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## ESSAY

# JOURNEYING THROUGH THE VALLEY OF EVIL

DOUGLAS O. LINDER\*

*Evil exists in the American legal system, according to Professor Douglas O. Linder. In this Essay, Professor Linder examines the current state of justice in America. His inspection reveals a system where thoughtlessness and indifference undermine liberty and justice, and where injustices comparable to those prevalent in Germany's Third Reich occur. Through stories of individual suffering, Professor Linder describes the institutional indifference to the human consequences of decisionmaking that occurs when judges and political leaders become swept away by popular causes and bureaucratic concerns. He contends that such institutional indifference pervades our legal system and is the evil that destroys liberty and shatters lives. Professor Linder acknowledges that the courts and political leaders have begun to respond to this evil by eliminating or modifying programs that have caused the gravest injustices, but urges that we must all become dedicated to individualized justice to ensure that future injustices are prevented.*

It is interesting to compare reactions to the words "injustice" and "evil." Tell persons—especially persons who happen to be law professors—that you are researching the subject of *injustice* and a knowing and vaguely approving look comes over their faces. They conclude that you are a liberal (as they are, most likely) who wishes to investigate and expose the government's poor treatment of Haitians, welfare mothers, criminal defendants, or some other downtrodden group. On the other hand, tell these same people that you are exploring the subject of *evil*, and they appear perplexed and slightly troubled, as though you had just announced that you had visited relatives in the netherworld last week. They seem unable to shake the word from its biblical or supernatural associations and cannot understand what of any value could be said on the subject of evil—if indeed such a thing exists.

Evil exists. The reality of evil in the world is no more problematic

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than the reality of injustice. The two ideas are closely related. Behind an act of injustice is often, although not always, evil.<sup>1</sup> Where evil is present, injustice often, although not surely, will follow.<sup>2</sup> Injustices are acts that violate a right or inflict an undeserved hurt. Evil is a source or aspect of human nature that tends to cause injustices.

Injustice and evil both involve disproportionate suffering. Injustices are *undeserved* hurts. Evil, in its primary sense, is what drives one to "exceed due measure" or "overstep proper limits."<sup>3</sup> When severe punishment is inflicted upon the perpetrator of a serious wrong, neither evil nor injustice may have much to do with the matter.

Good and evil are often thought of as opposites, but their relationship is much more complex than that. Martin Buber, a Jewish theologian, examined the relationship between good and evil.<sup>4</sup> He concluded that good was the product of a striving for truth and beauty.<sup>5</sup> Good does not happen by accident: It comes from caring about and paying attention to noble goals. Evil, however, requires no such purposefulness. Evil may come visiting whenever one strays from the path of truth and beauty. Evil is the consequence of distractions and inattention.<sup>6</sup> Whereas one must work to be good, one happens to be evil.

Americans usually do not think of evil in this way. We have been conditioned by Hollywood, television, and politicians to expect evil to come from the perverted and sadistic, from monsters and global conspiracies. Our villains are diabolic, given to demonic profundities. They are Iago and Macbeth, Darth Vader and the Joker, Godless Communists and All Those Behind the Assassination of President Kennedy.

Evil rarely has such a face. Hannah Arendt recognized "the banality of evil."<sup>7</sup> In *Eichman in Jerusalem*, a report on the trial of Adolf Eichman, Arendt wrote that Eichman, far from having a desire "to prove

1. Despite their close relationship, injustice and evil can each exist in the absence of the other. The execution of an innocent person may be a great injustice. If the execution followed a fair trial with strong, but ultimately misleading, evidence suggesting the defendant's guilt, however, it could not be said that evil caused the execution. Fate may sometimes be unkind, but not evil.

2. Evil, as will be shown later, is more often associated with thoughtlessness than with an evil design. Thoughtless patterns of behavior sometimes may stumble onto just outcomes, as well as unjust outcomes.

3. OXFORD ENGLISH DICTIONARY 909 (Compact ed. 1971).

4. MARTIN BUBER, *GOOD AND EVIL: TWO INTERPRETATIONS* (1952).

5. *Id.* at 97.

6. *Id.*

7. HANNAH ARENDT, *EICHMAN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (2d ed. 1965).

a villain,"<sup>8</sup> sent thousands of Jews to their deaths merely because of "a lack of imagination."<sup>9</sup> Eichman's only motive was looking out for his personal advancement. According to Arendt, he "*merely . . . never realized what he was doing.*"<sup>10</sup>

"The strange interdependence of thoughtlessness and evil"<sup>11</sup> that Arendt observed in Jerusalem underlies many of the injustices that have dishonored the American legal system in recent years. Overidentification with popular causes of the day and immersion in professional legal culture have blinded many of the key players in our justice system to the human consequences of their decisions. Bureaucratic thinking has enabled people who should know better to conclude that they are mere functionaries who, if they did not do what they did, would watch as others carried out the same injustices. Arendt concluded, from the Eichman trial, that "remoteness from reality and thoughtlessness can wreak more havoc than all the evil instincts taken together."<sup>12</sup> So, also, we might conclude today.

If we look for classic villains as perpetrators of the evil in our criminal justice system, we will not find them. The evil that exists comes from people who, like Eichman, are "terribly and terrifyingly normal."<sup>13</sup> They include politicians who badly want to be reelected, frustrated and possibly bored members of a sentencing commission with other priorities,<sup>14</sup> district judges who hope to be appellate judges, appellate judges

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8. *Id.* at 287. Arendt contends that it was Eichman's lack of imagination that enabled him to sit for months on end facing a German Jew who was conducting the police interrogation, pouring out his heart to the man and explaining again and again how it was that he reached only the rank of lieutenant colonel in the S.S. and that it had not been his fault that he was not promoted.

*Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 288.

12. *Id.*

13. *Id.* at 276.

14. The United States Sentencing Commission publishes sentencing guidelines that determine sentence ranges for most federal crimes. 28 U.S.C. § 994 (1988). The Commission has been criticized for not giving enough thought to special circumstances that should affect sentencing. One commentator noted that "several members of the . . . Commission apparently considered their work so undemanding that they openly violated the statutory requirement of full-time service on the Commission." Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 951 (1988); see also 28 U.S.C. § 992(c) (1990) (requiring full-time service on the commission). Judge Stephen G. Breyer wrote 160 opinions for the First Circuit Court of Appeals during four years of service on the Commission. Another Commissioner, Michael K. Block, moved from Washington to Tucson, Arizona during his service, returning to Washington only about two days a month. Alschuler, *supra*, at 951. Professor Alschuler contends that the Commissioners may not have appreciated "the impact of the resolution of [sentencing] issues on people's lives." *Id.*

who want fewer sentencing cases on their dockets, federal prosecutors who do not look to see where their bandwagons are headed, and jurors who merely want to go home. These people are not malicious. They are nice to cats and small children. They are pleasant dinner guests. But together they are responsible for more undeserved human suffering than any of them would care to consider.

Evil in the modern American legal system has not escaped the attention of Judge Richard Posner. In a recent review of Ingo Muller's *Hitler's Justice: The Courts of the Third Reich*,<sup>15</sup> Judge Posner identified disturbing parallels between America's legal system and that of Germany's Third Reich. Judge Posner's concerns relate to virtually all the major governmental players in our legal system. "[J]udges who impose savage sentences on minor drug dealers" remind him of the German judges who took pride in their role as "fighters on the internal battlefield, battlers against 'the enemy within.'"<sup>16</sup> He wonders whether prosecutors who pursue marijuana growers, "manipulators" of financial markets, sellers of dirty magazines, and violators of arcane campaign financing regulations are inappropriately using their offices in much the same way as did prosecutors who earlier brought charges against Germans for "dishonoring the race."<sup>17</sup> In the decisions of legislators and administrative officials marking the United States "as the most penal of civilized nations today,"<sup>18</sup> Judge Posner sees a "deeply problematic"<sup>19</sup> state of affairs that reflects, although perhaps not quite in degree, the awesome severity of the criminal code in Nazi Germany.<sup>20</sup>

Practices have gained judicial acceptance that would have been almost unimaginable in this country only two or three decades ago. Among these are pretrial detention that leaves defendants languishing in jail for two or more years while awaiting trial, the rapid expansion of the death penalty and its authorization for use on teenagers, and application of draconian forfeiture laws in cases involving only minute quantities of contraband.<sup>21</sup> Litigants attempting to challenge other unlawful or highly

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15. Richard A. Posner, *Courting Evil*, THE NEW REPUBLIC, June 17, 1991, at 36 (book review).

16. *Id.* at 42.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 41-42.

21. The United States Supreme Court has upheld these practices against constitutional challenges. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that execution of persons under 18 at time of crime "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment"); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (finding certain extended pretrial detentions constitutional); *Calero-Toledo v. Pearson Yacht*

dubious practices, such as housing prisoners in inhumane conditions or chokeholding persons suspected of minor traffic violations, have been confronted with administrative and judicial obstacles that could frustrate even the most patient and skillful plaintiffs' attorney.<sup>22</sup>

Not all of the harshness and expanded prosecutorial powers in our legal system can be justified as a response to public crisis. Severity of punishment has increased out of proportion to the threat posed by many criminal acts. Many persons face long prison terms for activities that pose little, if any, threat to anyone's security. Even as rates for many types of crimes dropped, punishment for these crimes grew more harsh.<sup>23</sup> Similarly, the general willingness to allow the government to fine, confine, search, research, drug, drug test, rough up, round up, and in other ways cause individuals to suffer significant indignities has not depended on the ability of government to demonstrate an increased need to adopt these tactics. Deference to government is in vogue,<sup>24</sup> and government has made the most of the opportunities presented to it, often without much regard for the human consequences of its decisions. Our jurisprudence, our institutions, and our politics increasingly deny or ignore the basic humanity of prisoners, criminal defendants, and targets of government suspicion.

This Essay attempts to show that injustices are real and that real people are responsible for them. It examines the patterns of thinking and behavior that lead to injustices. Finally, this Essay attempts to chart a course through "the valley of evil"<sup>25</sup> that takes account of human weaknesses and bureaucratic realities.

## I. SEARCHING FOR EVIL

Evil rarely announces itself. It slips in quietly, usually under an as-

Leasing Co., 416 U.S. 663, 680-90 (1974) (finding seizure of yacht for marijuana violation constitutional).

22. See, e.g., *Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991) (holding that prisoners who allege prison conditions constitute "cruel and unusual punishment" must show "deliberate indifference" by responsible officials); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (finding that a person seeking to enjoin police practice of employing chokeholds has no standing unless he can establish substantial likelihood of being choked again).

23. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS DATA REPORT 1989, at 17 (1990).

24. David Stewart, *Advantage Government*, A.B.A. J. 46 (July, 1992). Justice Stevens recently complained of "a special privilege for the Federal Government." *United States v. Williams*, 112 S. Ct. 1735, 1748 (1992) (Stevens, J., dissenting) (reversing the district court's dismissal of indictment for failure of the prosecution to disclose to the grand jury "substantial exculpatory evidence" in its possession).

25. The metaphor is inspired by the 23rd Psalm: "Even though I journey through the valley of the shadow of death, I fear no evil." *Psalms* 23:4 (Revised Standard Version).

sumed name. If not for its frequent companion, injustice, it would be hard to spot at all. Injustice itself is often difficult to recognize because it takes many forms.

Many instances of governmental injustice in our nation's history do not directly involve punishment through the criminal justice system. Governmental support of the institution of slavery<sup>26</sup> and displacement of Native Americans from their traditional lands<sup>27</sup> are two examples of injustices outside the criminal justice system. Eager governmental support for the causes of economic development and western expansion has taken its victims as well. More recently, overzealous pursuit of abstract—sometimes commendable—goals such as environmental quality, affirmative action, and respect for life has taken a heavy toll on particular individuals whose interests were ignored or sacrificed in the rush to serve those goals.

