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Shouting into the Wind: District Court Judges and Federal Sentencing Policy

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Shouting into the Wind: District Court Judges and Federal Sentencing Policy

David M. Zlotnick*

I.	Introduction.....	646
II.	Draconian Sentences Based Solely on Drug Amounts.....	651
A.	<i>The Impact of Mandatory Minimums, the Federal Drug Conspiracy Statute, and the United States Sentencing Guidelines</i>	651
B.	<i>Case Studies: From the Girlfriend Cases to "Real" Drug Dealers</i>	655
III.	Disparity, Disparity, Disparity	666
A.	<i>Judicially Created Disparity: Are Frequent Departers "Liberal" Law Breakers?</i>	667
B.	<i>Non-Judicially Created Disparity.....</i>	669
1.	<i>Fast-Track Departures and Federalization of Crime</i>	671
2.	<i>Substantial Assistance Disparity.....</i>	674
3.	<i>Law Enforcement Created Disparity</i>	676
	Conclusion	681

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I. INTRODUCTION

*It is not permitted to . . . us to indulge our feelings of abstract right on these subjects; the law . . . recognises [that] right . . . although its existence is abhorrent to all our ideas of natural right and justice.*¹

*[H]ow can I respond to you when you are saying what you seek is fairness and justice? To be brutally frank, I don't know that fairness and justice have much to do with it. . . . I have to punish you with great severity because that's what the law requires me to do.*²

The first quote is an excerpt from a judge's charge to the jury in an 1833 Pennsylvania case which sent an African-American slave back to his owner under the hated Fugitive Slave Act.³ The second is from a federal district court judge in 1996. The judge, Robert Matsch (D. Co.),⁴ was responding to a plea for mercy from a first-time offender he was about to sentence to thirty years in prison for a crack cocaine conspiracy. While separated by one hundred and fifty years, these two judges shared the same predicament; each felt bound by oath and office to take away a man's freedom under a Congressional act that each personally viewed as morally bankrupt.

Neither of these statements should be viewed as an isolated rant from a cantankerous jurist. In fact, there is a long tradition of American judges using the bench as a bully pulpit to declare laws, enacted by Congress and upheld by the Supreme Court, morally wrong. Today, as noted by Judge Matsch, the issue is not slavery but sentencing. In the last two decades, Congress has dramatically increased the penalties for drug and gun offenses, while si-

1. *Johnson v. Tompkins*, 13 F. Cas. 840, 843 (C.C.E.D.Pa. 1833) (No. 7,416) (per Baldwin, Cir. J.).

2. Sentencing Transcript at 41, *United States v. Williams* (D. Colo. Feb. 16, 1996) (No. 94 CR 254 M) (on file with author) [hereinafter *Williams Sentencing Transcript*].

3. *Johnson*, 13 F. Cas. at 843.

4. See *Williams Sentencing Transcript*, *supra* note 2. Judge Matsch is nationally known for presiding over the Oklahoma bombing cases. Peter Anin & Tom Morganthau, *Putting the Plot on Trial (Judge Richard Matsch to Try the Oklahoma City Bombing Case)*, NEWSWEEK, Jan. 29, 1996, at 30, available at 1996 WL 9471141.

multaneously restricting judicial sentencing discretion, thereby depriving judges of the ability to ameliorate the results of these higher penalties in sympathetic cases. Since 1986, this new sentencing regime has required federal judges to condemn thousands of men and women to actual or the equivalent of life sentences without parole.⁵ And sadly, a disproportionate number of these men and women are the African-American descendants of those who were forcibly kept in slavery.⁶

Robert Cover argued that although the abolitionists were deeply disappointed in the failure of the judiciary to protect escaped slaves, the natural rights rhetoric of Northern judges was ultimately an important component in turning the tide of Northern public opinion against slavery.⁷ Similarly, for the first time

5. A twenty or thirty year sentence for a defendant in the fifties or higher is essentially a life sentence. For example, 70-year old Robert Van Doren, who was suffering from prostate cancer, was sentenced to twenty years in prison after he was found with a total of sixty-five grams of cocaine in 1996. *United States v. Van Doren*, 182 F.3d 1077, 1079-80 (9th Cir. 1999). When sentencing Van Doren, District Court Judge Marilyn Huff expressed her displeasure with this "incredibly sad case" caused by the mandatory minimums. "[T]he Court takes no pleasure in giving a lengthy sentence. If it were up to the Court, if I had discretion, I would think that 10 years would be sufficient punishment." Sentencing Transcript at 55, *United States v. Van Doren* (S.D. Cal. Nov. 14, 1997) (No. 96-1082-H-Crim.) (on file with author).

