	0.4062	
C.V.		13.61029			

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > T
INTERCEP	1	3.099528	0.14104160	21.976	0.0001
LSTDDRUG	1	0.127208	0.00877921	14.490	0.0001
TOTCHPTS	1	0.063629	0.06942541	0.917	0.3598
TRIAL	1	0.480377	0.06338010	7.579	0.0001
HELP	1	-0.284939	0.06506073	-4.380	0.0001
AGE	1	0.001317	0.00242552	0.543	0.5875
MALE	1	0.082221	0.06350204	1.295	0.1959
BLACK	1	0.097701	0.05492159	1.779	0.0758
CITIZEN	1	-0.125232	0.05247816	-2.386	0.0173
SPOUSE	1	-0.017151	0.04958047	-0.346	0.7295
MITROLHI	1	-0.188501	0.05817960	-3.240	0.0013
HIGHMID	1	0.180498	0.09316886	1.937	0.0532
STREET	1	0.089757	0.09663618	0.929	0.3534
MONMANF	1	0.261446	0.10829669	2.414	0.0161
COURIER	1	-0.000832	0.08651129	-0.010	0.9923

Variable	DF	Standardized Estimate
INTERCEP	1	0.00000000
LSTDDRUG	1	0.50583831
TOTCHPTS	1	0.03007882
TRIAL	1	0.25901214
HELP	1	-0.15586377
AGE	1	0.01843848
MALE	1	0.04297279
BLACK	1	0.06198739
CITIZEN	1	-0.08667011
SPOUSE	1	-0.01194943
MITROLHI	1	-0.11717394
HIGHMID	1	0.10620501
STREET	1	0.05058685
MONMANF	1	0.10820343
COURIER	1	-0.00055988

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Appendix C. Cont'd.

Model: B Dependent Variable: LPRISON

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	15	124.13385	8.27559	26.979	0.0001
Error	557	170.85447	0.30674		
C Total	572	294.98832			
Root MSE		0.55384	R-square	0.4208	
Dep Mean		4.06594	Adj R-sq	0.4052	
C.V.		13.62150			

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > T
INTERCEP	1	3.093926	0.14250844	21.710	0.0001
LSTDRUG	1	0.127331	0.00879704	14.474	0.0001
TOTCHPTS	1	0.063315	0.06949124	0.911	0.3626
TRIAL	1	0.479429	0.06351870	7.548	0.0001
HELP	1	-0.285756	0.06517684	-4.384	0.0001
AGE	1	0.001316	0.00242752	0.542	0.5881
MALE	1	0.079208	0.06442080	1.230	0.2194
BLACK	1	0.098437	0.05502681	1.789	0.0742
CITIZEN	1	-0.128416	0.05368732	-2.392	0.0171
SPOUSE	1	-0.017962	0.04970220	-0.361	0.7179
MITROLHI	1	-0.187796	0.05827960	-3.222	0.0013
HIGHMID	1	0.182142	0.09342225	1.950	0.0517
STREET	1	0.092128	0.09706973	0.949	0.3430
MOMBANF	1	0.263157	0.10855075	2.424	0.0157
COURIER	1	-0.001460	0.08661037	-0.017	0.9866
FEMPLOY	1	0.014232	0.04972892	0.286	0.7748

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Appendix C. Cont'd.

Model: C, Dependent Variable: LPRISON

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	16	124.47814	7.77988	25.369	0.0001
Error	556	170.51017	0.30667		
C Total	572	294.98832			

Root MSE	0.55378	R-square	0.4220
Dep Mean	4.06594	Adj R-sq	0.4053
C.V.	13.62000		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > T
INTERCEP	1	3.109941	0.14329215	21.704	0.0001
LSTDDRUG	1	0.127042	0.00880031	14.436	0.0001
TOTCHPTS	1	0.062809	0.06948523	0.904	0.3664
TRIAL	1	0.477153	0.06354803	7.509	0.0001
HELP	1	-0.288175	0.06520962	-4.419	0.0001
AGE	1	0.001497	0.00243326	0.615	0.5388
MALE	1	0.079125	0.06441375	1.228	0.2198
BLACK	1	0.096484	0.05505160	1.753	0.0802
CITIZEN	1	-0.125165	0.05376906	-2.328	0.0203
SPOUSE	1	-0.080930	0.07746904	-1.045	0.2966
MITROLHI	1	-0.185603	0.05830993	-3.183	0.0015
HIGHMID	1	0.191060	0.09379044	2.037	0.0421
STREET	1	0.098935	0.09727142	1.017	0.3095
MONMANF	1	0.275288	0.10914093	2.522	0.0119
COURIER	1	0.008724	0.08713260	0.100	0.9203
FEMPLOY	1	-0.036869	0.06927069	-0.532	0.5948
SPS_WRK	1	0.102313	0.09656143	1.060	0.2898

Variable	DF	Standardized Estimate
INTERCEP	1	0.00000000
LSTDDRUG	1	0.50517832
TOTCHPTS	1	0.02969128
TRIAL	1	0.25727367
HELP	1	-0.15763356
AGE	1	0.02095836
MALE	1	0.04135454
BLACK	1	0.06121504
CITIZEN	1	-0.08662377
SPOUSE	1	-0.05638627
MITROLHI	1	-0.11537245
HIGHMID	1	0.11241981
STREET	1	0.05575912
MONMANF	1	0.11393222
COURIER	1	0.00587026
FEMPLOY	1	-0.02505364
SPS_WRK	1	0.06686000

DRUG USE INFORMATION

9) ANY DRUG USE EVER

- (1) YES
 (2) NO

Any use ever, of:

- 10) OPIATES 11) HALLUCINOGENS 12) COCAINE 13) OTHER STIMULANTS
 14) BARBITURATES 15) MARIJUANA 16) ALCOHOL 17) OTHER ILLEGAL DRUGS

ANY DRUG USE IN LAST FREE YEAR IN THE COMMUNITY

Any use in the last year, of:

- 18) OPIATES 19) HALLUCINOGENS 20) COCAINE 21) OTHER STIMULANTS
 22) BARBITURATES 23) MARIJUANA 24) ALCOHOL 25) OTHER ILLEGAL DRUGS

DRUG USE IN CURRENT OFFENSE

During the current offense, was the individual UNDER THE INFLUENCE OF:

- 26) OPIATES 27) HALLUCINOGENS 28) COCAINE 29) OTHER STIMULANTS
 30) BARBITURATES 31) MARIJUANA 32) ALCOHOL 33) OTHER ILLEGAL DRUGS

HISTORY OF DRUG USE

Used any of the following drugs 5 or more times:

- 34) OPIATES 35) HALLUCINOGENS 36) COCAINE 37) OTHER STIMULANTS
 38) BARBITURATES 39) MARIJUANA 40) History of abuse (involved in current offense and/or indication of abuse on PSI e.g., 2 DUI's, referral to alcohol treatment); of ALCOHOL.
 41) OTHER ILLEGAL DRUGS

42) ROLE IN CURRENT OFFENSE:

01. High-Level Dealer
02. Pilot/Boat Captain
03. Mid-Level Dealer
04. Street-Level Dealer
05. Manufacturer/Hill Manager
06. Financier
07. Money Launderer
08. Bodyguard/Strongman/Debt Collector
09. Broker/Steerer/Go-Between
10. Courier
11. Mule
12. Renter/Storer
13. Moneyrunner
14. Off-loader/Loader
15. Gopher/Lookout/Deckhand/Worker/Employee
16. Enabler (Passive)
17. User Only

APPENDIX 4.—LETTER FROM GLENN NELSON, STUDENT, TO HON.
WILLIAM J. HUGHES, CHAIRMAN, UNDATED

Dear WILLIAM J. HUGHES,
 My mom has 7 years, 3 months
 Present Bush put her in jail
 Can you ask Bill Clinton to take
 it down to a years. If you can't
 That is ok, I would like to see
 my mom get Probation. My
 mom is a fist time Non-Viol-
 ent offender. My mom never
 been in Jail. This is her fist time
 I want my mom [redacted] home
 because I Love her, so she can
 [redacted] Help me with my homework
 and she will be there
 [redacted] When I need her.

Glenn Nelson

4003 Wilkens Ave
 Baltimore MD 21229
 410-368-8330

APPENDIX 5.—REMARKS OF ALFRED BLUMSTEIN, CARNEGIE MELLON UNIVERSITY, "MAKING RATIONALITY RELEVANT—THE AMERICAN SOCIETY OF CRIMINOLOGY 1992 PRESIDENTIAL ADDRESS," CRIMINOLOGY, VOL. 32, No. 1, 1993

MAKING RATIONALITY RELEVANT—THE AMERICAN SOCIETY OF CRIMINOLOGY 1992 PRESIDENTIAL ADDRESS

ALFRED BLUMSTEIN
Carnegie Mellon University

RATIONALITY AND RELEVANCE

The theme of the 1992 New Orleans meeting of the American Society of Criminology (ASC) was "Rationality and Relevance." This theme reflects the view that an important mission of the ASC and its members involves the generation of knowledge that is useful in dealing with crime and the operation of the criminal justice system (i.e., relevance) and then helping public officials to use that knowledge intelligently and effectively (rationality).

Of course, that hope is so often frustrated by policies that ignore well-founded criminological knowledge. That occurs because of the power of ideology ("don't confuse me with the facts, I've already made up my mind") exacerbated by the simplistic rhetoric that dominates so much of the discussion of criminal justice policy and that substitutes for more serious accommodation to the inherent complexities of the problem.

It may also be the case that one person's rational policy preference appears far less rational to another. Depending on one's prior disposition, the evidence bearing on a particular question may be more or less compelling. Also, since policy choices inevitably involve issues of value as well as fact, in any weighing of costs and benefits, different people will assign different utilities to any particular degree of crime reduction or any kind of pain imposed on a guilty person. In discussing rationality, it is important to recognize that two different preferences can be equally rational if they derive from different utility structures. That possibility makes it important to identify whether a disagreement about policy results from a difference in the presumption of the effect of a policy, which is empirically knowable (e.g., the estimated deterrent elasticity of crime reduction for a given change in sanction policy) or a difference in value (e.g., the degree of satisfaction associated with a given decrease in the robbery rate).