Nowhere, however, is the potential for evil to cause injustices greater than in the context of the criminal justice system. The criminal justice system separates persons from their loved ones, causes physical and emotional scars, denies individuals many of their most basic freedoms, and even takes lives. Many of the clearest cases of governmental injustice are drawn from the criminal justice system. It was through its Reich Ministry of Justice that the Nazis worked their profound evil against Jews, Poles, homosexuals, and other victims of Nazi hatred.<sup>28</sup> In our own country, we can point to examples of gross injustice such as the hangings of suspected witches in Salem Village and the guilty verdicts that almost sent eight black teenagers, "the Scottsboro Boys," to their deaths for a rape that they almost certainly did not commit.<sup>29</sup> The videotaped Los Angeles police beating of Rodney King in 1991 is but the latest striking example of how a system designed to provide justice sometimes serves up its opposite.

There is no public injustice so great that it will not have its defenders, but that does not mean that injustice exists merely in the eye of the beholder. If injustice is but a superstition, then so are all the shared moral values upon which a community depends. It is a testament to the modern obsession with the empirically verifiable that there are critics

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26. For an account of governmental support of slavery, including the 1850 fugitive slave law and *Dred Scott*, see generally RUSSEL NYE, *FETTERED FREEDOM, CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860* (1963).

27. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 443-44 (1973).

28. See ROGER GOODMAN, *THE FIRST GERMAN WAR CRIMES TRIAL* i-iii (n.d.).

29. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 239-40 (1970).

who argue that we should “see through” questions of justice.<sup>30</sup> As C. S. Lewis noted, “the whole point of seeing through something is to see something through it.”<sup>31</sup> If someone insists on *proof* that an injustice is really an injustice, it may not be possible to satisfy him. Ultimately, notions of justice and injustice involve weighing public and private interests and will often lead persons to different conclusions in specific cases. It should not be necessary to coax reluctant agreement from the last defender of the Third Reich’s policy before we call the Holocaust an injustice; neither should the absence of unanimous opinion be a bar to conclusions about injustices today. “Takings” jurisprudence suggests limitations on how much sacrifice the government can ask of a private property owner before compensation is exacted. Injustices can be similar to takings in that they involve situations where the government has asked an individual to give up too much in order to achieve a public goal—too much property, too much liberty, or too much physical security.

Injustices usually occur when the human consequences of decisions are ignored or undervalued. This happens when the decisionmaker focuses her attention elsewhere. The “elsewhere” where attention might be focused is as diverse as those individuals who make the offending decisions. Eichman’s trial in Jerusalem showed him to be a normal man who was able to inflict great human suffering because his own career advancement so occupied his thoughts as to make him almost oblivious to the effects his decisions were having on people.<sup>32</sup> Twelve jurors in the infamous “Scottsboro Boys” rape trial of 1933 were able to vote to send innocent teenage blacks in Alabama to the electric chair after only minutes of deliberation—and to laugh about it on their way back to their jury seats<sup>33</sup>—not because the jurors were foul and despicable people, but because they were less concerned with doing individual justice than with vindicating a justice system. William Calley could order that Vietnamese women and children be massacred at My Lai because he had become conditioned to think of his victims as “the enemy,” not as human beings.<sup>34</sup> Calley’s answer to the question of whether he discussed the killings with his superior officers is revealing of his indifference: “No sir . . . . It wasn’t any big deal, sir.”<sup>35</sup>

Although the roots of indifference remain many and varied, two ten-

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30. C.S. LEWIS, *THE ABOLITION OF MAN* 90-91 (MacMillan paperback ed. 5th prtg. 1968).

31. *Id.* at 91.

32. ARENDT, *supra* note 7, at 276.

33. CARTER, *supra* note 29, at 239.

34. JOSEPH DI MONA, *GREAT COURT-MARTIAL CASES* 271-72 (1972).

35. *Id.* at 274.



dencies seem especially pronounced in the American legal system of the early 1990s. Working either separately or together, these two factors are responsible for much unnecessary suffering. One is a tendency for players in the justice system to overidentify with causes—popular causes or causes that have become key parts of an administration's agenda. The second is the tendency, especially apparent among judges, to become blind to certain consequences of their decisions due to an immersion in their professional culture.<sup>36</sup> That such immersion is today generally applauded, and even rewarded, has only exacerbated this tendency.

### A. *Overidentification with Causes*

Few would deny that a politician, prosecutor, judge, or administrative official could come to identify so strongly with a cause that his capacity to do justice to individuals might be diminished. In his eagerness to serve his cause, he may neglect to consider as fully as he should the harm that will fall on persons adversely affected by his decisions. Obviously, the story of the German judiciary during the Third Reich is an extreme example of overidentification with a popular cause. Ultraconservative German judges used what Judge Posner has called the extraordinary "plasticity" of law<sup>37</sup> to produce decisions that inflicted enormous harm on Jews, Poles, homosexuals, and other targets of Nazi hatred. As one judge stated, "Eliminating the last traces of the enemy within is undoubtedly a part of the restoration of German honor. German judges can participate in this task through generous interpretation of the penal code."<sup>38</sup> Another leader of the profession put the matter even more bluntly by suggesting that German judges "make value judgments which correspond to the National Socialist legal order and the will of the political leadership."<sup>39</sup> The Nuremberg tribunal's decision in *The Justice Case* recounts the grim tale of German judges creatively interpreting Nazi law to reach death sentences for Jews accused of such minor violations as hoarding eggs.<sup>40</sup>

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36. This tendency has been noted by scholars. For example, Professor Lon Fuller, writing an opinion for a justice in an imaginary case, warned of "the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world." Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 642 (1949).

37. Posner, *supra* note 15, at 42.

38. *Id.* at 38.

39. *Id.*

40. United States v. Alstoetter et al., in 3 TRIALS OF WAR CRIMINALS 100-26 (1951). The defendants in the Nuremberg trials were charged with common design and conspiracy, war crimes, crimes against humanity, and membership in a criminal organization. *Id.* at 115-26.

In the United States, of course, the official conservative dogma asserts that judges are to interpret the law, not make the law.<sup>41</sup> Thoughtful judges, whether liberal or conservative, understand that to be impossible. The title of an essay by Judge Posner, *What Am I—A Potted Plant?*, suggests that he is a judge who recognizes that subjective value judgments strongly influence judicial decisions.<sup>42</sup> As he candidly stated, “Judges—not all, but most—who are sympathetic to the principles and the policies of the government they serve will decide cases in harmony with those principles and policies, and those who are not won’t.”<sup>43</sup>

Identification with administration policies is even more pronounced among prosecutors, administrative officials, and politicians, all of whom are free from the need to be perceived as objective and above politics. Members of Congress, federal agency officials, and attorneys for the United States are often outspoken in their support of programs that are high on an administration’s or the public’s agenda. While pornography, drugs, insider trading, or pollution rise and fall as administration enforcement priorities, so also does the rhetoric on these dangers emanating from the congressional chambers, the commission meeting rooms, and the offices of district attorneys.

No cause was more popular during the 1980s than the “War on Crime.” Government has been fighting crime for centuries, of course, but rising crime rates beginning in the late sixties made “law and order” a virtually indispensable slogan for any politician hoping to get elected. The fact that rising crime rates at the time had less to do with governmental neglect of citizen security than with an increase in the number of persons in the prime crime-producing years mattered little. Whether as a politician, a U.S. attorney, or an elected judge, it became important to “talk tough” about crime.

Some good has come from our two decades of the war on crime. Although probably more a result of an aging population than anything else, there have been recent improvements in some crime statistics.<sup>44</sup>

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41. This view is most closely associated with President Reagan, though it is a view that President Bush apparently shared. Former Attorney General Edwin Meese has presented the case for this view in numerous forums, including in a speech entitled “The Law of the Constitution,” delivered October 21, 1986, at Tulane University. Edwin Meese, *The Law and the Constitution, in WHO SPEAKS FOR THE CONSTITUTION?: THE DEBATE OVER INTERPRETIVE AUTHORITY 1* (The Federalist Society 1992).

42. Richard Posner, *What Am I—A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23.

43. Posner, *supra* note 15, at 41.

44. Crime rates in most offense categories declined during the 1980s. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BJS DATA REPORT 1989, at 17 (1990).

Others have gotten much worse.<sup>45</sup> It is not the intention here to assess the costs and benefits of recent changes in the criminal code or rules of criminal procedure. Rather, the goal is to identify how sloganism, political posturing, careerism, and bandwagoning have caused gross miscarriages of justice in individual cases. In particular, overzealous pursuit of causes such as "the war on drugs" and "the war on pornography" have brought trial judges to tears and resignations, and have shattered the lives of individual defendants and their families.

These are populist times. "Give the people what they want" is the prevailing philosophy in Washington and most state capitols. If the people are thought to want harsher criminal penalties, the impetus is to enact harsher penalties. If opinion polls favor drug testing, pretrial detention, or executions, then those issues are certain to receive substantial support among politicians. This is not the sort of government that the framers of the Constitution had in mind. James Madison warned against the hasty enactment of laws based on enthusiasms of the day. In *The Federalist Papers*, Madison wrote that a republic must "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."<sup>46</sup> Contrary to Madison's hopes, elected officials have largely surrendered their judgment to public opinion polls. Especially on the issues of crime and punishment, hypersensitivity to popular attitudes has banished reason from debate.

An example of how populism has reworked our criminal law is the "severity revolution"<sup>47</sup> of the last decade or so. People are thought to want harsher criminal penalties.<sup>48</sup> The result has been a bidding war sending sentences to the point where, according to Judge William Schwarzer, Director of the Federal Judicial Center, "no other industrialized country imposes sentences of comparable severity."<sup>49</sup> Our incarceration rate of 426 prisoners for every 100,000 residents ranks well ahead

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45. *Id.* The number of personal crimes, such as personal theft and crimes of violence, has increased since 1980.

46. THE FEDERALIST No. 10, at 46 (James Madison) (Bantam Classic ed., 1982).

47. Alschuler, *supra* note 14, at 903. Maximum sentences as set by the legislature actually began increasing early in the twentieth century. RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 2 (1979).

48. Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 LAW & HUM. BEHAV. 451, 459 (1990).

49. William Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCE REP. 339, 341 (1991).

of second-place South Africa's 333.<sup>50</sup> Changes in sentencing laws guarantee prison time for many offenders who should be dealt with in other ways. Draconian mandatory minimum sentences have been enacted in response to the perceived "lock-'em-up-and-throw-away-the-key" attitude of the public.<sup>51</sup> The death penalty has been adopted for a growing list of crimes, and its application sanctioned even for teenage defendants.<sup>52</sup> Reasoned debate has been swept aside in the rush to satisfy the public's perceived desire for more severe and certain punishments.<sup>53</sup> What has been conspicuously lacking is attention to *consequences* other than the obvious political consequences of not supporting a popular measure. Ironically, recent research suggests that if the public understood how tough sentences *actually are*, they would be more inclined to move toward greater leniency than greater severity.<sup>54</sup>

Our approach to justice issues is increasingly abstract and collectivist. Professor Albert W. Alschuler has called current American legal and social thought "the bottom-line collectivist-empirical mentality."<sup>55</sup> Politicians, administrators, and judges are less concerned with achieving justice between parties than with "speculating about the customary behavior of large groups."<sup>56</sup> Individuals do not count for as much as they used to. Arguments about social utility have obscured the fact that justice is, in Lloyd Weinreb's words, "insistently individual."<sup>57</sup>

50. MARC MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION 3 (Sentencing Project, 1991).

51. See discussion *infra* accompanying notes 59-111.

52. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (affirming death sentence for seventeen-year-old convicted of murder, sodomy, robbery, and receiving stolen property).

