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CRIMINAL LAW

SENTENCING EDDIE

GERARD E. LYNCH*

I.

The mandatory minimum sentences attached to federal narcotics violations¹ have come in for plenty of criticism. The United States Sentencing Commission in 1991 submitted a lengthy report critical of the mandatory minimum provisions.² A political protest organization, Families Against Mandatory Minimums, has been formed, and has gotten some media attention.³ Newspaper columnists,⁴ professional commentators,⁵ judges,⁶ and academics,⁷ have criticized the statutes. Amidst the

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¹ See, e.g., 21 U.S.C. § 841(b)(1)(1994).

² See U.S. Sentencing Comm'n, *Special Report to The Congress: Mandatory Minimum Penalties In the Federal Criminal Justice System* (1991).

³ See, e.g., Tom Schoenberg, *Advocate Gains by Time Served: Decade-Old FAMM Expands Agenda*, LEGAL TIMES, Mar. 5, 2001, at 1.

⁴ See, e.g., Bob Hebert, *The Truth About Justice*, N.Y. TIMES, Sept. 18, 2000, at A 25; Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More than Kingpins*, WASH. POST, Nov. 4, 1990, at C 1.

⁵ See, e.g., Ronald Weich, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 FED. SENTENCING REP. 94 (1996); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 40 FED. B. NEWS & J. 158, 158 (1993) (arguing that Congress has been "impulsive, reckless, driven by unquenchable political passions" when passing mandatory minimum statutes).

⁶ See, e.g., William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992).

⁷ See, e.g., Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need For Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 99 (1999) ("The enactment of these mandatory sentencing statutes has confirmed reformers' concerns about the institutional deficiencies of legislatures when involved in detailed

controversy over President Clinton's last-minute pardons of various offenders, his pardons of a number of marginal defendants sentenced to lengthy terms under these statutes have drawn little or no objection.⁸ Even Chief Justice Rehnquist, a strong voice for law enforcement, has denounced mandatory minimum sentences as having little serious justification.⁹

In an effort to make the effects of the statutes more vivid, critics have searched out examples of extreme injustice created by the statutes. The examples cited are usually minor accomplices in the narcotics trade, usually women, often pressured by men in their lives to participate in some modest way (such as courier or bookkeeper or message-taker) in a drug transaction or conspiracy involving a quantity of drugs that triggers a five- or ten-year mandatory minimum. In the ideal case study, the defendant is only marginally culpable, her contribution to the crime is minimal, she received little or no compensation, and the transaction is just barely over the statutory floor.

It is easy to construct hypothetical examples of such extreme cases in which a defendant qualifies for a mandatory minimum sentence when any sensible person would question whether the actor should be incarcerated at all. And, tragically, such cases are not only hypothetical: real-life examples can be

sentencing lawmaking"); Kenneth R. Feinberg, *Federal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 302-03 (1993) (Congress's enactment of "mandatory sentencing has played havoc with the orderly guideline system").

⁸ If anything, these pardons have drawn praise. See, e.g., Joe Davidson, *Clinton's Tough Prison Watch*, CHRISTIAN SCI. MONITOR, Mar. 27, 2001, at 11 (describing Clinton's commutations for "about 20 prisoners serving mandatory minimum drug sentences" as "much too little, much too late"); Lenore Skenazy, *This Clinton Pardon Makes a Telling Point*, N.Y. NEWSDAY, Mar. 7, 2001, at 33 ("while everyone is talking about the message Clinton's pardons are sending, let's hope his pardon of Loretta Fish [who had been sentenced to nineteen years after unknowingly lending her jeep to a drug-dealing boyfriend] sends this one loud and clear: It is time to repeal the disastrous mandatory minimum sentencing laws"); Stuart Taylor Jr., *Good Pardons, Bad Laws, and Bush's Unique Opportunity*, NAT'L J., Feb. 17, 2001, at 466 ("The uproar over ex-President Clinton's abuse of his pardon power in some cases has overshadowed his salutary use of it in others—in particular, his commutations of the savagely severe prison terms of more than 20 nonviolent, nondangerous bit players in drug deals").

⁹ "Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.' Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole." William H. Rehnquist, Luncheon Address, in U.S. Sentencing Comm'n, *Drugs and Violence in America* 283, 287 (1993).

found.¹⁰ Such cases, however, are relatively few. Prosecutorial discretion usually finds a way to avoid dramatic injustices. The cases that remain are sometimes the product of misguided tactical decisions by defendants or defense lawyers who refuse more reasonable plea offers. This fact, of course, does not excuse the shockingly unjust results occasionally produced—even one single injustice is too many, and the fact that a defendant could have avoided an extreme sentence by waiving her constitutional right to trial is neither a comfort nor a justification for an unduly harsh sentence. But it does render the public debate about mandatory minimums, like the debate about many criminal justice issues, somewhat artificial and sensational, as opponents cite unusual anecdotes about unbelievably cruel outcomes, while proponents counter with equally exotic instances of unreasonably lenient discretionary sentences that, they say, warrant legislative control.

