

Correcting Course:

**Lessons from the 1970 Repeal
of Mandatory Minimums**

About the Author

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Executive Summary

The United States has the largest prison population in the world. Many of these offenders are not murderers, robbers, or rapists, but drug users, addicts, or sellers. Every year, thousands receive lengthy mandatory terms in federal prisons for these drug crimes. The mandatory sentences on the books today were designed to stop drug trafficking, but they have not. It is not the first time in American history that they have been used and failed.

In 1951, Congress established mandatory minimum prison sentences for drug crimes. Named for its sponsor, Representative Hale Boggs (D-La.), the Boggs Act imposed two-to-five year minimum sentences for first offenses, including simple possession. The Act made no distinction between drug users and drug traffickers for purposes of sentencing.

The driving force behind the Boggs Act was a mistaken belief that drug addiction was a contagious and perhaps incurable disease and that addicts should be quarantined and forced to undergo treatment. Just five years after the Boggs Act, Congress passed the Narcotics Control Act of 1956. The new law increased the Boggs Act's minimum prison sentences for drug offenses.

Far from slowing the rise in drug use among America's youth, the strict antidrug laws were followed by an explosion in drug abuse and experimentation during the 1960s. The grim statistics during that period confirmed that mandatory minimum sentencing laws were simply not working. Correctional professionals, including prison wardens and judges, expressed opposition to the mandatory sentences.

The Prettyman Commission established by President John F. Kennedy and the Katzenbach Commission created by President Lyndon B. Johnson were both created to

study ways to reduce drug use. They found that long prison sentences were not an effective deterrent to drug users, that rehabilitation should be a primary objective for the government, and that courts should have wide discretion to deal with drug offenders.

President Richard Nixon took office in 1969 determined to curtail the growing drug problem. Rather than add new arbitrary and harsh mandatory sentences, the Nixon Administration and Congress negotiated a bill that sought to address drug addiction through rehabilitation; provide better tools for law enforcement in the fight against drug trafficking and manufacturing; and provide a more balanced scheme of penalties for drug crimes. The final product, the Comprehensive Drug Abuse Prevention and Control Act of 1970, repealed mandatory minimum drug sentences except in limited and serious circumstances.

The Act was praised by both Republicans and Democrats in Congress. Then-Congressman George H.W. Bush (R-Texas) spoke in favor of the repeal because it would “result in better justice and more appropriate sentences.” Supporting the repeal of drug mandatory minimums exposed members of Congress to no political jeopardy. Indeed, every senator, save one, and all but a handful of House members who voted for repeal won re-election. There is no evidence to suggest that any of the small number of defeated members lost because of their vote for repeal.

In the mid- and late- 1980s, Congress reinstated mandatory minimum laws. This time, Congress was reacting, in part, to the high-profile drug overdose of basketball star Len Bias. The new laws were enacted without any hearings, debate, or study.

Today, after 20 years of experience, it is clear that the current mandatory minimums have failed as badly as those enacted in the 1950s. The evidence leads to the following conclusions about mandatory minimum sentences:

- They have not discouraged drug use in the United States.
- They have not reduced drug trafficking.

- They have created soaring state and federal corrections costs.
- They impose substantial indirect costs on families by imprisoning spouses, parents, and breadwinners for lengthy periods.
- They are not applied evenly, disproportionately impacting minorities and resulting in vastly different sentences for equally blameworthy offenders.
- They undermine federalism by turning state-level offenses into federal crimes.
- They undermine separation of powers by usurping judicial power.

These problems have caused many former prosecutors, federal judges, and legal commentators to speak out against mandatory minimums. A report by the nonpartisan Federal Judicial Center, the education and research arm of the federal courts, concluded by agreeing with the findings of sentencing expert Michael Tonry, who said that “[a]s instruments of public policy [mandatory minimums] do little good and much harm.”¹

States are leading the reform effort with bipartisan repeals of their own mandatory sentencing policies and by turning to drug courts and other alternative solutions.

Today’s Congress, as the 91st Congress did in 1970, should reform mandatory minimum sentencing. This report presents two options: excise all mandatory minimums for drug offenses found in the criminal code or expand the existing “safety valve” to allow judges to depart from the statutory sentence when that punishment would be excessive. Either solution will result in better and more cost effective criminal justice and pave the way for smarter alternatives.

Introduction

“**A**ll men make mistakes, but a good man yields when he knows his course is wrong, and he repairs the evil,” Sophocles once wrote.² In 1970, Congress proved it had enough wise and good men and women to do something unusual – repeal a tough criminal law that it had passed 20 years earlier. By 1970, Congress had learned that the mandatory minimum prison sentences it had passed in the 1950s to combat drug trafficking crimes were a mistake. These laws failed to reduce drug trafficking or drug use, as their proponents had claimed they would.

A mandatory minimum sentence is a required minimum term of punishment (typically incarceration) that is established by Congress or a state legislature in a statute. When a mandatory minimum applies, the judge is forced to follow it and cannot impose a sentence below the minimum term required, regardless of the unique facts and circumstances of the defendant or the offense.

In 1951, Congress adopted the Boggs Act, named for its sponsor, Representative Hale Boggs (D-La.), which imposed harsh mandatory minimum sentences on those convicted of drug crimes. Five years later, Congress added even more punitive sentences, including the death penalty for drug sales to a minor.

Over the next decade and a half, drug use soared. The tough new laws did little to deter drug trafficking and abuse, as both juvenile and adult drug usage rates exploded during the 1960s. By the end of the decade, drug use had moved out of the cities, into suburbia, and onto campuses. Seemingly convinced that mandatory minimum sentences for drug offenders were ineffective, a broad, bipartisan majority in Congress voted to repeal nearly all such sentences in 1970.

Today, federal lawmakers face the same dilemma that their predecessors in the 91st Congress faced. In the 1980s, Congress responded to the media frenzy around the crack cocaine epidemic by enacting two antidrug crime bills containing new mandatory minimum sentences. Twenty years later, the results are in: the new penalties have failed. These mandatory sentences are no more effective than the similar sanctions adopted in the 1950s. The question now is simple: Will members of Congress follow the example set by their predecessors in 1970 and eliminate mandatory minimums, or will they continue to stand by a costly failed experiment?

To better educate members of Congress and the American public about the choice at hand, this report presents the history of the Boggs Act and its repeal. It then examines the record of the mandatory minimums that were enacted in the mid-1980s and finds that they have failed for the same reasons as the mandatory sentences in the Boggs Act. The report concludes that the current Congress should follow the example of the 91st Congress in 1970, correct course, and vote once again to reform mandatory minimum sentences.

The Boggs Act: Congress Adopts Mandatory Minimums

Since the founding of this nation, Congress has responded to public concern about particular crimes by passing tough mandatory sentencing laws. For example, as early as 1790, piracy triggered a mandatory sentence of life in prison without parole. Many of these older mandatory sentences are still on the books.³

One noteworthy exception is the Boggs Act, which codified tough mandatory drug sentences in 1951 and was repealed in 1970. The history of these sentences and their repeal is worth revisiting because it holds valuable lessons for us today.

The Boggs Act of 1951 first codified mandatory minimum sentences for the possession or sale of narcotics.⁴ Findings from the heavily-publicized hearings of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce revealed a growing trend in American society – drug addiction and trafficking were increasing at alarming rates, particularly among young people.⁵ Representative Hale Boggs (D-La.) observed, “We need only to recall what we have read in the papers this past week to realize that more and more younger people are falling into the clutches of unscrupulous dope peddlers.”⁶

The Boggs Act attempted to curtail the use and distribution of drugs with strict minimum sentences and fines for violators. A first offense – even for simple possession without intent to distribute – carried a minimum two-to-five year prison term. A second offense carried prison terms of five-to-10 years, and a third offense carried a sentence of 10-to-15 years.⁷ The Act made no distinction between drug users and drug traffickers for purposes of sentencing.

Boggs Act

Sentences for drug crimes*

First offense	→	2 to 5 years
Second offense	→	5 to 10 years
Third offense	→	10 to 15 years

**The offense could include everything from simple possession to drug trafficking.*

Driving this and other antidrug laws adopted during the period was Federal Bureau of Narcotics Commissioner Harry J. Anslinger.⁸ Citing rising addiction and violence among juve-

niles, Anslinger argued that soft-hearted judges were to blame. Long prison sentences, not rehabilitation, were what young addicts needed.⁹ Anslinger described drug addicts as incurable, “spread[ing] addiction wherever they are,... contaminat[ing] other persons like persons who have smallpox.”¹⁰ Public education efforts, Anslinger said, would encourage, not deter, drug use by young people. This was one of the few points Anslinger made during his testimony that drew disagreement from the investigating committee.¹¹

Anslinger’s answer to the growing abuse problem was simple: Congress should pass lengthy mandatory minimum prison terms for nearly all drug crimes.¹² At a time when addiction was not well understood, Anslinger’s idea proved popular, especially among members of Congress who got a chance to show their constituents that they were tough on crime. The Boggs Act passed easily.¹³

In 1955, four years after the Boggs Act became law, another Senate subcommittee, headed by Senator Price Daniel (D-Texas), launched a nationwide investigation into the traffic and sale of illegal narcotics.¹⁴ Records of the investigation demonstrate the lack of understanding many senators had about drugs. When asked by a member of the subcommittee, Anslinger confirmed the “fact” that marijuana users “ha[ve] been responsible for many of our most sadistic, terrible crimes in this Nation, such as sex slayings, sadistic slayings, and matters of that kind.”¹⁵ The subcommittee’s report concluded that “[d]rug addiction is contagious. Addicts, who are not hospitalized or confined, spread the habit with cancerous rapidity to their families and associates.” The solution was compulsory

treatment, and, for those who failed to respond to such treatment, “place[ment] in quarantine type confinement or isolation.”¹⁶ When the subcommittee’s investigation ended, it issued reports finding that the United States had more drug addicts than any other Western nation,¹⁷ drug addiction was a “contagious disease,” and “Red China” was attempting to subvert American society by smuggling heroin into the country.¹⁸