I should also emphasize that the relevance requirement does not demand that knowledge be immediately translatable into policy. So little is known about the causes of crime and about the effects of criminal justice policy on crime that new insights about the criminal justice system can often be extremely revealing and can eventually change the way people think about the crime problem or about the criminal justice system. Such conceptual knowledge is fully as relevant as—and can well be more important than—a new method for optimally allocating police patrol cars across patrol beats.

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I want to identify an example of ways in which I believe the criminal justice system is behaving irrationally by any criterion. I want to try to identify why that is happening, and then discuss some approaches that our community—the ASC as well as the larger community—might use to enhance the rationality of policies regarding crime and criminal justice.

THE WAR ON DRUGS

There is no question but that the drug problem is an issue of serious concern to American society. Many people are debilitated, at least in the short run, as a result of drug-taking behavior, and the long-term consequences can be even more severe in terms of significant degradation in economic performance of the individual and of the economy as a whole.

Further, there is a profound nexus between drugs and crime more generally. In 1986, 52% of prisoners reported that they had ever used major drugs¹ and 35% reported that they had been under the influence of a serious drug at the time they committed the crime that led to their current imprisonment (Bureau of Justice Statistics, 1992:650).

Given the seriousness of the problem, the American public several years ago vigorously demanded that something be done about it. Our political system puts great stake on responding to such articulated demand—even when there is no clear means of effective response. Unfortunately, our political system learned an overly simplistic trick: It responds to such pressures by sternly demanding increased punishment. It has found that approach to be strikingly effective—not in solving the problem, but in alleviating the political pressure to “do something.” The public generally seems to accept that approach to almost any behavior it finds objectionable, and without much questioning as to whether that approach will be effective in the particular context of concern.

As a result, there has been a succession of escalating cycles: The insistence of the public leads to intensified efforts to attack the drug trade; that doesn't have much effect on the drug market, so the efforts are intensified still further. Many states have adopted mandatory-minimum sentences for drug dealing that are comparable to the sentences for homicide. The consequence of these efforts has been a dramatic growth in the number of arrests for drug offenses and the filling of prisons with drug offenders.

Figure 1 shows the growth from 1965 to 1991 in arrest rates for drug offenses, by race.² Since the early 1970s, the rate for whites has been fairly steady, about 300 per 100,000. On the other hand, the rate for nonwhites

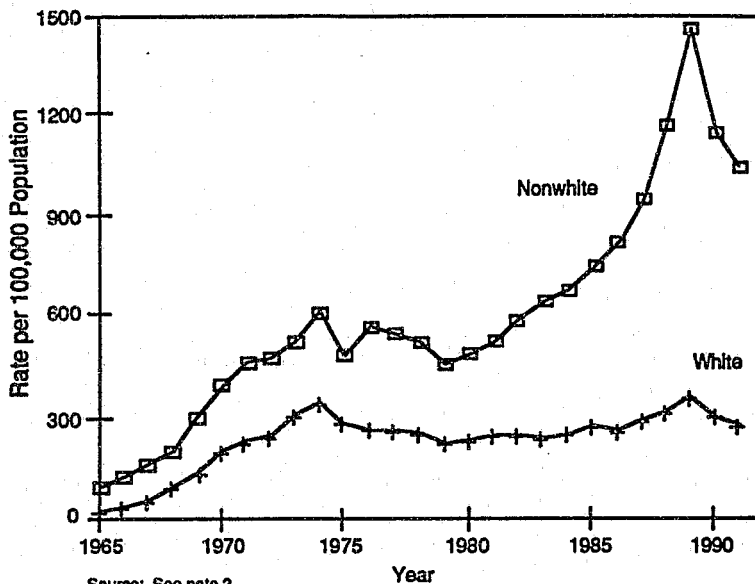
1. The major drugs include heroin, methadone, cocaine, PCP, and LSD.

2. The data for Figures 1 and 2 were taken from the Federal Bureau of Investigation (1990); more recent data were provided by the FBI's Uniform Crime Reporting Program. The assistance of Sharon Profiter in providing that information is much appreciated.

PRESIDENTIAL ADDRESS

11.10.91

Figure 1
Arrest Rates for Drug Offenses,
by Race, 1965-1991



Source: See note 2.

(primarily African-Americans) climbed steadily from 1980 to 1985, then began to grow exponentially at a rate of about 15-20% per year until it reached a peak in 1989, and then decreased somewhat in 1990 and 1991.

The difference in the rate of arrest of whites and nonwhites for drug offenses is far greater than the nonwhites' relative representation among drug users. To the extent that self-reported drug users are a racially representative sample of drug sellers (and many drug sellers *are* also users), there could well be a serious distortion in the racial distribution of drug arrests. It is probable, however, that nonwhites are overrepresented among drug sellers (compared with users) to the extent that there is traffic from largely white, middle-class suburbs to largely nonwhite, poor ghetto areas to buy drugs, without a corresponding reverse flow.

On the other hand, the growth in nonwhite arrests can be attributed to nonwhites' greater vulnerability to arrest compared with whites. There tends to be a more dense police presence where nonwhites reside because of the greater amount of crime there. There have also been reports of race being used at least implicitly in police profiles of drug couriers. Also, according to personal reports from individuals involved in policing narcotics, markets

BLUMSTEIN

operated by blacks tend much more often to be outdoors and vulnerable to police action, whereas markets run by whites tend much more often to be inside and thereby less visible and more protected from police surveillance and arrest.³ Further, the dramatic growth in arrests of blacks since 1985 also reflects the growth of crack-cocaine use, a growth that has occurred predominantly in black communities, and the associated enforcement focus on that drug.⁴

The growth in drug arrests for adults is very similar to that depicted in Figure 1. The situation is rather different for juveniles, however, as depicted in Figure 2. From 1965 until about 1980, arrest rates for white and nonwhite juveniles were very similar; indeed, from 1970 until 1980, the arrest rate for whites was higher than that for nonwhites. But arrest rates for both groups grew from a rate of about 10 per 100,000 juveniles in 1965 to a peak of about 30 times higher in 1974 (329 for whites and 257 for nonwhites).

The decline after the 1974 peak was undoubtedly a consequence of the general trend toward decriminalization of marijuana in the United States. A major factor contributing to that decriminalization was undoubtedly a realization that the arrestees were much too often the children of individuals, usually white, in positions of power and influence. Those parents certainly did not want the consequences of a drug arrest to be visited on their children, and so they used their leverage to achieve a significant degree of decriminalization. Following the peak, arrest rates for both racial groups declined, and continued to decline for whites. On the other hand, for nonwhites, the decline leveled out in the early 1980s and then began to accelerate at a rate even more dramatic than that for adults, about 20–25% per year, until the peak in 1989.

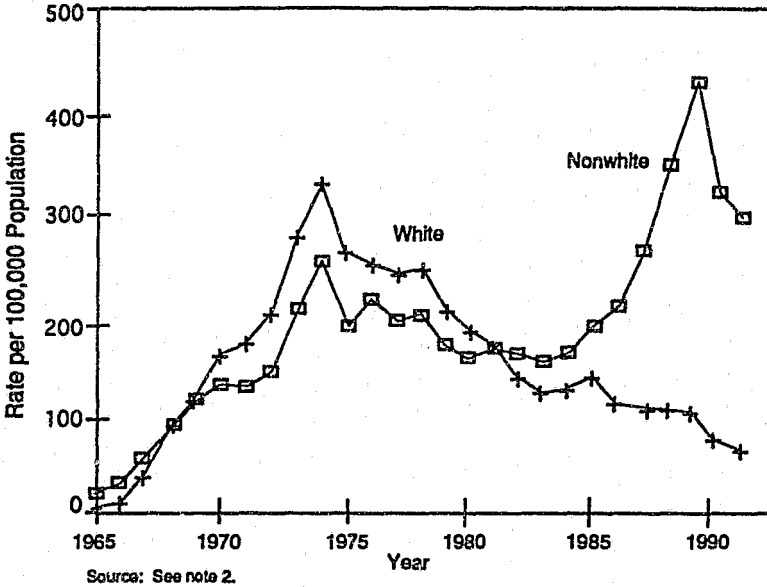
What is particularly troublesome about both the adult and the juvenile aspects of the war on drugs of the late 1980s is the degree to which the impact has been so disproportionately imposed on nonwhites. There is no clear indication that the racial differences in arrest truly reflect different levels of

3. Personal communications with several individuals involved in drug-related police activities.

4. The Minnesota Supreme Court, in *State v. Russell*, 477 N.W.2d 886 (1991) declared a Minnesota statute unconstitutional which defined possession of three grams of crack cocaine as warranting a presumptive sentence of 48 months, while possession of 10 grams of powder cocaine was elsewhere defined as warranting a presumptive sentence of 12 months. The ruling, based on equal protection grounds, found that the legislative distinction was racially discriminatory in its impact: in 1988, 100% of those sentenced under the crack cocaine statute were black, while 66% of those sentenced under the powder cocaine statute were white. In part because of evidence that crack and powder cocaine are pharmacologically identical, the court held that there was no rational basis for the differential treatment of blacks and whites. (The assistance of Michael Tonry in developing the information on this ruling is much appreciated.)

