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National Association of Criminal Defense Lawyers

December 5, 1990

The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am writing on behalf of the 20,000 members of NACDL and its state and local affiliates regarding the Sentencing Commission's study of mandatory minimums, as directed under section 1703 of the newly enacted crime bill, P.L. 101-647.

We know that the Commission has its hands full carrying out this detailed study within the six-month time frame allotted, but there is one important related issue we wish to commend to the Commission's attention: the need for this same type of impact assessment on new mandatory minimum sentencing provisions before they are voted upon for enactment.

The reality is that, whatever conclusions the Commissions reaches in its report, and whatever recommendations it makes, it is likely that legislation proposing new mandatory minimums will continue to surface from time to time in Congress. Although we heartily endorse the concept of reviewing the impact of all existing mandatory minimums and suggesting alternative ways that Congress might express its desire to increase sentences without resorting to mandatory minimums, we believe it is necessary to deal with this reality, and to equip Congress to make informed decisions based on the merits of each new proposed mandatory minimum.

Many states now require that some sort of impact assessment be conducted on new sentencing legislation before it is enacted. (Enclosed for your information is a review of state experience in this area which we prepared for Senate Judiciary Committee staff last year, including proposed legislation.) One state--Tennessee--mandates a "pay as you go" approach, so that any sentencing-enhancement law enacted without accompanying funding for prison costs "shall be null and void." We found that the legislative reaction to such assessments has been overwhelmingly positive.

The Honorable William W. Wilkins, Jr.
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We note that the prosecutorial community also appears to support making such information available to legislators. Last Fall, the Criminal Justice Section of the American Bar Association--made up of prosecutors and judges as well as private practitioners--debated a resolution urging that Congress and the state legislatures should not enact any legislation affecting sentencing or parole policies without first considering a prison impact assessment and appropriating the necessary money to implement the legislation, or taking "other counterbalancing steps" to decrease prison populations. Prosecutors on the Criminal Justice Council spoke up in favor of the resolution: a representative of the Justice Department's Criminal Division said that Congress has been "unbelievably irresponsible" in not seeking and considering this type of information in the past. Prosecutors from Illinois and Maryland also expressed the support of the law enforcement community. Subsequently, the full ABA overwhelmingly approved the resolution.

We stress that although the need for prison impact assessments is nowhere more compelling than where mandatory minimums are proposed, it extends to all laws which would be likely to cause a net increase in prison populations. A requirement for prison impact assessments should extend to any legislation creating a new offense, expanding the scope of an existing offense, changing the rules of eligibility for probation, parole or supervised release, or otherwise increasing sentence length or the number of offenders subject to imprisonment. Naturally, this would cover amendments to the sentencing guidelines developed by the Commission, though they are legislated in a slightly different way.

Judge Wilkins, we and many in Congress were shocked at the prospect that the massive new mandatory minimums approved by the Senate in its version of this year's crime bill could have suddenly become law without a moment's consideration of their effect on prison populations or on proportionality with sentences for other federal offenses. These provisions, particularly those in the Gramm amendment approved on June 28, 1990, were virtually drafted on the Senate floor, were shouted through not on their own merits but as part of a passionate debate on gun control, and raised the specter of penalties as extreme and irrationally disparate as those caused by the 5-year mandatory minimum for crack enacted in 1988, which the Commission has rightly singled out for criticism. It is our view that any report on mandatory minimums which does not address the need for impact assessments before enacting any such mandatory minimum has fallen short of satisfying the Congress's legislative request to the Commission, in section 1703(b)(8) of the crime bill, for information which would "contribute to a thorough assessment of mandatory minimum sentencing provisions."

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We encourage the Commission to discuss this idea with corrections officials and any other criminal justice planning professionals. We have no doubt that support for the concept of pre-enactment impact assessments will be unanimous among all responsible authorities involved in criminal justice policy.

Finally, though we fear the Commission may tire of hearing us harp on it, we hope that in reviewing the impact of mandatory minimums on "the Federal prison population" (section 1703(b)(3)), you will also consider the impact on individuals within that population. The insanity of mandatory minimums is not just a question of prison head counts, unwise budget allocations, or even illogical and inconsistent undermining of the guideline system. It is injustice with a human face, like Susana Sanchez-Robles, the single mother of five young daughters who I mentioned in my testimony before the Commission earlier this year, who is serving a mandatory ten-year sentence for a low-level "mule" offense. Many such cases are reviewed in the enclosed excellent article from the March issue of American Lawyer magazine, and more crop up every day, with judges increasingly lamenting their absolute powerlessness to avoid imposing an absurd and unjust sentence on a peripheral drug defendant--to tailor, for example, an alternative sentence for Ms. Sanchez-Robles which would punish and incapacitate her without, in effect, orphaning her children.

Such injustices are compounded, we note, by the requirement that mandatory minimums can be avoided only if the prosecutor certifies to the judge that the defendant has provided substantial cooperation in the prosecution of another person. In practice, our members attest, prosecutors will award such reductions only to the more culpable, high-level defendants who can roll over on somebody important. Low-level defendants, who can provide information only about their immediate supplier, never qualify, and thus end up serving proportionally more severe sentences than the true "kingpins."

The Commission's consideration of our views on these vitally important issues is, as always, greatly appreciated. If NACDL can be of any further assistance as you prepare your report under the crime bill, please do not hesitate to contact me.

With best regards,

Sincerely,

A handwritten signature in dark ink, appearing to read "H. Scott Wallace", with a long, sweeping horizontal stroke at the end.

H. Scott Wallace
Legislative Director

PRISON IMPACT ASSESSMENTS

Corrections population forecasting is utilized in some form in many states, to assist policymakers in the allocation of resources in addressing significant criminal justice issues. As the National Conference of State Legislatures has recommended (State Legislatures and Corrections Policies: An Overview, May 1989):

As legislatures consider new sentencing or corrections policies, it is important that they know the impact on the corrections system. For example, although a number of states enacted new mandatory sentencing provisions over the past decade, few planned for the increases in prison populations generated by these new laws. Corrections population forecasts and fiscal impact statements for corrections bills are two critical tools that legislatures should make use of as they develop criminal justice policy.

States which use corrections population forecasts to estimate the impact of pending legislation include Delaware, Florida, Louisiana, Tennessee, Minnesota, Oregon and Washington. Kansas, Colorado, South Carolina, Oklahoma, Pennsylvania and Indiana are reportedly in the process of developing forecasting capability. Legislatures in 10 states--Florida, Maryland, Michigan, Montana, Nebraska, Ohio, South Dakota, Vermont, Virginia and Washington (according to a 1987 report of the National Conference of State Legislatures)--have established legislative fiscal offices to prepare their own prison population forecasts.

Corrections population forecasts for pending criminal justice bills generally have at least two parts: an assessment of the legislation's impact on corrections populations, and a fiscal assessment of the cost of any such increases in corrections populations. Operations costs are usually projected at least five years into the future. The process is greatly expedited by reliance on a fiscal impact simulation model, containing various assumptions about how policy changes will affect incarceration patterns and related costs, and permitting easy computer manipulation of specific variables to reflect the operation of the new legislation.