6. "Nationwide more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20's are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system." Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting 3 (Aug. 9, 2003) (on file with author) [hereinafter Kennedy ABA Speech]. According to the Bureau of Justice Statistics website, the number of black adults under correctional supervision rose from 1,117,200 in 1986 to 2,149,900 in 1997. Bureau of Justice Statistics, Demographic Trends in Correctional Population by Race, at <http://www.ojp.usdoj.gov/bjs/glance/tables/cpracetab.htm>. Obviously, there is a critical difference between slaves who were imprisoned for no offense other than the color of their skin and drug defendants duly convicted for trafficking in drugs. Nevertheless, the disproportionate impact of the drug laws and the devastating impact on inner-city African-American communities cannot be overlooked. Some have even argued that the drug laws constitute a new form of slavery and even genocide. See, e.g., Richard Dorvak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & LAW 611 (2000); Knoll J. Lowney, *Smoked Not Snorted: Is Racism Inherent in our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121 (1994).

7. ROBERT M. COVER, *JUSTICE ACCUSED; ANTISLAVERY AND THE JUDICIAL PROCESS* 119-22 (1975).

since these sentencing laws came into effect in the 1980s, there is reason to hope that judicial voices might be heard and heeded in this debate. In the past year, three Supreme Court Justices have stepped forward to talk about the harshness of the federal criminal penalties or the rigidity and unfairness of mandatory minimums.

The speech that garnered the most attention was that of Associate Justice Anthony Kennedy.⁸ He chose the keynote address at the ABA Annual Meeting in August 2003 to make his statement. His ultimate conclusions were simple and powerful. He said, "our resources are misspent, our punishments too severe, our sentences too long."⁹ He singled out mandatory minimums statutes as "unwise and unjust,"¹⁰ and he argued that while sentencing guidelines in principle can be a component of a fair criminal system, the existing Federal Sentencing Guidelines need to be revised downward.¹¹ Justice Kennedy also criticized the continuing transfer of sentencing discretion from judges to federal prosecutors as misguided.¹²

Soon thereafter, Justice Stephen Breyer, a primary author of the original Sentencing Guidelines, delivered a speech criticizing mandatory minimums, stating "there is no room for flexibility on the downside" and that "is not a helpful thing to do. . . . It's not going to advance the cause of law enforcement in my opinion and

8. President Reagan nominated Justice Kennedy to the Supreme Court in 1988. He was viewed at the time as conservative. On the bench, he has largely voted with the conservative majority but there have been some surprises, such as *Lawrence v. Texas*, which declared Texas' criminalization of consensual homosexual sodomy unconstitutional. 593 U.S. 558 (2003).

9. Kennedy ABA Speech, *supra* note 6, at 4.

10. *Id.*

11. *Id.*

12. *Id.* at 5. The trial judge, he asserted, "is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutor." Justice Kennedy concluded with a request that the ABA study the matter and then asked Congress to repeal mandatory minimums and the President to reinvigorate the pardon process so that some already serving these sentences might be released. *Id.* Since then, the ABA Justice Kennedy Commission has begun to hold hearings throughout the country investigating different aspects of the American criminal justice system. Brenda Sapino Jeffreys, *ABA Commission Holds Hearings on Criminal Justice in Texas*, TEXAS LAWYER, Feb. 16, 2004, available at WL 2/16/2004 Tex. Law. 10. The author testified before this Commission on November 12, 2003.

it's going to set back the cause of fairness in sentencing."¹³ Chief Justice William Rehnquist's contribution was a series of remarks targeted at the controversial 2003 Feeney Amendment. "In unusually pointed terms," he condemned the provisions which place judges under special scrutiny when they lower sentences, stating that the act "could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their duties."¹⁴

Nevertheless, as important as these voices could be to the debate over sentencing reform, this essay focuses on the less prominent voices of district court judges like Judge Matsch who have labored for years in relative obscurity to implement Congress's directives. Like the pre-Civil War judges, federal judges have not just been doing an unpleasant duty and going quietly back to their cloistered chambers. Some have been so outraged that they have gone public with their complaints in the press. A significant few resigned (or took senior status and declined to hear criminal cases).¹⁵ Many others have used the moment of sentencing, just as the antebellum judges did, to proclaim their fealty to the rule of law, yet also to denounce the injustice of the laws passed by Congress.