It is much harder to discuss the more routine and modest injustices produced by mandatory minimums. We have a language, and even some widely agreed-upon standards, for arguing about the essentially binary questions of guilt or innocence, or even of jail or no-jail, that make it intelligible to say, “This person should not be in prison.” But, once it is agreed that a given defendant *ought* to go to jail, or even that his sentence should be “serious” or “severe,” how do we argue about whether a five- or ten-year sentence is too much, or a three- or seven-year sentence too little?

The difficulty of deriving an objective basis for determining the absolute level of sentence appropriate to a particular offense is a well-known difficulty of “just deserts” sentencing.¹¹

¹⁰ See, e.g., Dan Gardner, *Civil Liberties Cast Aside in Overzealous Drug War*, CHI. SUN TIMES, Feb. 4, 2001, at 30A (citing examples); John Cloud, *A Get-Tough Policy That Failed*, TIME, Feb. 1, 1999, at 48 (citing examples and observing that “we now live in a country where it’s common to get a longer sentence for selling a neighbor a joint than for, say, sexually abusing her”); Henry Weinstein, *5 ½ Ounces of Crack Brings Life Term With No Parole*, L.A. TIMES, Dec. 7, 1989, at A1.

¹¹ Under the “just deserts” model of sentencing, once a defendant has been convicted of a crime, not only is it “just” to punish that defendant, but the severity of the punishment should be determined solely by the seriousness of the offense, inflicting neither more nor less suffering than the defendant “deserves” in light of the gravity of the crime. See, e.g., IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 147-48 (1989) (“Justice in these matters is to treat offenders according to their deserts, to give them what they deserve, not more, and not less”). That model, however, “requires only that we assign greater penalties as we ascend the scale of crimes, without ever supplying a starting point (the penalty for the least serious offense) or telling us *by how much*

The relative severity of sentences for different offenses can be rationally argued about: though it is possible to argue that selling drugs is a form of murder, most people would conclude that the penalty for intentional killing should be more severe than that for dealing cocaine; hence, the popularity among opponents of mandatory minimums of pointing out that the sentences meted out to mid-level narcotics dealers under those statutes exceeds the average time served in some states for those convicted of manslaughter or murder.¹² But if most would agree that this is an anomalous result, the argument that drug dealers should receive lower sentences than murderers tells us nothing about where the injustice lies: should the drug sentences be lowered or the murder penalties increased? For most people, including most judges, prosecutors and wardens, whether a certain number of years of incarceration is too much, too little or just right for a particular offense (at least within a very large range of tolerance set by grossly excessive or lenient extremes) probably depends more on what they are accustomed to than on any reasoned or deeply intuited belief in a particular level of sentence.¹³

Moreover, even to the extent that a language for addressing these issues can be developed, it is difficult, both morally and politically, to argue that sentences provided for particular crimes are excessive. This is not simply a function of a long-standing political climate in the United States that favors toughness on criminals. As with the defense of pardons or other devices to mitigate punishment, an argument for sentencing leniency must start with the proposition that the defendant committed an act that is worthy of punishment—indeed, an act

to increase the penalty as we move from one crime to the next in the scale." David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1636 (1992); see also Ernest van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250, 1254 (1987) ("Just deserts fails even more fundamentally to tell us what is deserved for any crime.").

¹² See, e.g., Joshua W. Shenk, *Why You Can Hate Drugs and Still Want To Legalize Them*, WASH. MONTHLY, Oct. 1995, at 32, 35 ("[T]hanks to mandatory minimum sentences . . . [n]on-violent drug offenders receive an average 60 months in jail time, five times the average 12-month-sentence for manslaughter convicts").

¹³ Even if public opinion surveys showed widespread agreement within a particular society about the appropriate level of sentence for various offenses, the respondents' views would be shaped by the practice within their community, and would not necessarily reflect either intrinsic moral intuitions or reasoned conclusions, since all of those polled would have been exposed to a regular diet of publicity about sentences imposed in actual cases.

that is so serious a violation of the rights of others or of society at large that the stigma of criminal conviction, and deprivation of liberty, is an appropriate social response. Crimes are by definition terrible acts, and once it is conceded that an individual deserves punishment, and has no defense that justifies or excuses his conduct, how can one argue that a particular sentence is "too much," without seeming to denigrate the seriousness of misconduct that is by definition immoral, dangerous, and deeply disturbing to public order? The fact is that violent criminals, those who sell dangerous illegal substances, and even many offenders against property, have inflicted harm on society and on individual victims that cannot adequately be repaid by any punishment that we could decently inflict. Against the background of the suffering of victims of crime and drug abuse, it is not easy to argue that some term of imprisonment is simply too much for the perpetrator.

For all of these reasons, the argument that a given mandatory sentence is excessive is a difficult one to make, in any but the most extreme cases. But that argument must be made, or we will be left with the distorted view that the problem of mandatory minimum sentences can be solved by creating a small safety valve to allow a reduced sentence for some narrowly-defined set of aberrant cases.¹⁴ The day-to-day excessiveness of sentences that are "only" a few years too long will go on.

II.