The Narcotics Control Act of 1956 was a response to both the Daniel Committee’s investigation and the growing public outcry over escalating drug use. Sentences for drug traffickers were increased to a five-year minimum for a first offense and a 10-year minimum for all subsequent violations. The Act stripped judges of their ability to suspend sentences or impose probation in cases where they felt a prison sentence was inappropriate.¹⁹

Evidence Shows Mandatory Minimums Ineffective

Far from stemming the rising tide of drug use among America’s youth, the era of Anslinger, with its tough mandatory sentencing laws, was followed by the Age of Aquarius. The 1960s were a time when the popularity of marijuana continued to grow on campus, and new hallucinogenic drugs came on the scene. By 1967, use of marijuana and psychedelic drugs was rooted in popular youth culture, evidenced by the release of The Beatles’ album *Sgt. Pepper’s Lonely Hearts Club Band*, which was replete with references to drug use.²⁰

When President Richard Nixon took office in 1969, he decried the fact that the overall number of drug addicts in America was in the “hundreds of thousands,” and the number of college students using drugs was in the millions.²¹ He also said what many Americans saw firsthand: drug use had expanded beyond urban cities and into middle and upper class neighborhoods.²²

Instead of stimulating public pressure for even stronger punishment for drug crimes, the grim statistics convinced experts that harsh mandatory minimum sentences were simply not working. Correctional professionals agreed. In a poll conducted by the Senate Judiciary Subcommittee on Juvenile Delinquency, 92 percent of federal prison wardens who responded were opposed to the mandatory minimum sentence provisions, and 97 percent were opposed to the prohibition of probation or parole. Of the responding probation officers, 83 percent were opposed to mandatory minimums, and 86 percent were opposed to the bar against probation or parole. Of the federal judges who responded, 73 percent were opposed to mandatory minimums, and 86 percent were opposed to the absence of probation or parole.²³

Federal policymakers began to search for a Plan B. In 1963, President John F. Kennedy convened the President’s Advisory Commission on Narcotics and Drug Abuse to address the public outcry over America’s illegal drug addiction problem. The Prettyman Commission, as it was known, studied drug use and the laws affecting those who abused drugs.

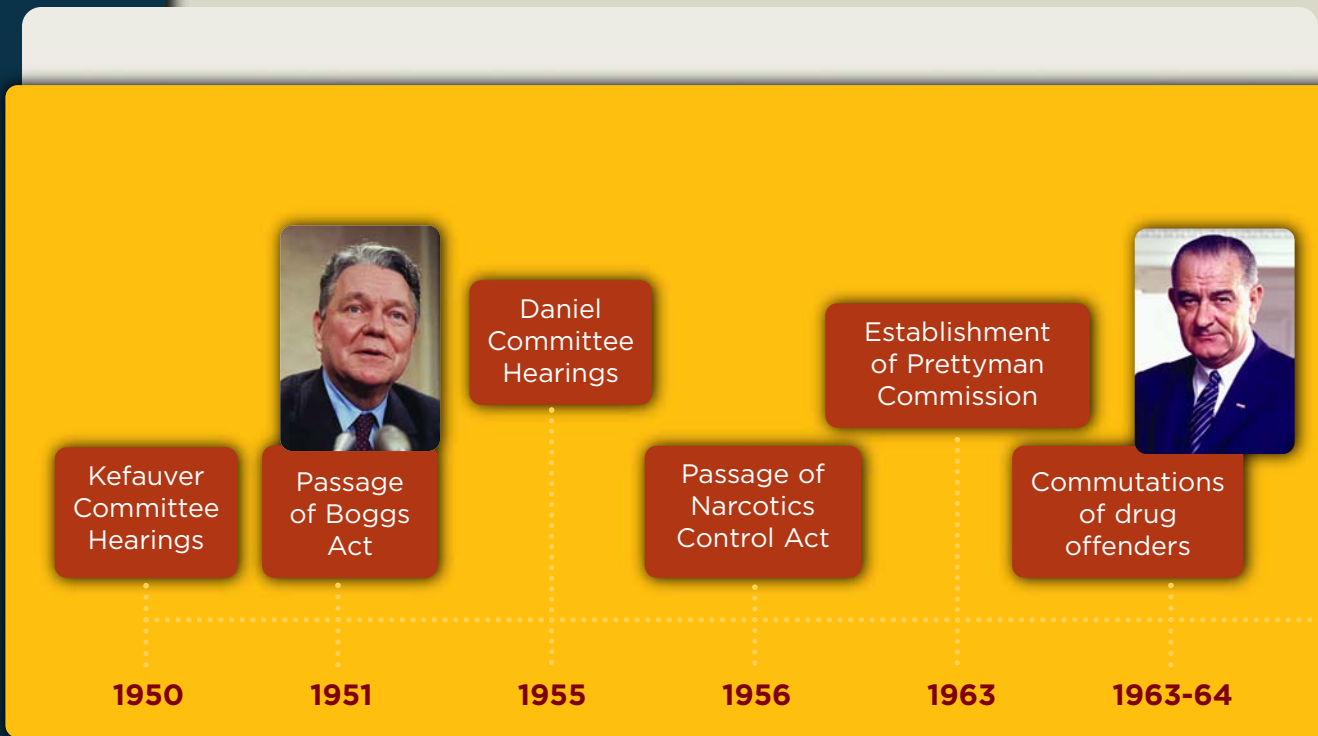
The commission recommended rehabilitating individual drug abusers and cautioned that where drug possession penalties warranted imprisonment, “the rehabilitation of the individual, rather than retributive punishment, should be the major objective.”²⁴ “[P]enalties [should] fit offenders as well as offenses” and “be designed to permit the offender’s rehabilitation whenever possible.”²⁵ Stiff penalties and sentences were not effective deterrents: “persistence of narcotics abuse, despite severe penalties for the possession of narcotics, is persuasive evidence that the abuser will risk a long sentence to get his drug,” the commission concluded.²⁶

In addition to establishing the Prettyman Commission, President Kennedy seems to have used his pardon power to alleviate the impact of the mandatory minimums created by the Narcotics Control Act of 1956.²⁷ In 1963, the annual report from the attorney general revealed that “many long-term narcotic offenders who, by statute, were not eligible for parole but whose sentences were felt to be considerably longer than the average sentences imposed for such [drug] offenses” received commutations (reductions in their sentences) from the president.²⁸

The Prettyman Commission recommended that “penalties [should] fit offenders as well as offenses.”

When Attorney General Robert F. Kennedy learned that the commutations of these drug offenders boosted morale in prisons, he ordered the director of the Bureau of Prisons to review cases with unequal sentences and to present worthy cases to his office for recommendations in favor of presidential clemency.²⁹ Interpreted broadly, commuting lengthy drug sentences imposed under the 1956 Act was a signal to Congress that a policy change was needed.³⁰

In 1966, President Lyndon B. Johnson established the President’s Commission on Law Enforcement and Administration of Justice, known as the Katzenbach Commission, which produced a ten-volume study on federal criminal justice. Among its recommendations was that “[s]tate and federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators, taking account of the nature and seriousness of the offense, the prior record of the offender and other relevant circumstances.”³¹



Nixon and Congress Get Tough...and Repeal Mandatory Minimums

President Nixon came to office in 1969 determined to curtail the rampant drug problem. In a July 14, 1969 message to Congress, the president called for drastic changes to the federal drug control laws:

Within the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans. ... A new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States.³²

President Nixon's prescription was not simply to lock up drug addicts. In fact, speaking at a governors' conference, Nixon said that education and rehabilitation were the best methods to counter drug abuse.³³



Establishment of Katzenbach Commission

1966

July 14
Nixon speech calling for a new drug policy



1969

Nixon sends proposed legislation to Congress

1970

October 27
Nixon signs Boggs Act repeal

1970 1984

Establishment of U.S. Sentencing Commission and Sentencing Guidelines

Election-focused Congress reinstates mandatory minimums for drug crimes



1986

Nixon’s appointees also made clear that the Administration did not see mandatory minimum sentences as a cure-all for drug crime. Attorney General John Mitchell testified before the Senate in support of “sentences which are reasonably calculated to be deterrents to crime and which also give judges sufficient flexibility.”³⁴ Dr. Roger Egeberg, Assistant Secretary of Health, Education and Welfare, decried mandatory minimums and called for greater flexibility for sentencing judges in testimony he delivered before the House.³⁵

On July 14, 1969, Attorney General John Mitchell forwarded to Congress the Administration’s proposed bill calling for the reform of the laws governing drug use and abuse.³⁶ The final product that emerged from Congress, the Comprehensive Drug Abuse Prevention and Control Act of 1970, fundamentally altered the fed-



President Richard Nixon ran on a promise to fight crime and stop drug abuse. A year into office, he signed comprehensive crime legislation that repealed mandatory minimum sentences.

eral government’s approach in dealing with drug abuse, drug manufacturing, and drug trafficking. Its purpose was threefold:

- To address drug addiction through the rehabilitation of drug users,
- To provide better tools for law enforcement’s fight against drug trafficking and manufacturing, and
- To provide a “balanced scheme of criminal penalties for offenses involving drugs.”³⁷

It sought to change the structure of all criminal penalties for controlled substances to provide a “consistent method of treatment of all persons accused of violations.”³⁸ **Most significantly, it eliminated all of the mandatory minimum drug sentences, save one.**³⁹ The only mandatory minimum to survive repeal was for offenders who participated in a “continuing criminal enterprise,” a large-scale, ongoing drug operation that earned significant profits.⁴⁰

First-time violations of simple possession of a controlled substance without the intent to distribute were reclassified as misdemeanors carrying fines and probation; judges could dismiss such charges without a finding of guilt in instances where an offender did not violate the terms of his or her probation and could expunge the offense from minors’ records.⁴¹ Manufacturing and distributing illegal drugs carried new punishments of *up to*

a maximum of 15 years imprisonment for a first violation, and *up to* a maximum of 30 years imprisonment for subsequent offenses or for adult dealers who sold drugs to minors.⁴²

New drug sentences after the 1970 repeal of mandatory minimums

Drug crimes*	Term
First offense	—> up to maximum of 15 years
Second or later offense	—> up to maximum of 30 years
Selling drugs to minors	—> up to maximum of 30 years

**For drug manufacturing or trafficking offenses only.*

Both Democrats and Republicans in Congress hailed the Act as a comprehensive reform that would counter America's growing drug problem by punishing drug traffickers while rehabilitating drug abusers. Representative George H.W. Bush (R-Texas) explained how reducing sentences could actually reduce drug crime while increasing fairness in and respect for the justice system:

[T]he complete overhaul of the existing Federal criminal provisions applicable to drug related activities...will improve law enforcement and foster greater respect for the law. The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better justice and more appropriate sentences. ... The penalties in this bill are not only consistent with each other, but with the rest of the Federal criminal law – something which cannot be said for present drug laws. As a result, we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences.⁴³

Members from both parties argued that the mandatory minimums then on the books limited judicial discretion, were so harsh that courts and juries avoided applying the sentences, and undermined respect for the laws in general. Congressman John Glenn Beall, Jr. (R-Md.) argued that “[f]ederal penalties for drug violations are inconsistent, illogical, and unduly severe in some cases. [Repealing mandatory sentences] would revamp the entire penalty scheme, substituting a new and flexible system of penalties which will enable courts to truly tailor the punishment in any given case to fit the crime. Current penalties have little or no deterrent value.”⁴⁴ Congressman David Satterfield (D-Va.) noted the “extreme difficulty in attempting to dispense justice and in sentencing individuals who have been convicted of violations where a minimum penalty is required... [Repeal of minimum penalties] will afford our courts greater latitude to the end that greater justice will be served better.”⁴⁵



Representative George H.W. Bush (R-Texas), the future U.S. president, supported the repeal of mandatory minimum drug laws in 1970.