But these statements have not received the press that the recent remarks by the Supreme Court Justices did. A variety of reasons explain this difference, such as the local nature of cases and

13. Martin Finucane, *Breyer Assails Sentencing Rules*, PITT. POST GAZETTE, Sept. 22, 2003, at A18, available at 2003 WL 64500168. Breyer also noted that Chief Justice William Rehnquist and "others on our court" shared his views. *Id.*

14. Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at A14. Rehnquist has also criticized mandatory minimums in the past but has not gone as far as Kennedy who called for an overall lowering of penalties. See Michael Brennan, *A Case for Discretion; Are Mandatory Minimums Destroying Our Sense of Justice and Compassion*, NEWSWEEK, Nov. 13, 1995, at 18, available at 1995 WL 14647063 (reporting Rehnquist's claim that mandatory minimums were "a good example of the law of unintended consequences").

15. Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. OF LEGAL STUD. 231 (2004) (providing statistical support for the proposition that judges took senior status at a higher rate in the period when the Guidelines became effective and were determined to be constitutional); see also *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at 22 (reporting the resignation of Federal District Judge J. Lawrence Irving).

the lower public profile of district court judges. In addition, most district court judges are hesitant to engage in political debate or talk to the media. Thus, most of their comments have been made in nearly empty courtrooms during sentencing proceedings. While duly recorded by court reporters, their statements have usually been heard only by the attorneys and a few family members of the defendants. Sometimes eloquent orations, other times steely civics lectures, and occasionally angry tirades against Congress or the prosecution, federal judges have expressed their unhappiness with the dual straightjacket of mandatory minimums and the guidelines. As time has passed with little legislative relief, and more often, with new penalties and more restrictions on their discretion, many have come to feel that they have been shouting into the wind; their words dissipating quickly in the face of political sloganeering about drugs and crime.

Nevertheless, even if it will take the broad brush strokes of the giants on the Supreme Court to get the public's attention on this issue, listening to the voices of those closest to the actual defendants and cases themselves makes sense. For when the nation finally reaches a period where a more rational and equitable sentencing regime is possible, the knowledge and expertise of the district court judges, with their daily intimacy with these laws, will provide the best information about what changes are necessary. I feel fortunate that the Open Society shared my belief that these statements are of value. With their funding and a visiting position, I have been in Washington, D.C. for a year and a half working to gather and document these kinds of cases. I have corresponded with hundreds of federal inmates, read their case files and interviewed their sentencing judges. Out of this research, I have compiled about fifty judges and case profiles that represent the issues and concerns of the judges. In this essay, I share a few of these profiles that reflect two of my most important findings.

First, I will discuss the types of cases that most distress the judges. While judicial outrage over long sentences for sympathetic, low-level offenders is reasonably well known, I also found that a significant number of judges are concerned with the unduly punitive nature at the high end of the sentencing table. Thus, some of my profiles concern cases involving relatively serious, but nonviolent, drug dealers who received extremely long terms, including life sentences, that were largely the result of drug quantity. The

second finding I discuss in this essay concerns disparity. Although Congress has severely limited judicial sentencing discretion, many judges contend that discretion, and therefore disparity, has not disappeared from the system. Rather, it has merely been transferred to the police and prosecutors, where judges argue that it is both less transparent and almost always unreviewable. Thus, some of my profiles show how prosecutorial and police discretion contribute to dramatic instances of sentencing disparity. Thus, this essay posits that the claimed congressional cure has both failed to remedy the disease of disparity and created its own oppressive harms.

II. DRACONIAN SENTENCES BASED SOLELY ON DRUG AMOUNTS

A. *The Impact of Mandatory Minimums, the Federal Drug Conspiracy Statute, and the United States Sentencing Guidelines*

In brief summary, the current sentencing regime is the product of both increased statutory penalties in 1986 and 1988 and the implementation of the United States Sentencing Guidelines in 1987. The first important piece of legislation to take effect was the Anti-Drug Abuse Act of 1986.¹⁶ This statute imposed weight based mandatory minimum penalties of five, ten, and twenty years (and life without parole for certain recidivists) for trafficking in relatively small amounts of most illegal narcotics such as crack cocaine, LSD, heroin and marijuana.¹⁷ For example, possession with intent to distribute five grams of crack cocaine, with a street value of only about \$500 in 1986,¹⁸ carries a five-year mandatory pen-

16. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended 21 U.S.C. §§ 841-848 (2000)). The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission and mandated the creation of the Guidelines. However, it took the original Commission three years to release the first version.

17. Many have argued that "the careful, deliberate procedures of Congress were set aside in order to expedite passage" of the mandatory minimums in the immediate aftermath of the death of college basketball star Len Bias. Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408 (1996).