In some states the process is compelled by statute. The Louisiana Law Enforcement Commission is statutorily required to "maintain prison population projections" and "prepare and present to the governor and legislature a policy impact statement on each major change to correctional law." (La. R.S. 15:1204.1). Some

states with sentencing commissions have assigned the task to them. In Minnesota, the Sentencing Guideline Commission is statutorily required to consider correctional resources in establishing and modifying its sentencing guidelines (Ch. 244.09, Minn. Statutes, 1989), but performs a similar function voluntarily on pending legislative measures; the legislative leadership and chairs of the House and Senate Judiciary Committees routinely route criminal justice legislation through the "fiscal impact note process" at the Commission, and if a bill is determined to have a fiscal impact, it is referred to the Appropriations Committees.

Often, the process is undertaken voluntarily by the legislature or the executive branch. In Delaware, the idea of prison forecast reports on proposed legislation was conceived by the Criminal Justice Executive Committee, a panel consisting of the Attorney General, Chief Justice of the state Supreme Court, Director of Corrections, a colonel of the state police, a public defender, head of Juvenile Rehabilitation, and chaired by a private criminal defense lawyer. The reports are carried out, at the request of the Committee, jointly by staff at the state's Statistical Analysis Center and the Criminal Justice Council, to provide a cooperative balance between research and policy perspectives. An annual report reflecting cumulative legislative changes over the past year is also prepared. The Delaware project has been duplicated in Washington. In Florida, the process is carried out by the Criminal Justice Estimating Conference, which includes representatives of both the executive and legislative branches.

Tennessee mandates a "pay-as-you-go" approach, requiring that any law causing a net increase in periods of imprisonment is "null and void" unless and until funding is appropriated to cover the "operating costs" of the law equal to the projected costs of the most expensive of the 10 ensuing fiscal years, as estimated by the state prison impact assessment office. (Tennessee Statutes, 9-6-118).

When a legislature is informed beforehand of a bill's impact on prison resources, it can move immediately to provide the necessary funding, rather than waiting until after implementation to assess the actual impact on prison overcrowding. In Minnesota in 1988, for example, when a prison impact assessment was performed on a bill to substantially increase sentences for violent and repeat offenders, the legislature made use of the assessment to support an appropriation for an entire new prison, allowing prison construction to begin in time to adapt to the increased prison population.

Assessments of a bill's impact commonly go beyond bare prison numbers. They may include assessments of its projected effect on crime, based on empirical studies of similar laws in

other jurisdictions; the effect on resources for other parts of the criminal justice system, including courts, prosecutors, indigent defense services, probation and pre-trial services; and adjudication patterns. The Delaware project, for example, in considering a reduction from 15 to 5 grams in the threshold quantity of heroin or cocaine which would trigger a mandatory minimum 3-year prison term, examined the bill's effect on criminal drug activity, to determine the ability of drug sellers to stay within the 5-gram limit without significantly affecting sales, and to determine the proportion of non-selling users who would be brought within the bill's increased penalties.

In Louisiana, a recent report on a proposed increase in the mandatory minimum sentence for armed robbery, from 5 to 15 years, included an empirically based assessment of the negligible added deterrent effect, expected reductions in plea agreements and corresponding increases in judicial resources for trials, and an analysis of counterproductive factors (including a difficulty obtaining convictions because of juror reluctance to convict if the mandatory minimum sentence seems disproportionately harsh). Louisiana also examines practical problems with a bill's implementation, based on interviews with prosecutors (on a recent proposal to make AIDS transmission prosecutable as second-degree murder, the report explored the significant evidentiary problems in tracking the victim's sexual history, showing causation, or establishing intent), as well as cost issues related to expected litigation challenges, including the costs of litigating a significant constitutional claim up to the U.S. Supreme Court.

The result is an analysis not just of cost, but of costs relative to benefits. Information is provided to legislators which will permit them to reach informed conclusions about whether the proposed legislation's cost is appropriate relative to its potential for reducing crime and increasing the safety and security of the citizenry.

The administrative burden of the prison impact assessment process appears minimal. A variety of computer forecasting models have already been developed for the states, by experts such as Kay Knapp, former Executive Director of the Minnesota Sentencing Commission and the United States Sentencing Commission, and currently Director of the Institute for Rational Public Policy. Staffing requirements vary according to the number and complexity of assessments performed, but are generally moderate: in Louisiana, two full-time staff produce some 300 assessments on pending bills in each 85-day legislative session. In Washington, regular Sentencing Commission research staff report on any bill in hearing--some 50 reports per legislative session. In Delaware, a professional staff of three, asked to analyze some 100 bills in a year, select fewer than 10 of the most significant measures for detailed reports.

PRISON IMPACT ASSESSMENTS

(a) Section 3731 of title 42, United States Code, is amended by adding at the end the following new subsection:

"(g) Preparation of prison impact assessments

"(1) The Director shall prepare prison impact assessments, in consultation with the Prison Impact Advisory Committee established under paragraph (2), in response to requests from Congress for information relating to the prospective impact of a pending measure or matter on prison populations and resources within the criminal justice system. A prison impact assessment shall include--

"(A) Projections of the measure's impact on prison (including community confinement facilities), probation and parole populations;

"(B) An estimate of the fiscal impact of such population changes on federal (and, if applicable, state) expenditures and revenues, including expenditures for construction and operation of correctional facilities for the current fiscal year and five succeeding fiscal years;

"(C) An analysis of any other significant factors affecting the cost of the measure, its impact on the operations of the components of the criminal justice system, and its potential for making law enforcement more effective and the administration of justice more efficient and fair; and

"(D) A statement of the methodologies and assumptions

utilized in preparing the assessment.

"(2) (A) The Director shall appoint, under section 3787(e) of this title, a Prison Impact Advisory Committee to assist in carrying out the authority provided under paragraph (1). The Committee shall consist of two designees of the Attorney General, two representatives of the federal judiciary, two practicing criminal defense lawyers (of whom one shall be a federal public defender), two experienced prison forecasting methodologists, a representative of the National Institute of Corrections, a representative of the United States Sentencing Commission, and a representative of the Bureau of Prisons.

"(B) The Committee shall prepare and transmit to the Congress, by February 1 of each year, a prison impact assessment reflecting the cumulative effect of all relevant changes in the law taking effect during the preceding 12 months."

(b) Title 2, United States Code, is amended by inserting in chapter 6 the following new section:

"190n. Requirement of prison impact assessments; appropriations

"(a) Any measure or matter proposing to establish a new criminal offense, expand the scope of an existing offense, establish or increase a minimum mandatory term of imprisonment, or otherwise increase sentence length or the number of offenders subject to imprisonment shall not be considered in either House of Congress, nor take effect, until a prison impact assessment prepared under the authority set forth in section 3731(g) of title 42 has been transmitted to the Congress by the Director of

the Bureau of Justice Statistics and has been available to the Members for at least seven calendar days (excluding Saturdays, Sundays, and legal holidays).

"(b) (1) For any law enacted, or amendment to the federal sentencing guidelines taking effect, after January 1, 1989, which results in a net increase in periods of imprisonment for federal criminal offenses, there shall be appropriated the estimated net cost of such law or amendment.

"(2) The amount of appropriations made under paragraph (1) shall be equal to the amounts reflected in the prison impact assessment prepared by the Bureau of Justice Statistics under section 3731 of title 42. For purposes of this subsection, the estimated net cost shall be the first-year operating cost plus the construction cost of any new federal correctional facility capacity attributed in such assessment to the enactment of such law or amendment.