“It is the opinion of most law enforcement people that the harsh mandatory sentences in narcotics law have been a hindrance rather than an aid to enforcement.”

— Former Rep. William L. Springer (R-Ill.)

Members of Congress from both parties also cited the support among law enforcement for reform: “It is the opinion of most law enforcement people that the harsh mandatory sentences in narcotics law have been a hindrance rather than an aid to enforcement,” said Congressman William L. Springer (R-Ill.).⁴⁶ Congressman Edward Boland (D-

Mass.) echoed these sentiments: “This section on simple possession violations reflects the judgment of most authorities that harsh penalties imposed on the user have little deterrent value.”⁴⁷ Senator Jacob K. Javits (R-NY) observed that the Boggs Act “had a most severe penalty – life imprisonment. That did not seem to dam up the flow of narcotics nor the fast-spreading abuse of drugs.”⁴⁸

Finally, members argued that targeting all offenders with broad, unvarying sanctions was simply unfair, whereas the changes made in the repeal would reserve mandatory penalties only for the most serious drug offenders: those involved in a “continuing criminal enterprise.”⁴⁹ Senator Roman Hruska (R-Neb.) argued that under the new law, “persons established as professional traffickers are exposed to appropriately severe penalties with mandatory minimums – the only place in the penalty scheme where these minimums are to be found.”⁵⁰

Congress sent the 1970 Act to President Nixon on October 14, and he signed the bill on October 27, mere days before hotly contested midterm congressional elections. President Nixon and Vice President Spiro Agnew campaigned aggressively in key states and districts, and frequent calls for “law and order” were a common feature of many races.⁵¹ To the Administration, repealing nearly all existing mandatory minimum drug sentences was not in conflict with its pro-law enforcement campaign rhetoric.⁵² Perhaps the most noteworthy fact about the 1970 election was that every senator that voted for the 1970

Act and to repeal mandatory sentences was reelected, save one who lost for completely unrelated reasons.³³

Likewise, all but only a handful of House members who voted for the legislation were reelected, and none of the losers appear to have been targeted over mandatory minimums.⁵⁴

Every senator that voted for the 1970 Act and to repeal mandatory sentences was reelected, save one who lost for completely unrelated reasons.

Drug Mandatory Minimums are Tried – And Fail – Again

The popularity of recreational drug use continued to grow in the 1970s. Marijuana and heroin use rose and cocaine emerged as a fashionable drug among the professional class. A handful of drug-related deaths suffered by young rock-n-roll musicians, including Janis Joplin, Jimi Hendrix, and Jim Morrison, stripped the veneer off the view that drug use carried no danger, but it was not until the 1980s that public attitudes began to turn sharply against drugs.

In the early 1980s a new drug, crack cocaine, emerged. The drug was cheap and easy to transport,⁵⁵ and the level of its use was viewed as “epidemic” in major cities around the country.⁵⁶ The crack epidemic brought with it fears of increased drug-related violent crime,⁵⁷ along with a number of misperceptions about the addictiveness of the drug and its effects on users.⁵⁸ As Congress was debating how to respond to mounting public fears and a media frenzy surrounding crack,⁵⁹ Americans awoke on June 20, 1986 to the news that basketball star and NBA first-round draft pick Len Bias had died the night before from an overdose from powder cocaine.⁶⁰ The tipping point was reached.

Congress wasted no time in responding to Bias’s high-profile death with a display of political opportunism and “tough on crime” stances that included no meaningful reflection on the previous failure of mandatory minimums.⁶¹ The House Judiciary Committee drafted and passed new antidrug penalties⁶² in less than one week.⁶³ The legislative history of this period reveals no hearings, debate, or study preceding the adoption of these provisions.⁶⁴ The lack of legislative history makes discerning Congress’s intent difficult, but one goal is clear: the mandatory penalties were intended to apply to “serious” and “major” traffickers.⁶⁵ In 1988, passage of mandatory minimums for simple possession of crack showed Congress’s desire to fight use of the drug as well as drug trafficking.⁶⁶

Federal mandatory minimum drug sentences for first convictions

Type of drug	Five years no parole*	10 years no parole
Crack cocaine	5 grams**	50 grams
Powder cocaine	500 grams	5 kilos***
Heroin	100 grams	1 kilo
LSD	1 gram	10 grams
Marijuana	100 plants or 100 kilos	1000 plants or 1000 kilos
Methamphetamine	5 grams (pure)/50 grams (mixture)	50 grams (pure)/500 grams (mixture)
PCP	10 grams (pure)/100 grams (mixture)	100 grams(pure)/1 kilo (mixture)

*There is no parole in the federal system. **Five grams is roughly equal to a single packet of sugar. ***A kilo is equal to 2.2 lbs.

Other mandatory minimum sentences

Offense	Length of sentence
Firearm possessed during drug offense	5 years added to drug sentence
Armed Career Criminal Act (<i>Felon in possession of a gun with three prior felony convictions</i>)	15 years
Continuing Criminal Enterprise	20 years

These mandatory minimums came only a few years after Congress, in 1984, created the U.S. Sentencing Commission.⁶⁷ This expert body wrote and implemented the U.S. Sentencing Guidelines, with the mandate that equally blameworthy offenders get similar sentences.⁶⁸ At the same time, the guidelines also gave courts some flexibility to tailor sentences to fit individuals or special circumstances.⁶⁹


By 1994, harsh mandatory minimum drug sentences had been imposed on thousands of minor drug offenders, and stories of over-punishment were rampant. Congress responded to mounting public pressure to change mandatory minimums by enacting the “safety valve.”⁷⁰ The “safety valve” permits courts to sentence certain nonviolent drug offenders below the mandatory minimum if they have a limited criminal history, did not play a leadership role in the offense, did not possess a gun or use violence, and provided the

prosecution with all of the useful information they had about the crime.⁷¹ While the safety valve provides relief for about one quarter of federal drug offenders annually, its terms are stringent, and a person can easily fail to qualify for relief. For example, having even one too many prior offenses on one's record – even if the offense is nonviolent or occurred when the person was a juvenile – can be enough to fall outside the scope of the safety valve's protection.⁷²



The cocaine overdose of basketball star Len Bias sparked the reintroduction of mandatory minimums in 1986.

In light of Congress's lack of deliberation when it created the current mandatory minimums, it is not surprising that the laws have failed just like their predecessors. Current federal mandatory minimum penalties have not curbed drug use or trafficking and have created a myriad of other harmful side effects and costs. It is time once again for Congress to end another costly, failed experiment with mandatory minimums. The case for doing so is much stronger now than it was in 1970, when Congress first repudiated mandatory sentences, because the hill of evidence has grown into a mountain. The evidence supporting reform includes the following:

 **Mandatory minimums have not discouraged drug use.**

While current mandatory minimums were targeted at drug traffickers, Congress was also undeniably concerned with reducing drug use.⁷³ In theory, mandatory minimums would lock up drug traffickers, making drugs less available and more expensive, thus resulting in reduced drug use.⁷⁴ The theory has not worked. Price is “the most widely used measure of supply reduction effectiveness,” and since 1981, the prices of both crack and powder cocaine have dropped or remained consistently lower than they were at the time mandatory minimums were passed.⁷⁵

Some of this price decline may be due to the fact that the demand for drugs had already started to decline several years *before* mandatory minimums were enacted.⁷⁶ Drug use dropped among all ages from its high of 14.1 percent in 1979 to 7.7 percent in 1988 – a reduction of nearly 50 percent.⁷⁷ At a minimum, since mandatory minimum sentences were attached not only to drug trafficking offenses but also to simple possession of crack cocaine, the new stiff penalties’ deterrent effect, if any, should manifest itself in falling usage of that drug. Mandatory minimums, however, did not decrease usage rates for crack and powder cocaine; rather, use decreased when negative media coverage increased the perception that using the drugs was dangerous and socially unacceptable.⁷⁸ When this perception decreased, usage of the drugs increased.⁷⁹

Mandatory minimums have failed to reduce drug trafficking offenses.⁸⁰

Proponents of mandatory minimums point to reduced national crime rates as evidence that the tough sentences work. Despite more than 50 years of experimenting with mandatory minimums, however, backers can point to no conclusive studies that demonstrate any positive impact of federal mandatory minimum sentences on the rate at which drugs are being manufactured, imported, and trafficked throughout the country.⁸¹ National crime rate statistics do not include these types of drug trafficking offenses, so they cannot show whether mandatory sentences are reducing drug trafficking activity.⁸² In fact, data from both the Federal Bureau of Investigation⁸³ and the Bureau of Justice Statistics⁸⁴ show a steady increase in the number of drug offenders arrested at both the state and federal levels over the last decades, as well as increases in the amount of drugs seized by law enforcement each year.⁸⁵ This data could be proof of more drug activity, better enforcement of drug laws, or both, but there is no definitive connection between mandatory minimums and reductions in drug trafficking offenses.