53. Eric Sterling, a Staff member of the House Judiciary Committee, described the process of setting criminal penalties:

The way in which these sentences were arrived at—it was like an auction house . . . . It was this frenzied, panic atmosphere—I'll see your five years and I'll raise you five years. It was the crassest political poker game. Nobody looked and said these sentences are going to have the following effect on the courtrooms and around the country, on street corners and on the prisons.

*United States v. Scott*, 757 F. Supp. 972, 980 (E.D. Wis. 1991) (citing Michael Isikoff & Tracey Thompson, *Getting Tough on Drugs: Draconian Sentences Jurt Small Offenders More Than Kingpins*, WASH. POST, Nov.4, 1990, at C1).

54. Alschuler, *supra* note 14, at 938.

55. Albert W. Alschuler, "Close Enough for Government Work": *The Exclusionary Rule after Leon*, 1984 SUP. CT. REV. 309, 346.

56. Alschuler, *supra* note 14, at 904. Alschuler believes that misleading discussion of "group rights," speculation about group behavior, and aggregate judicial management have left society "increasingly indifferent to individual cases and small numbers." *Id.* at 905.

57. LLOYD WEINREB, NATURAL LAW AND JUSTICE 229 (1987).

### 1. Three Stories

Justice is "insistently individual."<sup>58</sup> References to justice for ethnic groups or categories of offenders are really assertions about social utility. The working of evil is most obviously exposed in the undeserved suffering of individuals, not in general observations about the mistreatment of criminal defendants or suspects. With that in mind, the following section examines three injustices and the evil that made each possible.

#### a. Richard Anderson, Oakland Longshoreman

In 1989, Richard Anderson was a forty-nine year old longshoreman in Oakland, California.<sup>59</sup> Anderson had no criminal record and a reputation after twenty-four years on the docks as a reliable worker.<sup>60</sup> Anderson's troubles began when he was waved down on an Oakland Street by an acquaintance.<sup>61</sup> The acquaintance asked Anderson to drive him to a Burger King a few miles away, and Anderson complied. At the Burger King a federal agent posing as a drug customer went to Anderson's truck and picked up the 100 grams of crack that Anderson's acquaintance had with him.<sup>62</sup> Anderson was tried before a jury on charges of violating federal drug trafficking laws. The jury concluded that Anderson knew he was driving his acquaintance to a drug deal.<sup>63</sup>

The Anti-Drug Abuse Act of 1986<sup>64</sup> provides for a mandatory penalty of ten years without the possibility of parole for those participating in a transaction involving over fifty grams of crack.<sup>65</sup> The Act focuses on the weight of the drugs; a person's prior record or degree of participation in the crime is irrelevant.<sup>66</sup>

58. *Id.*

59. *New Drug Law Leaves No Room for Mercy*, CHI. TRIB., Oct. 5, 1989, at 28, available in LEXIS, Nexis Library, Majpap File.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* Anderson testified at the trial that he knew nothing of the drug deal. Katherine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June. 8, 1990, at B16.

64. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered titles of the U.S.C.). Mandatory sentence provisions were further strengthened by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (making relevant amendments to titles 18, 21, and 28 of the United States Code).

65. 21 U.S.C. § 841(b) (1990). The possession of five grams of crack—the weight of five paper clips—carries a mandatory sentence of five years. *Id.* § 844.

66. Federal Judge Jon O. Newman of Connecticut has called basing punishment on the amount of drugs carried or sold "incremental immorality." David Margolick, *Justice By the Numbers: A Special Report*, N.Y. TIMES, Apr. 12, 1992, at A1 (quoting Judge Jon D. Newman).

United States District Judge William Schwarzer imposed the ten-year minimum prison term on Anderson on September 8, 1989.<sup>67</sup> Schwarzer fought back tears as he said to those assembled in his courtroom: "We are required to follow the rule of law . . . [b]ut in this case the law does anything but serve justice. . . . It may profit us very little to win the war on drugs if in the process we lose our soul."<sup>68</sup>

b. Kevin Hogan, Alaska Fisherman

On May 8, 1988, Kevin Hogan and a crew of three headed for Alaska in a \$140,000 fishing boat he had just purchased in Washington.<sup>69</sup> The boat developed engine problems along the route and was forced to stop briefly in Canada for repairs.<sup>70</sup> The Canadian stop was reported to customs agents in Ketchikan, who searched the boat.<sup>71</sup> The search revealed that one of Hogan's three crew members had 1.7 grams of marijuana in his jacket.<sup>72</sup> Customs officials acknowledged that Hogan knew nothing about the marijuana aboard his boat, the *Hold Tight*.<sup>73</sup>

Under the "Zero Tolerance" program initiated less than two months earlier, even small amounts of drugs could result in arrests and forfeitures of property.<sup>74</sup> Customs agents decided to seize Hogan's boat.<sup>75</sup> Hogan had planned to use the boat during Alaska's twenty-four hour halibut season later that month.<sup>76</sup> The halibut catch could have netted Hogan the \$40,000 he needed to pay the mortgage on the *Hold Tight*.<sup>77</sup> Hogan said as a result of the seizure, "I stand to lose it all in this deal," referring to everything for which he had worked during the prior fifteen years.<sup>78</sup> In Hogan's hometown of Homer, Alaska, more than 1,000 people signed petitions supporting Hogan. The city council passed a resolution urging that Customs officials show "some sense of proportionality" in the Hogan case.<sup>79</sup>

The Customs Service expressed its position in a letter written by

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67. Bishop, *supra* note 63, at B16.

68. *Id.*

69. *Fisherman, Drug Program in Standoff*, CHI. TRIB., June 3, 1988, § 1, at 18.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. "Zero Tolerance" Drug Battle Called Overkill, CHI. TRIB., May 16, 1988, available in LEXIS, Nexis Library, Majpap File.

75. *Fisherman, Drug Program in Standoff*, *supra* note 69, at 18.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

John Elkins, acting director of the Service's regulatory procedures and penalties division in Washington, D.C., to the Customs Service's Anchorage office. Elkins said that it is not enough to warn crew members of the drug program, as Hogan said he had done.<sup>80</sup> Elkins contended that Hogan was negligent in not detecting the marijuana: "It is our view that Kevin Hogan was, as owner and master, responsible for the actions of crew members."<sup>81</sup>

c. Robert Brase, Nebraska Farmer

"Project Looking Glass" was the name given to a U.S. Postal Service investigation designed to uncover purchasers of child pornography.<sup>82</sup> The Postal Service apparently obtained names of potential targets for the investigation from raids of distributors of nudity-oriented videotapes.<sup>83</sup>

Robert Brase was a farmer from Shelby, Nebraska.<sup>84</sup> In 1987, he had been married for ten years and was the father of two children.<sup>85</sup> He had no criminal record, and there was no evidence that he had ever sexually abused children.<sup>86</sup> Brase's name apparently turned up on a mailing list found during the raid of a California video distributor.<sup>87</sup> There was no evidence that Brase had ever ordered an X-rated video or violated any of the nation's obscenity laws.<sup>88</sup> The Postal Service, as part of Project Looking Glass, mailed Brase a catalog advertising videos depicting minors engaged in sexual activity.<sup>89</sup> Brase ordered a video tape.<sup>90</sup> Less than one hour after the tape reached Brase's Nebraska farm home, a team of postal inspectors arrived and searched Brase's home.<sup>91</sup> The only child pornography discovered was the tape received from the U.S. Postal Service.<sup>92</sup>

On October 22, 1987, a grand jury in Omaha indicted Brase for allegedly receiving by mail a videotape showing minors engaged in sexually

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80. *Id.*

81. *Id.*

82. Frank Kuznik, *Operation Borderline*, PLAYBOY, Sept. 1988, at 45.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

explicit conduct.<sup>93</sup> Eleven days later, Robert Brase drove his pickup truck to a seldom-used county road nine miles from Shelby and shot himself.<sup>94</sup> Brase was one of four persons indicted in the government sting operation to commit suicide.<sup>95</sup>

H. Robert Showers, executive director of the Justice Departments of National Obscenity Enforcement Unit, defended the sting operation: "When normal law enforcement techniques don't work to solve a problem, you have to go to new ones."<sup>96</sup> Showers denied any responsibility for the suicides: "This kind of sting is designed to penetrate into these underground, secretive operations, and we get some well-regarded people in the community—high-ranking professional people, persons who are considered upstanding citizens. In those circumstances, something like suicide is to be expected."<sup>97</sup>

## 2. What Went Wrong?

Anderson, Hogan, and Brase were not treated well by our justice system. Each was punished far more severely than his own conduct warranted. Anderson's decision to drive his drug-dealing acquaintance to the Burger King was surely a mistake in judgment, but it was a spontaneous response to a request for assistance. Many, if not most, people would have made the same decision. Hogan's decision not to search his crew members for evidence of marijuana hardly can be called negligent, let alone be categorized as misconduct justifying what effectively amounted to a multi-thousand dollar penalty which threatened bankruptcy and loss of livelihood. Brase's interest in child pornography only arguably deserves the label "criminal." The criminal sanction should be reserved for producers of child pornography, not for consumers like Brase whose voyeuristic interests may be biological in origin.<sup>98</sup>

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93. *Brase*, UPI, Nov. 3, 1987, available in LEXIS, Nexis Library, UPI File. Brase was indicted for violating the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified at 18 U.S.C. §§ 2216, 2251-2257; 28 U.S.C. § 522 (1988)). The act criminalizes the knowing receipt through the mails of a "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(2)(A) (1990).

94. *Brase*, UPI, Nov. 3, 1987, available in LEXIS, Nexis Library, UPI File.

95. Lawrence A. Stanley, *The Child Porn Myth*, 7 CARDOZO ARTS & ENT. L.J. 295, 325 (1989). Project Looking Glass and Operation Borderline, a related sting operation implemented by United States Customs, resulted in about 225 indictments. *Id.*

96. Kuznik, *supra* note 82, at 45.

97. *Id.*

98. While recognizing the State's interests in protecting the victims of child pornography and attempting to solve this problem, the Government takes the position that punishment of consumers is necessary because it is difficult to identify and punish the producers of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990). Evidence is mounting that sexual predilections previously thought to be environmental in origin may have a biological basis.



The injustices suffered by Anderson, Hogan, Brase, and thousands like them originated in the overidentification with popular causes by persons far removed from Oakland, Homer, and Shelby. Indifference to the human consequences of these decisions made each of these injustices possible.

a. Mandatory Minimums

Richard Anderson was sentenced under the Anti-Drug Abuse Act of 1986.<sup>99</sup> The Anti-Drug Abuse Act was a product of the politics of crime and the "severity revolution" that those politics created. Under the law's mandatory minimum sentences, first-time participation in a drug trafficking crime involving over five kilograms of cocaine or fifty grams of crack results in a minimum ten-year prison sentence without any opportunity for parole.<sup>100</sup> The sentence applies regardless of the defendant's age, criminal background, mental abilities, family status, drug history, or degree of participation in the crime.<sup>101</sup> Driving a drug dealing acquaintance to the Burger King assures a ten-year minimum sentence no less than engaging in the kind of drug dealing that congressional supporters of the minimum sentence had in mind when they voted for the legislation.

Senate Majority Leader Robert Byrd first proposed the mandatory minimum sentence provisions of the Anti-Drug Abuse Act. Senator Byrd, who called mandatory minimum sentences "really just a matter of common sense,"<sup>102</sup> argued that it was important that a drug dealer "know that there will be no escape hatch through which he can avoid a term of years in the penitentiary."<sup>103</sup> The minimums were designed to counter the problem of "revolving door justice."<sup>104</sup> Byrd stated his intentions to "put these criminals in jail, lock the door, and for a lengthy period of time refuse to permit anyone to use the key to let them out."<sup>105</sup>

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Studies on differences between the brains of homosexuals and heterosexuals, for example, point to a possible biological basis for homosexuality. Marilyn Elias, *Differences Seen in Brains of Gay Men*, USA TODAY, Aug. 3, 1992, at 8D. Other researchers have attempted to explain the vastly greater interest in pornography among males in socio-biological terms. See, e.g., DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* 180-84 (1979). I offer this evidence only to illustrate the point that sexual preferences may be biologically based and not to suggest any correlation between homosexuality and interest in child pornography.

99. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered titles of U.S.C.).

100. 21 U.S.C. § 841(b)(1)(A) (1992).

101. *Id.*

102. 132 CONG. REC. S14,301 (1986) (statement of Sen. Robert Byrd).

103. *Id.*

104. *Id.*

105. *Id.*

The law was meant to deal especially harshly with what the Senator called "kingpins." According to Byrd, kingpins could be "identified by the amount of drugs with which they [were] involved."<sup>106</sup>

The decision to base prison terms on the quantity of drugs involved, however, leads to much injustice. Had Richard Anderson's acquaintance been carrying forty-nine grams of crack instead of more than fifty, Anderson would have faced a mandatory five years in jail instead of ten. Yet the quantity of drugs involved had nothing to do with Anderson's culpability. Even if one rejects Anderson's contention that he did not know his acquaintance was carrying drugs, it is almost inconceivable that Anderson quizzed his rider about whether he was dealing more or less than fifty grams. Chance, rather than some considered willingness to deal drugs in substantial quantities, explains why Anderson was sentenced to ten years—not five—in a federal penitentiary.

By ignoring offender characteristics and levels of participation, Congress has created a system that treats lookouts and couriers as harshly as it does those who plan and reap the benefits of drug trafficking. It is "the mules," poor and often naive couriers, that usually get caught.<sup>107</sup> Judge Judith N. Keep provided an analysis of the situation in her San Diego area district: "What we frequently see . . . are the mules. . . . They often have no prior criminal record, just a financial crisis. They take a chance and they get caught."<sup>108</sup> An example of the type of defendants now filling America's federal prisons because of the mandatory minimum sentences are impoverished Nigerians who attempt to finance trips to the United States by agreeing to swallow and deliver condoms containing quantities of heroin.<sup>109</sup> Judge Raymond J. Dearie of Brooklyn reported "hundreds" of such "tragic" cases in his New York courtroom,<sup>110</sup> adding that these defendants were generally decent people who acted out of desperation.<sup>111</sup>

Some federal district judges have been so upset at the prospect of imposing the severe mandatory minimum sentences on low-level couriers that they have devised ways to avoid doing so. Judge Alfredo Marquez of California refused to impose a mandatory minimum sentence on a "mule" hired in Mexico to drive a car containing drugs to the United States. Judge Marquez ruled that imposition of the five-year sentence would violate the defendant's due process rights under the Fifth Amend-

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106. *Id.*

107. Bishop, *supra* note 63, at B16.

108. *Id.* (quoting Judge Judith N. Keep).

109. David Margolick, *At the Bar*, N.Y. TIMES, July 24, 1992, at B7.

110. *Id.* (quoting Judge Raymond J. Dearie).

111. *Id.*

ment.<sup>112</sup> Judge James Lawrence King of Florida had the responsibility of sentencing an eighty-three year old courier facing a mandatory ten-year sentence; instead, Judge King sentenced the man to less than two months in prison, saying that Congress never intended to imprison a man of his age for a decade or more.<sup>113</sup>

Justice does not mean treating every case the same. Justice depends on treating *similar cases* similarly. There is no justice in giving identical sentences to both jaywalkers and kidnappers. Nor is it just to punish Richard Anderson for driving an acquaintance to the Burger King as harshly as his passenger, who planned the drug deal and who expected to benefit greatly from its completion. Professor Albert Alschuler has observed that "appropriate sentences depend upon circumstances that we cannot quite name."<sup>114</sup> Generally, aggravating and mitigating factors are recognized in individual cases, but all consideration of them is precluded by the Anti-Drug Abuse law.

Why would Congress enact legislation certain to create victims of injustice like Richard Anderson? The answer, of course, is not that Congress thought about people like Richard Anderson (or about eighty-three year old couriers, or desperate Nigerians) and cruelly and deliberately decided to punish them harshly. Rather, the problem was that Congress did not consider carefully the human consequences of its decision. The legislation was supported by conservatives and liberals alike,<sup>115</sup> and there was no genuine floor debate on the mandatory minimum sentence provision. Congressional records concerning recent legislation to adopt mandatory minimum sentences, for example, are virtually devoid of discussion as to how the new laws might affect certain categories of defendants less blameworthy than those "kingpins" whose examples peppered debates. Few asked whether the laws might cause prison overcrowding, or whether potential overcrowding might exacerbate already dangerous prison conditions. No one in Congress had the prescience to inquire whether the imposition of mandatory minimum sentences in certain cases could demoralize the best members of the judiciary, and even drive

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112. *United States v. Redondo-Lemos*, 754 F. Supp. 1401, 1406-09 (D. Ariz. 1990), *rev'd*, 955 F.2d 1296, 1303 (9th Cir. 1992). Judge Marquez's position is not widely shared. *See, e.g.*, *United States v. Cobbins*, 749 F. Supp. 1450, 1458 (E.D. La. 1990) (holding that a defendant has no due process right to have his sentence determined by a judge).

113. *Miami Judge Rejects Sentencing Guidelines*, THE WASH. TIMES, Oct. 12, 1990, at B5.

114. Alschuler, *supra* note 14, at 915.

115. Senator Strom Thurmond, a Republican of South Carolina, and Senator Edward Kennedy, a Democrat of Massachusetts, were co-sponsors of the Sentencing Reform Act. It passed 392-16 in the House and 97-2 in the Senate. President Reagan signed the legislation into law. David Margolick, *Full Spectrum of Judicial Critics Assail Prison Sentencing Guides*, N.Y. TIMES, Apr. 12, 1992, at A1, A40.

some outstanding judges from the bench. No one, it seemed, was willing to risk the political heat that could result from questioning the propriety of a tough sentence for drug offenders. Given that many members of Congress may have themselves violated drug laws, one might have expected more concern about tough mandatory sentences. More than half of all high school seniors have smoked marijuana,<sup>116</sup> as have Supreme Court nominees and President Bill Clinton.<sup>117</sup> Even voices of moderation on the Anti-Drug Abuse bill, such as Senator Joseph Biden of Delaware, however, found it necessary to preface floor remarks with the suggestion that a nineteen-year old possessing two grams of marijuana "is not something to take lightly."<sup>118</sup>

There was a time when Congress might have rejected simplistic solutions such as mandatory minimum sentences. Political outcomes were at one time determined more by relatively stable coalitions organized along party lines.<sup>119</sup> Television has changed the nature of politics. Politicians depend upon short-term voter approval. They ride along on the currents of the temporary enthusiasms of the day, dreading the possibility that a controversial position taken on principle might inspire an opponent to produce a negative thirty-second commercial at election time. Many persons who at one time publicly opposed mandatory minimum sentences have changed their positions. President George Bush, for example, while a congressman from Texas in 1970, argued that the elimination of mandatory minimum sentences "will result in better justice and more appropriate sentences."<sup>120</sup>

The unwillingness to examine the human impact of mandatory minimum sentences under the 1986 legislation in large part stemmed from public demands for stern action against drug dealers. Public pressure for tough new penalties for drug crimes was not surprising in view of the steady flow of alarmist headlines and stories about drug use that appeared in the mid-1980s. A *Newsweek* cover story, for example, de-

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116. Adam P. Weisman, *I Was a Drug-Hype Junkie*, THE NEW REPUBLIC, Oct. 6, 1986, at 14, 16.

117. The nomination of Judge Douglas Ginsburg was withdrawn after reports that he had used marijuana on several occasions. See Kenneth B. Noble, *Aides Say Reagan's Stance on Ginsburg Contradicts Policy on Drug Use*, N.Y. TIMES, Nov. 7, 1987, at 33. President Bill Clinton has admitted trying marijuana (though not inhaling) while a student at Oxford University. Anne Senior, *A Beard, A Pink Suit and Marijuana Puffs—Clinton at Oxford*, REUTERS, Oct. 27, 1992, available in LEXIS, Nexis Library, REUTERS File.

118. 132 CONG. REC. S14,077 (1986) (statement of Sen. Biden).

119. See THEODORE LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED 97 (1985).

120. 116 CONG. REC. H33,314 (1970) (statement of Representative Bush). George Bush later became a strong supporter of mandatory minimum sentences. Stuart Taylor, Jr., *Taking Issue*, AM. LAW., Dec. 1992, at 61.

scribed drug usage in America as an epidemic "as pervasive and as dangerous in its way as the plagues of medieval times."<sup>121</sup> It was only one of three *Newsweek* cover stories on drug abuse to run within a five-month period in 1986. Network news shows ran almost daily stories on the subject, and drugs were the subject of news documentaries on prime-time television.<sup>122</sup>

What is remarkable about the extensive media coverage prior to the passage of the Anti-Drug Abuse Act of 1986 is that it took place while statistics showed a general *decline* in drug usage.<sup>123</sup> Use of marijuana, hallucinogens, stimulants, sedatives, and barbiturates has been declining since 1981.<sup>124</sup> Use of heroin and PCPs remains steady.<sup>125</sup> Only statistics on cocaine use showed a recent increase—from sixteen percent of all high school seniors during the years 1982 to 1984 to seventeen percent in 1985 (the same percentage that had experimented with the drug in 1981).<sup>126</sup>

Interestingly, even the adoption of new draconian sentences in 1986 and 1988 did little to satisfy the public perception that drug laws were not tough enough. The percentage of the public in favor of tougher drug trafficking penalties actually increased during the 1980s, from seventy-nine percent to eighty-five percent.<sup>127</sup> Such poll results coupled with a growing fear of the thirty-second negative campaign advertisement ("Senator Shmoe voted AGAINST new penalties for the drug traffickers that prey on our school children") help explain the politics of drugs.

The public that told pollsters that it wanted tougher penalties for drug dealers was not thinking of people like Richard Anderson. Richard Anderson is like a porpoise caught in a drift net. He was not what Congress wanted to catch, but he was caught nonetheless under its indiscriminate definition of drug trafficking. No one—not the Congress that passed the Anti-Drug Abuse Act, not the judges who must enforce it, not the public that said it wanted tougher penalties—wants to see people like Richard Anderson spend ten years in already overcrowded federal prisons. Unfortunately, however, he will.

The evil responsible for locking Richard Anderson away for ten

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121. Weisman, *supra* note 116, at 15 (quoting Richard M. Smith, *The Plague Among Us; The Drug Crises*, NEWSWEEK, June 16, 1986, at 15).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Of course, trends on drug use tell only part of the story. There is no denying that drugs are widely used in the United States. Over half of all 1986 high school seniors tried marijuana, and between three and five million Americans used cocaine each month during 1986. *Id.* at 16.

127. John M. Greacen, *Report to Members*, CRIM. JUST., Winter 1988 (n.d.).

years lies in the unwillingness of the media and Congress to take seriously his plight and the plight of people like him. The media has been more interested in hype than facts. Stories of drug-related killings receive heavy media attention; seldom appears a headline that reads, "Nineteen Year-Old Drug Courier Gets Harsh Sentence." Meanwhile, members of Congress have been more interested in positioning themselves for reelection than in improving the quality of justice.

Someday we will declare a victory in our war against drugs, and reason may then return to our approach to drug trafficking. The first signs of this happening are federally mandated studies<sup>128</sup> on the effects of mandatory minimum drug sentences.<sup>129</sup> These studies show prison overcrowding, growing health problems in an aging prison population, and large numbers of "small fish" receiving "big fish" sentences.<sup>130</sup> The mandatory minimum sentencing will be repealed.<sup>131</sup> All wars, however, claim their victims. The victims of the war on drugs will include people like Richard Anderson, who because of a one-time mistake in judgment, will have spent ten dreary years away from the places, friends, and family that make life worth living.