So let me introduce you to a more typical "victim" of the mandatory minimum sentence provisions. Eddie is about as randomly selected as can be: he happens to be the very first person I was called upon to sentence after taking office as a federal district judge. He is worth writing about precisely because he is nobody's poster child for reforming mandatory minimum sentences. There is no question in my mind that most people would regard him as a good candidate for severe treatment at the hands of the law, and I'm not about to dispute that view.

Eddie was found guilty by a jury of conspiring to sell cocaine. He was the last man standing from a twenty-five defen-

¹⁴ See, e.g., 18 U.S.C. § 3553(f) (1994); Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. REV. 1471 (2000) (arguing for the elimination of the five safety valve requirements and for their replacement with a single definition of low level offender).

dant indictment; everyone else had pled guilty. Eddie (like many of the defendants) was a somewhat marginal member of the "organization." Perhaps, indeed, he balked at pleading guilty because he didn't see himself as a co-conspirator at all. The evidence showed that Eddie sold cocaine to a number of steady customers, and bought from the principal defendant, a wholesaler of substantial quantities of the drug. By law, Eddie's involvement as a regular, re-selling customer of the drug ring makes him a co-conspirator with the other members in the distribution of narcotics, but in economic reality he was likely less a partner or employee of the wholesaler than an independent contractor, looking to secure a reliable supplier to the extent that he could, but no doubt as prepared as any other retail merchant to shift allegiance to another wholesaler if a new dealer came along offering better quality or price, or a more regular source of supply.

How much cocaine did Eddie sell? Both the sentencing guidelines and the mandatory minimum statutes make it important to know just how much cocaine Eddie was responsible for. But the amount in question is inherently unknowable. The jury was justified in concluding that Eddie was in the regular business of selling drugs. Unlike a bank robber or murderer, Eddie was not someone who from time to time planned discrete, particular jobs, or was now and then tempted by one or more opportunities for profit, or was inspired by passion to commit a particular horrible act. Rather, he had for some period of time a regular business or trade of selling a particular commodity. He almost certainly sold more than the government knew about, and if he had not been arrested he would surely have gone on selling. Had he been arrested in connection with a particular sale (say, if he had made the mistake of selling to an undercover officer or a drug user who had a reason to "turn" and become a police informant), the scope of his activities known by the authorities might have looked much narrower. As it was, he was caught because the government was focusing a major investigation on his supplier, and overheard him negotiating on a couple of occasions with the supplier, whose phone was tapped. No amounts were discussed, though a fair-minded juror could have reasonably concluded that the transactions were intended for resale and not for personal use. The critical evidence of amount was provided by a "cooperating witness"—a violent thug who was the bodyguard and general factotum of

the supplier. This individual, his reliability guaranteed by his decision to testify for the government in exchange for leniency, estimated that he saw Eddie purchase cocaine in one and two ounce quantities (sometimes more) on at least ten occasions. The government thus contended, with some justice, that Eddie was involved in transactions that, conservatively, involved five hundred grams or more of cocaine. A reasonable person would be concerned that the witness might have exaggerated—but a reasonable person would also have some confidence that the witness was not privy to all of Eddie's dealings.

Moreover, Eddie was not a first offender. Now aged fifty-three, he spent a year in prison in his youth as the getaway driver in an armed robbery of a mail truck, and was convicted again in a drunk driving incident a few years later. His youthful offenses were few and isolated, however, and he then went a long time without further arrests. Most unusually, he seems to have gotten in serious trouble again only after age forty, with an apparently late-life turn to drugs: possession of heroin at age forty-three, leading to unsuccessful drug treatment; another fairly dramatic driving incident a few years later; then yet another driving incident that led to drug possession charges. Then, a much more serious drug charge: a conviction in Florida, at age forty-nine, along with three co-defendants, for conspiracy to purchase three kilograms of cocaine from an undercover officer. There are three interesting facts about this offense: it was Eddie's first arrest, let alone conviction, for a serious crime since his youthful robbery; it was his first criminal venture outside the New York area; and although it was his first involvement in the sort of crime that might suggest serious profit from illegality, he apparently (as in his robbery case) was regarded as only a bit player, a mere lookout. There is one interesting fact about its disposition: Eddie was sentenced to probation.¹⁵

¹⁵ Those of us who practice in the federal system and worry about the federal guidelines pay far too little attention to the fact that federal prosecution accounts for a tiny percentage of all criminal cases. Thus, any arguable deterrent effect of severe federal drug sentences is dissipated to the extent that most offenders are sentenced in state court, under regimes that vary enormously in severity. Many federal prisoners experience a pattern of several state sentences that earn them probation or minor jail terms before landing in federal court and receiving, to their shock, a far more severe sentence for essentially similar conduct. This pattern would be less disturbing if the decision to prosecute cases in federal court were based on a conscious selection of the most serious cases. Sometimes this is indeed the case; federal investigative agen-

Though current sentencing guidelines treat such matters as irrelevant, it is worth noting that at the time of his sentencing Eddie had been married for over twenty years and had three teen-aged children, to whom he had provided steady financial and emotional support. He served honorably in the military in Vietnam, earning a number of medals and citations before being honorably discharged as a sergeant. Despite receiving disability payments from the Veterans Administration for Post-Traumatic Stress Disorder, and despite his attributing his drug usage to his military experience, he has maintained a steady record of employment throughout his life.