Large numbers of drug addicts support their habits by committing drug trafficking offenses. In 2004, almost 60 percent of federal drug traffickers reported using drugs in the month before the offense; a third were using drugs at the time of the offense.⁸⁶ A full quarter of all those convicted of a federal drug offense committed their crimes to get money to buy drugs.⁸⁷ Over half of all federal drug offenders in 2004 met the official criteria for having a drug abuse or dependence problem.⁸⁸ Mandatory minimums give drug addicts and drug traffickers lengthy prison sentences, but have failed to solve the drug abuse problems that lead to possession and trafficking offenses.

Mandatory minimums' failure comes with billions of dollars in direct costs.

Mandatory minimums apply to almost all federal drug offenses, and the majority of people in federal prisons are drug offenders. From 1990 to 2000, drug offenders accounted for 59 percent of the growth in the federal prison population.⁸⁹ In 2000, 57 percent of federal prisoners were serving sentences for a drug offense.⁹⁰ The large number of drug convictions contributes to the growth in the federal prison population. Between 2000 and the end of 2006, the federal prison population grew by an average of nearly five percent annually.⁹¹ The trend continues: in 2008, the federal prison population passed the 200,000 mark, and more than half of these prisoners are serving time for a drug crime.⁹² Drug offenses continue to be the largest category of federal convictions (almost 35 percent of all 2007 convictions),⁹³ and more than 65 percent of these offenders received mandatory minimums.⁹⁴ Because the U.S. Sentencing Commission has used mandatory minimums as the starting point for calculating other drug sentences under the guidelines, almost all drug sentences have gotten longer.⁹⁵

Greater use of prison sentences for drug crimes and longer sentences required by mandatory minimums have driven a dramatic increase in federal corrections costs. In the five-year period from 1987 to 1992, during which the 1986 and 1988 mandatory

Mandatory minimums: Locking up more drug offenders, longer

Drug offenses are the largest single category of federal convictions:

- **34 percent** of all federal offenders in 2007 were sentenced for a drug offense.
- **67 percent** of all federal drug offenders received a mandatory minimum:
 - **28 percent** received a five-year mandatory minimum
 - **39 percent** received a minimum sentence of 10 years or more

Percentage of drug offenders receiving mandatory minimums:

- **82 percent** of crack cocaine offenders
- **81 percent** of methamphetamine offenders
- **79 percent** of powder cocaine offenders

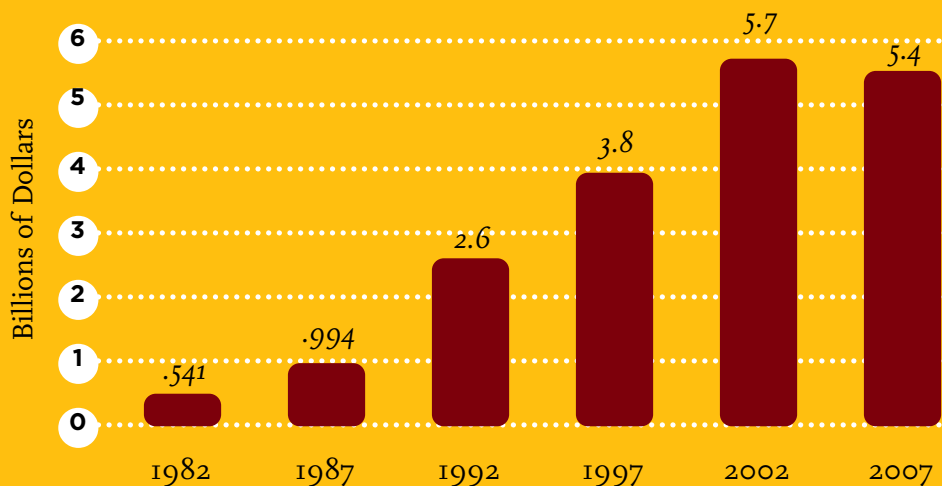
Some benefit from the "safety valve":

- **25 percent** of federal drug offenders who would have been subject to a mandatory minimum received a shorter sentence under the 1994 "safety valve" provision available to non-violent, low-level, first-time drug offenders.

Source: United States Sentencing Commission, 2007 Annual Report 31-33 (2007), available at <http://www.uscc.gov/ANNRPT/2007/aro7toc.htm> (last visited June 20, 2008).

Federal corrections costs soared in last 25 years

Federal correctional costs increased 925 percent from 1982 to 2007, to over \$5.4 billion.



Sources: Bureau of Justice Statistics, U.S. Dep't of Justice, *Justice Expenditure and Employment in the United States*, 2003 (Apr. 2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeuso3.pdf> (last visited June 18, 2008); Office of Management and Budget, *Dep't of Justice Budget Information*, available at <http://www.whitehouse.gov/omb/budget/fy2009/justice.html> (last visited July 31, 2008).

In 2007, American taxpayers spent over \$5.4 billion on federal prisoners.

minimums were fully implemented, federal correctional spending increased by 266 percent. Between 1987 and 2007, federal correctional spending increased 550 percent.⁹⁶ In 2007, American taxpayers spent over \$5.4 billion on federal prisoners.⁹⁷

Mandatory minimums also impose substantial indirect costs.

Congress has determined that the long prison terms (and corresponding isolation from society, families and employment) of many of the 650,000 state and federal prisoners released annually actually create a public safety problem in the communities they reenter. In the Second Chance Act, passed in 2008, Congress recognized that high rates of recidivism are common among people who reenter society after serving long sentences, as they usually emerge from prison with few job skills and little remaining social network.⁹⁸

Another indirect cost of long mandatory minimum sentences is incurred by the families and children of the prisoners, who lose breadwinners, spouses, and parents when a

loved one is incarcerated. At least 1.5 million children have a parent in prison – an increase of more than 500,000 children since 1991. The majority of these children are under 10 years old.⁹⁹ These children are at high risk of going to prison themselves without proper support.¹⁰⁰

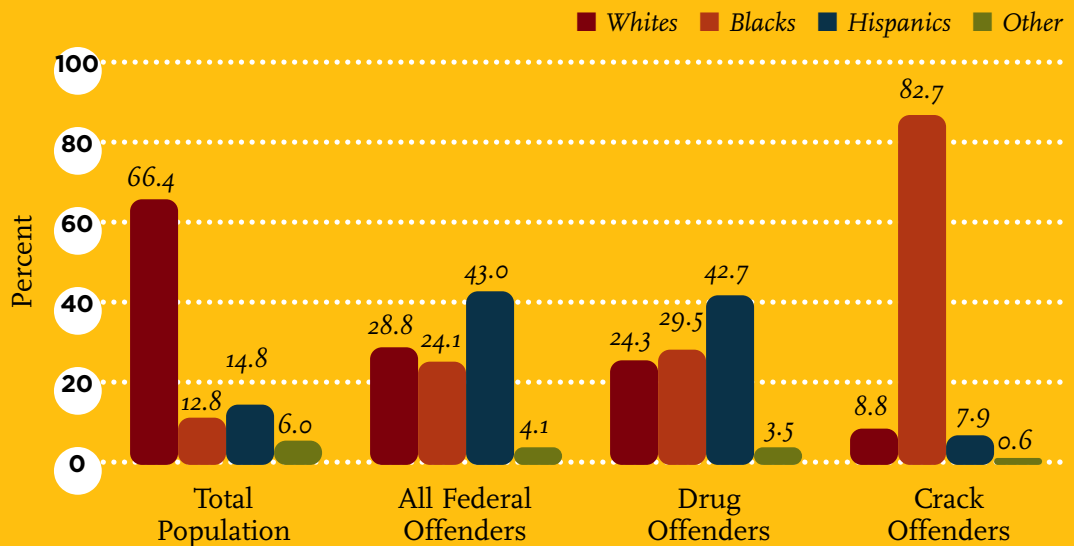
At least 1.5 million children have a parent in prison – an increase of more than 500,000 children since 1991.

Mandatory minimums create unwarranted disparities.

In 2007, Blacks and Hispanics made up approximately 67 percent of all federal offenders sentenced¹⁰¹ and 72 percent of all federal drug offenders,¹⁰² but comprised only about 28 percent of the United States' population.¹⁰³ This racial disparity is partly driven by mandatory minimum sentences,¹⁰⁴ particularly the far harsher mandatory sentences imposed on crack cocaine offenses than powder cocaine offenses.¹⁰⁵ In 2007, over 80 percent of federal crack cocaine offenders were Black,¹⁰⁶ even though two thirds of crack cocaine users were Whites or Hispanics¹⁰⁷ and Blacks comprised less than 18 percent of the nation's crack cocaine users.¹⁰⁸ The five and ten-year mandatory minimum sentences for crack cocaine were used as a starting point for calculating the rest of the guideline ranges for other crack offenses in the U.S. Sentencing Guidelines.¹⁰⁹ As a result, sentences for crack offenses are uniformly harsher than those for powder cocaine offenses. In 2006, crack cocaine sentences (both mandatory terms and those calculated under the guidelines) were 44 percent longer than powder cocaine sentences.¹¹⁰

The way mandatory minimums are applied can also undermine the principle that two equally culpable defendants who committed the same crime should generally get the same sentence. Two equally blameworthy defendants facing the same mandatory minimum can, in fact, receive very different sentences, depending on what they know or which prosecutor they get. More culpable defendants can get shorter sentences than their less culpable cohorts, too. One of the only ways to be sentenced below the mandatory minimum is to provide “substantial assistance” to the prosecution by sharing information about the crime and other offenders.¹¹¹ Offering assistance to the prosecution is encouraged and necessary to expedite cases through the system, but can result in inequity when offenders are sentenced more harshly than their equally culpable codefendants solely because they have little or no valuable information to offer.¹¹² Prosecutors decide what information is considered valuable, which influences whether a person gets a reduction.¹¹³

Racial demographics of federal offenders



Sources: U.S. Census Bureau, *The 2008 Statistical Abstract, The National Data Book, Annual Estimates of the Resident Population by Race, Age, and Sex: April 1, 2000 to July 1, 2006*, at Table 8 (May 17, 2007), available at <http://www.census.gov/prod/2007pubs/08statab/pop.pdf> (last visited Sept. 5, 2008); U.S. Sentencing Commission, *2007 Annual Report 27* (2007), available at <http://www.ussc.gov/ANNRPT/2007/aro7toc.htm> (last visited July 22, 2008); U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy 126* (May 2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (last visited July 22, 2008).