"(3) Any law enacted, or amendment to the federal sentencing guidelines approved under section 994(p) of title 28, without the funding required by this subsection shall be null and void unless and until such funding is appropriated in regular appropriations enactments."

(c) Section 994(g) of title 28 is amended by adding "and in promulgating an amendment under subsection (p)" after "in promulgating guidelines pursuant to subsection (a) (1)", and by adding a comma and "in consultation with the Prison Impact Advisory Committee established under section 3731(g) of title

42," after "and shall make recommendations".

SUMMARY

The proposed legislation is in three parts:

1) An authorization for the Director of the Bureau of Justice Statistics to conduct prison impact assessments on pending criminal justice legislation, as well as a cumulative annual report at the end of each year, working together with a Prison Impact Advisory Committee composed of experts in prison forecasting and in all aspects of the criminal justice system. The minimum components of an assessment are a prison population forecast, a cost estimate, and a statement of the assumptions and methodologies relied upon. Analysis of any other significant factors affecting the cost or effectiveness of the measure would be within the discretion of the Committee and the Director.

The responsibility to perform impact assessments might alternatively be assigned to other bodies, such as the U.S. Sentencing Commission or the General Accounting Office. The important thing is that the objectivity, balance and credibility of the process be maximized, through devices such as the proposed Prison Impact Advisory Board, with its wide range of professional skills and perspectives represented.

2) A requirement that any bill (including sentencing guideline amendments transmitted by the U.S. Sentencing Commission to the Congress for approval) which would create or broaden a criminal offense, or increase sentence lengths or the number of offenders subject to imprisonment, not be considered in either House until a prison impact assessment has been prepared and made available to Members of Congress for seven calendar days. The legislation also includes the Tennessee statute's "pay-as-you-go" requirement, so that measures increasing prison populations or costs would not take effect until the necessary funding is appropriated.

3) A requirement that the U.S. Sentencing Commission consider prison impact assessment information in formulating guideline amendments.

Ten Years For Two Ounces

Congress is packing prisons with bit players in small-time drug deals.

BY STUART TAYLOR, JR.

"For the kingpins—the masterminds who are really running these operations, and they can be identified by the amounts of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction the minimum term of ten years."—*Robert Byrd, Democrat of West Virginia, then the Senate minority leader and a principal sponsor of the Anti-Drug Abuse Act of 1986, on September 30, 1986.*

MEET RICHARD Anderson and Susana Sanchez-Robles, drug kingpins.

Born poor into a Louisiana sharecropping family, Anderson left school in the eleventh grade to work. He fought his way into the longshoreman's union in Oakland in the sixties, when black-white brawls were part of the job. He did well. Now 48 years old, he is a skilled crane operator with a stellar work record after 24 years on the docks.

Anderson was driving his beat-up 1972 Toyota through East Oakland the evening of December 12, 1988, headed for a family birthday party at his sister Marilyn's house. From there

he would go to the docks to work the graveyard shift.

Anderson spotted Michael Lucero at a phone booth. Lucero, the teenage boyfriend of a friend's daughter, flagged him down. Could he have a ride to Burger King and then home? Sure, for a couple of dollars of gas money.

At the Burger King parking lot, Lucero got out and said he'd be back in a few minutes. Moments later a big man—6 feet 5 inches big—opened the passenger-side door and got in. It was night and a dangerous part of town. Anderson was scared. The big man picked up a yellow paper bag Lucero had left between the two front seats. "Is this the stuff?" he asked. "I don't know," said Anderson. "What stuff?" The big man took the paper bag and left.

Now Anderson knew this was a drug deal. He was trying to start his car and leave when men with guns and badges swarmed around him.

That's the way Anderson recalled it at his trial in March 1989 in federal district court in San Francisco. The big man—a federal undercover agent—told a different story about their

20-second encounter:

He had arranged the buy with Lucero earlier that day. Lucero had said a friend would drive him to their Burger King rendezvous in an old beat-up car. Up drove an old beat-up Toyota. Lucero got out and into the agent's waiting car. He said the agent would find a bag of crack cocaine in the front of the Toyota.

The agent had trouble with the Toyota's door. The driver opened it from the inside, as though expecting him. The agent picked up the yellow bag and emptied the crack—a "hard, tan, rocky substance"—into his hand. "Looks good," he said. The driver nodded. The agent asked if he could take it back to his own car. Sure, the driver said.

Back in his own car, the agent settled the price with Lucero: \$2,300 for 102 grams (3.7 ounces) of crack. Then he gave a signal. Other agents hidden nearby closed in and arrested Lucero and Anderson.

TEN YEARS, NO PAROLE

The jury believed the agent, and Anderson was convicted on three federal narcotics trafficking charges. The trial judge, William Schwarzer, said at the sentencing that "I might have found differently," but that "the evidence, although marginal, was sufficient" to support the jury's verdict.

The sentence followed automatically: Ten years, without parole.

Ten years. In an extraordinary display of emotion, Judge Schwarzer choked back tears when he had to say those words last September 15. He called the sentence a "grave miscarriage of justice." But he said he had no choice: In the Anti-Drug Abuse Act of 1986 Congress imposed an array of long, mandatory minimum prison sentences for drug crimes, including ten years for anyone involved in distribution of more than 50 grams of crack. Ten years for less than two ounces.

Ten years. "I couldn't believe it," recalls Anderson. Before 1986 many judges would have put him on probation. A tough judge might have given him two years, perhaps four.

Ten years. No matter that, even under the prosecution's theory, he was just a marginal figure in a small-time crack sale, a man with no prior drug convictions, at most a drug user making a few dollars to support his personal consumption.

Ten years: twice the average federal prison time served for robbery. More than ten times the average time served for bribery, fraud, or embezzlement.

Ten years: Taxpayers will pay more than \$200,000 to warehouse this former taxpayer.

Unless Anderson wins his appeal, the earliest he will get out of the federal correctional institution at Pleasanton, California—with the maximum 14 months off for good behavior—is late 1997.

By then he will be 56 years old. "My daughter who's ten will be eighteen," he muses. "The one twelve will be twenty. Sheew. . . .

"That's the only thing hurts me," Anderson says, "thinking about them last two. . . . There's so much corrupt out there on the streets. It's just impossible for a lady to raise two girls and keep 'em straight. It's rough out there. . . .

"They're growing up fast, too," he adds. "So fast, sheew. You can't bring that time back. That's lost time, and one might grow up and say, 'Well, you wasn't there when I needed you.'"

Judge Schwarzer, a scholarly, highly respected Ford appointee, is not known as a light sentencer or a man given to displays of emotion. But he suggested at the sentencing that nobody with any sense of justice would put Anderson away for ten years. Halting for long intervals to control his emotions, he bitterly denounced the 1986 law as an "unjust statute" that "makes judges clerks or, not even that, computers, automatically imposing sentences without regard to what is just and right.

"In the long run," said Schwarzer during the sentencing, "if that's the task we impose on judges, the kind of judges we will get on the bench are those who have no sense of justice or conscience and who will serve as clerks to carry out the rule of the Congress. It behooves us to think that it may profit us very little to win the war on drugs if in the process we lose our soul."