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Figure 2
Arrest Rates for Drug Offenses,
Juveniles, by Race, 1965-1991



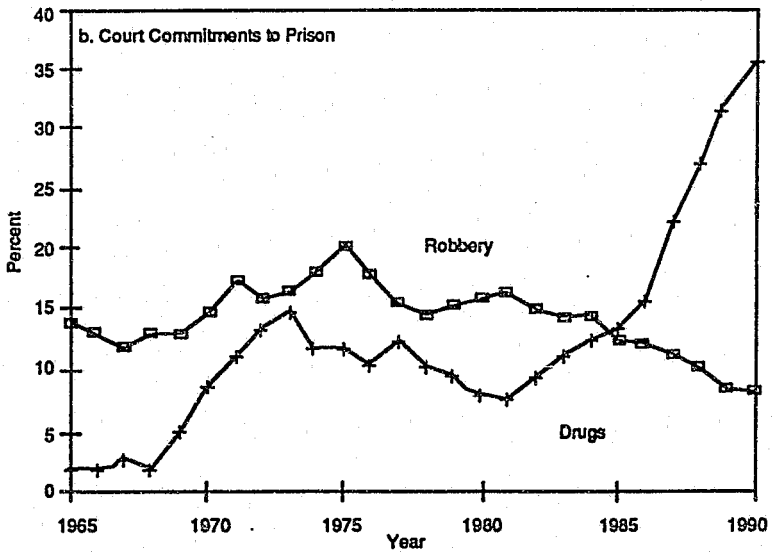
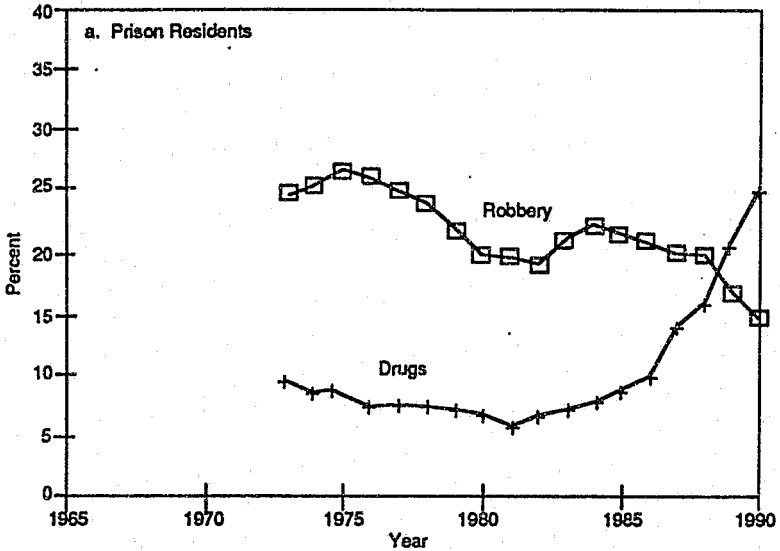
activity or of harm imposed, and so it is reasonable to presume that a large part of the difference is attributable to enforcement patterns and practices.

Even if it did reflect different levels of activity, the enormous growth rate, as well as the very high absolute values of arrests (2,000 per 100,000 for adult blacks, or 2% of the adult black population, even higher for males in their twenties), still represents a major assault on the black community. One can be reasonably confident that if a similar assault was affecting the white community, there would be a strong and effective effort to change either the laws or the enforcement policy.

The intensity of the crackdown shows itself in the prison populations. In 1991, 56% of the prisoners in federal prisons (Bureau of Justice Statistics, 1992:657) and over 25% of those in state prisons were there on a drug charge. This compares with the rates 10 years earlier, when only about 7 or 8% of prisoners were convicted on a drug charge. The growth is illustrated in Figure 3 with data obtained from the Florida Department of Corrections on the fraction of prisoners (3a) and court commitments (3b) sentenced for robbery compared with drug charges. These figures show the rapid rise in the drug fraction of the resident population—from consistently under 10% until 1986

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Figure 3
Prison Residents and Court Commitments on Robbery
and Drug Charges, Florida, 1965-1990



Source: Florida Department of Corrections, 1991.

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to 25% in 1990. There is an even more dramatic rise in commitments (the flow into prisons) to over 35% in 1990.

Drugs represent an even larger fraction of New York State prisoners. In 1991, drug offenders were 45% of new commitments to prison and 34% of prison populations.

Despite the enormous magnitude of the efforts and the impacts on the criminal justice system, and on a particular minority group, accepting those costs would not necessarily be irrational if the approach were truly effective in reducing drug abuse. There is, however, no indication that the efforts have been at all successful. Figure 4, taken from a recent DUF (Drug Use Forecasting) report (National Institute of Justice, 1991), which indicates the percentage of booked arrestees who tested positively for drugs by urinalysis, shows that in a sampling of cities, the number of drug-positive arrestees is impressively high (and it can get even higher, to about 80% in Philadelphia and 75% in Manhattan, for example), but also that the measurements show no consistent downward trend.

Even in the National Institute on Drug Abuse household surveys,⁵ the ever-prevalence measures for cocaine (see Figure 5) show a peak about 1982 (well before the beginning of the drug crackdown of the late 1980s) followed by a steady decline for those in the age ranges of 12-17 and 18-25.

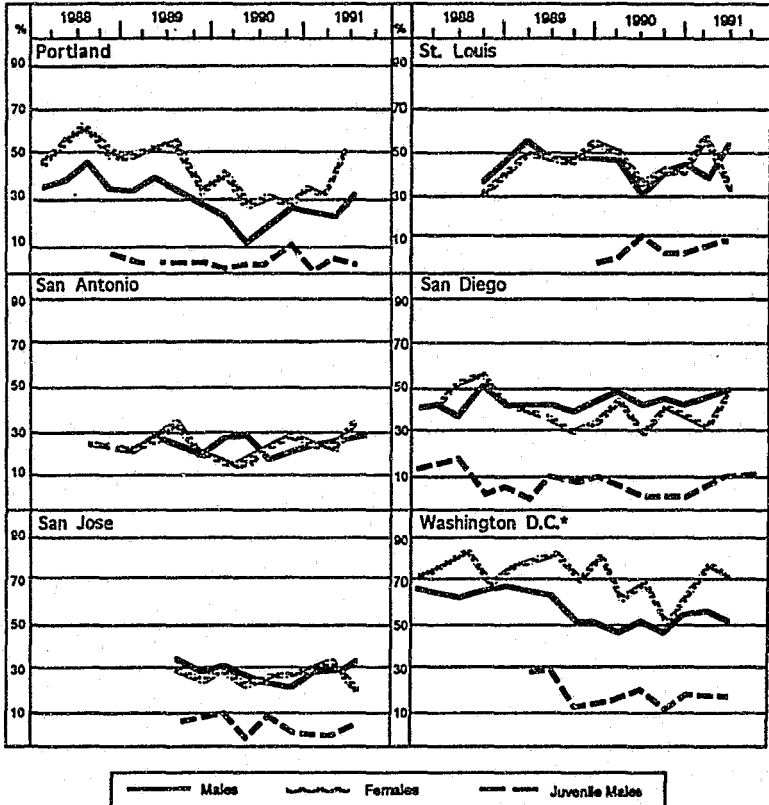
Of course, it is not at all surprising that we have not seen a dramatic change in drug abuse as a result of the intense accumulation of drug sellers in prison. When we consider the means by which the criminal justice system can control crime (rehabilitation, incapacitation, and general deterrence), it becomes evident very quickly that imprisoning drug sellers will not work through any of the three methods. Incapacitation removes crimes from the street only if the crimes leave the street with the offender. This should work with the pathological rapist. If, however, there is a ready buyer in the street, removing his or her favorite drug seller will simply mean that a substitute will move in, and the replacement continues to provide the desired drugs. It may take some time for recruitment and training, but experience shows that the amount of time is rarely more than a few days.

A similar situation applies to general deterrence. One of the rationales most frequently cited for increasing the level of drug sanctions is that sellers will be deterred from engaging in drug transactions. There is little question that some actual or potential sellers, learning of the severe sanctions, are indeed deterred. But as long as there remain willing sellers to take their place, that deterrent effect is of little import. As long as the market demand persists and there is a continued supply of sellers, there should be little effect on drug transactions.

5. The data were taken from Bureau of Justice Statistics (1992:353), adapted from National Institute on Drug Abuse (1991:20-22).

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Figure 4
Trends in Cocaine Use Among Booked Arrestees



Source: National Institute of Justice (1992)

Note: Positive by urinalysis. Gaps on the graph represent periods when data were not collected

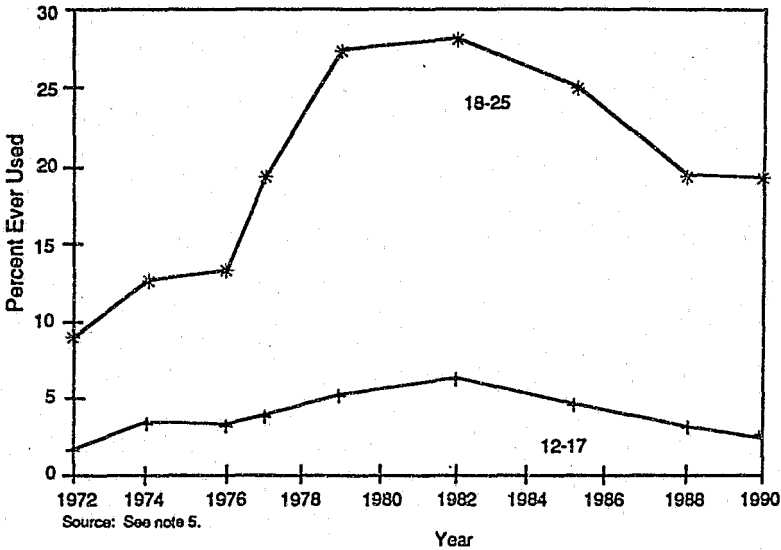
* 1988 Washington, D.C. data based on arrestees tested by D.C. Pretrial Services Agency. Data collected after 1988 are from the DUF program.

Rehabilitation of individual offenders could have some important effect on drug users, but is not likely to be very meaningful for drug sellers. There is nothing inherently irrational about their behavior, especially if they view themselves as having little economic potential in the legitimate economy.