18. Jane Gross, *A New Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 19, 1985, at A1; see also Don J. DeBenedictis, *How Long Is Too Long?*, 79 A.B.A. J. 74 at 76 (1993) (stating the street value for crack cocaine was \$100 per gram).

alty.¹⁹ Fifty grams results in a ten-year mandatory.²⁰ If the defendant had any prior drug felony, including relatively minor state charges,²¹ the mandatories double to ten and twenty years.²² Two prior drug felonies and fifty grams of crack requires a mandatory life sentence without parole.²³ These crack penalties are also largely responsible for the increase in racial inequities in the federal prison population. Because of the hysteria over the crack epidemic in 1986, Congress made the penalties for crack 100 times more severe than for powder.²⁴ Ironically, even though all the cocaine in the country is imported as powder, the penalty structure is less harsh for the actual importers than for the inner city black youth at the bottom of the distribution chain.²⁵

Congress expanded the reach of the drug mandatory minimums in 1988 by making them applicable to charges of conspiracy to possess or distribute narcotics.²⁶ Before this amendment, drug distribution conspiracies were covered by the general federal conspiracy statute, which carries a maximum five-year sentence.²⁷ Adding conspiracy to the mix, however, did more than just increase the number of cases eligible for the mandatory penalties.

19. 21 U.S.C. § 844(a) (2000).

20. *Id.*

21. For example, simple possession of any kind of cocaine is a felony in Rhode Island. See R.I. GEN. LAWS § 21-28-4.01 (2002).

22. 21 U.S.C. § 841(b)(1)(A).

23. *Id.*

24. 21 U.S.C. §§ 841(b)(1)(A), (B).

25. "The most ironic effect of the 100:1 ratio involves those cases in which a retail crack dealer receives a longer sentence than the wholesale powder distributor who supplied him the powder cocaine from which the crack was produced." William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1273 (1996). Historically, inner city minorities have been the primary distributors and users of the crack form of cocaine. The relative cheapness of a single dose of crack has been one explanation for this phenomenon. Crack, however, is nothing more than powder cocaine mixed with the right proportions of water and baking soda and popped into a microwave. Moreover, early reports that crack was more addictive or dangerous to pregnant women have turned out to be overstated. UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, iv-v (2003) at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf.

26. 21 U.S.C. §§ 846, 963 (2000).

27. 18 U.S.C. § 371 (2000); see also *United States v. Davis*, 793 F.2d 246 (1986) (charging defendant with conspiracy to distribute cocaine under the general federal conspiracy statute).

Now a marginal participant is subject to a mandatory minimum, even if he never had possession or even constructive possession of drugs. Even taking a phone message or giving a ride to a friend is enough to draw a person into the conspiracy, so long as a jury believes the defendant agreed to assist the primary actor.²⁸

The 1986 Act also increased sentences by requiring drug quantity (and hence the applicable mandatory minimum) to be determined by weighing the entire "mixture or substance," not just the amount of actual narcotic.²⁹ This provision was intended to punish dealers who increased their sales by mixing narcotics with cutting agents,³⁰ but it had devastating consequences for defendants involved with drugs such as LSD. The weight of an actual dose of LSD is negligible, too small to easily be put into a pill. Therefore, LSD is generally sold on sheets of paper, with individual doses dried onto stickers or decals on the paper. The user licks the paper to ingest the drug.³¹ As upheld in *Neal v. United States*,³² the mixture or substance requirement compels a sentencing court to weigh the paper as the relevant "mixture or substance" to assess the statutory penalty.³³ Since a ten-year mandatory requires only ten grams of LSD, dealers who, for example, use heavy paper, generally receive at least the ten-year mandatory.³⁴ The facts that most LSD defendants are part of very local distribution rings, that many engage in subsistence dealing as part of their Grateful Dead lifestyle, or that there is virtually no violence connected to LSD trafficking or use are all irrelevant to the application of the mandatory minimum.

The Sentencing Guidelines, while intended to bring rationality and fairness to federal sentencing, actually exacerbated the draconian penalties under the 1986 Act. As recounted elsewhere, the first Commission had not finished its work when the 1986 Act

28. See, e.g., *United States v. Esparsen*, 930 F.2d 1461 (10th Cir. 1991).

29. 21 U.S.C. § 841(b)(1)(A)(v).

30. There are several justifications for this provision. Some cutting agents are themselves poisonous. Imprecision in cutting agents for drugs like heroin also can lead to more deaths and hospitalizations as users are unsure of the purity of the substance. More sales also equaled more profits.

31. See generally *United States Drug Enforcement Agency, Lysergic Acid Diethylamide, available at www.dea.gov/concern/lsd_factsheet.html.*

32. 515 U.S. 284 (1996).

33. *Id.* at 296.