#### b. Zero Tolerance

"Zero Tolerance" was a creation of Commissioner of Customs William Von Raab.<sup>132</sup> Von Raab and others in the Reagan Administration felt frustrated by an inability to reduce seriously the supply of illicit

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128. The Crime Control Act of 1990 required the Sentencing Commission to prepare a report on the effects of mandatory minimum sentences. Pub. L. No. 101-647, § 1703, 104 Stat. 4789, 4845 (1990) (codified in scattered sections of 21 U.S.C. and 42 U.S.C.).

129. In August 1991, the U.S. Sentencing Commission issued a special report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*, 4 FED. SENTENCE REP. 231 (1991) [hereinafter *Special Report*]. The General Accounting Office has conducted its own study of mandatory sentences. The report was to be submitted to Congress by the end of 1992. Edward M. Kennedy, *Foreward: Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. ix, xi (1992).

130. The report of the Sentencing Commission suggests that Congress should consider repeal of mandatory minimum sentence provisions. *Special Report*, *supra* note 129.

131. According to Senator Edward Kennedy, the "decision to exclude mandatory minimum penalties from the 1990 crime bill is a good sign that the tide is turning, and that a majority in Congress is beginning to recognize that the proliferation of mandatory minimum sentences is counterproductive." Robert F. Howe, *Drug Sentencing Faulted*, WASH. POST, Feb. 25, 1991, at D1, D4 (quoting Sen. Kennedy).

132. The Zero Tolerance policy was adopted by the National Drug Policy Board, a cabinet-level group, in March of 1988. "Zero Tolerance" *Drug Policy and Confiscation of Property: Hearing Before the Subcomm. on Coast Guard and Navigation of House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 63 (1988) (statement of Commissioner William Von Raab).

drugs.<sup>133</sup> The decision was made to lower demand by raising the penalties for drug users. Under Zero Tolerance, drug users undeterred by the often insignificant risk of imprisonment now had to weigh a more substantial risk of losing valuable property.<sup>134</sup>

Asset forfeiture was an enforcement tool well before Zero Tolerance. Zero Tolerance, however, expanded the use of civil forfeiture to cases involving small quantities of drugs. Previously, only confiscation of contraband was likely to result from the discovery of drugs. Civil forfeiture in general has been a very popular tool among law enforcement personnel. There is added incentive to use the forfeiture penalty because profits from the forfeiture program are channelled back to law enforcement programs.<sup>135</sup>

Less than two months after Zero Tolerance took effect on March 21, 1988, the Customs Service had seized over 700 vehicles, and the Coast Guard had seized twenty-seven boats, including Hogan's *Hold Tight*.<sup>136</sup> Hogan's case was not the only case involving the seizure of valuable commercial property. On the Canadian border at Blaine, Washington, Customs officers seized a \$100,000 rig when they discovered a marijuana cigarette in the cab.<sup>137</sup> In Key West, Florida, the Coast Guard seized a seventy-three-foot fishing boat and sold its eight-day haul of fish for \$5,827, after officials discovered three grams of marijuana seeds and stems on board.<sup>138</sup> The most valuable property seized in the first month of Zero Tolerance's operation was the \$2.5 million yacht *Ark Royal*. The Coast Guard found one-tenth of an ounce of marijuana aboard the chartered boat.<sup>139</sup> As if to prove that Zero Tolerance really meant *zero* tolerance, officials have also seized property in cases where only minuscule quantities of drugs had been discovered. One woman in Washington had her car impounded after Customs inspectors used tweezers to re-

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133. *Id.*

134. Before the Zero Tolerance policy took effect on March 21, 1988, Coast Guard personnel finding small amounts of marijuana in routine checks of crafts usually just tossed it overboard. Customs officials handled discoveries of small amounts of drugs in a similar way. Jon Nordheimer, *Tighter Federal Drug Dagnet Yields Cars, Boats and Protests*, N.Y. TIMES, May 22, 1988, at 1.

135. The Drug Enforcement Administration has acquired more than two billion dollars in seized assets since 1985. (In 80% of cases persons whose property has been seized do not contest it). Jim Newton, *Seizure of House Raises Concerns on Drug War, Civil Libertarians Say*, L.A. TIMES, Apr. 2, 1992, at B1.

136. Pete Yost, *"Zero Tolerance" Drug Battle Called Overkill*, CHI. TRIB., May 16, 1988, at 9.

137. Nordheimer, *supra* note 134, at 1.

138. *Id.*

139. *Id.*

move one-tenth of a gram of marijuana from the bottom of her purse.<sup>140</sup>

Targets of Zero Tolerance may regain their property eventually. In some cases, officials apparently have recognized the injustice involved and returned property after payment of a fine and seizure fee.<sup>141</sup> In other cases, those whose property has been seized can only hope that the government fails to prove by a preponderance of the evidence that the seized property was either purchased with drug profits or used in committing a drug crime. Acquittal in a criminal case does not affect the government's standard of proof in a later forfeiture suit.<sup>142</sup>

The seizure of Kevin Hogan's fishing boat at the height of the Alaska fishing season because a crew member possessed marijuana was a penalty disproportionate to his crime. Even if one recognizes a duty of boat owners to hire drug-free employees, the failure to do so certainly registers a rather low level of blameworthiness. Scant evidence exists to show marijuana to be a significant long-term health risk.<sup>143</sup> Although marijuana causes reduced mental and physical levels of functioning, it is absurd to argue that pot in the pocket of a fisherman represents the public risk that it might, say, in the hands of a United Airlines 747 pilot. A \$140,000 fine and possible bankruptcy is not an appropriate penalty for inadequate attention to a crew member's drug use. There will be close calls in forfeiture cases, but this is not one of them.

Only thoughtlessness, the handmaiden of evil, can explain a gross injustice like the seizure of the *Hold Tight*. It is easy for "generals" in the War on Drugs, such as Commissioner Van Raab, to avoid considering how their drug enforcement policies may affect a fisherman 5000 miles away; their focus remains on larger goals, their preoccupation with the movement of pieces on war room maps. More difficult to explain are the actions of "lieutenants" in regional offices. Their blindness to injustice may stem from a belief that aggressive pursuit of forfeiture cases will advance their careers, or it may be the result of benefitting too directly from the windfall proceeds of the forfeitures they authorize.

### c. Project Looking Glass

Child pornography had been all but eradicated in the United States when the Federal Government began sending advertisements and letters

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140. *Id.*

141. *Id.*

142. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984).

143. *See, e.g., Ravin v. State*, 537 P.2d 494, 511 (1975) (holding the private possession of marijuana to be protected by the Alaska Constitution and concluding that the health risks of marijuana are small); Jefferson Morley, *Our Puritan Dilemma*, *THE NEW REPUBLIC*, Dec. 1, 1986, at 13.



to people like Robert Brase. The Attorney General's Commission on Pornography reported in 1986 that federal statutes enacted in the 1970s aimed at child pornography distributors had "effectively halted the bulk of the commercial child pornography industry."<sup>144</sup> The report also suggested that 1984 federal statutes criminalizing the receipt of child pornography had largely eliminated the market for noncommercial child pornography.<sup>145</sup> Even at its height, the child pornography problem was largely a myth. The entire commercial industry is estimated to have generated only one million dollars in the decade ending in 1982, an insignificant share of the pornography market.<sup>146</sup> One distributor alone was estimated to have accounted for over eighty percent of the market.<sup>147</sup> A number of experts agree that only 5000 to 7000 minors worldwide have ever appeared in commercial child pornography; most of these children live outside the United States.<sup>148</sup>

By far the largest advertiser, manufacturer, and distributor of child pornography is the United States Government.<sup>149</sup> In its zeal to promote itself as the protector of family values, the government has implemented elaborate sting operations<sup>150</sup> to identify and capture individuals such as Robert Brase, many of whom had never before purchased child pornography. Some, like Nebraska farmer Keith Jacobson, who successfully brought his case to the Supreme Court, had indicated to the government that they had little interest in child pornography.<sup>151</sup> The government,

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144. *Osborne v. Ohio*, 495 U.S. 103, 143 & n.17 (1990) (Brennan, J., dissenting) (citing 1 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 607 (1986)).

145. *Id.*

146. Lawrence A. Stanley, *The Child Porn Myth*, 7 CARDOZO ARTS & ENT. L.J. 295, 320-21 (1989).

147. *Id.* at 320.

148. *Id.* at 307-09.

149. Petitioner's Reply Brief at 11, *Jacobson v. United States*, 60 112 S. Ct. 1535 (1992) (No. 90-1124).

150. Stanley, *supra* note 146, at 322-30.

151. *Jacobson v. United States*, 112 S. Ct. 1535, 1537-40 (1992). In response to a government questionnaire, supposedly sent by the "American Hedonist Society," Jacobson indicated that his interest in "[p]re-teen sex-homosexual" material was above average, but not high. *Id.* at 1538. Justice White noted that when Jacobson finally placed his order for the pornographic material, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. *Id.* at 1536. Justice White concluded

the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited [petitioner's] interest in material banned by law but also exerted substantial pressure on [petitioner] to obtain and read such material as part of the fight against censorship and the infringement of individual rights.

however, would not always take “no” for an answer.

Project Looking Glass, the sting investigation which resulted in Robert Brase’s arrest, was created by Post Office Inspector Ray Mack.<sup>152</sup> Mack originally envisioned Looking Glass as an intelligence-gathering operation,<sup>153</sup> with the focus to remain on apprehending distributors.<sup>154</sup> There were no plans to sell or distribute child pornography to anyone.<sup>155</sup>

Administration officials in Washington decided to elevate Looking Glass to the major sting operation it became.<sup>156</sup> Calvin Comfort was a postal inspector whose job was to implement Project Looking Glass in the midwest region.<sup>157</sup> Comfort identified possible targets, wrote advertisements, analyzed responses to advertisements, and frequently became a “pen pal” to targets who exhibited reluctance to order the pornographic materials. Writing under pseudonyms such as “Carl Long,” Comfort employed “mirroring techniques” in which “Long” expressed a shared interest in whatever sexual inclinations his targets’ letters revealed.<sup>158</sup> In these letters, Comfort/“Long” emphasized his interest in discreetness. Typical is the language in one of the three letters sent to a sting target: “I agree with you about privacy. I am real discrete [sic] but still our conservative society wants to pry into private lives.”<sup>159</sup>

There is no evidence to suggest that Robert Brase or most of the other targets of Project Looking Glass were child molesters or had ever engaged in sexual activity with minors. In fact, the vast majority of persons who exhibit an interest in child pornography pose no threat of committing criminal sexual activity with minors.<sup>160</sup>

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*Id.* at 1537.

152. Petitioner’s Brief at 22, *Jacobson* (No. 90-1124).

153. *Id.* at 28.

154. *Id.*

155. *Id.*

156. *Id.*

157. Petitioner’s Reply Brief at 4, *Jacobson* (No. 90-1124).

158. Petitioner’s Brief at 22, *Jacobson* (No. 90-1124).

159. Petitioner’s Reply Brief at 6, *Jacobson* (No. 90-1124).

160. On the other hand, there is evidence suggesting that most child molesters are regular users of pornography. Detective William Dworin of the Los Angeles Police Department estimates that “of the 700 preferential child molesters (pedophiles) in whose arrest he has participated during the last ten years, more than one half had child pornography in their possession and about 80% owned [some type of] pornography.” Amicus Curiae Brief for the National Center for Missing and Exploited Children and the National Law Center for Protection of Children and Families at 12, *Jacobson* (No. 90-1124). Ron Langevin, an expert on pedophilia and a Senior Research Psychologist at the University of Toronto, contends that most sex offenders are exposed to pornography of the *Penthouse* variety, not child pornography. He asserts that “[t]he link between pornography and sexual crime has consistently been statistically nonsignificant.” Stanley, *supra* note 146, at 333.