It is difficult to discern whether the continued escalation of sanctions has been carried out in ignorance of these basic insights. If so, a massive rehabilitative educational program is needed for our legislators and other public officials, and that would be a worthy challenge for the ASC. Alternatively, the

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Figure 5
 Ever-Prevalence of Cocaine Use Among
 Respondents to NIDA National Household
 Surveys on Drug Abuse, by Age Group



policies may be viewed somewhat more cynically. It is not unreasonable to believe that the people who establish the high-sanction policies fully understand the limitations of the policies but need some means to respond to the public pressure to "do something." Lacking any better alternative to propose, they merely increase the sanctions, not so much because they think it will work, but because they have come to realize that it is an effective way to relieve the political pressure.

The basic observation about drug markets is that they are inherently demand driven. As long as the demand is there, a supply network will emerge to satisfy that demand. While efforts to assault the supply side may have some disruptive effects in the short term, the ultimate need is to reduce the demand in order to have an effect on drug abuse in the society.

Thus, the appropriate response and strategy in dealing with the drug problem must be focused on demand reduction, and that can come through treatment and prevention. Treatment is appropriate for those who are currently abusers, both by making it readily available to all those who, on their own, want to discontinue drug use and also by finding means of coercing the others into the treatment.

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The effects of the preventive approach are much more distant. There are no ready, demonstrated approaches to prevention that are certain to work, but a wide variety of methods exist, ranging from the DARE (Drug Abuse Resistance Education) program, to the "Just Say No" exhortation, to newspaper ads, to attempts to enlist peer leaders. All of these have a potential for being effective to some degree with different populations. None is guaranteed to work in all circumstances, however.

While waiting for these demand-reduction strategies to work in the long run, drug markets still cannot be left to flourish in the short run without some degree of intervention. But that degree of intervention need not be as massive as it has been in most cities over the past five years. Markets can be disrupted by sporadic raids, but possibly using methods that will avoid filling the prisons with the sellers. One method used in Houston was to announce where the next day's raid would take place; this had the effect of disrupting the market in that location, since the drug sellers avoided that location, but it also saved the criminal justice system from having to deal with another load of sellers who would inevitably have to be processed through the system, many imprisoned, all with no significant effect on drug sales.

The policy approach that has to be pursued is thus one of diminishing the resources that are currently being expended on the attack on the supply system, and reallocating as much of that as can be effectively used on demand reduction. That will require a conscious effort to do so, since there are strong incentives (such as the benefits police derive from asset forfeiture) for police and prosecutors to focus their efforts on attacking the supply network. It will also undoubtedly result in complaints by some who are unaware of the limitations of attacking the supply side that the drug war is not being pursued with sufficient vigor. Efforts must thus be directed at explaining the issues to such challengers.

As part of the reallocation of effort, it is important to reconsider the sentencing guidelines and mandatory-minimum sentencing legislation that have elevated the severity of punishment for drug sales to a level comparable to that for homicide. Once the futility of the underlying deterrent strategy becomes clear, perhaps rationality will show itself in legislatures willing to back off on the severe sanctions they have mandated. Perhaps they will be willing to consider more useful legislation, which would provide a sunset provision for all mandatory-minimum sentencing laws, which legislatures now use as an automatic response to any offense viewed as heinous by their constituents. They get their political satisfaction from this act of passion, but the consequences live on indefinitely. Since repealing the mandatory-minimum law may be difficult politically (legislators might be accused of being soft on that particular offense), it might be more feasible to pass a generic sunset law that requires that all mandatory-minimum sentencing provisions expire two

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years after they are imposed in the absence of an explicit effort to re-enact them.

I have been told that one of the former leaders in the current drug war has likened the drug problem to Humpty Dumpty. When all the King's horses and all the King's men couldn't put Humpty together again, the response was merely to double the number of horses and men, rather than to recognize at some point the futility of the effort.

The astonishing fact is that virtually everything that has been stated here is rarely disputed by anyone in the system, or by anyone who understands the problem. In the face of that, American criminal justice policy somehow seems totally unable to introduce the rationality that is needed. Even in the 1992 presidential debates, when the question of drug policy came up, all three contenders took a strong stance but no one—not even Ross Perot, who was ready to take a large political risk in other areas by proposing major tax increases—did other than posture vigorously by calling for severe sanctions.

The question, then, is how the nation can introduce some rationality into the policy process. Rationality must be given a voice that is separated from the political environment, in which the widespread concern over crime and fear of victimization have paralyzed all players with a political stake and forced them to huddle at the extreme punitive end and to freeze out any contrary position. The nation thus needs another forum, one that can introduce rational considerations without the fear of their resulting in political catastrophe.

INTRODUCING RATIONALITY

As long as fear and punitiveness pervade the American public, it appears that it will continue to be unsafe for any political figure to pursue anything other than a high-punishment strategy. Any leadership in this area is unlikely to come from the Justice Department, which has demonstrated its responsiveness to the political whims of the current time. Thus, there needs to be a group outside those with political vulnerability that can bring the relevant research to bear and that can highlight where current policies are behaving irrationally and in clear conflict with existing and well-established criminological evidence. One possibility is the set of agencies that the Congress has created; despite the highly political nature of the Congress, those agencies—the General Accounting Office, the Office of Technology Assessment, and the Congressional Budget Office—seem to have retained a high degree of independence and integrity.

Perhaps it is now time for this issue to be pursued by a presidential commission like the one whose 25th anniversary was commemorated at the New Orleans meeting—Lyndon Johnson's President's Commission on Law

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Enforcement and Administration of Justice.⁶ Any opportunity for leadership on this issue would need the status of such a commission to be able to take a realistic look at current policies and ways in which they have been counter-productive and to do the cost-benefit analysis that would at least highlight those policies whose costs clearly exceed the benefits on any reasonable utility scale. Such a commission obviously needs political representation, but it must also have diverse and respected criminological input of the sort that has been provided by a succession of panels of the National Academy of Sciences. The commission would need criminologists as members, but it would also have to organize a panel under the auspices of the National Academy of Sciences to review the growing body of data on crime, criminal careers, and sanctions and their effectiveness for various kinds of offenders and offenses. The commission should be charged, not only with evaluating current policies and recommending improved ones, but also with developing a process that brings criminological rationality more effectively and vigorously into the public debate about policies regarding crime. Perhaps a group such as the Council of Economic Advisors, with appropriate funding and research staff, is called for.

Inevitably, any such effort will focus not only on immediate crime problems and the immediate response to them, but on the societal problems that contribute to the crime situation. Any such forward-looking research will have to recognize that there are many factors currently in place that should make the crime problem become increasingly serious over the coming decade. Among these are the following:

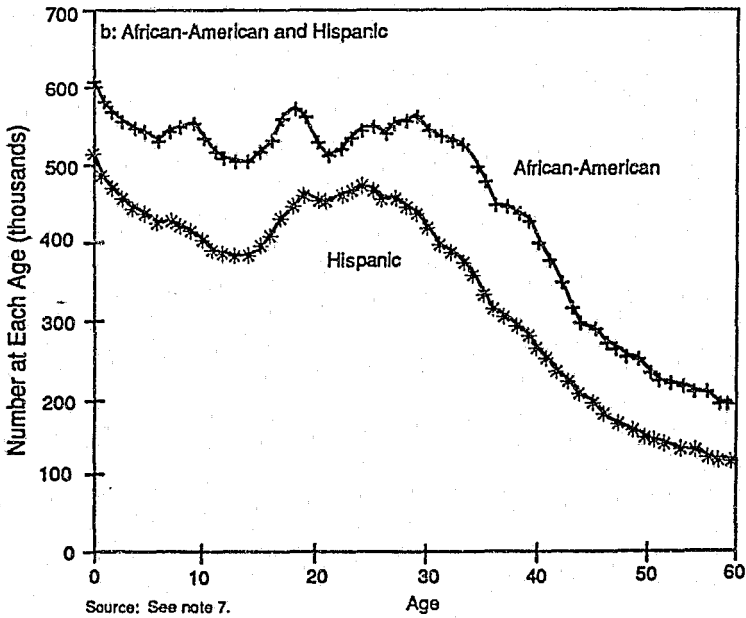
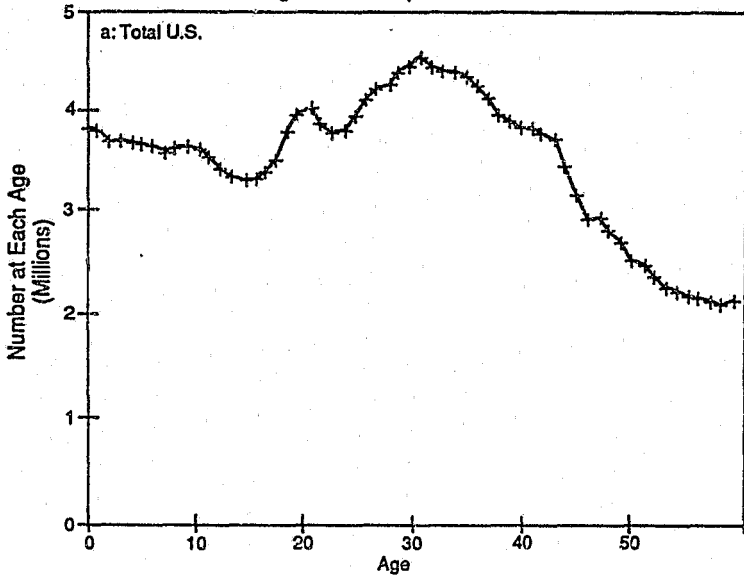
- The effect of the changing demographic composition will increase crime rates as the population in the 15-19 age range (the one with the highest age-specific offending rates) will be growing over at least the next decade, especially in the groups with the highest offending rates (see Figures 6a and 6b).⁷
- There have been increases in recent years in the age-specific offending rates for murder, robbery, and other violent crimes among young people (see Butterfield, 1992).
- The socialization problem, which is being exacerbated by changes in family structure, will be becoming increasingly serious as the percentage of children born to an unwed mother (currently at 23%) continues to

6. The commission's report, *The Challenge of Crime in a Free Society*, was published in 1967.

7. The data for Figure 6 were obtained from the U.S. Bureau of the Census, 1991. The values in the graph were obtained by three-point smoothing, so that the value presented for age i is obtained from $(N_{i-1} + N_i + N_{i+1})/3$, where N_i is the reported population of age i .