Despite these favorable aspects of his life history, I assume most judges, and most citizens, would regard Eddie as a candidate for a reasonably severe sentence. Whatever one thinks of the policy costs and benefits of the war on drugs, the sale of cocaine has been emphatically outlawed by the people's elected representatives. Those who undertake to make money from the trade in illegal substances do so knowing that they are violating the law, and knowing that they are preying on the weaknesses of mostly poor people by providing them with dangerous and addictive substances. One can reasonably believe that non-criminal responses to drug abuse might serve the country better than our current efforts to solve the problem by criminal law, but one can't reasonably have much sympathy for people—particularly people who have skills, job opportunities, and maturity—who engage in a harmful and illegal trade out of greed. Moreover, this particular defendant had only shortly before been convicted of another drug trafficking offense, and had benefited from judicial leniency on that occasion. Reasonable people can disagree over whether sending him to prison for an extended period is enlightened or even sensible social policy, but it is, for better or worse, *our* social policy, adopted by democratically-elected officials and generally endorsed by a majority of the nation's people. It is clear to me that it is a judge's duty to enforce that policy, whether or not she would vote for it as a

cies tend to focus their attention on larger rings and more significant offenders. But the selection is often far more random. Small fry are caught up in multi-defendant federal prosecutions because federal agencies investigated a large organization of which they were small parts. Thresholds for determining what cases are "large" vary from place to place, and political or bureaucratic battles among prosecutors and law enforcement authorities often have more to do with whether a case is prosecuted in state or federal court than the seriousness of the offense.

legislator, out of respect for the law of a democratic polity. Moreover, even a judge who might generally favor more lenient (or more severe) penalties than most of her colleagues must consider the important interest in horizontal equity among offenders. Where a judge has discretion, she should exercise it as wisely as she can, and not defer mindlessly to what her colleagues might do; yet, some deference must be paid to mainstream judicial views, since it is unjust that sentences should swing wildly from extreme to extreme depending on the personality or politics of the particular judge doing the sentencing.

Thus, even for a judge with some skepticism about the justice and efficacy of the severity of our current drug sentences, Eddie seems a candidate for a serious sentence. He has broken a law that our legislators and citizens want treated with particular seriousness. Unlike the poster children for the repeal of mandatory minimums, he is a mature, employed man and a home-owner (not youthful and without prospects); he was apparently a dealer (if on a smallish scale) in his own right and not a mere employee or flunky of another; he did not act under duress, or with marginal knowledge or culpability. Among the ranks even of drug violators, his prior record must rank him among the less sympathetic offenders: not only was he a recidivist, but he was one who had benefited from leniency on his most recent arrest, and returned immediately to dealing.

III.

But if we agree that Eddie does not deserve leniency, we still are left to ask, what should his sentence actually *be*? You can try this on your friends, lawyers and non-lawyers alike, and you will almost surely get a range of answers. I can pick a number as well as anyone else, and before 1987 that's more or less what judges were asked to do—pick the number that they thought, taking all of the above facts and more into account, was the fairest sentence. But I don't have a lot of confidence, and I doubt that any of your more intelligent and thoughtful friends will have much either, that the number that any of us picks represents some objectively correct just desert. Most of my law students, faced with questions like this, insist (with considerable point, I think) that they simply *cannot* answer, without knowing more about the system: what is the going rate for this and other offenses? They realize instinctively that the question is intrinsically a relative one, and that the answer should be worked out

by reference to what punishment is, or roughly should be, imposed on a range of other offenders, from murderers to litterers. At the extremes, there are some widespread non-relative opinions: almost no one thinks life imprisonment is appropriate, and almost no one thinks someone like Eddie should escape jail altogether. But the range of actual numbers, if people are pressured to give some, is likely quite wide.

I shouldn't keep you in suspense any longer about the actual sentence. Of course, there is only the most modest suspense anyway for those readers familiar with federal sentencing. The amount of cocaine attributable to Eddie exceeds five hundred grams, and so he is subject to a mandatory minimum sentence of five years (and a maximum of forty, well beyond his life expectancy).¹⁶ As a prior narcotics offender, moreover, if the government chooses to file a prior felony information, the mandatory minimum is doubled to ten years.¹⁷

Of course, the mandatory minimum sentence could be amplified even further. While Eddie himself, if we credit the informant witness, only can be proved to have purchased for resale about five hundred grams of cocaine, he was arguably a member (whether or not he would have so considered himself) of what he surely knew was a larger organization, and by his acts he certainly could be found to have joined a conspiracy whose (accomplished) objects included the distribution of significantly larger quantities of cocaine, indeed of an amount in excess of five kilograms of the drug. The government, in fact, charged him initially with membership in precisely such a conspiracy, a charge that would have subjected him to a mandatory minimum of *ten* years (maximum: life),¹⁸ which in turn would be doubled by his prior drug felony to a twenty-year sentence, something pretty close to a life term for a man his age.