The stigma and shame associated with an interest in child pornography led planners of the sting to "expect" suicides,<sup>161</sup> and, predictably, four happened. Gary Hester, like Robert Brase, shot himself just prior to arraignment.<sup>162</sup> Dale Riva committed suicide hours before his indictment was to be announced publicly.<sup>163</sup> Thomas Cleasby left a suicide note stating that he had been "'cursed with a demon for a sexual preference.'"<sup>164</sup>

Left alone, Robert Brase would most likely have continued to lead a quiet life on his Nebraska farm with his two children and his wife of ten years. The world is not a safer place because of his absence. The death of Brase is as random as it is tragic. Brase's decision to order legally a videotape from a California distributor, the government's decision to conduct the raid on that California distributor, the discovery as a result of the raid of the mailing list that included Brase's name, Brase's decision not to move in the years following his videotape order to a new address that might have prevented the fatal solicitation from reaching its target, and Brase's decision to respond affirmatively to the solicitation: Life should not turn upon such things.

What would have happened if the designers and implementers of Project Looking Glass had, before any of this started, visited the Nebraska farmhouse of Robert Brase and talked with him? Would Robert Showers, director of the Department of Justice's National Obscenity Enforcement Unit, still refer to his suicide as an acceptable risk? Would "Carl Long" have been willing to write the letters that won Brase's confidence and resulted in his mail orders? Would they instead have called the whole thing off?

The stories of Richard Anderson, Kevin Hogan, and Robert Brase illustrate the tragic human consequences which stem from overidentification with popular causes. Their losses differ from those of many others only in degree.

The stories of the government officials responsible for the fates of Anderson, Hogan, Brase, and thousands in similar positions demonstrate that evil often has a very human face. Senator Byrd, Commissioner Von Raab, or Obscenity Enforcement Director Showers derived no sadistic pleasure from the suffering of Anderson, Hogan, or Brase. They scarcely knew (if they knew at all) those persons who were most adversely af-

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161. H. Robert Showers, executive director of the Department of Justice's National Obscenity Enforcement Unit, said that, given the nature of the sting, "something like suicide is to be expected." Kuznik, *supra* note 82, at 45.

162. See Stanley, *supra* note 146, at 325 & n.149.

163. See *id.*

164. *Id.* (quoting *A Fresh Assault on an Ugly Crime*, NEWSWEEK, Mar. 14, 1988, at 64-65).

fectured by their decisions. As identification with a popular cause slips into overidentification, blindness to the consequences of one's decisions correspondingly increases, as does the probability of working evil.

### B. *Elevation of Docket Management*

Docket management problems rival overidentification as a cause of evil in our legal system. There is no dispute that the volume of cases in our court system has reached a crisis level. In response, the legal system has placed great importance on caseload reduction. In an effort to meet these demands, many courts have elevated docket management concerns above concerns for individual's rights.

All professional cultures are subject to internal demands, in addition to the demands of a larger society. These demands may differ from those of the official law and larger society.<sup>165</sup> Many of the internal legal demands on the legal system relate to methods of legal reasoning. Attorneys feel compelled to present arguments in certain ways, and judges feel compelled to explain their decisions in forms of generally accepted legal reasoning. Another set of internal demands relates to increases in the volume of civil and criminal cases that must be processed. Pressure has grown to develop rules that will promote efficient processing of cases. Frequently, this translates into pressure to reach decisions that discourage resort to the courts. This nearly obsessive concern for solving docket management problems has produced tortured legal reasoning and has made institutional indifference to individual suffering almost fashionable.

One cannot know whether the Supreme Court's concern with docket management problems formed part of a chain of events leading to the 1992 riots in Los Angeles following the Rodney King beating case.<sup>166</sup> What is known is that almost nine years before the country watched the videotaped beating of King by four Los Angeles police officers, the Supreme Court had confronted a similar showing of violence by the LAPD. Even if *City of Los Angeles v. Lyons*<sup>167</sup> fell short of endorsing the Los Angeles police department's notoriously rough tactics,<sup>168</sup> it certainly had to be considered good news by then-Police Chief Daryl Gates.

Adolph Lyons was a twenty-four year old black male whom two Los Angeles police officers stopped because one of his taillights was

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165. LAWRENCE FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 225 (1975).

166. Timothy Egan, *After the Riots*, N.Y. TIMES, May 11, 1992, at A1.

167. 461 U.S. 95 (1983).

168. Richard Serrano, *Understanding the Riots—Six Months Later: A New Blue Line/Re-making the LAPD; A New Direction, A Long Road*, L.A. TIMES, Nov. 17, 1992, at J33.

burned out.<sup>169</sup> Even though Lyons complied fully with police commands, one of the officers continued to choke the handcuffed Lyons until he blacked out.<sup>170</sup> After Lyons regained consciousness he spat up blood and dirt, urinated, and defecated.<sup>171</sup> In one sense, Lyons was lucky; in the eight previous years, no less than sixteen persons had died following the use of a chokehold by LAPD officers.<sup>172</sup> Rejecting Lyon's claim for injunctive relief, the Supreme Court instead erected a new standing barrier to persons seeking review of police department policies.<sup>173</sup> Justice Marshall, in his dissenting opinion, noted that the Court's decision "immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights so long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future."<sup>174</sup> The suffering of Adolph Lyons produced little more than a shrug from the Court: "Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangle holds will be illegally applied and injury and death unconstitutionally inflicted on the victim."<sup>175</sup> Of course.

A strong desire to reduce caseloads undoubtedly is a driving force behind many recent decisions dealing with criminal law and suspects' and prisoners' rights.<sup>176</sup> It explains how courts could conclude that it is not a constitutional violation for a state to execute an innocent person,<sup>177</sup> or that decisions of trial judges *not* to depart downward from sentencing guidelines are unreviewable,<sup>178</sup> or that it is possible for a constitutionally protected zone of privacy to exist that does *not* include protection against routine body cavity searches of persons awaiting trial.<sup>179</sup> Taken collec-

169. *Lyons*, 461 U.S. at 114.

170. *Id.* at 115.

171. *Id.*

172. *Id.* at 115-16.

173. *Id.* at 105-10.

174. *Id.* at 137 (Marshall, J., dissenting).

175. *Id.* at 108.

176. Nancy Levit, *Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 350-52 (1989).

177. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2523 (1992) (holding that whenever a claim of actual innocence is raised in a second petition for habeas corpus relief, the petitioner must show by clear and convincing evidence that no reasonable juror would have found him guilty). The Supreme Court considered whether the execution of an innocent person violates the Eighth or Fourteenth Amendments in *Herrera v. Collins*, 61 U.S.L.W. 4108 (U.S. Tex. Jan. 25, 1993). The Court affirmed the Fifth Circuit decision denying federal review of new evidence suggesting the petitioner's actual innocence. *Id.*

178. *See, e.g., United States v. Cipollone*, 951 F.2d 1057, 1058 (9th Cir. 1991) (citing *United States v. Morales*, 898 F.2d 99, 103 (9th Cir. 1990)).

179. *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

tively these decisions reveal a judiciary that has moved steadily toward an aggregated, empirical approach to justice, and away from individualized justice.

It is often difficult to determine the degree to which docket management concerns affected decisions in particular cases. Most judges understand that justice is *supposed to be* individual; they cannot, without embarrassment, justify decisions primarily on the basis of serving docket management goals. Never will a judge be so candid as to write in her opinion, "Plaintiff loses despite having the facts and the law in his favor because I am convinced that a decision for the plaintiff will encourage too many less worthy lawsuits." When hunting for evidence of cases in which docket management concerns were controlling, it is usually necessary to look beyond the four corners of judicial opinions. It is necessary to look at the briefs of litigants, caseload statistics, and patterns of judicial decisionmaking.

It is beyond the scope of this essay to gauge how frequently concerns about judicial caseloads are deciding cases. Rather, the goal is to demonstrate that the elevation of docket management concerns rivals overidentification with popular causes as the largest cause of injustice in the American legal system today. Two stories, one implicating a single court of appeals and another implicating a large part of the federal appellate judiciary, are offered in support of that proposition.

### 1. An Individual's Story—Keith J. Hudson

Keith J. Hudson successfully sued correctional officers for a beating they inflicted at the state penitentiary in Angola, Louisiana.<sup>180</sup> What is remarkable about the case is not that the Court permitted Hudson to keep the \$800 in damages awarded at his trial, but rather that a unanimous panel of Fifth Circuit judges would have taken it away from him.<sup>181</sup> While Judges Politz, Davis, and Barksdale joined in "deploring the use of unnecessary force in the treatment of prisoners,"<sup>182</sup> they concluded that Hudson's injuries from the beating failed to meet the Circuit's "significant injury" requirement to prove violations of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>183</sup>

The beating of Keith Hudson took place in the early morning hours

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180. *Hudson v. McMillian*, 112 S. Ct. 995, 997-98 (1992).

181. *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990), *rev'd*, 112 S. Ct. 995 (1992). The panel judges included Judges Politz, Davis, and Barksdale. *Id.* at 1014.

182. *Id.* at 1015.

183. *Id.*

of October 30, 1983.<sup>184</sup> Hudson and an inmate in an adjacent cell had argued.<sup>185</sup> Marvin Woods and Jack McMillian approached Hudson's cell,<sup>186</sup> handcuffed and shackled Hudson, removed him from his cell, and led him to administrative lockdown.<sup>187</sup> On the way there, McMillian told Woods to hold Hudson still so he could "knock the gold teeth out" of Hudson's mouth.<sup>188</sup> While Woods held the prisoner's jumpsuit, McMillian punched Hudson in the eye, chest, and mouth. Arthur Mezo, a correctional supervisor, observed this beating and told the two guards "not to have too much fun."<sup>189</sup> Hudson was left with bruised lips, a black eye, and a swollen cheek.<sup>190</sup> For several months, a cracked dental plate prevented him from eating normally.<sup>191</sup>

The Fifth Circuit's "significant injury" requirement was fashioned in response to the rising tide of civil rights lawsuits filed by prisoners. In a one-year period ending March 31, 1991, prisoners filed 24,905 civil rights lawsuits in the federal courts; in the Fifth Circuit alone, 3,355 such suits were filed.<sup>192</sup> An amicus brief filed by the States of Texas, Hawaii, Nevada, Wyoming, and Florida praised the Fifth Circuit's significant injury test as an "objective method for winnowing the wheat from the chaff."<sup>193</sup> The brief reported that "[t]he significant injury requirement has been very effective in the Fifth Circuit in helping to control . . . docket management problems."<sup>194</sup>

While the significant injury requirement may assist the Fifth Circuit in controlling its caseload, it also has the effect, as the United States pointed out in its amicus brief, of allowing torture, so long as it leaves no lasting marks.<sup>195</sup> For example, it would permit the use of the "Tucker Telephone," a hand-cranked device that was used in Arkansas prisons in

184. *Hudson*, 112 S. Ct. at 997.

185. *Hudson v. McMillian*, No. 83-1385-A, slip op. at 3 (M.D. La. Apr. 30, 1987).

186. *Hudson*, 112 S. Ct. at 997.

187. *Id.*

188. Joint Appendix at 6, *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (No. 90-6531).

189. *Hudson*, 112 S. Ct. at 997.

190. *Id.*

191. *Id.*

192. Brief for Texas, Hawaii, Nevada, Wyoming, and Florida as Amici Curiae at 15 n.12, *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (No. 90-6531) (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE TWELVE MONTH PERIOD ENDED MARCH 31, 1991).

193. *Id.* at 15.