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Figure 6
Age of U.S. Population in 1990



Source: See note 7.

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increase, as it has for at least the past 30 years (see Figure 7).⁸ This problem is exacerbated by the growth in the number of children living under the poverty line and whose parent or parents have to struggle to manage their own affairs, which can handicap their efforts to socialize their children.

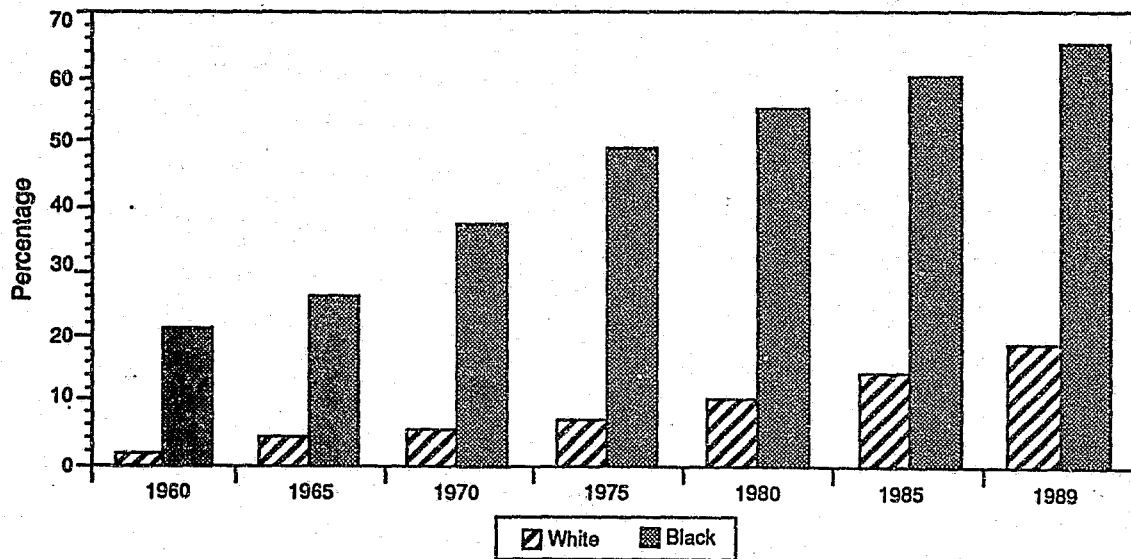
Our nation has considerable difficulty in addressing these issues. As long as the planning horizon remains as close as the next election—or increasingly, the next poll—it will be difficult to direct political attention to these issues because the benefits from any intervention are likely to occur well after the current incumbent leaves office. It is also likely that any programs directed at enhancing socialization will be very expensive because such efforts are inherently labor intensive and will require the recruitment and training of a large number of people into professions that have not been very remunerative. It will be particularly difficult to get the federal government to pay much attention to these issues as long as the federal budget deficit continues to be a serious problem, and there are no signs whatsoever that that situation will reverse itself within the next decade.

Finally, and perhaps most important, our political culture and our traditions make it clear that the problem of socialization rests predominantly, if not exclusively, with the family, and any attempt to transfer that authority outside the family will undoubtedly be met with major resistance. That resistance would undoubtedly be diminished if there were some therapies and treatments that were demonstrably effective in socializing young children. No one has yet identified such therapies. While it would be an extremely worthwhile effort to try to find them, the lag in the evaluation process of 10 to 20 years suggests that it will be a long time before effective therapies are developed and assessed.

All this suggests that the path would be much easier if society finds ways to augment the family with day-care centers, parent-training programs, and other resources—all of which would have to be used only on a voluntary basis—in order to invoke the best available knowledge in helping to socialize coming generations. Certainly, these efforts will not be easy in a political environment that is highly charged with accusations of racism and with defensive concerns about the racial differences that pervade evidence of offending patterns. The conflict that has been generated, for example, by the discussions of the “violence initiative” suggested by the Department of Health and Human Services (by former Secretary Louis Sullivan, an African-

8. Figure 7 was taken from the article, “Paternity and Public Policy,” by Daniel R. Meyer, published in *Focus* (vol. 14, Summer 1992), the publication of the Institute for Research on Poverty, University of Wisconsin-Madison. The data were drawn from U.S. House of Representatives, Committee on Ways and Means, *1992 Green Book* (Washington, D.C.: Government Printing Office, 1992): 1074; and *Statistical Abstract of the United States* (Washington, D.C.: Government Printing Office), 1987:61 and 1991:67.

Figure 7
Births to Unmarried Women as a Percentage of all Births, by Race, 1960-1989



NOTE: Percentages for blacks prior to 1970 include blacks and "other."

Source: See note 8.

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American) has already brought charges that the program is one with sinister racial intent. The charges of racist intent are particularly surprising in view of the fact that most violent crime is intraracial. Until the nation finds some means of pursuing research and programs regarding crimes that do involve disproportionate numbers of black offenders as well as black victims, without invoking the invective of racism, it is likely that the policies pursued will be paralyzed and ineffective. And in such a situation, given the continuing decline in family structure, it is most likely that the crime problem will continue to get worse, that it will generate increased fear and hostility, that the only response will be increased sanctions, and that the jails and prisons will continue to fill.

It should be clear that the nation will one way or another suffer the costs of these problems. We are now in a lull period before the crime problem gets worse and the reactions to it become more mean. It is important that major efforts be established to identify the nature of the problem, to assess alternative approaches, and to restore rationality to the policy process.

As one potentially important step in that process, I would urge that President Clinton establish a presidential commission on crime and drug policies and the criminal justice system in order to direct some needed national attention to these pressing issues.

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Alfred Blumstein is Dean and J. Erik Jonsson Professor of Urban Systems and Operations Research at the H. John Heinz III School of Public Policy and Management of Carnegie Mellon University. He has served as past president of the Operations Research Society of America and of The Institute of Management Sciences, and he was 1991-1992 President of the American Society of Criminology. He has chaired panels on research on deterrence and incapacitation, on sentencing, and on criminal careers of the National Research Council. His research interests include criminal careers, imprisonment policy and its impacts, and criminal justice planning.

**APPENDIX 6.—FACTS ON FEDERAL BUREAU OF PRISONS,
DECEMBER 1992**

FACTS ON FEDERAL BUREAU OF PRISONS DECEMBER 1992	
PERSONNEL	23,975
STAFF BY GENDER	
Male	72.9%
Female	27.1%
STAFF BY RACE	
White	71.3%
African American	17.9%
Hispanic	8.6%
Asian	1.4%
American Indian	0.7%
NUMBER OF INSTITUTIONS	67
TOTAL POPULATION	72,225
SENTENCED POPULATION	64,427
CAPACITY	52,013
PERCENT OF CAPACITY	148%
INMATES BY SECURITY LEVELS	
Minimum	27.0%
Low	30.1%
Medium	22.3%
High	10.5%
Pre-trial	6.3%
Holdover	3.7%
GENDER	
Male	92.2%
Female	7.8%
RACE	
White	64.1%
African American	33.3%
American Indian	1.5%
Asian	1.2%
ETHNICITY	
Hispanic	26.1%
CITIZENSHIP	
United States	72.9%
Mexico	7.2%
Colombia	4.5%
Cuba	3.6%
Other	8.5%

AVE. AGE OF POPULATION	37
TYPE OF COMMITMENTS	

U.S. Code	88.5%
Parole Violation	5.4%
Probation Violation	1.2%
DC Superior Court	0.3%
State, territorial	0.8%
Other	3.9%

SENTENCE IMPOSED	
-------------------------	--

Under 1 Year	2.4%
1-3 Years	13.4%
3-5 Years	12.3%
5-10 Years	31.4%
10-15 Years	18.0%
15-20 Years	9.2%
Over 20 Years	11.3%
Life	2.0%

TYPE OF OFFENSES (Sentenced Pop. Only)	
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Drug Offenses	59.9%
Robbery	11.0%
Property Offenses	5.4%
Extortions, Fraud, Bribery	6.8%
Violent Offenses	3.4%
Firearms, Explosions, Arson	8.1%
White Collar	1.1%
Immigration	1.1%
Courts of Corrections	0.8%
National Security	0.1%
Continuing Criminal	
Enterprise	1.0%
Miscellaneous	1.4%

FY 1992 COST OF CONFINEMENT		
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	Daily	Annual
*Bureau-wide	\$56.84	\$20,803
Minimum Security	\$41.31	\$15,120
Low Security	\$44.72	\$16,369
Medium Security	\$42.35	\$15,499
High Security	\$49.69	\$18,188
Detention Centers	\$52.13	\$19,080
Administrative	\$48.00	\$17,567
Major Medical Centers	\$69.97	\$25,611
Contract Comm. Treat.	\$37.10	\$13,578

*Includes Central and Regional Office Overhead

For additional information, contact
the Bureau's Office of Public Affairs
202 307-3198

APPENDIX 7.—LETTER FROM FRANK DOMURAD (WITH ATTACHMENTS),
DEPUTY COMMISSIONER FOR ADMINISTRATION & PLANNING, TO PROF.
LYNN BRANHAM, SEPTEMBER 7, 1993

THE CITY OF NEW YORK
DEPARTMENT OF PROBATION

115 Leonard Street - Room 2C
New York, New York 10013

FRANK DOMURAD
Deputy Commissioner
for Administration & Planning



Tele # (212) 374-5681
Fax # (212) 374-3263

September 7, 1993

Professor Lynn Branham
2202 Northampton Way
Lansing, Mich. 48912

Dear Professor Branham:

Attached please find a short description of the Department's Edgecombe Day Treatment Center, as well as more extensive material on our Adult Supervision Restructuring Project. If you have any questions or require further information, feel free to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "F. Domurad".