❑ Mandatory minimums undermine federalism and separation of powers.

Mandatory minimum laws enacted against drug users have federalized offenses that fall under state jurisdiction. This federalization occurs because federal mandatory minimums are being applied to a much larger group of offenders than their proponents intended.

Designed to bring down “kingpins,” the whales of drug trafficking,¹¹⁴ the federal mandatory minimum laws are also being used to prosecute the minnows. For example, 66 percent of federal crack cocaine offenders in 2005 had only low-level involvement in drug activity, working as street-level dealers, lookouts, couriers or other such positions.¹¹⁵ Only

two percent performed trafficking functions at a managerial or supervisory level, and less than a third (31 percent) were importers, high-level suppliers, organizers, leaders, or wholesalers, the functions most consistent with those Congress believed warranted high mandatory minimum penalties.¹¹⁶ These figures, according to the U.S. Sentencing Commission, indicate a “failure to focus scarce federal law enforcement resources on serious and major traffickers,” and “exaggerate the culpability” of the majority of crack cocaine offenders in terms of their trafficking function.¹¹⁷ Similar effects are found across other mandatory minimum drug sentencing regimes.¹¹⁸

State law enforcement is well equipped to handle the local and community-level drug offenses perpetrated by many offenders currently receiving federal mandatory minimums. Federal resources should be limited to targeting the people the states lack the resources and jurisdiction to fight: large-quantity international drug importers, producers, and suppliers.¹¹⁹

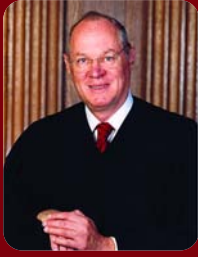
The Constitution’s separation of powers is also violated. Rather than allowing judges to use their intrinsic judicial power of discretion to impose criminal sentences, mandatory minimums have been a power grab by both the legislative and executive branches. First, the legislative branch dictated one-size-fits-all sentences that courts must follow. Second, the executive, in the person of the prosecutor, influences the sentence because prosecutors have discretion to choose certain charges on the basis of the penalties they carry.

For all of these reasons, there has been steadily growing criticism of mandatory minimums by former prosecutors,¹²⁰ federal judges,¹²¹ and other commentators and organizations.¹²² In 1991, the U.S. Sentencing Commission (USSC) studied the impact of mandatory minimum sentences.¹²³ In its report, the USSC criticized mandatory minimums, finding that they



“[M]andatory minimums... frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.”¹²⁶

— Chief Justice William H. Rehnquist



“...I can accept neither the necessity nor the wisdom of federal mandatory

minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”¹²⁷

— Justice Anthony M. Kennedy, speaking at the 2003 annual meeting of the American Bar Association.

too often result in sentences out of proportion with an individual offender’s culpability, that they discourage plea bargaining, and that they have the greatest impact (in terms of length of sentence) on the least serious drug crimes.¹²⁴ The 1994 report by the Federal Judicial Center, the education and research agency for the federal courts, summed up the judicial consensus on mandatory minimums well: “federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system.”¹²⁵

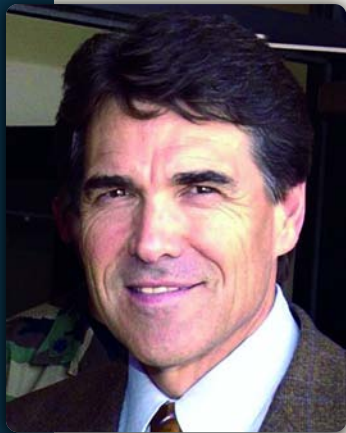
Time to Correct Course

It is time for Congress to correct course and bring its failed experiment with mandatory minimum sentences to an end, just as the 91st Congress did in 1970. Congressional action is now overdue, because other American legislative bodies have led the way in reforms.

There is a strong, bipartisan mandatory minimum reform and repeal movement at the state level. At the height of their popularity in the mid-to-late 1970s to 1980s, mandatory minimum drug sentences existed in 49 states.¹²⁸ State correctional spending increased from an aggregate \$6 billion in 1982 to over \$39 billion in 2003, an increase of over 550 percent.¹²⁹ In part because of the pressure this put on state budgets, as well as an evolving understanding of effective sentencing and punishment, many states have revisited these policies.¹³⁰ States are reforming or eliminating their mandatory minimums, especially those covering low-level, nonviolent drug offenses, or creating alternatives to incarceration for these offenders.¹³¹

Michigan, for example, under Republican Governor John Engler, repealed nearly all of its mandatory minimum drug sentences in 2003, replacing them with a more flexible sentencing guidelines system.¹³² In 2001, Louisiana repealed mandatory sentences for simple possession of drugs and cut its minimum drug trafficking terms by half.¹³³ The same year, North Dakota repealed its mandatory minimum for first-time drug offenders, and Connecticut allowed courts more freedom to disregard mandatory penalties for drug possession or dealing when “good cause” to do so exists, even if the offense occurred in a “drug-free school zone.”¹³⁴

In addition to repealing mandatory minimums, states are also finding smarter, more cost-effective ways to deal with drug offenders. In 2007, Texas legislators replaced prison sentences in low-level, first-time felony drug possession cases with mandatory drug treatment. Since 2006, Kansas has revised automatic penalty enhancements for second, third, and subsequent possession offenses.¹³⁵ Jurisdictions in all 50 states and the District



Governors like Rick Perry of Texas are relying increasingly on drug courts and other alternatives to mandatory minimum prison sentences for nonviolent offenders.

of Columbia now operate drug court programs, which are alternative sentencing systems typically combining intensive drug and mental health treatment with community supervision arrangements.¹³⁶ Studies continue to show that drug courts are cost-effective, reduce recidivism, and lower crime rates, and the number of these courts has increased as states have gotten the message.¹³⁷ Texas Governor Rick Perry described these programs as “help[ing] break the cycle of addiction and crime by using the authority of the court to promote accountability and enhance motivation for treatment.”¹³⁸ Interestingly, as in the 1970s, there has been no evidence of electoral backlash against the politicians who have backed these state-level reforms.

Unlike in 1970, reform of federal mandatory minimums today would not initiate an ad hoc approach to sentencing, thanks to the sentencing guidelines.¹³⁹ The guidelines give judges the ability to protect public safety by sentencing harshly when it is deserved. An offender with numerous prior convictions, a gun, or a role as a manager or leader can often receive a guideline sentence that is longer (and sometimes much longer) than the currently applicable mandatory minimum.¹⁴⁰

Recommendations for Reform

The last 20 years, like the 20 years preceding the repeal of the Boggs Act, have shown mandatory minimums to be ineffective, expensive, and increasingly abandoned by states that enacted them. Now is the time for Congress to do as the 1970 Congress did and reform mandatory minimum drug sentences. Reform could be accomplished in several ways:

Excise mandatory minimums from the criminal code.

Congress could excise all mandatory minimums for drug offenses found in Title 21 of the U.S. Code, while retaining the existing statutory maximums and sentencing guidelines for those offenses. The guidelines, while indexed to the mandatory minimums, are nuanced and capable of accounting for important differences among offenders. Allowing the guidelines to stand alone would give the courts flexibility to impose appropriate sentences in all cases.

Expand the existing statutory safety valve.

Congress could maintain the current mandatory minimum sentences, but provide courts an opportunity to opt out of them in certain cases by expanding the existing statutory safety valve.¹⁴¹ Currently, the safety valve allows suspension of the mandatory minimum sentences in drug cases when a judge finds the case meets certain criteria.¹⁴² When those strict criteria are met the court may impose a guideline sentence in lieu of the mandatory minimum sentence.

Congress could expand the safety valve by permitting courts to invoke it when, after looking at all the relevant facts and circumstances of the case and considering the purposes of punishment, imposing the mandatory minimum sentence would violate the parsimony mandate found in 18 U.S.C. § 3553(a). This provision directs judges to impose a sentence that is “sufficient but not greater than necessary to comply with the purposes” of sentencing.¹⁴³ This mandate is a long-standing, highly esteemed, and uncontroversial feature of American sentencing law.¹⁴⁴

Conclusion

Twice in the past half century, Congress has enacted mandatory minimum sentencing laws to combat public fears about drug abuse and drug trafficking. Both times, the mandatory sentencing laws have failed to alleviate these problems. Worse, the laws caused other serious problems, including skyrocketing spending on corrections at the state and federal level. In 1970, Congress and a new Administration committed to reducing crime and drug abuse wisely repealed the failed mandatory minimum laws enacted in the Boggs Act of 1951 and the Narcotics Control Act of 1956.

The current mandatory minimum laws, enacted during the crack cocaine epidemic of the mid-1980s, have imposed too many burdens with no corresponding benefit. It is time once again for Congress to correct course and eliminate mandatory minimum sentences for drug offenders.