34. 21 U.S.C. § 841(b)(1)(A)(v).

took effect. Confronted with this new penalty structure, the Commission decided to use the mandatory minimums as the floor for the base offense levels for most federal drug crimes.³⁵ As a result, the Guideline range for most defendants is higher than statutory minimums.³⁶ In fact, until amended by the Sentencing Commission in 1994, the Guidelines sometimes required life sentences without parole solely on drug quantities even when the statute did not.³⁷

“Draconian” is the adjective most frequently employed to describe these sentences. On an aggregate level, the following statistics are illustrative. The average federal drug sentence before 1984 was 65.7 months.³⁸ By 1991, this average ballooned to 95.7 months.³⁹ While there has been a slight decrease in drug sentences over the past ten years, probably due to the “quiet rebellion” of prosecutors and judges,⁴⁰ the increase in the federal prison

35. See Jesseca R.F. Grassley, *Federal Sentencing Policy Following the Cocaine 1995 Report: Issues of Fairness of Just Punishment*, 21 HAMLIN L. REV. 347, 392 (1998). Note that for live marijuana plants and LSD, the Commission ultimately decided to use a more rational calculus divorced from the mandatory minimum weight calculations. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 516 (2002) (amending the manner in which marijuana plants are counted)[hereinafter U.S.S.G.]; U.S.S.G. app. C, amend. 488 (2002) (amending the manner in which LSD is weighed for sentencing purposes).

36. Although there can be reductions for minimal or minor role and such, drug amounts above the statutory minimum carry increasing higher base offense levels under the Guidelines. Thus, for example staying with crack cocaine, 20-35 grams carries a base offense level for a defendant with no prior convictions of 78-97 months, already 18 months higher than applicable five year mandatory. U.S.S.G. § 2D1.1(c) (2002); U.S.S.G. ch. 5, pt. A, sentencing table (2002). Add in even a few minor convictions and the same quantity might require sentencing ranges of 87-108 months or 97-121 months. *Id.*

37. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1076 (2001).

38. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data From the District Level*, 87 IOWA L. REV. 477, 479 (2002).

39. *Id.*

40. Bowman & Heise coined this term to characterize their hypothesis that most of the players in the federal criminal justice system, including many prosecutors and judges, recognize that many sentences are much higher than necessary to accomplish any of the goals of sentencing. Thus, the players have collaborated to find ways within the system to ameliorate the results for some defendants. See Bowman & Heise, *supra* note 38; Bowman & Heise, *supra* note 37.

population has continued unabated. And, this increase has been fueled largely by the addition of even more nonviolent drug offenders.⁴¹

B. Case Studies: From the Girlfriend Cases to “Real” Drug Dealers

While the media has reported some of this aggregate data, sentencing issues usually take a back seat to reports on crimes and arrests, or to more general coverage of the “War on Drugs.” When print and television media cover this issue, they tend to cover only the most sympathetic defendants, with a disproportionate number of stories about women inmates.⁴² These women tend to fit a profile: the wives and girlfriends of drug dealers who rarely profit from the crime. Because they were peripheral players, they usually could not “rat out” other dealers to save themselves. Thus, in many instances, the girlfriends received greater sentences than their clearly more culpable partners who were able to cooperate in exchange for lesser sentences. Focusing on the inmates themselves, now model prisoners – remorseful, harmless, and sometimes young and attractive, these stories have been the perfect fodder for news shows like *20/20* and *60 Minutes*.⁴³

41. In 1980, the federal prison population was 26,600, at last count in 2004 it has grown to 172,000, and in 2010 the population is estimated to be 216,000. Vanessa St. Gerard, *216,000 Federal Inmates Projected by 2010*, CORRECTIONS TODAY, Dec. 1, 2003, at 20, available at 2003 WL 14014554. For the first time last year, the federal prison population exceeded that of the largest state system, California. Kevin Johnson, *Federal Prison Population Nears 165,000; Number Surpasses States’ Systems*, USA TODAY, Jan. 23, 2003, at A21, available at 2003 WL 5303980. The United States now has the highest incarceration rate in the world, higher than Libya, Malaysia, and Burma. See Philip Johnston, *England Has Highest Rate of Imprisonment in EU*, DAILY TELEGRAPH, Feb. 27, 2003, at P8, available at 2003 WL 12080817. While the federal system accounts for only about 10% of the nation’s prison population, financial incentives to mimic the federal system have caused many states to similarly abolish parole and otherwise adopt the punitive approach of the federal government. See David Dolinko, *The Future of Punishment*, 46 UCLA L. Rev. 1719, 1722 (1999).