Schwarzer is one of dozens of federal judges—including many Reagan-appointed conservatives and some former prosecutors—who bitterly denounce the mandatory minimum sentences that Congress has ratcheted upward in a drug-warring frenzy each election year since 1984. "The vast majority of federal judges are extremely concerned over the impact of mandatory minimum sentences," Schwarzer says.

These laws have more than doubled the average time served for federal drug crimes and produced a staggering increase in long-term incarceration of drug offenders. Most are undoubtedly real criminals. But

many are marginal players with no prior criminal records—lookouts, drivers, "mules."

Some are naive kids who made one slip, perhaps to save face with friends. Some are guilty at most of helping out in something they suspected, but did not know, was a drug deal. A small percentage, the law of averages suggests, are innocent. Anderson just might be one of those. "I was unaware," he says. "I didn't know what the kid had left in my car. . . . He's the one that sold the stuff to them, not me." Probably he knew more than he admits. Probably. But how much more?

Most of these long-term drug prisoners, like Anderson, are black or Hispanic and were born poor. Many, like him, have had rough lives. Anderson had a violent father who left the family when Anderson was 7 years old and with whom he had frequent fights. During one of them, in 1965, he stabbed his father, who had a heart attack and died. Anderson says his father had been trying to kill him with a gun. He was allowed to plead to manslaughter "without malice . . . in heat of passion" and served only a year in jail.

Anderson was also arrested in 1985 for jaywalking and charged with possession of a small amount of crack. The charge was later dismissed, as was another possession charge after a similar street arrest in 1987. His urine tested positive for cocaine in January 1989, when he was in a halfway house awaiting trial on the Burger King bust.

Joseph Russoniello, the U.S. attorney in San Francisco, says Anderson was apparently "a cocaine user who in all probability [was] lending himself out to the trade to support his habit."

The lawyers handling Anderson's appeal, Charles Breyer and Liisa Van Duyts of San Francisco's Coblentz, Cahen, McCabe & Breyer, vigorously reject this bold inference from a couple of minor, unproven possession charges and urine tests.

"If he was involved in this matter at all he was just giving the ride," says Breyer. "What's so offensive about this law is that it makes it impossible to impose just sentences, sentences that fit the crime and the person. This man has been an outstanding citizen for over twenty years."

The grounds for the appeal are that Anderson was incorrectly told by two magistrates, two prosecutors, and his federal public defender before going to trial that the mandatory

minimum he faced if convicted was five years when in fact it was ten (they had misread or failed to read the 1986 law); that the evidence was insufficient to support the conviction; and that there was no evidence that Anderson knew the type and quantity of drugs Lucero was selling.

It could have been worse for Anderson. If he'd had one prior drug felony conviction—state or federal—even for simple possession of one marijuana cigarette, his mandatory minimum sentence would have been 20 years. If he had had two prior drug convictions, it would have been life imprisonment without parole.

Virtually all state law drug offenses are also federal crimes. Traditionally federal prosecutors have taken only the biggest cases, involving interstate and international drug networks and major dealers. Now, with Congress imposing mandatory minimum sentences far heavier than those in most traditions in the stories told by her daughters. "She was using these children as decoys to distract the inspectors," Wheat says.

The jury apparently agreed. Sanchez-Robles was convicted in September on four federal charges of cocaine and marijuana trafficking.

But there is no reason to think she was more than a minor cog—a mule—in somebody else's drug enterprise. She had never been arrested before. She and her girls lived in dingy simplicity. Poor Mexican-American women who don't use drugs and know little of them are typically paid only a few hundred dollars for such lowly work, according to Hall. They are given little information about what or how much they are hauling and are often discarded after one or two trips.

Prosecutor Wheat says Sanchez-Robles's pattern of frequent border crossings suggests that she was "part of an organized operation" and that she may have made thousands of dollars bringing in drugs from Mexico.

Neither Hall nor Wheat really knows whether Sanchez-Robles took dope across the border more than once, or what she was paid, if anything. In the eyes of the law it makes no difference. To convict Sanchez-Robles of trafficking marijuana and cocaine on June 30, 1989, the jury did not have to find that she knew the type of drugs in the van—or the quantity.

The jury did not even have to find that she knew for certain there were any drugs in the van at all; Judge Judith Keep of the U.S. district court in San Diego explained, in a fairly standard instruction, that it would suffice for the government to prove the de-

fendant had "deliberately closed her eyes" to obvious signs that illegal drug were stashed somewhere in the van.

The conviction on all counts could thus have rested on no more than a jury finding that Sanchez-Robles must have smelled the marijuana. It mattered not whether she had loaded the drugs, had seen them, or had been paid.

And once convicted, her mandatory minimum sentence under the 1986 law followed automatically: ten years, without parole. The marijuana alone would have brought a five-year sentence. But the mandatory minimum for having more than five kilograms of cocaine is ten years. In the eyes of the law, proof that Sanchez-Robles knew she was hauling cocaine, not just marijuana, was not necessary for her to be sentenced on the basis of the cocaine.

Application of the federal Sentencing Commission's guidelines—which have been skewed upward by using the mandatory minimum statutes as a baseline—actually increased the sentence, to ten years and one month.

Sanchez-Robles says Judge Keep smiled at her, perhaps in an effort to soften the blow, after pronouncing her sentence last December 4. "I'll remember that smile forever," she says.

NO DISCRETION

Anderson and Sanchez-Robles are among hundreds of peripheral players in other people's drug deals who are serving long prison terms under the 1986 law and another mandatory minimum sentencing law that Congress passed in 1988, dramatically ratcheting up the penalties for drug offenses.

These laws remove all judicial discretion by requiring mandatory minimum sentences of five years, ten years, 20 years, or life in prison, without parole, for a wide range of drug offenses. The penalties for first offenders are determined solely by the amounts of drugs involved, regardless of whether the defendant is the head of the drug enterprise, a one-time lookout, or a driver.

Five years is the minimum for assisting in distribution of five grams of crack (the statutory term is "cocaine base"), 500 grams of cocaine powder, 100 grams of heroin, 100 kilograms of marijuana, or one gram of LSD.

Ten years is the minimum for 50 grams of crack, five kilograms of cocaine powder, one kilogram of heroin, 1,000 kilograms of marijuana, or ten grams of LSD.

The penalties for crack are astronomical: Simple possession of five adulterated grams, weighing less than

a quarter and worth a few hundred dollars, carries the same five-year sentence as selling 4,999 grams of pure cocaine, worth as much as \$175,000 wholesale.

And the drug quantities for which a defendant can draw five or ten years are small enough to sweep in low-level street dealers and their lookouts, drivers, and runners, and even, in the case of crack, some mere drug users uninvolved in selling. These are people who used to be dealt with by state courts and punished by probation or a prison stint of six months to two years.

One perverse aspect of these laws is that the mandatory minimums are triggered by the weight of the drugs without regard to whether they are pure or adulterated. A half kilogram of highly diluted cocaine in the hands of a small-time dealer will bring a five-year mandatory minimum, while a smaller quantity of pure, much more valuable stuff in the hands of a major trafficker will not.