Endnotes

- ¹ Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center (1994), at 32 (quoting Michael Tonry, ed., *Mandatory Penalties*, in 16 CRIME & JUSTICE: A REVIEW OF RESEARCH 243-44 (1990)).
- ² SOPHOCLES, *ANTIGONE* 233 (Dudley Fitz & Robert Fitzgerald trans., Harcourt Brace 1939).
- ³ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5, 10, App. A (Aug. 1991), available at http://www.ussc.gov/t_congress/MANMIN.PDF (last visited July 23, 2008) [hereinafter 1991 USSC REPORT].
- ⁴ Act of Nov. 2, 1951, ch. 666, 65 Stat. 767 (repealed 1970).
- ⁵ S. REP. NO. 82-725, at 3 (1951).
- ⁶ 97 Cong. Rec. 8198 (1951).
- ⁷ Act of Nov. 2, 1951, ch. 666, 65 Stat. 767 (repealed 1970).
- ⁸ RUFUS KING, *THE DRUG HANG-UP: AMERICA'S FIFTY-YEAR FOLLY* 113 (1972).
- ⁹ *Investigation of Organized Crime in Interstate Commerce: Hearings Before the Senate Special Comm. to Investigate Organized Crime in Interstate Commerce*, 82d Cong., pt. 12, 663, 666-67 (1951) [hereinafter *Organized Crime Hearings*] (testimony of Harry J. Anslinger).
- ¹⁰ *Id.* at 665.
- ¹¹ *Id.* at 663; KING, *supra* note 8, at 118, 146. The committee ultimately expressed its disagreement with Anslinger: “[L]ike any disease [drug addiction] can be attacked with greater vigor if brought out in the open and discussed in a forthright manner. If by education the young people of the Nation can be made aware of the true character of narcotic drugs and the dangers of addiction, they will become strong fighters in the campaign against the evil.” S. REP. NO. 82-725, at 29.
- ¹² *Organized Crime Hearings*, at 664.
- ¹³ KING, *supra* note 8, at 113.
- ¹⁴ *Illicit Narcotics Traffic: Hearings Before the Senate Comm. on the Judiciary, Subcomm. on Improvements in the Federal Criminal Code*, 84th Cong. (1955).
- ¹⁵ *Id.*, pt. 4, at 18 (“Is it or is it not a fact that the marihuana user has been responsible for many of our most sadistic, terrible crimes in this Nation, such as sex slayings, sadistic slayings, and matters of that kind?”).
- ¹⁶ S. REP. NO. 84-1850, at 2, 20 (1956).
- ¹⁷ S. REP. NO. 84-1440, at 2 (1956).
- ¹⁸ *Id.* at 3-4.
- ¹⁹ Section 103, 70 Stat. 568 (codified at 26 U.S.C. §7237 (1954) (repealed 1970)).
- ²⁰ See MARTIN A. LEE & BRUCE SHLAIN, *ACID DREAMS* 179-182 (1985).
- ²¹ Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, The American Presidency Project (July 14, 1969), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2126&st=&st1=> (last visited June 17, 2008).
- ²² Richard Nixon, Remarks at the Opening Session of the Governors’ Conference at the Department of State, The American Presidency Project (December 3, 1969), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2353&st=&st1=> (last visited June 17, 2008).
- ²³ *Hearings Before a Special Subcomm. of the Senate Judiciary Comm. on S. 2113, S.2114, S. 2152 and LSD and Marihuana Use on College Campuses*, 89th Cong., Exhibit 80, at 613 (1966) (statement of Dean F. Markham) (from testimony given by Markham at the 1962 White House Conference on Narcotics); *Dodd Blasts Parole-less Drug Terms*, WASH. POST (Sept. 29, 1962), at C3.
- ²⁴ THE PRESIDENT’S ADVISORY COMMISSION ON NARCOTIC AND DRUG ABUSE, FINAL REPORT 4 (Nov. 1963).
- ²⁵ *Id.* at 3.
- ²⁶ *Id.*
- ²⁷ Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 F. SENT. REP. 139, 142 (2001).
- ²⁸ *Id.* quoting Annual Report of the Attorney General, 1963, at 62-63.
- ²⁹ *Id.* at n. 23.
- ³⁰ See Shanor & Miller, *supra* note 27, at 139, 142-43 (describing how clemency can be used systematically to create and spur policy changes); see also Margaret Colgate Love, *Reinventing the President’s Pardon Power*, 20 FED. SENT. REP. 5, 6 (2007) (“In a more recent ‘systematic’ use of the power evidently intended to send a message to Congress, Presidents Kennedy and Johnson commuted the sentences of more than 200 drug offenders serving mandatory minimum sentences under the Narcotics Control Act of 1956.”).
- ³¹ THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 223 (Feb. 1967).
- ³² *Supra* note 21.
- ³³ *Supra* note 22.
- ³⁴ *Narcotics Legislation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 91st Cong. 216 (Sept. 15, 1969) (statement of Attorney General John Mitchell); Jack Rosenthal, *Nixon Aides Ease Marijuana Stand*, N.Y. TIMES (Oct. 14, 1969), at A1, A19.
- ³⁵ *Crime in America: Views on Marihuana: Hearings Before the House Select Comm. on Crime*, 91st Cong. 7 (Oct. 14, 1969) (statement of Roger O. Egeberg); Rosenthal, *supra* note 34, at A19.
- ³⁶ H.R. REP. NO. 91-1444, pt. 1, at 2 (1970).
- ³⁷ *Id.* at 1.
- ³⁸ *Id.*
- ³⁹ *Id.* at 4-5. Engaging in a “continuing criminal enterprise” was punishable by a mandatory minimum sentence of 10 years to life in prison. *Id.* at 5. Second offenses under this provision required a mandatory minimum sentence of 20 years to life. *Id.* at 10.
- ⁴⁰ See Pub. L. No. 91-513, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 848 (2007)).
- ⁴¹ H.R. REP. NO. 91-1444, pt. 1, at 11.
- ⁴² *Id.* at 5.
- ⁴³ 116 Cong. Rec. 33,314 (1970).
- ⁴⁴ *Id.* at 33,313-14.
- ⁴⁵ *Id.* at 33,313.
- ⁴⁶ *Id.* at 33,300; H. REP. NO. 91-1444, pt. 1, at 11 (noting how mandatory minimums made prosecutors reluctant to charge and juries reluctant to convict).
- ⁴⁷ 116 Cong. Rec. 33,316 (1970).
- ⁴⁸ *Id.* at 35,077.
- ⁴⁹ See *supra* note 40 and accompanying text (explaining “continuing criminal enterprise”).
- ⁵⁰ 116 Cong. Rec. 35,052 (1970).
- ⁵¹ 1970 CQ Almanac, at 1071.
- ⁵² In fact, the alternative penalty provisions in the 1970 Act were based on an Administration proposal submitted to Congress. According to Representative Clark MacGregor (R-Minn.), “Title II of H.R. 18583 grew out of the Nixon administration’s proposal, which came up last year, for a reorganization of all existing narcotic and dangerous drug control laws.... Among changes common to both proposals would be.... a complete revision of the existing penalty structure, including making any first-time simply [sic] possession offense a misdemeanor, regardless of the drug involved, and easing penalties for second-time possession offenses. Also, mandatory minimum penalties would be eliminated, except for a special class of professional offenders.” 116 Cong. Rec. 33,315 (1970).
- ⁵³ *Supra* note 51, at 1072. Senator Thomas Dodd of Connecticut lost his seat running as an independent against moderate Republican House member Lowell P. Weicker, Jr. *Id.* at 1076. The Senate had censured Dodd in 1967 for diverting funds for his personal use, thus making it unlikely that he could win a Senate nomination in a Democratic primary. Running as an Independent, he ultimately split the Democratic vote, helping the Republican win. *Id.* at 1072.