As it happens, the government chose not to pursue this charge. Under *Apprendi v. New Jersey*,¹⁹ it is arguable (and I would argue) that the federal narcotics law creates three sepa-

¹⁶ 21 U.S.C. § 841(b)(1)(B)(1994).

¹⁷ 21 U.S.C. §§ 841(b)(1)(A), 851(a)(1)(1994). The only suspense is whether the government chose to file the information, but experienced practitioners will be in little doubt about the answer. Perhaps if Eddie had pled guilty, the prosecutor might have been willing to forego the filing in order to secure a certain conviction. But Eddie went to trial. Enough said: no mercy.

¹⁸ 21 U.S.C. §§ 841(b)(1)(A), 846 (1994).

¹⁹ 530 U.S. 466 (2000).

rate offenses (in effect, drug distribution in the first, second, and third degree), with separate sentencing ranges of zero-to-twenty, five-to-forty, and ten-to-life (with enhanced versions carrying doubled minima for prior offenders). At any rate, it is not disputable, after *Apprendi*, that a defendant can't be subjected to a higher sentence than the *maximum* for the lowest category, unless the jury specifically finds that the offense involved a quantity of drugs that moves him into the next higher category.²⁹

The prosecutors decided, no doubt influenced in part by the belief that twenty-to-life was a bit extreme for a small-time dealer like Eddie, that it was the better part of tactical trial wisdom to submit to the jury only one question about amount, rather than a checklist of possible findings, and to confine their argument to requesting the jury to find that Eddie had conspired to distribute only those amounts they could actually put into his hands. Accordingly, the government dropped the highest charge, sought (and received) a jury verdict only of conspiring to distribute more than half a kilo, and argued (successfully) to the Probation Department and the judge that the defendant was subject to a mandatory minimum of "only" ten years.

IV.

Was the sentence unjustly harsh? It certainly seems a very heavy sentence to me, but as noted above I don't know that I have a reliable, objective basis for deciding how severe is *too* severe. But I can provide a comparison, both in bottom-line and

²⁹ Whether the Constitution permits imposition of a mandatory *minimum* sentence based on a non-jury, preponderance-of-the-evidence finding of a drug amount not charged in the indictment, and whether, if it does, Congress intended to create mandatory minimum sentences that float free of the enhanced *maximum* sentences it created, are unsettled questions. Compare *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (upholding state statute pursuant to which anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years imprisonment if the judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" in the course of committing the felony), with *Apprendi*, 530 U.S. at 487 n. 13 (though not "overruling *McMillan*" *per se*, "limit[ing] its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict"). The Court reserved "for another day the question whether *stare decisis* considerations preclude reconsideration of [*McMillan's*] narrower holding." See also *Apprendi*, 530 U.S. at 498, 520-21 (Thomas, J., concurring) (advocating a "broader rule" which covers the "*McMillan* situation of a mandatory minimum sentence").

in methodology, to another way of calculating Eddie's sentence: the much-vilified sentencing guidelines.

I don't mean to hold up the guidelines as a model of absolute justice. As will become clear shortly, I have my own objections to their approach to drug sentences. But I think the guidelines can provide a basis for assessing the mandatory minimum sentences. No one thinks that the guidelines are unduly lenient on drugs, or that they were created by a bunch of bleeding hearts. Indeed, the guidelines use the mandatory minimum sentence drug amounts as guideposts to their own sentencing structure. It is perhaps appropriate, then, to consider that a sentence that exceeds the guideline range just might be excessive.

Given the amount of cocaine attributed to Eddie, the guidelines provide for an offense level of 26.²¹ No adjustments apply. For first offenders, or those with only a minor criminal history, this would translate to a sentence of just over five years.²² But Eddie's criminal history category presents a more interesting calculation. His early offenses are disregarded as too old,²³ but he gets one criminal history point for each of his two drug possession charges and his Florida drug trafficking conviction.²⁴ This alone would move him above the basic criminal history category, but because he was on probation for the Florida offense when he committed the present crime, he gets a two-point "bonus,"²⁵ which puts him into a still higher criminal history category.²⁶ The total guideline sentence for Eddie, then, would be 78-97 months.²⁷ His most likely sentence, then, would have been six and a half years in prison.²⁸ I would call that a rather

²¹ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2000).

²² U.S. SENTENCING GUIDELINES MANUAL Ch. 5 Pt. A (Sentencing Table) (level 26, criminal history category I (63-78 months)).

²³ U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(e).

²⁴ U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c).

²⁵ U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d).

²⁶ U.S. SENTENCING GUIDELINES MANUAL Ch. 5 Pt. A (Sentencing Table). Three points would translate to Criminal History Category II, but five points places him in Category III.

²⁷ *Id.* (level 26, criminal history category III).

²⁸ In our district, it is unusual for defendants to be sentenced beyond the bottom of the available sentencing range. I don't think Eddie would be a good candidate for elevation above this level. Most, if not all, of the negative aspects of his conduct and history—his prior criminal convictions and the amount of his drug dealing—has been taken into account in setting the range; his favorable personal circumstances (employment and military record and family circumstances), on the other hand, have not

severe sentence, perhaps more than I might have imposed if the law left me complete discretion. But I could have imposed the guideline sentence without feeling that the sentence was out of line with any reasonable conception of justice.