42. Impoverished drug couriers from foreign countries have also gotten some coverage, and to a lesser degree, addicts, whose motivation was clearly their addiction.

43. See, e.g., Chris Graves, *Clinton Commutes Minneapolis Woman’s Drug Sentence*, STAR TRIB. (Minneapolis – St. Paul), July 10, 2000, at 1B, available at 2000 WL 6979603 (reporting Serena Nunn’s release from federal prison after serving ten years of a fourteen year sentence for conspiring to possess and distribute cocaine).

Nicole Richardson's story, told on a *Dateline* segment,⁴⁴ is a typical case. She was seventeen-years-old when she fell in love with Jeff Thompson, a drug dealer who sold cocaine, ecstasy, and eventually LSD.⁴⁵ When one of his suppliers, who was cooperating with the government, made a monitored call to the house, Nicole answered and was recorded telling him where to find Thompson to pay him for drugs.⁴⁶ For this offense, she was taken out of college and given a ten-year mandatory minimum sentence.⁴⁷ Thompson, on the other hand, received a cooperation agreement and a five-year sentence.⁴⁸ Because he was actually engaged in trafficking, he, and not Nicole, could provide the government with information regarding the other drug dealers.⁴⁹ Nicole's judge was Alex. T. Howard, Jr. of Alabama, a Reagan appointee. Judge Howard stated that "[i]n all of my experience with guidelines, this case presents to me the top example of a miscarriage of justice."⁵⁰

While a 1994 law called the "safety-valve" now allows judges to reduce the sentences of some of the least culpable offenders,⁵¹ my research has found that the "girlfriend" cases continue. Lakisha Murphy had been with her boyfriend, Cedric Robertson, since she was fifteen.⁵² Cedric was a member of the "Crips" and a drug dealer.⁵³ Cedric was also a paraplegic and Lakisha was his primary caretaker, feeding and bathing him.⁵⁴ Cedric dealt crack with his gang from his wheelchair, and in fact, the government considered him the principal of the group.⁵⁵ Because Lakisha spent most of her time caring for Cedric at his house, she clearly was

44. *Dateline* (NBC television broadcast, June 29, 1993) (transcript on file with author).

45. Nancy Roman, *Mandatory Drug Sentences Lead to Inequities: Rule Forces Jails to Free Violent Felons*, WASH. TIMES, Aug. 24, 1994, at A8, available at 1994 WL5493326.

46. *Id.*

47. *Id.*

48. Jim Dwyer, *A Mad Affair of Drugs, Jails*, NEWSDAY, Sept. 14, 1994, at A2, available at 1994 WL 7398885.

49. *Id.*

50. Roman, *supra* note 45.

51. 18 U.S.C. § 3553(f) (2000).

52. Sentencing Transcript at 66, *United States v. Murphy* (W.D. Tenn. Aug. 22, 2002) (No. 00-10010-04) [hereinafter *Murphy* Sentencing Transcript].

53. *See id.* at 72, 74.

54. *Id.* at 38.

55. *Id.* at 5.

aware of Cedric's illegal activities.⁵⁶ She also admitted that she sometimes helped him with his drug business, and even made a few retail sales when none of Cedric's gangmates were around.⁵⁷ For this activity, she was sentenced in 2002 to a ten-year mandatory minimum sentence.⁵⁸

Judge James D. Todd, another Reagan appointee, who sits in the Western District of Tennessee was troubled by the sentence. He spoke directly to her at the sentencing hearing

The tragedy of this case, Ms. Murphy, is that you made a very poor choice of boyfriends I have no doubt that this was Cedric Robertson's drug operation. . . . [But] a woman can stand by her man without becoming a criminal herself. . . . But you had the misfortune in this case of having a boyfriend who couldn't use his arms and his legs and couldn't care for himself, so you became his arms and his legs. And in doing so, you did, in fact, become a criminal. . . . [But] part of the problem in this case, Ms. Murphy, is that the sentencing guidelines passed by Congress have tied my hands as to what discretion I have. They have also passed mandatory minimums which also tie my hands.⁵⁹

In addition to the continuation of the "girlfriend" cases, my research suggests that another category of defendants, whose sentences deeply trouble some judges, has received virtually no media attention. These cases involve very lengthy sentences, sometimes life sentences without parole, meted out to more serious, but still non-violent, drug dealers. In these transcripts, the judges generally go out of their way to emphasize that the defendant's conduct

56. *See id.* at 38-39. During this period, she usually worked a part-time cashier's job and maintained her own residence. *Id.* at 38, 40 (discussing Lakisha Murphy's lifestyle during her relationship with Cedric Robertson).