An additional five years is added to the sentence of anyone who "uses or carries a firearm" in a drug trafficking crime. This has been interpreted to include having an unloaded pistol under your bed along with five grams of crack. The quantity-based mandatory minimums are doubled if the defendant has one prior felony drug offense. And the ten-year mandatory minimums are extended to life in prison without parole for defendants who have two prior drug offenses.

There are also mandatory minimums for distributing drugs to persons under 21 and pregnant women, employing minors in drug sales, and distributing within 1,000 feet of a school or college campus or within 100 feet of a playground or video arcade.

If the feds find five grams of crack in your bedroom, you get five years. If you had previously been convicted of even a minor drug felony, you get ten. If they also find an unloaded and licensed pistol that you keep in your closet for protection against burglars—perfectly legal but for the presence of drugs—make it 15.

Don't expect the judge to give you a break just because your role was minimal or you aren't really a drug dealer. The judge has no power to give you a break. The mandatory minimums strip judges of their traditional discretion to fit the punishment to the crime and transfer it to prosecutors, who determine the sentence when they choose from the long menu of charges they could bring.

Congress isn't finished jacking up these penalties yet. After all, it's another election year, and a Gallup poll last year found 92 percent of the public favor tougher penalties for drug dealers. Democrats and Republicans,

liberals and conservatives alike are vying for commissions in the drug war by combing through the statute books in search of new ways to increase mandatory minimum sentences.

Last October Senator Phil Gramm, a Republican from Texas, found a nifty one, and the Senate adopted it without recorded dissent: the third increase in three years in the mandatory minimum sentence for distributing drugs to persons under 21, this time to ten years. Gramm cited the need to put away "people who are selling drugs to children." But his amendment would give ten years without parole to an 18-year-old college freshman—a senator's daughter, let's say—who gives her 20-year-old boyfriend 5.1 grams of marijuana, which would make ten cigarettes and cost as little as \$10, or one snort of cocaine.

How's that? Here's how: In the eyes of the law, anyone 18 or over deserves special punishment as a corrupter of youth if she distributes even a tiny amount of certain illegal drugs to anyone under 21. (Congress, perhaps with senators' children in mind, exempts "offenses involving five grams or less of marijuana" from this mandatory minimum.) And distributing includes giving.

One might think that in such a case a sensible federal prosecutor would find a way to avoid charging a defendant—a senator's daughter, at least—under a statute carrying a ten-year mandatory minimum.

But don't count on it. Under a Justice Department policy issued last March by Attorney General Richard Thornburgh, prosecutors are obliged to charge "the most serious readily provable offense or offenses consistent with the defendant's conduct." There's no exception for cases in which throwing the book at a defendant would lead to an unjust or absurd mandatory minimum prison term.

COOPERATE OR ELSE

There is one way—and only one way—for a defendant to get around these mandatory minimum sentences: by coming up with enough information incriminating other people to bargain for a prosecution motion to give the defendant credit for "substantial cooperation." If you will help your federal prosecutor make a case against your business partner, your neighbor, your friend, or your brother, maybe you can cut a deal.

Providing an incentive to snitch—an incentive strong enough to overcome feelings of loyalty and fears of being killed—is thus the only value deemed important enough to release a drug defendant from the inexorable

arithmetic of mandatory minimum sentencing. Congress has codified the value system George Orwell captured in 1984: "Under the spreading chestnut tree, I sold you and you sold me."

But bit players like Anderson and Sanchez-Robles typically don't know enough to get credit for substantial cooperation. Both tried, and both were spurned. Most prosecutors will not make such a motion simply because the defendant tells all he knows. The information has to be of substantial value in making other cases. And Congress has barred judges from giving defendants credit for cooperation unless the prosecution moves for such credit.

The people who have the kind of information needed to cut "substantial cooperation" deals with prosecutors are typically midlevel or high-level traffickers who have been in the business for some time. That is why lowly mules often draw longer prison terms than the career criminals who are using them.

That is also why bit players in drug deals often have little incentive to plead guilty. In many cases they will be in prison just as long if they plead as if they gamble on a trial and lose. Many judges expect a major increase in the number of drug defendants going to trial. That in turn will aggravate court backlogs and delays; the mandatory minimums could actually increase crime, by defeating the swiftness of punishment that many experts consider a more effective deterrent than long prison terms.

The real kingpins should get long prison sentences. But most don't get caught. Many of those who do get caught are people like these:

- A Dominican man with a wife, children, a job at home, and no criminal record was visiting his brother in Queens when the brother, a crack dealer, got busted. The guest was convicted of assisting in his brother's operation during his brief stay. His sentence was 15 years, without parole, reduced to ten when the appellate court held he was not liable for the gun possessed by a co-defendant. "This sentence was just off the wall, crazy," says the judge who had to impose it. "He has a wife and kids at home. He's in the United States two days. He looked at me and started to cry like a baby. It was a moment I will not soon forget."

- Juan, a 20-year-old New Yorker with no criminal record and a job at a transmission shop, was asked by an uncle in Texas one evening to go to Baltimore the next day, meet someone, and pick up a package for \$100 or so. The uncle did not say what would

be in the package. Juan obliged. At the Baltimore train station, the uncle's contact, an informant, handed him a bag, opened it, told him it contained cocaine, and left. Juan was sitting on a bench thinking about what to do next when federal agents arrested him moments later. With eight kilograms in the bag, the automatic sentence was ten years. "He's a good kid, a nice kid," says his lawyer. "He is confronted with an uncle who asks for some favors. The next day he finds himself sitting in jail for what could be half his life. It is a tragedy."

- Robin Nurse, a 27-year-old single mother of a 7-year-old girl, was an office manager for her mother, a Long Island, New York, psychoanalyst. Then she became one of hundreds of mules caught bringing drugs from New York by train through Washington's Union Station. She had no prior convictions. The valuable part of her cargo, four kilograms of cocaine, would have brought a five-year sentence. But she also had 91 grams of crack, which she denied knowing about. The mandatory minimum for that was ten years. Nurse declined to set someone else up in an effort to get a sentence reduction for fear of harm to herself or her family.

- Another mule busted at Union Station, a 21-year-old woman described by the judge in her case as a "naive" first offender, got five years for hauling 1.4 kilograms of cocaine. She pled guilty, saying she had been told her cargo was marijuana and had been paid \$300 plus train fare.

- Jose Alberto Mendez, a high school student, pled guilty to taking \$500 to deliver a bag full of 287 grams of heroin to a restaurant rendezvous last May. Federal district judge Robert Sweet of Manhattan termed him "an impressionable young man with no prior criminal record" who had "fallen under the influence of older, hardcore criminals." The judge called the five-year mandatory minimum he had to impose "excessive and counterproductive."

- A 19-year-old high school graduate with no prior record was caught with two ounces of crack and a .22 caliber pistol in his car. His mandatory minimum was 15 years—ten for the crack plus five for the gun.

- An 18-year-old Mexican alien with no prior record who had been working odd jobs in the United States for a few months was recruited as a lookout for a heroin sale for \$500. He was caught. The proprietor was not. That's what lookouts are for. This one got ten years.

- A 35-year-old Washington man

with a long history of petty crimes was arrested in his bedroom with 21 grams of crack and two pistols, released on bond, and later caught with 28 grams of crack and some other drugs in his car. The judge had to give him 35 years, without parole. "He's just a small-time dealer," the judge says, shaking his head. "Now he'll be in prison until he's at least sixty-five. It's the longest sentence I have ever imposed."