Judged by the guideline standard, then, the mandatory minimum sentence required in this case is excessive, to the tune of three and one-half years—nearly a fifty percent increase in the length of incarceration. Moreover, a comparison of the *method* by which the guidelines and the statutory provision arrive at their results suggests that the guideline approach—flawed as I think it is—is by a good deal the more sophisticated, and the fairer, system.

Both the guidelines and the mandatory minimum terms have been criticized by liberals for not taking into account facts about the personal history of the offender.²⁹ Both systems rely on only two types of factors in setting a sentence: the seriousness of the offense and the offender's record of prior convictions. But within those limitations, the guidelines are vastly more nuanced. This is evident, even in Eddie's case, in the criminal history calculation. The mandatory minimum provision is extremely crude and simplistic: any prior conviction for a "felony drug offense" triggers the doubling of the mandatory minimum; conversely, the ordinary minimum would apply regardless of the number or severity of the offender's prior non-drug convictions. Thus, by way of example, if Eddie had been convicted in South Dakota for simple possession of two or more

been. Presumably, the higher end of the range should be reserved for those who lacked those points in their favor, or had other anti-social traits not accounted for in the guidelines.

²⁹ See, e.g., Judge Weinstein's bleak view of the Guidelines: "[Because the Guidelines] tend to deaden the sense that a judge must treat each defendant as a unique human being . . . it is quite possible that we judges will cease to aspire to the highest traditions of humanity and personal responsibility that ought to characterize our office." Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 366 (1992). But one does not have to be a liberal, or a believer in rehabilitationist theories of penology, to question these approaches. Thoughtful conservatives should also recognize that by taking discretion away from judges, the guidelines merely give it to other actors in the system. See, e.g., KATE SITTH AND JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 126 (1998) ("[B]y squeezing discretion out of the judicial domain, the Guidelines have required it to expand elsewhere, shifting the locus, but not necessarily the quantity, of disparity. Moreover, many of the present sources of disparate treatment, camouflaged and concealed, are less consonant with our constitutional values than the open and unabashed exercise of judicial discretion of the old order.").

ounces of marijuana,³⁰ he would be subject to the ten-year minimum, but if he had a prior record for multiple murders and rapes, he would only be required to serve five years.

The guidelines, in contrast, make a fairly sophisticated effort to assess the weight of an offender's prior record. The record is judged not by the presence or absence of a single prior drug offense, but on a sliding scale with six basic categories, plus some additional refinements. Offenders with more prior convictions get more points, and thus greater sentence enhancement, than those with only one, and they get more or fewer points for each offense depending on the severity of the crime, judged primarily by the sentence served for it.³¹ The record is judged more harshly if the defendant committed crimes while on probation or parole (a factor that would hurt Eddie under the guidelines), or shortly after release from prison.³² On the other hand, prior offenses in the distant past are not counted.³³ In Eddie's case, for example, a serious crime committed thirty years ago was disregarded; had this been his first offense since then, he would have been treated by the guidelines (appropriately, in my view) as a first offender, and the offense would not enhance his punishment for the present crime. But if that thirty-year-old crime had been a drug felony (rather than a "mere" armed robbery), the mandatory minimum provision would have added five years to his sentence, even if he had gone straight for the entire thirty years between.

The relative degrees of subtlety of the guidelines and the mandatory minima with respect to assessing the offense conduct itself is hidden in Eddie's case, because none of the adjustments available under the guidelines actually apply to his case. Note, however, that the mandatory minima are triggered by amount of narcotics only, and only in rather crude increments. The mandatories click in, for powder cocaine, at five hundred grams (five years) and five kilos (ten years).³⁴ The guidelines, in con-

³⁰ S.D. CODIFIED LAWS § 22-42-6 (Michi 1998) ("It is a Class 6 felony to possess more than two ounces of marijuana but less than one-half pound of marijuana.").

³¹ U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(a)-(c) (2000).

³² U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d), (e).

³³ U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(e).

³⁴ Since the mandatory minima for crack cocaine, calculated at the unjustifiable ratio of 100 to 1 to powder cocaine, are unspeakable, we will not speak of them. *But see* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999) (giving detailed criticisms of the crack ratio).

trast, have 4 different sentencing levels in the range from 400 grams to 5 kilos, and a total of 16 graduated levels from under 25 grams to over 1500 kilos, that can take an offender from 10 months in prison to life.