57. *Id.* at 40.

58. *Id.* at 77. Because of two prior petty offenses, she was ineligible for the safety valve. *Id.* at 74 (referring to the limitations on mandatory sentences provided in 18 U.S.C. § 3553(f) (2000)). Perhaps on principle, or out of love or fear, Lakisha did not cooperate with the police. *Id.* at 80.

59. *Id.* at 72, 76. Although Cedric received 192 months, four of the other male co-defendants who were far more culpable received less time than Lakisha because they cooperated. Judge Todd also noted that "it seems unfortunate in this case that you're doing more time than some of these guys did . . . and there's nothing I can do about it." *Id.* at 80.

should be punished with a lengthy sentence. The excessiveness of the applicable mandatory minimum (sometimes exacerbated by the operation of the Guidelines) is nevertheless viewed as overkill by these judges. These comments are most common in cases that involve a mandatory life sentence based almost entirely on drug quantity.⁶⁰ Especially for judges with state court experience, life sentences without parole are deemed appropriate only for the most heinous murders and the most serious violent recidivists. In addition, because there is often no likelihood of release before death or old age, some judges are troubled that these defendants are offered no hope and no incentive for rehabilitation. However, because these defendants are not as obviously sympathetic, and because the judges themselves are not as eager to ally themselves with these men, this group of cases has received much less media coverage.⁶¹

Two cases from Chicago are illustrative. In 1992, Senior Judge Milton I. Shadur⁶² (N.D. Ill.) sentenced Rudy Martinez to a life term without parole for running a continuing criminal enterprise (CCE) that sold cocaine.⁶³ The Presentence Investigation Report (PSR) for this case reveals that Rudy never knew his father

60. Sometimes there is also an upward adjustment in these cases for the defendant's leadership role but the life sentence is still largely driven by drug quantity. See 28 U.S.C. §§ 994(i)(3), (5) (2000).

61. There are exceptions. For example, Donnie Clark, who was pardoned by President Clinton, got some media attention for his life sentence. However, that was more because of the notoriety of the federal operation which raided a quiet Florida backwater and resulted in the arrest of many prominent locals for cultivating marijuana. Paul Wilborn, *A Prisoner of the War on Drugs*, COMMUNITY TIMES, Jan. 23, 1994, at 1, available at 1994 WL 5316724.

62. Judge Shadur was a private lawyer for over thirty years before being appointed to the federal bench by President Carter in 1980. 1 ALMANAC OF FED. JUD. 38 (7th Cir. 2004). During his years on the federal bench, Judge Shadur has presided over many noteworthy cases, including desegregation of Chicago's schools and prison overcrowding litigation. *Id.* at 39. He wrote the first opinion validating the federal death penalty statute for drug-related killings, conducted the first trial under this statute, and developed a procedure for picking a "death qualifying" jury. *Id.* In the Almanac of the Federal Judiciary's anonymous survey of attorneys, many attorneys applauded Judge Shadur's legal skills, praising him as "one of the brightest men who ever walked onto the federal bench." *Id.* at 40.

63. Sentencing Transcript at 79-81, *United States v. Martinez*, (N.D. Ill. April 23, 1992) (No. 91 CR 53) (on file with author) [hereinafter *Martinez Sentencing Transcript*].

and that his mother suffered from depression and alcoholism.⁶⁴ By age fourteen Rudy was using and selling drugs and he became a member of the Latin Kings gang, following the footsteps of his older brother.⁶⁵ He was expelled from school and left home at age sixteen to live a life on the streets.⁶⁶ Rudy was arrested in 1991 for his part in a multi-state cocaine conspiracy that operated from 1988 to 1991 in Chicago and Minnesota.⁶⁷

According to the government's evidence at trial, Martinez was a supplier for his co-defendant Cynthia Pluff.⁶⁸ The government charged that he (and others), provided Pluff with wholesale quantities of cocaine on almost a weekly basis during the course of the conspiracy.⁶⁹ Pluff then sold the cocaine in Minnesota and allegedly gave Martinez some of the profits.⁷⁰ The participants were arrested after the DEA monitored a twenty-kilo delivery of cocaine to Martinez from Florida.⁷¹ Both Pluff and Martinez's friend, Chris Evans, testified against Martinez and received sentences of four and one half, and seven years respectively, in exchange for their testimony.⁷² A jury convicted Martinez of all but one count.⁷³

After trial, he did not deny selling drugs.⁷⁴ Rudy also acknowledged both a personal and illegal business relationship with

64. Presentence Report at 7-8, *United States v. Martinez*, (N.D. Ill. March 27, 1992) (No. 91 CR 53-2) (on file with author) [hereinafter *Martinez* Presentence Report].