Frank Domurad

THE EDGECOMBE DAY TREATMENT CENTER

The Edgcombe Day Treatment Center is the culmination of extensive collaborative planning and coordination between the New York City Department of Probation and a variety of City and State funding and service delivery agencies, including the Office of the Deputy Mayor for Public Safety, the Office of Management and Budget, the State Department of Correctional Services, the State Division of Probation and Correctional Alternatives, the City Department of Corrections, the Board of Education, and the Department of Employment. The EDTC represents a sizable investment of City, State, and National resources, in an effort designed to reduce unnecessary prison and jail commitments, to improve probation practice, and to add to the body of knowledge available to policymakers and practitioners in the broader national and international criminal justice communities contemplating similar additions to the menu of intermediate sanctions in their jurisdictions.

The collaborative process between Department of Personnel and staff and consultants was supported by the National Institute of Corrections through its short-term technical assistance program and through a special Intermediate Sanctions Technical Assistance Project also funded NIC through the Center for Effective Public Policy in Washington, D.C.

The Edgcombe Day Treatment Center is designed to serve as an intermediate sanction in lieu of revocation to jail or prison for male probation violators in the Bronx and Manhattan. It targets those probationers, who, by virtue of certain new offense convictions and/or noncompliance with other requirements of the court's original probation sentence, are identified as being at the highest risk of further criminal behavior, and whom, in the absence of the EDTC option, the Department of Probation would otherwise seek most urgently to revoke and incarcerate. In other words, on a continuum of responses to probation violation behavior, the EDTC represents the penultimate case-management option, between the original, breached terms and conditions of probation and the 'last stop' of revocation to jail or prison.

Within the foregoing high-risk pool -- drawn from violators from specialized Intensive Supervision and Substance Abuse Units as well as general adult supervision caseloads -- subsequent screening and eligibility determinations by field officers and EDTC intake personnel are designed to assure maximum fit between the precise service and supervision needs of the offender and the resources and regimen available to Edgcombe participants. Upon a Department of Probation finding of suitability for the EDTC, following a combination of clinical and objective risk and needs screening and assessment procedures, eligible cases are diverted from the normal revocation process via a fast-tracked petition to the court for an enhanced probation order approving the offender's admission to the program.

The Center is in upper Manhattan, in the lower part of a building occupied in its upper levels as a work-release facility by State Corrections. Operating on a weekday schedule, the Center is designed to provide a combination of uniform as well as individualized diagnostic, treatment, and supervision services, both on the premises and through off-site referrals. Program components include a heavy emphasis on group counselling for substance abuse, literacy and G.E.D. instruction, vocational training and employment placement, community service, home curfew, telephone monitoring, and rigorous attendance and daily time management requirements. Offenders successfully completing the EDTC regimen are phased back into gradually decreasing levels of more traditional probation supervision, while failures are returned to the normal revocation process.

THE CITY OF NEW YORK
DEPARTMENT OF PROBATION

115 Leonard Street - Room 2E
New York, New York 10013

MICHAEL P. JACOBSON
Commissioner



Tels # (212) 374-3775
Fax # (212) 374-3170

ADULT SUPERVISION RESTRUCTURING

I. BRIEF PROGRAM OVERVIEW

As part of the Mayor's effort to streamline and downsize City government, the Department of Probation has initiated a total restructuring of Adult Supervision. At any one time, the Department supervises over 60,000 probationers, of which approximately 45,000 or 75% are felons. This restructuring focuses primary supervisory attention on high risk violent offenders.

The Department is in the process of planning and designing Adult Supervision Restructuring (ASR), which will be implemented in Manhattan in July, 1993. The new restructured system will:

- *utilize a new risk instrument which will identify our most violence prone probationers*
- *screen all offenders for placement in an appropriate violent or non-violent classification track*
- *assess all violent offenders as to treatment needs*
- *establish an enforcement program for the case management of violent offenders*
- *provide in-house treatment interventions, where appropriate, to violent offenders, including the use of group counseling techniques*
- *obtain external treatment interventions for offenders from governmental and non-governmental agencies, where appropriate*
- *establish automated reporting facilities (kiosks) to monitor non-violent probationers requiring a minimum level of supervision*
- *provide a range of disciplinary interventions and intermediate sanctions, including the Edgecombe Day Treatment Center, for violent and non-violent offenders who do not successfully complete treatment, enforcement and reporting programs*
- *redesign its MIS system to track probationers at all stages of adult supervision and to provide data necessary for management, oversight agencies and program evaluation*

- reduce administrative paperwork and improve the availability of information about probationers through automation and, specifically, through the development of an automated case folder
- develop outcome measures to evaluate the effectiveness of various treatment and enforcement strategies.

The planning and design process of ASR is now at mid-stream. Various teams of field personnel have conceptualized the new form of supervision in a series of five "pre-visioning" reports. Executive staff, working with the Computer & Data Communications Services Agency (CDCSA), has combined these reports with a "top-down" functional analysis of probation to establish guidelines for actual work process and program redesign. A design committee, again consisting primarily of field staff, will begin the actual restructuring design by mid-March.

The effort required to plan, design and implement a program of this magnitude has required a unique and intense multi-agency cooperation. A host of City oversight and line agencies as well as a number of universities and private consultants are key players in this program.

Among the issues they are addressing include the:

- conceptualization of the restructuring of Adult Supervision, the provision of required technical information and the coordination of the activities of the consulting team
- development of a statistical instrument to classify probationers according to their risk of committing future violent criminal acts.
- development of assessment instruments to identify violent probationers' social and psychological needs
- development of treatment interventions appropriate to various types of violent probationers' needs, which will take into account the racial and ethnic diversity of New York City's probation population
- development of staff training curricula and provision of training
- process evaluation of all aspects of the restructuring effort

In addition, NYNEX has agreed to serve as this project's corporate sponsor, providing pro bono technical assistance with the design process.

II. MAJOR COMPONENTS OF THE RESTRUCTURED SYSTEM

Adult Supervision Restructuring will consist of various program tracks keyed to the mode of interaction appropriate for various classes of violent and non-violent offenders.

Intake and Assessment will orient and will classify all incoming probationers as "violent" or "non-violent", using risk instruments being developed by the Department's consultants. Probationers will be briefed about the conditions of probation and the Department's expectations before being assigned to the appropriate supervision track.

The Enforcement Track will supervise two types of probationers. All probationers classified as "violent" will be assigned to the Enforcement Track. Those at highest risk will be assessed for social and psychological needs on the basis of the objective instruments designed by consultants. They will then be referred to appropriate treatment interventions, which will be provided by Department staff or by external agencies. Throughout the treatment process, the probationer's progress and conduct will be monitored by the assigned Probation Officer.

This track will work with probationers who become disciplinary problems, determining what types of action should be taken, from the lowest level of sanction through violation. It will also include intermediate sanctions for maintaining violating probationers in the community under close supervision. Examples of intermediate sanctions include home curfews, electronic monitoring and the already existing Edgecombe Day Treatment Center.

Treatment Services will be an adjunct to the Enforcement Track, providing interventions designed to change probationers' behavior. Interventions will be provided in the form of highly structured psycho-educative sessions designed specifically to meet the needs of identified segments of the violent probationer population. These segments may include the adolescent offender, the "mainstream" adult offender, the domestic violence offender and the sexual offender. Group leaders will receive specialized training from the Group Work faculty of the Hunter College School of Social Work. The training materials are being designed in conjunction with Department trainers.

The Case Management Track will monitor special conditions of probation established by the Court for non-violent offenders.

The Reporting Track will provide automated supervision for non-violent offenders without special conditions of probation through the use of interactive kiosks.

Misconduct Review aims to bring greater consistency to the Department's responses to probationers' failure to fulfill their conditions of probation. It will ensure that the Department's responses, including intermediate sanctions and ultimately violation and return to incarceration, are commensurate with the nature of misconduct.

III. THE RESTRUCTURING PROCESS TO DATE

The Department has completed several phases of the planning and design process.

- 1) In the early Spring of 1992, the Commissioner and relevant Executive Staff prepared a document outlining the fundamental assumptions and characteristics of a restructured Adult Supervision model, with its emphasis on focusing resources on the violent offender. The material was submitted to the Office of Management and Budget where it was approved. The Department was directed to proceed with planning. The Commissioner and executive staff subsequently met with all managers within the Agency to explain the broad dimensions of restructuring and to solicit participation in the initial planning stages.
- 2) The Commissioner established an executive level Working Group, which would meet weekly to track the project, to overcome any barriers that might arise in planning, design and implementation and to make broad policy decisions.

- 3) *In July 1992, Operational Assistant Commissioners met with field staff to solicit line staff participation in the preliminary planning stage.*
- 4) *Five committees were established comprised of line staff (both professional and clerical), management, and planning staff to produce five major "Pre-Visioning" documents. These documents outlined the "ideal state" of the five major components of restructured Adult Supervision. Through a short term technical assistance grant from the National Institute of Corrections, the consultant services of a nationally recognized expert in the field of community corrections were secured to work with executive staff and the pre-visioning committees.*
- 5) *A committee composed of Operations, Analytical and MIS staff has conceptualized and completed high level design work for an automated case folder which would, among other functions, reduce time demands that paperwork produces for probation officers, facilitate administrative oversight and allow a wide range of information, from reporting dates for probationers to arrest information, to be obtained automatically. The Department has identified the interfaces required for case management and has begun to meet with other City agencies to gain access to their computerized data. CDCSA has agreed to facilitate the required interfaces and provide assistance with establishing CityNet linkages.*
- 6) *Through the assistance of the New York City Department of Personnel, NYNEX Corporation agreed to become the Department's Corporate partner. [NYNEX had recently completed its own reengineering project.] Several trips were made to Westchester County by Departmental staff to discuss the NYNEX experience and to frame the scope of its own efforts to restructure. NYNEX was able to offer its expertise in the area of organizational change, design process and computer modeling. They conducted a design process workshop in NYC for Department staff.*

IV. NEXT STEPS FOR COMPLETING RESTRUCTURING

Executive staff will continue to meet to resolve outstanding policy issues and new ones identified during the design process. The Assistant Commissioner for Operations [a position dedicated to the restructuring effort] meets with line field staff to update them on the restructuring effort and to elicit feedback.