● A 40-year-old Syrian immigrant with two small children who ran a juice bar with his wife in New York got involved in selling a few ounces of heroin, because, he said, he needed the money to avoid losing the juice bar and his apartment. He got five years.

● A Washington, D.C., secretary got a mandatory five-year sentence; her son sold crack in her house—with her knowledge, the jury found—and some crack was found hidden in the attic and in a locked box in the family room.

DEMONS AND ABSTRACTIONS

It seems doubtful that most members of Congress or most voters would favor such sentences for any of these defendants after seeing them up close and hearing the facts and circumstances that judges and juries hear. A few years ago many would have gotten probation.

But nobody talks about defendants like these when the mandatory minimum laws sweep like tornados across the House and Senate floors, scattering sense and reason in their path. The legislators talk about demons and abstractions—drug lords, kingpins, scourges, plagues, merchants of death, enemies in the drug war. Little thought is given to the application of these laws to real people in real cases.

Among the judges and probation officers (not to mention defense lawyers) who do deal with real defendants, the emerging consensus seems to be that Congress has created a monstrosity, a grotesque engine of injustice that does little to deter crime.

The consternation that has swept through much of the federal judiciary at being required to impose draconian sentences on peripheral players in drug deals is striking. It is not limited to liberals with a soft spot for criminal defendants. Some of the most forceful complaints come from conservative Reagan appointees, including more than ten who have spoken out publicly or were interviewed for this article, four of them former prosecutors.

"It kills you to sentence these mules. It's awful," says a Reagan-ap-

pointed former prosecutor who favors very harsh prison sentences for real drug dealers. "All these guys know is that someone named Charlie in the Bronx told them to take it to somebody named Joe in Washington."

"I am putting I don't know how many young Mexicans in jail for mandatory minimums of five or ten years who have absolutely no record and who were making peanuts," says federal district judge James Redden of Portland, Oregon. Noting that he had to sentence two 50-year-old men to about 30 years in prison, he adds, "I guess we can ask the government to put them on life support systems so that they can serve their full sentences."

A Reagan-appointed trial judge in Washington, D.C., who requested anonymity says he does not know of a single judge in his district—which has more than 20 judges—who thinks the mandatory minimum laws make sense. "Every judge in this courthouse has had at least one case in which he was just horrified by the sentence he had to impose," this judge says.

In many cases judges say they are forced to incarcerate minor offenders who present no danger to the community for terms wildly disproportionate to their culpability, locking up peripheral drug defendants for longer terms than many killers, robbers, and rapists. These laws are trashing the careful gradation of penalties in proportion to degree of culpability that Congress professed to be seeking in the Sentencing Reform Act of 1984, which created the Sentencing Commission. And, these judges add, by eliminating all judicial discretion to fit the punishment to the crime, the laws shift to prosecutors the traditional judicial power to determine sentences.

"They've taken the problem of sentencing disparities, put it in the prosecutor's office, and worse, draped it with the mantle of prosecutorial discretion," complains a federal judge who used to be a federal prosecutor. "When two nutball federal judges issued very disparate sentences for similar defendants in the past, at least it was out in the open."

"I'M SORT OF A MOUTHPIECE"

Most judges who express such sentiments decline to speak for attribution. One notes that criticizing any aspect of the drug war could hurt a judge's chances for elevation to an appellate court.

"It takes the judging out of being a judge," Pamela Rymer, a Reagan appointee on the U.S. district court in

Los Angeles, who is considered a tough sentencer, told the *San Francisco Chronicle*. "There's no point in your being out there on the bench. I'm sort of a mouthpiece."

Some federal judges have gone beyond complaining about mandatory minimums and have publicly rebelled against them. Judge Robert Schnacke of San Francisco, a Nixon-appointed conservative, took the highly unusual step of telling the jurors at the end of a drug trial in November that the defendant would have to serve life in prison without parole if they convicted him of possessing more than 50 grams of crack. (He had two prior felony drug convictions, one for possessing a tenth of a gram of cocaine, the other for having two ounces for sale.)

Judge Schnacke explained that since sentencing was no longer the province of the judiciary, the jurors "should know what they're doing." After three days' deliberations, the jury acquitted the defendant on the crack charge, while convicting him on a firearm charge.

Most judges who assail mandatory minimums also denounce, as far too rigid, the federal Sentencing Commission's comprehensive sentencing guidelines. The guidelines determine the sentences for crimes not covered by mandatory minimums and the maximum penalties for all crimes. They are based on a "matrix" system in which the sentencing range (for example, 63 to 78 months) is set by adding "points" for the seriousness of the offense and the defendant's criminal history. "You compute the little numbers and scores, come up with an adjusted offense level, add in the criminal history, and bingo! Where the lines intersect is your sentence," complains a federal judge in New York.

The complaints about the guidelines resemble those about the mandatory minimums: They give judges too little latitude to take into account mitigating circumstances and the defendant's background; they shift the power to determine sentences from neutral judges to prosecutors; and the sentences for drug offenses are far too harsh across the board. (The Sentencing Commission is dominated by hard-line Reagan appointees and is very much in tune with the lust for long prison terms in Congress and the Bush administration.)

But whatever the problems with the guidelines, the mandatory minimum statutes are both more harsh and more rigid. In the absence of a mandatory minimum, the guidelines at least allow the judge to cut the sentence if the defendant played a minor role or accepts responsibility. They also give judges some latitude to go above or below the guideline range in

extraordinary cases.

The mandatory minimums not only eliminate these avenues for judicial discretion, they have driven the guidelines toward greater harshness for all drug offenses. This is because the Sentencing Commission has had to prescribe much longer guideline sentences to incorporate the mandatory minimums and provide proportional guideline sentences for similar crimes not covered by them.

The federal judiciary seems slowly to be preparing to lobby Congress to get rid of the mandatory minimums. Given the apparent futility of trying to get Congress to worry about the simple injustice of overly harsh sentences for minor drug defendants, the main line of attack seems to be that the mandatory minimums are messing up the system of guideline sentencing designed by the 1984 Sentencing Reform Act and will clog up the courts with drug trials.

A committee of the Judicial Conference of the United States headed by Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit resolved last year that mandatory minimum laws "are inconsistent with the scheme of guideline sentencing" under the 1984 Sentencing Reform Act and often lead to unduly harsh sentences in individual cases "that Congress could not have intended." The judges of the Third, Eighth, Ninth, and Tenth Circuits and the 15-member Federal Courts Study Committee, appointed by Chief Justice William Rehnquist, have also suggested with varying degrees of circumspection that the mandatory minimum statutes should be repealed.

"THIS MAN IS ONE OF THE ENEMIES"

Some judges say they have no problems with the mandatory minimums and see them as fitting weapons in the drug war.

In sentencing 22-year-old Richard Winrow to life without parole last December, federal district judge David Williams of Los Angeles said, "Congress has gone out to battle the drug war, and this man is one of the enemies." Winrow was convicted of having 5.5 ounces of crack for distribution in his room in his mother's house; he had three prior cocaine convictions. In state court his maximum sentence would have been four years. But under Congress's Anti-Drug Abuse Amendments of 1988, this small-time drug dealer will be punished more severely than most murderers. Noting that he and the defendant were both black and from the same neighborhood, the 79-year-old judge said drug dealers like Winrow

were "making it one of the neighborhoods you can't live in. can't walk down the streets on; my people are the victims."