- 54 *Id.* at 1080. Local factors such as redistricting played a key role in some of the elections in which party shifts occurred. *Id.* at 1077. Unemployment, recession, and farmer dissatisfaction with Nixon's agricultural policies were significant factors that led to losses of seats in other districts, particularly in the Midwest. *Id.* at 1077, 1081.
- 55 *See, e.g.*, 132 Cong. Rec. 22,993 (1986) ("While a gram of cocaine sells for at least \$100, two small pieces of crack, or enough to get three people high can be purchased in almost any American city for about \$10.") (statement of Rep. LaFalce); *id.* at 26,447 ("[Crack] can be bought for the price of a cassette tape, and make people into slaves.") (statement of Sen. Chiles).
- 56 *See, e.g., id.* at 22,667 ("A new form of freebase cocaine called crack is now becoming a major problem in many cities.") (statement of Rep. Traficant); *id.* at 26,437 ("We do have an epidemic in this country with regard to all kinds of controlled substances.") (Statement of Sen. Biden).
- 57 *See, e.g., id.* at 22,667 (1986) ("The widespread use of crack in New York City is said by many law enforcement officials in that city to have caused a rise in violent crimes last year.") (statement of Rep. Traficant); *id.* at 31,329-30 (describing robberies and other crimes committed in connection with drug use or sales) (statement of Sen. Chiles).
- 58 *See, e.g.*, 132 Cong. Rec. S8092 (daily ed. June 6, 1986) (statement of Sen. D'Amato regarding S. 2580) (calling crack "more addictive" than powder cocaine); 132 Cong. Rec. 31,329 (1986) ("[I]f you try it once, chances are that you will be hooked. If you use it up to three times, we know that you will become hooked, and it is the strongest addiction that we have found.") (statement of Sen. Chiles).
- 59 *See, e.g.*, 132 Cong. Rec. 22,667 (1986) (describing how drug-related deaths of several famous athletes "precipitated a media blitz on the problem of drugs in America.") (statement of Rep. Traficant); *id.* at 26,447 ("The politicians are hearing the same things Time magazine and Newsweek have heard. It is the same thing Nightline, NBC, and CBS have heard. ... [P]eople are fed up with drugs.") (statement of Sen. Chiles).
- 60 *See, e.g.*, Edward Walsh, *Bias' Death Fueled Antidrug Fervor; Public Concern, Election-Year Sensitivity United Congress on Issue*, WASH. POST (Sept. 14, 1986), at A1; *see also* 132 Cong. Rec. 26,453 (1986) (statement of Sen. Mattingly describing how a "national outcry" arose from Len Bias's death and the resulting media coverage).
- 61 132 Cong. Rec. 22,690 (1986) ("[B]ecause of the publicity surrounding the recent tragedy stemming from drug abuse, this issue has become fertile ground for political and Federal hype.") (statement of Rep. Weiss); *id.* at 26,440 ("We talk about a war [on drugs]. I love to use that term, because it sounds tough; it makes good talk, good speeches.") (statement of Sen. DeConcini); *id.* at 26,460 ("Some say the Senate is acting in response to a public outcry, and that we may be acting with undue haste.") (statement of Sen. Specter); *id.* at 26,462 ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate.") (statement of Sen. Mathias).
- 62 H.R. 5394, 99th Cong. (1986); H. REP. NO. 99-845, pt. 1 (1986).
- 63 Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L.REV. 383, 408 (1995) (describing how no committee hearings were held). "The careful, deliberate procedures of Congress were set aside to expedite passage of the bill." *Id.*
- 64 *See id.* at 408; *see also* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 117 (Feb. 1995), available at <http://www.uscc.gov/crack/chap5-8.pdf> (last visited August 27, 2008) (describing lack of legislative history in passage of 1986 law).
- 65 H.R. REP. NO. 99-845, pt. 1, at 16-17 (1986) (defining major traffickers as "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities" and serious traffickers as "the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials ... and doing so in substantial street quantities.").
- 66 *See* Pub. L. No. 100-690, 102 Stat. 4181 (1988); 134 Cong. Rec. H7,704 (daily ed. Sept. 16, 1988) (statement of Rep. Hunter) (stating that crack cocaine "causes greater physical, emotional, and psychological damage than any other commonly abused drug.").
- 67 Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. § 991 (2007)).
- 68 *See* 28 U.S.C. § 991(b)(1)(B) (2007); *see also* Pub. L. No. 98-473, 98 Stat. 2019 (codified as amended at 28 U.S.C. § 994 (2007)) (describing the Commission's duties and powers).
- 69 *See, e.g.*, U.S.S.G. § 5K2.0 (2008) (describing when a sentence may be increased or decreased based on factors "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").
- 70 *See Federal Mandatory Minimum Sentencing: Hearing on H.R. 2199 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103rd Cong., 1st sess. 30 (1993).
- 71 Pub. L. No. 103-322, 108 Stat. 1985, as amended by Pub. L. No. 104-294, 110 Stat. 3499 (codified as amended at 18 U.S.C. § 3553(f) (2007)).
- 72 *See id.*; U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 44 (2007), available at <http://www.uscc.gov/ANNRPT/2007/SBT0C07.htm> (last visited July 22, 2008) [hereinafter USSC 2007 SOURCEBOOK].
- 73 *See, e.g.*, 132 Cong. Rec. 944 (1986) ("What is most frightening about crack is that it has made cocaine widely available and affordable for abuse among our youth.") (statement of Rep. Rangel); *id.* at 26,453 ("The bill seeks to solve the drug crisis by attacking both the supply and the demand end.") (statement of Sen. Mattingly).
- 74 *See, e.g., id.* at 22,688 (arguing that use would decrease if "drug pushers [were arrested] before they have the chance to peddle their poison.") (statement of Rep. Fields); *id.* at 22,706 (describing how the threat of mandatory minimums would deter drug traffickers, reducing drug use by "taking the profit out of dealing.") (statement of Rep. Jones); *id.* at 22,993 ("Those that traffic in drugs do so for profit. It is big business and if we are to have any success at all we must alter the balance between the rewards, which are often vast, and the punishment, which is often too slight to dilute the attraction of the millions that can be made in the drug trade.") (statement of Rep. LaFalce); *see also* U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 64 (May 2002) [hereinafter 2002 USSC COCAINE REPORT] ("In theory, sentencing policies might reduce the supply of cocaine through the deterrence of potential traffickers or through the incapacitation of traffickers who are integral to the cocaine market.") (emphasis in original).
- 75 2002 USSC COCAINE REPORT, *supra* note 74, at 65-67.
- 76 *Id.* at 72.
- 77 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN, DEP'T OF HEALTH AND HUMAN SERVS., available at <http://oas.samhsa.gov/nhsda/98mf.pdf> (last visited June 30, 2008). The percentages used here refer to those who reported having used drugs during the past 30 days; this 30-day usage window is the most commonly used measure for charting drug use.
- 78 NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL INSTITUTE OF HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVICES, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2005, VOL. II 12-14, available at http://monitoringthefuture.org/pubs/monographs/vol2_2005.pdf (last visited July 30, 2008).
- 79 *Id.*
- 80 "Drug trafficking offenses," as used in this report, includes only growing, manufacturing, buying, selling, supplying, importing, exporting, and otherwise transporting or distributing illegal drugs. This term does not include other crimes committed while under the influence of drugs (i.e., murder, assault) or crimes that do not involve drugs but are committed to obtain money for drugs (i.e., burglary, robbery, petty theft).
- 81 All sides in the debate agree that proving causality between longer mandatory sentences and crime rates is difficult. Yet the burden falls on the proponents of mandatory minimums to provide evidence that they are working. The proponents have shown none.
- 82 *See, e.g.*, FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, PRELIMINARY ANNUAL UNIFORM CRIME REPORT (June 9, 2008), available at <http://www.fbi.gov/ucr/2007prelim> (last visited June 17, 2008) (describing nation-wide statistics only for violent crimes such as murder, robbery, rape, and arson, but not for federal drug trafficking offenses). The only data the FBI collects regarding drug trafficking offenses is the annual number of arrests for state and local "drug abuse violations."

- 83 See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 207 (1995), available at http://www.fbi.gov/ucr/Cius_97/95CRIME/95crime4.pdf (last visited Sept. 5, 2008) ("The 1995 drug abuse violation arrest total was 7 percent above the 1994 level, 41 percent higher than in 1991, and 65 percent higher than in 1986."); cf. *id.* at Table 29 with FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES Table 29 (2006), available at http://www.fbi.gov/ucr/cius2006/data/table_29.html (last visited Sept. 5, 2008) (showing an increase from 1,476,100 drug abuse violation arrests in 1995 to 1,889,810 such arrests in 2006).
- 84 In cities with populations of over 100,000, the rate (per 100,000 inhabitants) of drug-related arrests increased by 250% in the 1980s, from 66 per 100,000 (in 1980) to 231 per 100,000 (in 1989). See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS 472, Table 4.32 (Timothy J. Flanagan & Kathleen Maguire eds., 1992). This trend holds true for the 1990s and today. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS, 2003, at 1 (August 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjto3.pdf> (last visited June 18, 2008) (showing an average 4.4% annual increase in the number of federal drug offense arrests between 1994 and 2003); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, *Defendants Charged With Violation of Drug Laws in U.S. District Courts*, available at <http://www.albany.edu/sourcebook/pdf/t5372007.pdf> (last visited Sept. 5, 2008) (showing steady increases in number of federal drug defendants between 1985 (11,208) and 2007 (29,578)).
- 85 See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, *supra* note 84, at 482, Table 4.40. Amounts of heroin and cocaine seized by the federal Drug Enforcement Agency within the United States increased dramatically from 160 pounds of heroin and 1,139 pounds of cocaine (in 1979) to 2,464 pounds of heroin and 149,371 pounds of cocaine (in 1991). *Id.*
- 86 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 5 (Oct. 2006) (revised Jan. 2007), available at <http://www.ojp.gov/bjs/pub/pdf/dudsp04.pdf> (last visited July 30, 2008).
- 87 *Id.* at 6.
- 88 *Id.* at 7.
- 89 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDER STATISTICS, *Summary of Findings*, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#findings> (last visited June 18, 2008).
- 90 *Id.*
- 91 BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISON INMATES AT MID-YEAR 2007, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pimo7.pdf> (last visited July 30, 2008).
- 92 BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, available at <http://www.bop.gov/about/facts.jsp#4> (last visited May 27, 2008).
- 93 U.S. SENTENCING COMMISSION, 2007 ANNUAL REPORT 31 (2007), available at <http://www.ussc.gov/ANNRPT/2007/ar07toc.htm> (last visited July 22, 2008).
- 94 *Id.* at 32; USSC 2007 SOURCEBOOK, *supra* note 72, at Table 43.
- 95 U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 49, 53 (Nov. 2004), available at http://www.ussc.gov/15_year/15year.htm (last visited July 22, 2008) [hereinafter USSC FIFTEEN YEAR REPORT].
- 96 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (Apr. 2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeuso3.pdf> (last visited June 18, 2008).
- 97 *Id.*
- 98 H.R. REP. NO. 110-140, at 3-6 (2007). One modest step Congress and the President have taken is to enact the Second Chance Act (Pub. L. No. 110-199, 122 Stat. 657) to authorize funds to steer drug offenders toward treatment instead of prison and for "reentry" programs that will provide rehabilitation and job training to ease offenders' transition from prison back into mainstream life. See Press Release, *President Bush Signs H.R. 1593, the Second Chance Act of 2007*, Office of the Press Secretary, The White House (April 9, 2008), available at <http://www.whitehouse.gov/news/releases/2008/04/20080409-2.html> (last visited May 1, 2008). Little of the authorized funding, however, will be spent on those in or leaving federal prisons. See H.R. 1593, 110th Cong. (2007) (enacted). Other studies have shown that offenders serving lengthy sentences have slightly higher recidivism rates than offenders serving shorter sentences, and that offenders who serve prison sentences are more likely to recidivate than offenders who are given a community-based punishment. Paul Gendreau, Claire Goggin & Francis T. Cullen, *Effects of Prison Sentences on Recidivism*, at 16 (1999), available at http://www2.ps-sp.gc.ca/publications/corrections/199912_e.pdf (last visited July 30, 2008).
- 99 BUREAU OF JUSTICE STATISTICS, INCARCERATED CHILDREN AND THEIR PARENTS 1-2 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (last visited July 22, 2008); see also W. WILSON GOODE, SR. & THOMAS J. SMITH, BUILDING FROM THE GROUND UP: CREATING EFFECTIVE PROGRAMS TO MENTOR CHILDREN OF PRISONERS I (2005), available at http://www.ppv.org/ppv/publications/assets/i185_publication.pdf (last visited May 19, 2008).
- 100 See GOODE & SMITH, *supra* note 99, at 1.
- 101 *Supra* note 93, at 27.
- 102 USSC 2007 SOURCEBOOK, *supra* note 72, at Table 34.
- 103 See U.S. CENSUS BUREAU, THE 2008 STATISTICAL ABSTRACT, THE NATIONAL DATA BOOK, *Annual Estimates of the Resident Population by Race, Age, and Sex: April 1, 2000 to July 1, 2006*, at Table 8 (May 17, 2007), available at <http://www.census.gov/prod/2007pubs/08statab/pop.pdf> (last visited Sept. 5, 2008).
- 104 1991 USSC REPORT, *supra* note 3, at 76, 80-81; see also USSC FIFTEEN YEAR REPORT, *supra* note 95, at 90, 131 (Nov. 2004), available at http://www.ussc.gov/15_year/15year.htm (last visited July 22, 2008) (describing how mandatory minimum sentences for both gun and drug offenses disproportionately impact African Americans).
- 105 There is a five-year mandatory minimum for trafficking 5 grams or more of crack or 500 grams or more of powder cocaine. There is a 10-year mandatory minimum for trafficking 50 grams or more of crack or 5 kilograms or more of powder cocaine. 21 U.S.C. § 841(b) (2007). Because it takes 100 times as much powder cocaine as crack cocaine to trigger the same mandatory minimum sentence, this penalty system is commonly called the "100-to-1 drug quantity ratio." U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2-3 (May 2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf (last visited July 22, 2008) [hereinafter USSC 2007 COCAINE REPORT].
- 106 See *supra* note 93, at 32.
- 107 U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, OFFICE OF APPLIED STUDIES, 2006 *National Survey on Drug Use & Health*, at Detailed Table 1.34A (2006), available at <http://www.oas.samhsa.gov/NSDUH/2k6nsduh/tabs/2k6tabs.pdf> (last visited August 27, 2008).
- 108 *Id.*
- 109 USSC 2002 COCAINE REPORT, *supra* note 74, at 126.
- 110 See USSC 2007 COCAINE REPORT, *supra* note 105, at 12-13.
- 111 18 U.S.C. § 3553(e) (2007); U.S.S.G. § 5K1.1 (2007). The code and the guideline use identical language and permit the court to sentence an offender below the applicable *guidelines range* when a motion is brought by the prosecutor. The "substantial assistance" provision is limited in nature. First, only the prosecution, not the defense, can move for a departure for providing substantial assistance. Second, the assistance given must be "substantial." The guidelines do not define that term, so in practice there are potentially as many definitions of the term "substantial" as there are prosecutors. Third, the assistance given qualifies for a reduction only if it concerns the investigation of others—a defendant's full confession of his own criminal involvement is insufficient. Finally, there is no assurance to those who provide substantial assistance that they will receive a reduction of any particular magnitude, or that all who provide assistance receive the same reduction. A reduction could be limited to a small percentage or portion of the sentence; the amounts differ in every case and every circuit. See Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* at 3-4 (Jan. 1998), available at <http://www.ussc.gov/publicat/5kreport.pdf> (last visited July 30, 2008).