A Design Group was selected (comprised of field staff, managers and support personnel) in March. Following some training in the process of building a program design, the group began working full time on the creation of an overall detailed design for the project. The Department's Director of Training is coordinating training efforts throughout the Spring and implementation planning will begin shortly thereafter.

The Manhattan Adult Service Supervision staff will be relocating to their new location at 346 Broadway on or about July 1993. Staggered implementation of the new model will begin one month following relocation. Manhattan will be the first restructured borough, with the other boroughs coming on line by the end of FY 94, provided that suitable space can be located in each borough.

V. THE GAINSHARING PROGRAM

As a result of annualized budget savings of over \$3 million in Fiscal Year 1994, a portion of these savings will be used to increase probation officer salaries.

The productivity agreement is as follows:

Effective July 1, 1993, members of the United Probation Officers Association with five or more years of experience in the Probation Officer title series will receive \$775, members with ten or more years experience in the P.O. title series will receive an additional \$750 and members with fifteen or more years experience in the P.O. title series will receive an additional \$500. This constitutes 30% of the probation officers series savings generated in that fiscal year.

The UPOA will also fully cooperate and support the Department of Probation's restructuring of the Adult Supervision Program. There will be a labor/management committee established to monitor the progress of the restructuring program.

In addition, the City will fund an educational scholarship and training fund for self-improvement opportunities for probation officers in the amount of 3% of the total savings.

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GERALD MIGLIO
DIRECTOR



THE NEW YORK TIMES EDITORIALS/LETTERS SATURDAY, FEBRUARY 12, 1993

The New York Times

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Probation's Bold Experiment

Tucked into Mayor David Dinkins's latest New York City budget plan is a proposed experiment that, in time, could have a substantial effect on both municipal budgets and public safety. The experiment bears watching locally and across America.

The idea is for the city's Probation Department to apply modern technology and better management to the task, now poorly carried out, of supervising thousands of criminals not sent to prison but released under court supervision.

The probation departments responsible for such supervision typically run the largest correctional programs in a city or county. The active caseload in New York City totals 45,000, more than twice the number in city jails. Yet because legislators and municipal leaders rarely pay much attention to probation needs, crushing caseloads and paperwork severely hamper supervision.

New York City's new Probation Commissioner, Michael Jacobson, believes that a restructuring plan could improve the effectiveness of probation supervision while saving money. He would separate out two groups from the general caseload: those with deeply troubled or violent backgrounds who require intensive monitoring and help, and those more stable cases needing far less attention.

To deal with the easier cases, he would equip probation offices with kiosks similar to bank automatic teller machines. Instead of reporting for interviews with a probation officer to answer questions on employment status, living arrangements and the like, the client would check in with the

machine and punch in answers to such questions.

Technology now makes possible positive identification electronically through laser reading of gerprints or other means. On request, the machine could supply information about social services, as probation officers do now. Ideally, the machine could vastly reduce paperwork and face-to-face interviews for easier cases, allowing officers to focus on the hard ones.

Mr. Jacobson would require officers meet with the more troubled clients to do so in small groups, rather than one on one. Group meetings would permit more frequent contact. Because a single officer would deal with more clients, a convict who now reports twice a month for 10 minutes could be required to show up for a two-minute meeting every week. And the group approach might have a more positive impact on the clients' attitudes than individual interviews.

Of greatest immediate interest to City Hall is Mr. Jacobson's belief that automation would save for smaller staffs. Even after granting officers a million in "gainsharing" bonuses, the city could save \$2 million per year.

There's room for skepticism. The automation kiosks are untested for such use, and the idea of staff shrinkage makes some criminal justice experts nervous, whatever the productivity gains.

But the combination of high tech and group case management — potentially adaptable for agencies with big client caseloads — remains intriguing enough to justify a pilot program. Or starts, the experiment merits close attention not just in New York.



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The Metro Section

The New York Times

L+ B1

FRIDAY, JANUARY 29, 1993

Accord Made To Cut Staff For Probation

With Fewer Officers,
Savings of \$3 Million

By JONATHAN P. HICKS

The way the New York City Probation Department supervises 60,000 adult criminals will be refashioned — with less individual attention paid to nonviolent probationers — as a result of an agreement reached yesterday between the Dinkins administration and the probation officers union.

The agreement will enable the city to cut the number of probation officers in its adult division by 19 percent through attrition, from 383 to 310. While the \$3.3 million in annual savings is relatively small, the move appears to represent progress in the city's efforts to wrest greater productivity from its labor unions. Earlier this week, the city announced an agreement with the sanitation workers union that it says will save \$20 million a year.

Linked to Years of Service

The probation changes are part of a tentative contract agreement reached yesterday with the United Probation Officers Association, which represents 970 officers in the Probation Department's three major divisions: adult supervision, adult investigations and family court. The agreement calls for the same basic terms reached recently with the city's largest municipal unions, with an 8.25 percent pay increase over three years.

On top of that — even though the changes affect the adult supervision only — all probation officers will get 30 percent of the savings, with the balance going to the city. Probation officers with 5 to 10 years of service will receive additional pay increases of 2.4 percent based on their current salaries, or about \$775 a year.

Officers with 10 to 15 years of service will see an increase of 4.4 percent, or about \$1,525 a year. Workers with more than 15 years of service will receive pay increases of \$2,025 a year, a gain of 5.9 percent.

5.4% of Department's Budget

The \$3.3 million in savings represents 5.4 percent of the Probation Department's annual budget.

Under the plan, probation officers will be expected to do more work, but the work load will be kept within limits through several changes. Many nonviolent offenders will not always be interviewed face to face by probation officers and instead their interviews will be processed by computers in electronic kiosks.

Special counseling for violent offenders — now conducted individually — will be done almost exclusively in group sessions.

Continued on Page B2



Mayor David N. Dinkins announced a plan at City Hall yesterday to revise the probation system in New York City, saving \$3.3 million. With the Mayor

were, from left, First Deputy Mayor Norman Steisel, Labor Relations Commissioner James F. Hanley and Probation Commissioner Michael Jacobson.

By The Associated Press

Union Accord to Cut Officers in Probation Dept.

Continued From Page B1

although the seasons will take place more frequently.

Probation Commissioner Michael Jacobson said the department would use a "positive identification mechanism" such as a biometric fingerprint reading device to insure that the electronic interview was conducted with the intended person.

"In the absence of doing something like this, the caseload of the probation officer would have increased dramatically," Mr. Jacobson said.

He said the restructuring would be

under way in July in Manhattan, where it would undergo a six-month evaluation. Beginning next year, it is to expand to each of the other boroughs every three months, he said.

Mayor David N. Dinkins acknowledged that "there remain questions for us to answer as we implement our new system," adding that there was a need for careful monitoring and evaluation. But he added that the city's budget problems have made it clear "that a business-as-usual approach with less staff was simply not sufficient."

The Dinkins administration has been the subject of criticism by some

public officials who have contended that the Mayor has not worked diligently enough on securing productivity enhancements in recent contracts talks with 200,000 workers represented by the city's largest municipal unions.

Mr. Dinkins said yesterday that he remained "hopeful that, pundits' doubts notwithstanding, we shall have other gain-sharing and productivity announcements to make in the near future."

The Mayor said a portion of the savings that would go directly to the city would be used to finance personnel training and education in the Probation Department.

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"All the News
That's Fit to Print"

Some New Yorkers on Probation
Will Begin Reporting to Machines

By FRANCIS X. CLINES
Special to The New York Times

NEW YORK, May 23 — Thousands of New York City's most violence-prone novice criminals will soon be summoned to intensive therapy sessions of four hours a week and more in an overhaul of the traditional probation system, while less risky offenders will be monitored electronically by simply reporting to automated kiosks.

The change is a kind of triage, an attempt to single out the most threatening cases for the resources of probation services — society's often overlooked but crucial last chance to intercept fledgling felons before they graduate to a prison sentence.

Largest Effort Ever Made

At present, most of the city's 69,000 criminals sentenced to probation instead of prison are required to make token visits of 10 or 15 minutes to probation officers, some as seldom as once or twice a year. Each officer typically handles 160 cases, and two out of five probationers are later arrested for other crimes.

The new system, due to take effect this summer, will select about 15,000 criminals whose records stand out for their histories and crimes of violence.

Each of these chosen will be required to report twice weekly for at least two hours of peer-group counseling shepherded by teams of probation workers, far greater attention than the few minutes a month currently afforded to them.

Reporting to a Machine

The overhaul, the largest effort ever made to focus on the most threatening of probationers, will be studied by criminal justice officials alarmed at the growing size and expense of the nation's prison culture. The United States' inmate population, the largest in the world, has tripled since 1980 to more than one million convicts, with another 2.5 million criminals on probation.

The change in New York City, which has one of the largest probation departments in the nation, will amount to a working laboratory in the search for less costly alternatives to prison. While probationers are generally considered more susceptible to rehabilitation, they are afforded only a small fraction of

Continued on Page A16, Column 1

In New York, Some on Probation Will Report to Machines

Continued From Page A1

The new feature of kiosk reporting is likely to catch the public's eye, as less violent probationers skip the traditional brief face-to-face meetings and show up weekly at video identity machines that will resemble automated teller machines. The devices, primarily intended to make sure that probationers remain in the city, will free up money and manpower for the violence-prone cases.

Information on employment, housing and other social services is supposed to be accessible through the machines, which will also test voice-recognition technology in the attempt to verify that the probationer, and not some helpful friend, is at the screen reporting.

But, probation specialists are less interested in the technology and more interested in the program's effort to cull out potentially violent career criminals, intercepting them with better services or at least flagging them for future reference in protecting the city.

"The goal is to put the great majority of our limited resources behind the most high-risk, most violence-prone folks, to get that recidivism rate down," said Michael P. Jacobson, the city's Probation Commissioner, who estimates the rate of relapse into crime is now about 40 percent.