And that set of adjustments involves only the amount of the drug involved in the offense. The guidelines' (and the statutes') obsession with amount is one of their major vulnerabilities to criticism. Particularly because the amounts are cumulative—that is, multiple sales are aggregated to calculate a sentence based on a single total quantity—they can have the perverse effect of treating minor players in the drug trade the same as wholesalers or importers, by treating a large number of street-level deals as the equivalent of one or more significant transactions. For professional criminals employed in an illegal industry, the snapshot of an offender's conduct captured by arresting officers is somewhat arbitrary. For example, a street-corner seller of crack by the vial who is convicted of selling a single dose to an undercover officer is exactly the same person who might be observed on that corner for a week selling vial after vial for an eight-hour shift, seven days a week. The difference in "offense conduct" between the two cases (one vial or hundreds, a difference of years in prison) depends not on how bad or dangerous the offender is, but on whether the police targeted the seller in a simple undercover street operation, or as part of a larger effort aimed at identifying higher-ups. Someone dealing in kilo quantities, even once, occupies a higher rung on the industry's ladder than someone who sells by the gram, even if he sells, over the course of time, one thousand grams.³⁵

But if the guidelines might do better to take a still more sophisticated view of the trade, at least they allow for aggravating

³⁵ Prior to passage in 1984 of the Comprehensive Crime Control Act, drug amounts were generally irrelevant to most drug crimes. The Senate Report to the Crime Control Act explained the decision to make amount an element of the crime (or at least relevant to sentencing) as follows:

First, with the exception of offenses involving marijuana . . . the severity of current drug penalties is determined exclusively by the nature of the controlled substance involved . . . [but] another important factor [should be] the amount of the drug involved. Without the inclusion of this factor, penalties for trafficking in especially large quantities . . . are often inadequate.

S. REP. NO. 98-225, at 255-57 (1983) (Comprehensive Crime Control Act). It is questionable, for the reasons discussed above, whether the purpose of taking quantity into account (punishing the kingpins who traffic in large quantities) is served by the amount-mania that underlies present-day statutes and guidelines.

and mitigating circumstances. Under the statutory mandate, anyone who has *any* involvement in a transaction involving five hundred grams of cocaine must receive a five-year sentence, whether the defendant owned the drugs and would profit from their sale, or was simply a driver or courier participating for a modest fee. The guidelines, in contrast, provide, with respect to drug transactions and organizations of every size, enhanced punishments for those who are managers or supervisors, and lowered ones for those who are more marginal participants,³⁶ and provide special enhancements for certain specialists, like pilots and armed muscle.³⁷ If I were writing the guidelines, I would probably reverse the relative importance of roles in the trade versus sheer quantities of drugs, but the guidelines at least take the defendant's role in the offense into account. Under the guidelines, among players in a five-kilo cocaine deal, someone (with no prior record) who organized and led a team of five or more participants (including one who was a minor) in orchestrating the deal would face a recommended minimum of at least 235 months (nearly twenty years),³⁸ while someone who played a truly minimal role in the same deal could get as little as seventy-eight months (six and a half years).³⁹ The mandatory minimum is simply ten years, regardless.

This analysis provides us with another reason to consider the mandatory minimum sentences unjustly severe. In the eyes of their many critics, the guidelines are unduly simplistic, failing to make distinctions that matter, and limiting the flexibility of sentencing judges to respond to relevant differences. Yet by comparison to the mandatory minima, they are masterpieces of subtlety, nuance, and thoughtfulness. And the guidelines permit judges, in truly unusual cases and subject to appellate review at the government's instance, to depart and impose a lower sentence; though presumptively mandatory, for exceptional cause

³⁶ U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1, 3B1.2 (2000).

³⁷ U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(b)(1), (2).

³⁸ Base offense level of 32 for the amount and quantity of drugs, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4), plus 4 as an organizer or leader of a large organization, U.S. SENTENCING GUIDELINES MANUAL §3B1.1(a), plus 2 for using a minor in the offense, U.S. SENTENCING GUIDELINES MANUAL § 3B1.4, totaling level 38. For a first offender, the guideline sentencing range would be 235-293 months. U.S. SENTENCING GUIDELINES MANUAL Ch. 5 Pt. A (Sentencing Table).

³⁹ The same base offense level of 32, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4), in this case *reduced* by four levels for a minimal role in the offense, U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(a).

they can be treated as true *guidelines*. The mandatory minima (save for cooperation with the government⁴⁰ and an extremely limited “safety valve” provision⁴¹) are absolute. If, in Eddie’s case, the guidelines project a sentence of six and a half years but the mandatory statute requires ten, a sense that the latter is excessive is supported not simply by a (quantitative, political) conclusion that the guidelines’ provenance is likely to make them tough enough for most tastes, but also by a (methodological, technical, professional) conclusion that the guidelines’ method of arriving at six and a half years as the appropriate sentence has taken more of the appropriate factors into account, and has taken a much more defensible view of what is relevant in determining his just desert.