- 112 Vincent & Hofer, *supra* note 1, at 21. Similarly, the substantial assistance provision allows drug defendants with a more involved role (and thus more information to trade) to receive lower sentences than their less culpable counterparts. *Id.*
- 113 18 U.S.C. § 3553(e) (2007). To receive a sentence reduction below both the guidelines range (which can be higher than the mandatory minimum) and the mandatory minimum, the prosecutor typically must bring both a motion under § 5K1.1 and a motion under 18 U.S.C. § 3553(e). See *Melendez v. United States*, 518 U.S. 120 (1996). When deciding whether to grant a reduction, courts must give substantial weight to the government's opinion of the value and truthfulness of the offender's assistance. U.S.S.G. § 5K1.1 App. Note 3 (2008).
- 114 See USSC 2002 COCAINE REPORT, *supra* note 74, at 6.
- 115 USSC 2007 COCAINE REPORT, *supra* note 105, at 21.
- 116 *Id.*
- 117 USSC 2002 COCAINE REPORT, *supra* note 74, at vii.
- 118 Vincent & Hofer, *supra* note 1, at 11 ("Only 5% of the offenders convicted under the mandatory minimum statutes in fiscal year [19]92 were organizers or leaders of an extensive drug operation. Over 85% did not manage or supervise trafficking activity."). See also 1991 USSC REPORT, *supra* note 3, at 27-30 (describing how mandatory minimums are triggered based only on drug type and weight and are not tailored based on the offender's role or function).
- 119 H. REP. NO. 99-845, pt. 1 (1986) ("The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs.").
- 120 David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004).
- 121 *Id.* See also Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 458 (1999); Michael Brennan, *A Case for Discretion: Are Mandatory Minimums Destroying Our Sense of Justice and Compassion?*, NEWSWEEK (Nov. 13, 1995).
- 122 See, e.g., FAMILIES AGAINST MANDATORY MINIMUMS, *Voices for Reform*, available at <http://www.famm.org/ExploreSentencing/TheIssue/Voicesforreform.aspx> (last visited June 18, 2008); JUSTICE FELLOWSHIP, *Issues in Criminal Justice Reform: Mandatory Minimums*, available at <http://www.justicefellowship.org/contentindex.asp?ID=321> (last visited July 22, 2008).
- 123 1991 USSC REPORT, *supra* note 3 (the 1991 report was prepared pursuant to Pub. Law No. 101-647, § 1703, 104 Stat. 4789 (1991)).
- 124 *Id.* at 27.
- 125 Vincent & Hofer, *supra* note 1, at 1.
- 126 William H. Rehnquist, *Luncheon Address* (June 18, 1993), United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).
- 127 Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Sept. 5, 2008).
- 128 1991 USSC REPORT, *supra* note 3, at 8.
- 129 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (Apr. 2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeuso3.pdf> (last visited June 18, 2008).
- 130 Jon Wool & Don Stemen, *Issues in Brief: Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, Vera Institute of Justice 4 (Mar. 2004), available at http://www.vera.org/publication_pdf/226_431.pdf (last visited June 18, 2008).
- 131 Judith A. Greene, *Positive Trends in State-Level Sentencing and Corrections Policy*, Families Against Mandatory Minimums 10-18 (2003), available at http://www.famm.org/Repository/Files/82751_Positive%20Trends.pdf (last visited June 18, 2008).
- 132 *Id.* at 11-12.
- 133 *Id.* at 15.
- 134 *Id.* at 14-15.
- 135 *Id.* at 13-14. See also THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 17-20 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (last visited July 23, 2008) (describing how Texas and Kansas have created alternatives to incarceration in an effort to cope with rapidly growing prison costs).
- 136 See generally C. West Huddleston, III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, National Drug Court Institute (May 2005), available at http://www.ndci.org/publications/10697_PaintPict_fnl4.pdf (last visited July 23, 2008) (describing current status of drug courts and drug sentencing alternatives around the country).
- 137 See C. West Huddleston, III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, National Drug Court Institute 6-8 (May 2008), available at http://www.ndci.org/publications/PCPII_web.pdf (last visited July 30, 2008).
- 138 Press Release, *Perry Awards \$3.4 Million in Grants to Support Substance Abuse Treatment and Accountability through Drug Courts* (Dec. 29, 2006), available at <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2006-12-29.1043> (last visited June 18, 2008).
- 139 Vincent & Hofer, *supra* note 1, at 2. While imposition of the guideline sentence is no longer mandatory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Court did mandate that lower courts consider the guidelines when sentencing and "tailor the sentence in light of other statutory concerns." *Id.* at 245-46. While the experience under the now-advisory guidelines has been short, courts have largely continued to follow them. Since *Booker*, sixty-one percent of federal cases were sentenced within the applicable guidelines range. See U.S. SENTENCING COMMISSION, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT (July 2008) Table 1, available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_July_08_Final.pdf (last visited July 30, 2008). Twenty-five percent were sentenced below the guideline range upon motion of the government, usually in exchange for substantial assistance to law enforcement. *Id.* The 1984 Act establishing the sentencing guidelines provided for judicial review of a sentencing decision through an appeal filed by either the defendant or the government, including "plainly unreasonable" sentences and sentences where the guidelines were applied incorrectly. 18 U.S.C. § 3742(a)-(b). In *Gall v. United States*, decided the same day as *Kimbrough*, the Supreme Court held that a district judge's sentencing decision, whether inside or outside of the guidelines range, is reviewed under an "abuse of discretion" standard. *Gall v. United States*, 552 U.S. —, 128 S. Ct. 586 (2007) (No. 06-7949). Since *Gall*, the proportion of cases where a judge departed from the guidelines has remained essentially the same as the post-*Booker* rate. PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT, Table 1.
- 140 See, e.g., FAMILIES AGAINST MANDATORY MINIMUMS, *Profile of Marcus Boyd*, at <http://www.famm.org/ExploreSentencing/TheIssue/FacesofFAMM/MarcusBoyd.aspx> (last visited May 19, 2008) (describing how Boyd received a sentence of over 14 years under the federal guidelines, despite the fact that the applicable mandatory minimum sentence was only five years). Boyd's sentence was so lengthy because his testimony in his own defense was deemed to be obstruction of justice and because his ten prior convictions for driving with a suspended license produced a criminal history category of III under the guidelines, placing Boyd in a much higher guidelines sentencing range.
- 141 See 18 U.S.C. § 3553(f) (2007).
- 142 See *supra* note 71 and accompanying text.
- 143 See 18 U.S.C. § 3553(a) (2007).
- 144 See generally Brief of Amicus Curiae Families Against Mandatory Minimums at 5-12, *Gall v. United States*, ___ 552 U.S. —, 128 S.Ct. 586 (2007) (No. 06-7949) (describing how the so-called "parsimony principle" developed by Montesquieu, Cesare Beccaria, and Jeremy Bentham influenced the Founding Fathers and continues, to this day, to be a widely-accepted and uncontroversial guideline for criminal sentencing), available at [http://www.famm.org/Repository/Files/Gall_Amicus_Brief_\(FINAL_FOR_FILING_--_July_26,_2007\).pdf](http://www.famm.org/Repository/Files/Gall_Amicus_Brief_(FINAL_FOR_FILING_--_July_26,_2007).pdf) (last visited Sept. 5, 2008). "[P]arsimony is not an eighteenth century relic . . . To the contrary, it is now a Congressional command" set forth in 18 U.S.C. § 3553(a). *Id.* at 11-12.

Our Mission

Families Against Mandatory Minimums (FAMM) was established in 1991 to roll back the onslaught of mandatory minimum sentencing laws and promote fair and proportionate sentencing policies.

Through lobbying, advocacy, litigation, and media outreach, FAMM educates legislators and the public about the harm caused by mandatory minimum sentences. FAMM's national membership includes prisoners and their families, attorneys, judges, criminal justice experts and concerned citizens.

Our Vision

FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient but not greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation and reentry.



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