The planned overhaul in work and attitude is to be so total and so rapid that Mr. Jacobson has taken the unusual step of inviting low-level probation workers and supervisors to help redesign the department's services from top to bottom. About a dozen are doing so in daily brainstorming sessions on a schedule that aims to begin the first changes in Manhattan by August.

Computerizing Records

The overhaul is to include computerization of the department's highly fluid inventory of 47,000 active cases, which takes in a fresh load of more than 18,000 probationers from the courts every year. The turnover produces a flood of paperwork that makes it easy for probationers to slip off the reporting track. Those working on the redesign are being asked, in effect, to help solve some of their greatest frustrations in the current bureaucracy.

"I'm excited. I tell my peers back in the office that management is listening," said Ellen Watson Suber, a probation officer working with the design team which is led by Susan Cooper, a consultant in the relatively new specialty of revamping old work habits.

"This is the last shot before state time," Ms. Suber said of the typical probationer — young, repeatedly in trouble, and destined for prison unless something or someone changes him or her in probation. "We have to do more to catch them before the state grabs them."

A recent meeting of 15 people on an "action team" took place in a room plastered with hand-drawn work-flow charts that were constantly being cut to as the workers spoke more from their experience than from the manual. Dealing with "troublesome" — unruly probationers who are an alarming fact of life — was the morning topic. A steps were carefully talked about and argued out, the consensus was translated into tidy form by specialists in computer graphics and policy in the back of the room.

State Plans Cuts

Probation officials say the success of the new effort, in part, depends on persuading Albany to abandon plans to cut \$18 million statewide in probation services. If not rescinded, this would mean 33 million less for the city's \$6 million probation budget and a retreat to layoffs instead of reform, according to Commissioner Jacobson, who has been pleading his case in Albany.

The Independent Correctional Association of New York, a watchdog group, estimates that the cut would mean the loss of 100 of the city's 950 probation officers and a decision by judges to sentence more convicted defendants to far more costly prison terms rather than probation. At the same time, the State Assembly has been balking at rising prison costs and declining to enlarge the prison system significantly.

"This is a classic case where the pressure to address short-term political concerns is producing a misguided policy with unintended and potentially disastrous results," Bob Gangi, the association's executive director, has warned state officials. He and other prison critics want more money, not less, channeled to alternatives to prison.

Commissioner Jacobson concedes that there is no popular support for financing services for criminals who are free on probation, even though four out of five have serious convictions as neophyte felons. But he hopes government professionals in Albany will eventually acknowledge the cost effectiveness of the needed \$8 million in the context of the state's \$1.1 billion prison budget.

"We have the ability to design our own future," he said.

After the new system is implemented in Manhattan, additional bonuses are to be brought on line every three months. Eventually, the system could produce a savings of perhaps \$3 million annually and require 70 fewer probation officers, according to Commissioner Jacobson.

The new focus on violence-prone criminals, before they do something worse on the streets, is the best investment of scarce resources, Mr. Jacobson says. He is well aware of the last decade's popular and political emphasis on locking up all sorts of criminals for longer sentences. But as the budgetary implications grow clearer, the commissioner says he is counseling his overhaul to show that probation is the most critical and potentially more redeeming contact that a beginning criminal has with the justice system.

"If we don't end the contact next then they're going up," he said of the bootcamp prison system that is the waiting alternative.

Michael Jacobson

-- Continued from page 77

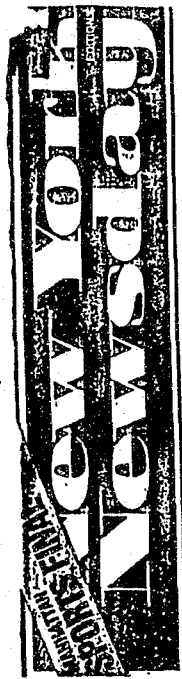
ple commit crimes over a certain period in their lives, and if they're jailed they'll just increase the length of that period.

Q. Will this program help kids you need to reach?

A. In the last budget we received more money for Family Court; if we more intensively supervise juveniles, we can keep them from going to an upstate facility, which saves about \$90,000 a year. But most important, it keeps them from the cycle of their first confinement upstate, coming back with little after-care, and slipping into the adult system.

Q. What reaction are you getting from your probation officers about all these innovations?

A. They want to work in less crowded space, and we're getting new space in almost every borough. They don't want to waste their time doing administrative or clerical functions and we're going to computerize every possible function in the agency. That means things like automating our case folders so we don't have massive mountains of paper. Most of the people involved in making this a day-to-day reality are probation officers. They have to own it, want it and buy into it. I've been surprised by how intellectually excited our people have been. The raises they'll get from the savings doesn't hurt, but it's probably the first time in their professional lives that somebody has offered the chance to design a system they want to live with.



WEDNESDAY, FEB. 24, 1993 • MANHATTAN • 36 CENTS

THE NEW YORK NEWSDAY INTERVIEW WITH MICHAEL JACOBSON

Group Therapy for Violent Offenders



Newsday/Donna Dietrich

Q. You've said that if your new program works, it will fundamentally change the nature of probation in America. Can you give us an overview?

A. We want to concentrate our resources among our most violence-prone population, and to do that we're going to see them more intensively in groups, as opposed to individually for short periods of time. The trick is to target the groups -- there may be one on domestic violence, for sexual abusers or young violent adolescents. To free up the people to do this, we want to use electronic kiosks for our low-risk probationers. Besides being capable of positively identifying them, these kiosks will let us ask them questions and provide them with information on drug treatment, job, health and unemployment programs. We can't do that now with our limited resources.

Q. The probation officers' union agreed to a 15 percent staff reduction in exchange for 30 percent of the savings. That's a major contractual concession, but it also leaves you with 350 counselors for 47,000 cases. Won't that strain your agency?

A. We'll start feeling the brunt of losing 73 officers in July. That's why we hope to have this new program up and running by then in Manhattan. We'll give ourselves six months to look at it and make changes. Then we'll add boroughs in three-month increments. By the end of fiscal 1994, we'll have the adult end of probation restructured.

Q. What kinds of tests will you use to determine who needs the most attention?

A. We have instruments now that predict recidivism. They don't fine tune it, though. We not only want to know whether there's a likelihood of your being rearrested, but what you'll be rearrested for. It's difficult social research, and we have consultants from Rutgers and John Jay working on it. We should get a first draft shortly and have it fine-tuned a few months later.

Q. Group therapy is hardly a new idea. What's

PROBATION FUNDIT
Michael Jacobson, the city's commissioner of probation, is in the midst of reforming the way his agency supervises convicts. Shaun Assael spoke with him for New York Newsday.

revolutionary about its use here?

A. The history, theory and practice of probation has always been to have a one-on-one interaction. For a caseload ratio of 1 to 25, maybe that's ideal. But when it's 1 to 160, the most you'll see people is four times a month for 15 minutes. It may make more sense to see them 10 times a month for two hours in a group setting. And all the available research suggests that this works well with violent offenders, contrary to expectations. That's new.

Q. What kind of therapy are we talking about?

A. There are a number of techniques, which differ depending on the problem. The kind of group work you would do with domestic violence batterers is different than with violent adolescents. It's not hand-holding. It's an attempt to make them understand the consequences of their actions so they look at the decision-making process that goes into committing violent crime and change it. Our goal is to change people's behavior in fundamental ways.

Q. Some would argue that the money should be directed at first-time offenders, since they have the best chance of being effectively counseled.

A. Our goal is to protect public safety and reduce violent crime. If you're a first-time offender, and your first offense happens to be criminal trespass, after we do an assessment and we think there's a low risk of you doing something violent again, we have to weigh the costs and benefits of putting a lot of resources into you. The person we really want to work with is a threat to the community.

Q. How do you decide who's a safe risk for automated supervision?

A. We're going to devote a lot of resources to assessment. Who are they? What have they done? And what's our best guess about what kind of risk they pose.

Q. Like all programs that emphasize alternatives to incarceration, this one is designed to save money. But every time the mayor needs to cut the budget, won't there be pressure to shove people into automated supervision who shouldn't be there?

A. No one is going to force us to put people on low-risk reporting if they're not appropriate. It's not in anyone's interest. One thing I'm trying to show is that with this kind of program, you can get recidivism rates down, which means hundreds fewer people going through the criminal justice system, taking up jail beds. Research has proven that po-

--Continued on page 80



Adult Supervision Restructuring GOALS

- Clarification of the organizational mission to reflect a clear mandate for public safety
- Rededication to "quality" in the assessment, treatment, and supervision of highest priority clients
- Implementation of state-of-the-art offender management and treatment modalities, including group supervision, array of intermediate sanctions for enforcement and control, and multi-level offender assessment methods
- Revision of MIS and related accountability technologies to support these "quality" efforts
- Changing the organizational culture in ways consistent with quality management strategies.

PROJECT MILESTONE CHART																	
Project Title: RESTRUCTURE ADULT PROBATION SERVICES										Agency: DEPT. OF PROBATION				Page: 1 of 1			
Project Manager: MICHAEL JACOBSON										Status as of: 3/31/93				Completion Date: 6/94			
No.	Task	Person Responsible	Milestone Status														
			4/93	5/93	6/93	7/93	8/93	9/93	10/93	11/93	12/93	1/94	2/94	3/94	4/94	5/94	6/94
1	Develop risk assessment instruments	Karmen	/														
2	Begin Kiosk solicitation process	Reinsons	/														
3	Develop group interventions	Andrews			/												
4	Develop training curriculum	Goodman			/												
5	Complete workflow redesign	Stern			/												
6	Move to 346 Broadway	Dolp				/											
7	Secure required waivers	Cunningham				/											
8	Develop MIS prototype	Reinsons					/										
9	Conduct staff training	Goldberg					/										
10	Implement reporting Kiosk demonstration	Reinsons						/									
11	Implement ASR in New York and Richmond Counties	Siegel						/									
12	Complete demonstration and issue RFP for Kiosk technology or determine alternate strategy	Reinsons										/					
13	Implement ASR in Queens County	Siegel										/					
14	Implement ASR in Kings County	Siegel											/				
15	Implement ASR in Bronx County	Siegel													/		

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