Prosecutors said afterward that they planned to put up posters in South-Central Los Angeles with Winrow's photograph, his crime, and his sentence, to deter other would-be drug dealers.

"Maybe if we want to have a deterrent effect we have to have tough sentences for some minor defendants," says a federal district judge from Tennessee. "It's just as important to deter the little people as the big guys because they can't be in business without the little people."

Many prosecutors like mandatory minimums, which give them the power to determine the sentence as well as enormous leverage to get defendants to turn informant. Some prosecutors say that under the old sentencing system many judges used their broad discretion to let professional drug criminals off with parole or token prison terms.

Russoniello, the U.S. attorney in San Francisco, says judges had been emasculating the drug laws by giving unduly light sentences. The mandatory minimums, he says, are a welcome congressional "reaction to the judiciary's failure to adequately sentence those involved in drug trafficking." He says "the peril of drug trafficking is so great, the danger and damage in what it does to society is so immediate, that those who are criminally culpable albeit peripheral ought to be prosecuted" and sent away for long prison terms.

Russoniello says the tough new laws will have a strong deterrent effect once people realize "that there will be a dire consequence if they get caught." Implicitly rejecting centuries of practice fitting the punishment to the defendant's degree of participation in the crime, he dismisses the "tired argument that persons who have different roles to play in a drug conspiracy are somehow entitled to different treatment at sentence merely because of the level of their involvement."

But most judges say that long prison sentences can provide only modest increments of deterrence at enormous social cost, barely denting the drug problem.

The Rockefeller drug laws in New York in 1973 imposed a regime of mandatory prison terms for minor offenders much like the new federal laws, with little effect on the drug problem. New York reduced the marijuana penalties in 1979, but its penalties for heroin and cocaine remain

among the most harsh in the nation, according to Robert Gangi, executive director of the Correctional Association of New York. "The drug problem is worse than ever," he says. Even the liberal use of the death penalty against relatively minor drug offenders in Malaysia and Singapore has not solved the drug problem there.

The people running drug rings rarely get caught. And they have little trouble finding new mules, lookouts, drivers, and the like, no matter how many are locked up.

"It doesn't deter," says Portland, Oregon's Judge Redden. "Certainly not with non-English speaking Mexicans who act as mules. . . . Perhaps it will deter a few young blacks when they see their friends facing a mandatory five or ten years at age eighteen or nineteen. I doubt it."

"Every year there's a new generation of eighteen-year-old kids who haven't gotten the message," says a Reagan-appointed federal judge in New York.

And how meaningful is the retributive purpose of criminal law in dealing with young members of an urban underclass where involvement in the drug culture is increasingly the norm, not the exception, where it is the exceptional teenager who resists the temptations and threats that his peers put before him?

"People born and raised in the inner city, they drop out of school. Even if they complete school they're essentially illiterate; they have no future, their peer influence, everything is negative," says a federal judge. "They have nothing going for them. This life-style that drugs and crime represent is the only thing they reach out for. It's the only thing that's there."

Many, perhaps most, of those sentenced to long terms of incarceration under the new laws are career drug dealers who arguably deserve five or ten years behind bars. Some may even deserve 20. But the Sentencing Commission's guidelines are a strong enough restraint on any soft-hearted judges to ensure that the really bad guys will get long sentences; for these most culpable defendants, the mandatory minimums are largely redundant. Meanwhile, the broad net Congress cast in the mandatory minimums is scooping up schools of minnows.

"My sense is that twenty percent of those who are going to jail now would have received probation under the old law, and they are primarily nineteen-, twenty-, and twenty-one-year-old first offenders," says a veteran probation officer in a large Eastern city. "In my experience their sentences are ranging from eighty-five to one hundred twenty months with no parole. That's a long time. It's just too harsh."

"Most of those sentenced under the mandatory minimums are people in up to their eyeteeth or repeat offenders," says Loren Buddress, chief federal probation officer in San Francisco. "But in a small percentage of the cases there are human beings who come before the court who may be tangentially involved in a large dope case or were not terribly bright or were coerced into it and get stuck with very tough sentences, and it's not just. It troubles me that the judges have absolutely no discretion at all to take mitigating factors into account. All the discretion now lies with the U.S. attorney's office."

Although the full impact of the 1986 and 1988 mandatory minimum statutes and the sentencing guidelines has not yet been felt, available statistics already reveal astonishing increases in the number of people being prosecuted and imprisoned, and the amount of time they are serving, for less and less serious drug offenses.

Between 1980 and 1987 the number of federal drug prosecutions rose by 153 percent, the number of convictions by 161 percent, and the number of prison sentences by 177 percent, from 3,675 in 1980 to 10,196 in 1987, according to the Bureau of Justice Statistics. These numbers, which have continued to soar since 1987, compare with a mere 4 percent increase from 1980 to 1987 in the number of violent offenders sentenced to federal prison, from 1,770 to 1,837.

The Sentencing Commission calculates that the average time served for all drug offenses will rise by 126 percent, from 23.1 months before the 1986 Anti-Drug Abuse Act to a projected 52.2 months, after all the new sentencing laws and guidelines are fully implemented.

The number of federal drug offenders serving five years or more without parole nearly doubled from September 1986 to September 1988, according to the General Accounting Office, even though, the GAO found, "moderate drug offenses have replaced serious offenses as the largest proportion of drug offenses for which individuals are sentenced." The average time served is pulled below five years by the many defendants convicted of having or selling quantities too small to trigger the mandatory minimum laws.

Mainly because of the new drug sentencing laws, the prison population is growing exponentially, and the proportion of black, Hispanic, and nonviolent first offenders is steadily

increasing.

After rising gradually from 17,000 inmates in 1950 to 24,000 in 1980, the federal prison population has more than doubled in the past ten years to 54,500. It is likely to double again by 1997, reaching 109,100, and continue rising to 147,000 by 2002, according to Sentencing Commission projections.

About 80 percent of the increase in recent years is attributable to incarceration of drug offenders. The Bureau of Prisons forecasts that the proportion of drug offenders among all federal prisoners will rise from the current 48 percent to 70 percent by 1995; in 1981 it was 26 percent.

"MY GOD, WHAT ARE WE DOING?"

Most drug offenders who get caught are black or Hispanic. These groups comprised 65 percent of those sentenced in drug trafficking cases under the new Sentencing Guidelines and mandatory minimum laws in the 16 months that ended a year ago. Blacks and Hispanics comprised 53 percent of federal prisoners in May 1989, and the percentage is rising.

Aliens comprise one quarter of the federal prison population. Many are couriers locked up for five or ten years at taxpayers' expense for bringing drugs into the United States once. "When you have a simple mule, a Nigerian woman who's not going to make a thousand dollars in her lifetime, and she smuggles by swallowing drugs in a balloon, and she doesn't even speak English, and we're putting these people away for three, four, and five years," says a federal judge in New York, "my God, what are we doing?"

Most of the drug offenders have never before been incarcerated, and 94 percent of these first-timers have no history of violence, according to the GAO.