One additional procedural fact needs to be recalled. To the extent that discretion exists in a system of mandatory sentencing, that discretion is shifted from judges—appointed by the President and confirmed by the Senate, usually of mature years and wide experience—to prosecutors. That the mandatory minimum in Eddie’s case was ten years, rather than *twenty*, was solely due to a tactical trial decision by the prosecutor. I intend no criticism of the prosecutor, who I think made a choice that was both just and tactically shrewd, by pointing out that this was a rather spontaneous, nearly casual, decision, made on the spur of the moment by a rather young prosecutor in the heat of trial. Though the decision surely was made against a background view that ten years was somehow “enough” to satisfy concerns of justice and public policy, the principal motivation at the moment was one of trial strategy, which could well have gone the other way. Had he made the opposite call, and the jury made the requested finding, the judge would have been required to impose a twenty-year sentence: under those circumstances, the judge would not have had the same discretion to reduce the sentence to ten—in the light of all relevant sentencing factors, for substantial reasons of justice stated on the record and subject to appellate review—that the prosecutor had to accomplish the same result—for reasons largely unrelated to culpability, with no public statement of reasons, and with little or no supervision. Moreover, the prosecutor could have chosen, before trial, not to file the prior felony information (reducing the mandatory sen-

⁴⁰ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1; 18 U.S.C. § 3553(e) (1994).

⁴¹ 18 U.S.C. § 3553(f).

tence to five years), or not to charge a particular amount in the indictment (arguably eliminating the mandatory minimum altogether). And if the defendant had agreed to plead guilty, there is little doubt that these options *would* have been exercised. Since a guilty plea would have adjusted the sentencing level downward by as much as three points,⁴² avoiding the mandatory minimum sentence would have enabled the prosecutor, in his unilateral discretion, to bring Eddie's guideline sentence down to as low as fifty-seven months⁴³—or even lower if the prosecutor further agreed, to avoid costly litigation over the credibility of his cooperating witness, to discount somewhat the witness's account of the amount of cocaine Eddie had bought. At the end of the day, it is possible that Eddie paid a higher price for exercising his right to a jury trial than for the crime he committed.

V.

Does it matter? Of course, the cases cited by the columnists seem to matter more. Someone who probably should not be jailed at all who is sent to prison for five years has been treated terribly unjustly, and it is easy to sympathize with someone whose story suggests that his or her culpability was minimal. Someone like Eddie, in contrast, has deliberately, repeatedly, violated the law; his culpability is clear, a sentence of some weight is certainly deserved; and the precise number of years awarded is necessarily somewhat arbitrary. That's why he's not the poster child of the movement to repeal mandatory minimum sentences. And in a political context in which we often speak rather casually of doubling sentences that are already quite brutal (by the standards of the industrialized, democratic world that we like to think should take its lead from us in human rights), who cares about a "mere" excess of a few years' punishment?

But if the injustice in Eddie's case is less serious than in the more unusual cases that are used to highlight the campaign against mandatory minimum sentences, I submit that we still ought to care, and to care a lot. First, even in this single indi-

⁴² U.S. SENTENCING GUIDELINES MANUAL § 3E1.1.

⁴³ At level 23, the guideline sentencing range for someone in Criminal History Category III would be 57-71 months, allowing a sentence of under five years. U.S. SENTENCING GUIDELINES MANUAL Ch. 5 Pt. A (Sentencing Table).

vidual case, the difference between 78 months and 120 is no small amount. The guideline sentence of seventy-eight months is hardly trivial: imagine being sent away from your family when your daughter was eleven, and returning on her eighteenth birthday; or consider going to jail with your mother aged seventy-five, and guessing whether she'll still be living at nearly eight-two, when you get out. That is just about exactly what would have happened to Eddie under the guideline sentence. Now consider the add-on under the mandatory minimum: three and a half *additional* years. That is longer than you spent in law school, dear reader, and about as long as your, or your child's, college or high-school years. If that increment in punishment is excessive, that is not, in my book, a trivial injustice.

Now ask how many Eddies are out there, getting how many cumulative years of incarceration, at what expense to them, to their families, to the public treasury, and to our sense of human decency.

Let me back up to where I began, and remind you of my assumptions. I do not think Eddie should be treated lightly. I am not questioning the need for or appropriateness of criminal laws against selling drugs. I am not even arguing that there's some clear-cut, objective way of determining whether ten years is in some absolute sense an unjust sentence for a person with his record who did what he did. Nor am I questioning the idea of sentencing guidelines and control of judicial discretion—note that if Eddie had received even the lowest available guideline sentence for the crime he was convicted of in Miami in 1997, instead of probation, he would never have committed the offense for which I sentenced him, and he would now be getting ready for release instead of looking at nine more years in prison.⁴⁴ I am just asking those who read this to consider exactly how the federal mandatory minimum sentences for drug crimes operate, and what the sentences imposed under that regime actually mean in particular cases, and then to consider whether—at least in the federal system, which already has a

⁴⁴ At any rate, a country in which a defendant goes from probation in one jurisdiction to ten years' imprisonment for a crime of somewhat comparable magnitude in another probably doesn't need, in the aggregate, more judicial discretion or more judicial leniency. I suppose one of my points is that campaign slogans, at such a general level, asserting that we need stricter or more lenient sentences, more guidelines or more discretion, are inherently misleading: we need to examine more closely *particular* sentencing regimes as they apply to *particular* crimes.

in the federal system, which already has a comprehensive guidelines regime—the statutory minimum sentence provisions are just or unjust, desirable or not, worth the price we pay for them or unnecessarily costly.

I did not expect sentencing people to prison to feel good. But I was sorry and surprised to find that the very first sentence I imposed felt like an injustice. And not a small one.