194. *Id.*

195. Brief for the United States as Amicus Curiae at 12, *Hudson v. McMillian*, 112 S. Ct. 995 (1992) (No. 90-6531).

the 1960s to administer electrical shocks to sensitive parts of the body.<sup>196</sup> So long as the resulting injuries were neither permanent nor required hospitalization, prisoners would be fair game under the Fifth Circuit's test.

Two well-known studies of prison and guard behavior have documented the danger of loosening constraints in the prison environment. One study conducted at Stanford University assigned students to the roles of "prisoners" and "guards" for what was to be a two-week experiment.<sup>197</sup> When researchers noted escalating levels of harassment and aggression directed against students dressed as prisoners, especially in the researchers' absence, they felt compelled to terminate the experiment after only six days.<sup>198</sup> As this study demonstrated, circumstances can elicit sadistic behavior from people who are not by nature sadistic. Stanley Milgram, whose 1965 study is considered a classic, reached a similar conclusion.<sup>199</sup> Milgram found that subjects would, when instructed to do so by an authority figure, administer what they believed were increasingly high levels of electrical shocks despite their victims' complaints, pleas to stop, and even shrieks of agony.<sup>200</sup>

Prisons are places where evil in its direct, sadistic form is far too often found. In 1986, the Ninth Circuit considered the complaint of an inmate who suffered ruptured hemorrhoids when a prison guard attempted to plunge a riot stick into the prisoner's anus.<sup>201</sup> In the same year, the Sixth Circuit considered a case where a correctional officer had waived a knife in a paraplegic prisoner's face, extorted food from him, and failed to relay requests for medical care so that he lay in his own feces for hours.<sup>202</sup>

Nothing in prior decisions of the United States Supreme Court required the Fifth Circuit to adopt its "significant injury" test. It was plainly and simply an attempt by the Fifth Circuit to reduce the volume

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196. The use of the "Tucker Telephone" is described in *Hutto v. Finney*, 437 U.S. 678, 682 & n.5 (1978).

197. Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 72-74 (1973).

198. *Id.* at 80-81, 89. The experiment is described in Petitioner's Brief at 24-25 n.20, *Hudson* (No. 90-6531).

199. Stanley Milgram, *Some Conditions of Obedience and Disobedience in Authority*, 18 HUM. REL. 57, 61 (1965). For a chilling account of the sadism of normal men in abnormal circumstances see CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (Harper Collins 1992).

200. Milgram, *supra* note 199, at 61.

201. The Ninth Circuit found an Eighth Amendment violation. *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986).

202. *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (finding that the facts established an Eighth Amendment violation).



of prisoner cases coming before it. It seems clear that few federal appellate judges have much interest in prisoner complaints; they came to the bench to decide antitrust cases. Fortunately, in *Hudson*, seven members of the Supreme Court rejected the opportunity to adopt the significant injury test as a docket control measure.<sup>203</sup> Justice Blackmun found "audacious" the suggestion "that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions."<sup>204</sup> Justice O'Connor, speaking for the Court, found that the Fifth Circuit's decision implicitly "ignore[d] the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment."<sup>205</sup>

## 2. An Institutional Story—The Courts of Appeals and Interpretation of Sentencing Guidelines

In the years since the 1987 implementation of the Federal Sentencing Guidelines,<sup>206</sup> the courts of appeals have transformed a well-intentioned, although imperfect, attempt to reduce sentencing disparities into an oppressively mechanistic regime. Some trial judges, finding that their sentencing discretion has been restricted far beyond whatever Congress or the Sentencing Commission ever intended, believe that "a foolish and illusory consistency has become the hobgoblin of the Federal courts."<sup>207</sup> Remarkably, the Sentencing Commission, whose guideline sentence ranges are becoming increasingly inescapable, appears not to appreciate fully this inflexible trend of appellate decisions. District Judge Lawrence

203. *Hudson v. McMillian*, 112 S. Ct. 995, 1002 (1992).

204. *Id.* at 1003 (Blackmun, J., concurring).

205. *Id.* at 1001 (quoting *Estelle v. Gamble*, 419 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968))).

206. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL (Nov. 1991). The federal guidelines became effective on November 1, 1987. Many judges, however, considered the guidelines unconstitutional and applied them only after the Supreme Court ruled the guidelines constitutional in *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

207. David Margolick, *Justice By the Numbers: A Special Report*, N.Y. TIMES, Apr. 12, 1992, at A1. The Sentencing Commission itself has recognized that judges have "an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *United States v. Denardi*, 892 F.2d 269, 278 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part) (quoting S. REP. NO. 225, 98th Cong., 2d Sess. 52 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3235). Nonetheless, appellate courts have strongly discouraged use of this so-called departure power. See, e.g., *United States v. Poff*, 926 F.2d 588, 591-93 (7th Cir.) (en banc), cert. denied, 112 S. Ct. 96 (1991); *United States v. Pharr*, 916 F.2d 129, 131-33 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991); *United States v. Pozzy*, 902 F.2d 133, 138-40 (1st Cir.), cert. denied, 111 S. Ct. 353 (1990).

Despite appellate court discouragement of the departure power, Judge Vincent Broderick, head of the Criminal Law Committee of the Judicial Conference of the United States, has urged district judges to depart more frequently from the guidelines. Margolick, *supra*, at A40.

K. Karlton wrote in a letter to editors of the Federal Sentencing Reporter:

Perhaps my most enlightening experience (at the Sentencing Institute of the National Judicial Center) were my conversations with members of the Commission and their staff. These folks repeatedly asserted that the district judges who are dissatisfied with the guidelines have ample opportunity to affect them through the device of departure. The fact that the courts of appeal had transformed the product of the Commission's effort from guidelines into law, permitting departures under only the most limited of circumstance, either was unknown, unappreciated or ignored in favor of a fiction which no one familiar with the way the system actually worked could take seriously.<sup>208</sup>

What may be behind the inflexible interpretation that has characterized appellate court treatment of the Commission's guidelines is a hostility towards sentencing cases. Over 1000 sentencing cases a year have clogged the courts of appeals since the guidelines went into effect.<sup>209</sup> Prior to the Sentencing Reform Act,<sup>210</sup> only a handful of sentencing cases reached the appellate courts each year.<sup>211</sup> The decisions of courts of appeals make sense when viewed as an effort to reduce the total volume of sentencing cases that are appealed.

The sentencing system created by Congress left trial judges free in certain cases to depart from sentencing ranges established by the United States Sentencing Commission. Congress authorized departures when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."<sup>212</sup> The statutory language makes clear that even when the Commission has indicated a belief that a particular circumstance *generally* should not be a basis for departure, it may be when the circumstance is especially compelling (present "to a degree" not adequately considered). For example, one could argue that despite the decision of the Commission generally to exclude age as a relevant mitigating factor in sentencing,<sup>213</sup> a court may be justified in

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208. 4 FED. SENTENCE REP. 186 (1991) (Nov. 20, 1991, letter to editors of Reporter).

209. Alschuler, *supra* note 14, at 906 & n.17.

210. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586 (1988)).

211. Alschuler, *supra* note 14, at 906.

212. 18 U.S.C. § 3553(b) (1988).

213. U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS § 5H 1.1. (1987) (Age Policy Statement).

doing so when the defendant is, for example, eighty-eight years old. The statutory language also indicates that mere consideration of a circumstance by the Commission will not exclude it as a basis for departure; exclusion is required only when the consideration is found to be "adequate." Finally, one might conclude from the statutory language that trial judges often could justify departure by identifying a circumstance "of a kind" that is not one of the "kinds" considered by the Sentencing Commission.

For the most part, however, the courts of appeals have foreclosed these routes of escape from the often harsh sentences the guidelines impose. The "to a degree" language of the statute has been largely ignored.<sup>214</sup> Commission consideration of a circumstance has been found to be "adequate" even where there is scant evidence to support that conclusion. Appellate courts have defined broadly categories of "kinds" of circumstances considered by the Commission, thus requiring even more ingenuity on the part of trial judges who believe that a defendant's circumstance justifies departure. As further incentive to trial judges to stay within guidelines, several courts of appeals have concluded, without much logic on their side, that decisions *not* to depart from guidelines are unreviewable.<sup>215</sup>

Courts of appeals often have rejected attempts by trial judges to tailor sentences to the circumstances of individual cases while expressing regret that the law should force such a harsh result. For example, the First Circuit reversed Judge C. Weston Houck's decision to depart downward from sentencing guidelines because of the defendant's pregnancy, with the suggestion that "judicial compassion . . . cannot be condoned when it results, as in this case, in individual sentencing contrary to the

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214. See Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988) (suggesting there is too much discretion); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992) (critical analysis of the sentencing grid); see generally Judy Clarke & Gerald McFadden, *Departures from the Guideline Range: Have We Missed the Boat, or Has the Ship Sunk?*, 29 AM. CRIM. L. REV. 919, 920 (1992) (arguing that there is "only a rebuttable presumption that an individual sentence should be within the applicable Guideline range").

215. "[A] district court's discretionary decision not to depart downward from the guidelines is not subject to review on appeal." United States v. Cipollone, 951 F.2d 1057, 1058 (9th Cir. 1991) (quoting United States v. Morales, 898 F.2d 99, 103 (9th Cir. 1990)); cf. United States v. Lee, 887 F.2d 888, 892 (8th Cir. 1989) (failure of district court to depart downward from Guidelines not at issue since case was remanded for resentencing because no guidelines were applicable to the offense). Judge Becker argues that for cases falling outside the "heartland," "a district court's refusal to depart cannot be squared with the overall sentencing scheme envisioned by Congress." United States v. Denardi, 892 F.2d 269, 281 (Becker, J., dissenting). Such a refusal to depart, Becker believes, may be a violation of law under 18 U.S.C. § 3553(a). *Id.* at 275 (Becker, J., dissenting).

intent and command of the guidelines."<sup>216</sup> The Eleventh Circuit rejected Judge G. Ernest Tidwell's attempt to depart downwardly from guidelines because of the minor nature of the defendant's prior convictions (e.g., the defendant stole a purse containing \$5.35), while acknowledging that "the result in this case is arguably harsh."<sup>217</sup> Judge Walter J. Skinner sought to depart from the guidelines by reducing a sentence in a pornography possession case involving a forty-one year old man with no criminal record, noting that "imprisonment will simply prevent the defendant from continuing to be a useful person and will add nothing to the public safety."<sup>218</sup> The appellate court overturned the departure, commenting that "[a]lthough the district court's sense of compassion and pragmatism . . . is understandable, regrettably, these considerations are insufficient to justify a downward departure."<sup>219</sup>

Other courts of appeals have reversed downward departures without any apparent regret. One court coldly held that a mandatory prison sentence that forced a female defendant to leave her three small children with her ill mother a thousand miles away failed to justify a downward departure. The court noted that the "imposition of prison sentences normally disrupts family relationships."<sup>220</sup> In another example, the Seventh Circuit concluded that the obvious mental illness of a woman convicted of writing threatening letters to the President could not serve as the basis for a downward departure.<sup>221</sup> The defendant was a long-term victim of sexual abuse who believed that her deceased father had commanded her to commit the crime.<sup>222</sup> Despite her mental illness and the court's concession that "she never intended to carry out her threats,"<sup>223</sup> the Seventh Circuit, through a determinedly technical parsing of the Commission's guidelines, held downward departure unlawful.<sup>224</sup>

The refusal of appellate courts to accept broad use of the departure power has created frustrated and unhappy district court judges. Some

216. *United States v. Pozzy*, 902 F.2d 133, 140 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990).

217. *United States v. Gonzalez-Lopez*, 911 F.2d 542, 551 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2056 (1991).

218. *United States v. Studley*, 907 F.2d 254, 257 (1st Cir. 1990).

219. *Id.* at 256-57.