The projected increase in the federal prison population will outstrip the government's plans to spend \$1.8 billion to double prison capacity by 1995. The system was over its design capacity by 1 percent in 1981; today it is 68 percent over capacity. Even if design capacity is doubled to the planned 64,400 by 1995, the system will still be 53 percent over capacity, based on the Sentencing Commission's "high growth scenario" projection of 98,400 prisoners in 1995.

Where to put all these people? Senator Gramm and House Republican whip Newt Gingrich of Georgia have called for putting them in tents on prison grounds and military bases.

They also want legislation to prevent federal courts from curbing prison crowding. And they want to force prisoners to work to pay their keep.

Given the pervasiveness of the drug culture in many inner-city areas, the Gramm-Gingrich approach could begin to approximate simply rounding up young urban blacks and putting them into involuntary servitude on chain gangs.

"We certainly support the spirit of it," White House spokeswoman Alixe Glen said when asked in January about the Gramm-Gingrich package by *The Washington Times*.

Meanwhile, J. Michael Quinlan, head of the federal Bureau of Prisons, made a revealing comment in a roundtable discussion excerpted in the July-August 1988 *Federal Sentencing Reporter*, a monthly publication of case reports and commentary on sentencing under the guidelines and mandatory minimums: "We're also acquiring college campuses and religious seminaries and converting them into minimum-security facilities."

So that's what we have come to. This is madness. The drug war will not be won, and a just society will not be achieved, by giving ever-longer prison terms to less and less serious, usually nonviolent, black and Hispanic first-time drug offenders.

Yet so far, the congressional urge to throw mandatory minimum sentences at the drug problem seems as politically unassailable as it is legally senseless and morally bankrupt. And many prosecutors and some judges dismiss questions about whether the sentences are unduly harsh with the observation that it is not for them to question what Congress, in its wisdom, has ordained.

Wisdom is not the word that comes to mind in reviewing the congressional process that produced the mandatory minimums required by the 1986 and 1988 drug laws, the 1989 Senate amendments, and other proposals moving through Congress this year.

When Congress was passing the 1986 and 1988 drug laws in election-year fevers of public panic and media hype, "people were trying to figure out every conceivable basis for increasing prison time," says Eric Sterling, who spent eight years as assistant counsel to the House crime subcommittee. He left in January 1989 to found the Criminal Justice Policy Foundation, which opposes overreliance on criminal sanctions to deal with the drug problem.

HELTER SKELTER IN HALLS OF CONGRESS

"The process has deviated from any kind of rational, organized approach," Sterling adds. "The committees with jurisdiction have largely been supplanted by floor action and Senate versus House throwing bills back and forth at each other. By final passage nobody knows what is in these bills. You have maybe an hour or two to review four hundred pages of legislation and your mind glazes over and you say, 'Wait a minute, am I looking at the fifth version or the tenth version?' It was the worst kind of legislating, it was legislating the way the stock market looks on a busy day, and so whether there's any kind of fit between subtitle G and subtitle K is purely accidental."

Sterling cites, as one example, Senator Gramm's 1988 amendment raising the maximum sentence for having narcotics in prison from five to twenty years. "That made the possession of narcotics in prison twice as serious a crime as the possession of a gun or a bomb or a rocket," he says. "I said to Gramm's staff person, 'This is absurd.' But he said Gramm insisted. This was going to be Gramm's part of the package, so it had to be in there."

The 1986 law started as an effort to identify the quantities of various types of drugs that drug kingpins and major dealers characteristically would have. As amendments got thrown on and the bill bounced back and forth between House and Senate, "the quantities kept going down, down, down," recalls Sterling, and the prison terms kept going up, up, up. He adds that "there was this whole offense-stacking process. We had multipliers of mandatory sentences for all kinds of circumstances."

"Congress passes these statutes imagining the worst cases," a Senate aide explains. "Like the law about selling within a thousand feet of a schoolyard, Congress is picturing a thirty-five-year-old drug kingpin on the corner selling crack to school kids. But the schoolyard statute ends up getting this eighteen-year-old kid selling to his seventeen-year-old friend."

Some members of Congress privately admit that mandatory minimum sentencing statutes are counterproductive. A few—Democratic Senator Edward Kennedy of Massachusetts most conspicuously—have suggested grave doubts as to the wisdom of these laws in floor debate. But they let most of the amendments pushing mandatory minimum sentences ever upward sweep through by voice votes, without recorded dissent.

Last October 5, for example, when Senator Gramm put in his amendment to raise the mandatory minimum for distributing drugs to persons under 21 to ten years in prison, Senate Judiciary committee chairman Joseph Biden, a Democrat from Delaware, put in the record resolutions evincing the concerns of federal judges about mandatory minimums. He said, "I have a practical concern about the ability of the system to tolerate all these mandatory minimum sentences."

But Biden took pains to stress that he was second to none in "wanting to get tough with those who sell to minors" and to say that "I am prepared to accept the amendment." Without further ado the Gramm amendment sailed through on a voice vote. It awaits House action.

"The politics of this issue are just terrible," says a Senate aide. "Nobody on the Hill will allow himself to be out-drugged. It's crazy, where they're voting to shoot down planes. We're going to be creating geriatric wards in prison. On the whole sentencing question the rhetoric is out of the ballpark, and nobody is saying anything reasonable on the other side. What are we doing to ourselves as a country? What kind of system are we creating? The senators up on the Hill don't take time to think about these questions."

The senators are too busy rushing from hearing to floor vote to fundraising event. Many members apparently have little conception of what they are voting for. One senator, considered among the more thoughtful on legal issues, "didn't want to hear about" problems the mandatory minimums would cause, an aide says. This senator said in discussions of the issues that the life sentences were really only 15-year sentences because prisoners would get out early on parole.

"I had the darnedest time convincing him that parole had been abolished," the aide recalls, not to mention that the senator had voted to abolish it. The 1984 law, which created the Sentencing Commission to write the guidelines, also abolished parole for all crimes committed after the guidelines had taken effect.

"Many of these guys didn't even know that was in there," this aide says; they did not understand that "life in prison means life now," both under the guidelines and under mandatory minimum statutes. Ten years means ten years now, except that those serving less than life terms can earn up to 54 good-time credit days a year, after their first year.

When the Senate was whipping through one mandatory minimum sentencing amendment, a Democratic senator who did understand it turned to an aide and said, "This is the most ridiculous thing." But he added, the aide recalls, that it would be political suicide to cast a vote against tougher penalties in drug cases.

"We're all being held hostage to fear of another Willie Horton campaign," the aide observes.

Robert Nelson, the assistant public defender in San Francisco who represented Richard Anderson at his trial, feels bad about what Congress has done to his client, and to others like him.

"I can't emphasize enough how strongly I feel about this," Nelson says. "Every time I have a mandatory minimum case I say to myself, this is wrong. It's just wrong. This man is not that bad. He's not a murderer; he's not a rapist. He made a mistake."

"It's just so sad that Congress and society have decided to punish blindly," Nelson adds. "It creates a system where the defendant is completely irrelevant. His prior history is irrelevant. His degree of culpability is irrelevant. His potential for rehabilitation is irrelevant. His ability to contribute to society is irrelevant. It makes me feel that our criminal justice system is bankrupt, that it's not about justice."

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