220. William Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCE REP. 339, 340 (1991).

221. *United States v. Poff*, 926 F.2d 588, 593 (7th Cir.) (en banc), *cert. denied*, 111 S. Ct. 96 (1991).

222. *Id.* at 590.

223. *Id.*

224. *Id.* at 593. Judges Coffey, Cudahy, Easterbrook, Marrion, and Posner dissented. *Id.* at 593-96. For a criticism of *Poff*, see Alschuler, *supra* note 14, at 911.

have vented their frustrations in judicial decisions; others have opposed the guidelines and their implementation in public speeches and open letters. One judge recently resigned over the sentencing.<sup>225</sup> Still others have "done their duty," albeit with the utmost reluctance.

Some trial court decisions have been highly critical of the lack of sentencing discretion. In a recent decision, Judge Glasser of New York pointedly noted that the defendant before him for sentencing was "a person, rather than an objective manifestation of discrete criteria to which are assigned numbers which, when added together, yield a sentencing result."<sup>226</sup> Judge Terrance T. Evans expressed a similar view when he wrote that "[i]ndividualized justice, which should be the due of anyone convicted in an American courtroom, has been replaced with a system of grids, points, and mindless absurdities."<sup>227</sup> Judge McNichols's contempt for the guidelines was evident in an opinion in which he complained that discretion has shifted "from persons who have demonstrated essential qualifications to the satisfaction of their peers, various investigatory agencies, and the United States Senate to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset."<sup>228</sup> Judge William Schwarzer expressed the moral qualms many judges apparently have with the harsh sentencing rules when he complained that the rule of law has been "drained of the semblance of justice."<sup>229</sup> Another district judge is reported to have wondered, "only half-jokingly, whether in years to come he and his fellow jurists will have to assert the Nuremberg Defense—"I was only following orders"—to justify the number of people they are sending to prison for decades."<sup>230</sup>

California District Judge Lawrence K. Karlton discerned a "seeming lack of interest at the appellate level"<sup>231</sup> in sentencing issues that is remarkable in view of the widespread and intense interest in the subject reported at the trial court level. Why have appellate judges interpreted sentencing guidelines so inflexibly when their district court brethren re-

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225. *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at A22. Judge Irving was named to the federal bench in July, 1982 by President Reagan. *Id.*

226. Schwarzer, *supra* note 220, at 341.

227. *United States v. Scott*, 757 F. Supp. 972, 972-73 (E.D. Wis. 1991), *aff'd sub nom. United States v. Thomas*, 969 F.2d 352 (7th Cir.), *cert. denied*, 113 S. Ct. 274 (1992).

228. *United States v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wa. 1990), *aff'd in part and vacated in part*, 952 F.2d 1101 (9th Cir. 1991).

229. *United States v. Anderson* (N.D. Cal. 1989) (transcript of proceedings) (*quoted at* 2 FED. SENTENCE REP. 185 (1990)).

230. *Scott*, 757 F. Supp. at 980 (quoting Micheal Isikoff & Tracy Thompson, *Getting Too Tough on Drugs*, WASH. POST, Nov. 4, 1990, at 25).

231. 4 FED. SENTENCE REP. 186 (1991) (Nov. 20, 1991, letter to editors).

main so strongly supportive of more sentencing discretion? The answer lies in distance. Appellate judges enjoy a distance from criminal defendants that trial judges do not. Appellate judges rarely, if ever, meet individual defendants or their families. They are familiar in only a general way with how years in prison can shatter families or dreams. Individual defendants are names on legal papers whose accumulation in their offices represents for most appellate judges a distraction from the types of issues that most concern and excite them. What California District Judge Irving called the “heavy”<sup>232</sup> burden of sentencing—a burden that finally convinced Irving to resign—is lightened considerably when the defendant is remote, and the job is shared and routine.

Distance from the human consequence of one’s decisions can breed the indifference and lack of imagination that Hannah Arendt found so closely linked to evil. Empathy, which is the enemy of evil, comes from our ability to imagine the details of another’s life. When knowledge of another’s life is reduced to a paragraph or two in a written brief, opportunities for empathy are limited, if not foreclosed altogether. Only those appellate judges with especially fertile imaginations or with great determination to think hard about the consequences of their decisions are at low risk of “working evil.” The temptation is often strong to turn what should be questions of fairness and justice into questions of expediency or personal interest.

## II. THE RESPONSE TO EVIL

The diffusion of power in the United States has proven to be, as James Madison imagined it would, a powerful check on evil and injustice. When the zealotry or shortsightedness of one branch of government produces injustice, therefore, there remains hope that another branch may see fit to correct it. When an individual state government becomes captured by a group that might deprive others of their basic liberties, one can look to Washington for possible relief. Even within the Executive Branch of the federal government, the political muscle of one agency can counteract another that has become beholden to special interests. To be sure, these checks on injustice are much more likely to have real effect when the victims of the injustice are themselves persons with political clout, or the focus of media attention, or so numerous and visible that their suffering can hardly be ignored.

Although the effects of evil cannot always be erased, future injus-

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232. *Federal Judge Quits Over Sentencing Rules*, CHI. TRIB., Oct. 1, 1990, at 6. Judge Irving added that he has had “a problem with mandatory sentencing in almost every case that’s come before me. . . . I just can’t do it any more.” *Id.*

tices might be prevented, when news of injustices flows freely and there are concerned people to receive it. For example, news of the implementation of Zero Tolerance was widely publicized (the seizure of \$2.5 million yachts is a good story and one that powerful interests wanted to get out).<sup>233</sup> Within weeks after it began, members of Congress grilled Commissioner Von Raab and others about what generally was perceived as an extreme and indefensible policy.<sup>234</sup> Legislation was hastily introduced to provide defenses for "innocent owners of vessels seized for drug violations."<sup>235</sup> As a result, a modicum of reasonableness soon crept into Zero Tolerance.

A judicial conference study of the effect of mandatory minimum sentences has prompted proposals to repeal or modify provisions in the Anti-Drug Abuse Act.<sup>236</sup> It is not just the individual injustices, such as the case of Richard Anderson, that have brought calls for reform. With prison populations expected to double by 1997 and nearly triple by 2002, concerns over spiraling prison costs have risen.<sup>237</sup> Over half of all federal prisoners are now serving time on drug charges, and the percentage is increasing.<sup>238</sup> Drug cases represent seventy to eighty-five percent of all

233. See, e.g., "Zero Tolerance" Drug Battle Called Overkill, CHI. TRIB., May 16, 1988, at 9. The President of the Boat Owners Association of the United States personally protested the seizure of the *Ark Royal*. The Association has 265,000 members among the country's estimated 15 million boat owners. *Id.* Coast Guard officers charged with carrying out the Zero Tolerance policy were reported as criticizing the policy. One officer said that the policy hurt Coast Guard "morale more than it's hurting the smugglers." Jon Nordheimer, *Tighter Federal Drug Dagnet Yields Cars, Boats and Protests*, N.Y. TIMES, May 22, 1988, at 1, 16. Government prosecutors expressed concern that they would lose Zero Tolerance forfeiture cases, opening the door to a general weakening of forfeiture laws. As a result, few such cases were tried. "The government is scurrying to take reasonable positions,' and the '[prosecutors] don't want to face a judge with one of these cases.'" 134 CONG. REC. E1924, E1925 (daily ed. June 10, 1988) (quoting Mark Thompson, *Wide Seizure Net Snags War on Drugs*, WALL ST. J., May 27, 1988, at 16).

234. "Zero Tolerance" Drug Policy and Confiscation of Property: *Hearings Before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 15-44 (1988).

235. 134 CONG. REC. H11,108, H11,242 (daily ed. Oct. 21, 1988) (introduction of H.R. 5210, 100th Cong., 2d Sess. (1988)).

236. REPORT OF THE FED. COURTS STUDY COMM. (April 2, 1990). At the state level, on June 16, 1992, the Michigan Supreme Court struck down as violative of that state's constitution the nation's toughest mandatory minimum sentence for a drug offense. The court found that the law, which mandated a sentence of life without opportunity for parole for the possession of more than a pound and a half of cocaine, was "unduly disproportionate" to the crime. *Court Overturns a Tough Drug Law*, N.Y. TIMES, June 17, 1992, at B10. The U.S. Supreme Court, in 1991, had held that the Michigan law did not violate the Eighth Amendment as cruel and unusual punishment. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701-02 (1991).

237. 136 CONG. REC. S8997, S8999 (daily ed. June 28, 1990) (statement of Sen. Edward Kennedy). The present federal prison population of 54,000 is expected to reach 109,000 by 1997 and 147,000 by 2002. *Id.*

238. The General Accounting Office reported that 57% of federal prisoners with no prior

federal cases in some jurisdictions, and civil litigation is being pushed off the docket.<sup>239</sup> The neglect of business litigation is beginning to squeeze important interests who otherwise would not shed tears over the plight of drug mules. Reform at some date thus appears inevitable.<sup>240</sup>

In the instances of Project Looking Glass and the Fifth Circuit's "significant injury" test in prison brutality cases, it was the Supreme Court that redirected the misguided programs. Project Looking Glass was effectively killed when the Court ruled that government implementation of Looking Glass constituted entrapment.<sup>241</sup> The possibility of continuing Project Looking Glass was further lessened by the media attention the *Jacobson* case received, including a segment on CBS's *Sixty Minutes*.<sup>242</sup> Keith Jacobson became more than a name on a legal document. He was a sympathetic, slow-speaking, middle-aged farmer whose image came into millions of living rooms. It became more difficult to be indifferent to his plight.

The Court's rejection of the "significant injury" test in prison brutality cases points to two important differences between the Supreme Court and courts of appeals. First, docket management is a concern of a different sort for a court whose review is discretionary, not mandatory. Second, the Supreme Court, although in some ways even farther removed than the courts of appeals from the parties whose cases it hears, has the resources, the committed personnel, and the institutional integrity to give a greater hope that it is a repository of justice than intermediate federal courts. Justice always? Of course not. But in comparison to the courts of appeals, it is a better bet.

Concern about justice is the surest way to counter evil. We must seek judges who believe passionately in the importance of individualized justice. We should seek judges who understand that it is their *job* to

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imprisonment records were drug offenders. Ninety-four percent of those drug offenders have no history of violence. *Id.* at S9000.

239. *Id.* at S8999 (statement of Sen. Edward Kennedy). Because mandatory sentences in drug cases leave defendants with nothing to gain by plea bargaining to a lesser offense, a disproportionately high number of drug cases go to trial. According to the 15-member Federal Courts Study Committee appointed by Chief Justice Rehnquist, the volume of drug cases is the biggest problem now facing the federal courts. Bishop, *supra* note 63, at B16.

240. In December 1990, Congress refused to enact additional mandatory minimum sentences until the results of the two studies were made available. Senator Edward Kennedy said that the "decision to exclude mandatory minimum penalties from the 1990 crime bill is a good sign that the tide is turning, and that a majority in Congress is beginning to recognize that the proliferation of mandatory minimum sentences is counterproductive." Robert F. Howe, *Drug Sentencing Faulted*, WASH. POST, Feb. 25, 1991, at D1, D4 (quoting Sen. Edward Kennedy).

241. *Jacobson v. United States*, 112 S. Ct. 1535, 1543 (1992).

242. The program was aired on February 9, 1992.



decide cases, and who do not become obsessed with docket management goals. We should elect politicians who are willing at least to balance concerns for justice with concerns for their own electability. We should promote openness among those who are closest to injustices, so that their revulsion is comprehended by those in a position to remedy the situation. We should safeguard the right of the media to report injustices, including enabling the media to access persons and documents that allow a more complete understanding of the government's role. Above all, we should strive to keep the "truth channels" open<sup>243</sup> and avoid being swept away by the tides of temporary enthusiasms.

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243. CHRIS GOODRICH, ANARCHY AND ELEGANCE 217-38 (1991).