65. *Id.* Rudy states he joined the Latin Kings at age twelve. Letter from Rudy Martinez, to David Zlotnick, Associate Professor of Law, Roger Williams University School of Law (Apr. 10, 2004) (on file with author).

66. Letter from Rudy Martinez, to David Zlotnick, Associate Professor of Law, Roger Williams University School of Law (Apr. 10, 2004) (on file with author).

67. *Martinez* Presentence Report, *supra* note 64, at 1. Rudy believes that the government only went back to the grand jury to request the superseding indictment that charged him with the CCE count because he refused to cooperate with the government. Letter from Rudy Martinez, to Families Against Mandatory Minimums at 1 (Oct. 30, 1996) (on file with author).

68. *Martinez* Sentencing Transcript, *supra* note 63, at 13.

69. Memorandum from Ronald S. Safer, Assistant U.S. Attorney, to U.S. Probation Officers at 1 (March 27, 1992) (regarding *U.S. v. Martinez*, Government's Official Version of the Offense) (on file with author).

70. *Id.*

71. *Id.* at 2.

72. See *Martinez* Sentencing Transcript, *supra* note 63, at 30-31.

73. *Martinez* Presentence Report, *supra* note 64, at 1.

74. *Id.* at 2.

Pluff and a close friendship with another co-conspirator, Evans.⁷⁵ He denied, however, being the head of the organization and knowledge about the full extent of the conspiracy.⁷⁶ He argued that his involvement included no more than 50 kilograms of cocaine (not the 150 kilograms as reported by the cooperating witnesses).⁷⁷ He also told the probation officer that he felt terrible that two other co-defendants, who he did not believe were involved in selling drugs at all, were also convicted on the basis of the cooperators who implicated him.⁷⁸ While he had prior arrests, this first conviction nevertheless carried a mandatory life sentence.⁷⁹

At sentencing, Mr. Martinez stated, "I have quite a lot to say here, because we are talking about my life here."⁸⁰ He spoke about why he felt it was unfair to hold him responsible as the leader/organizer for the drug activity in Minnesota of which he was completely unaware.⁸¹ He explained that Cynthia Pluff and her family members ran the operation in Minnesota and he was simply one of her suppliers. While he made some money from these transactions, he denied splitting the Minnesota retail profits with her, and, in general, he contested that he made the kind of money that the government alleged.⁸²

Nevertheless, Mr. Martinez told Judge Shadur, "I am a drug dealer. That's all I know how to do. That's all I have been doing all my life."⁸³ He made clear, however, that he did not want to use his upbringing as "a cop out either, because it's a cheap cop out."⁸⁴ But he did talk about his childhood, his involvement in selling drugs at a young age, and the temptation to rise above his family's poverty by any means possible.⁸⁵ Near the end of his comments, Mr. Mar-

75. *See id.* at 2, 10.

76. *Id.* at 2.

77. *See id.*; Letter from Rudy Martinez, to Families Against Mandatory Minimums at 1 (Oct. 30, 1996) (on file with author).

78. *Martinez* Presentence Report, *supra* note 64, at 2.

79. *Id.* at 7. Mr. Martinez reports that after his federal conviction and incarceration, state authorities indicted him for first degree murder but that he was found not guilty of that charge. Letter from Rudy Martinez, to Families Against Mandatory Minimums at 2 (Oct. 30, 1996) (on file with author).

80. *Martinez* Sentencing Transcript, *supra* note 63, at 36.

81. *Id.* at 36-42.

82. *Id.* at 41.

83. *Id.* at 44.

84. *Id.* at 45.

85. *See id.* at 46-50.

tinez said that ultimately, he could not blame his situation on his codefendants, the police, the prosecutor or even the judge.⁸⁶ He told Judge Shadur:

[A]gain I ask you if you could depart from these guidelines and if not it's understandable. And I know if you have to give me mandatory life – I know most likely it's going to come out of your mouth, and you are going to state that, because your hands are tied and there is nothing you can do about it because of this book, and I know that. I can't be upset with you I think about it sometimes, your Honor, and I would hate to be in your shoes, your Honor because it must be hard for a man to pass judgment on someone, and may be he does want to give him that time, and maybe he doesn't. But I pretty much know it's out of your hands, and that must be an awful feeling.⁸⁷

In response, Judge Shadur stated:

[F]or better or worse, fairness has departed from the system. It is no longer the operative standard for federal judges. And as a result in a way it is sort of an insult . . . to the process to talk of fairness within the context of standards that to such a great extent do not involve considerations of fairness.⁸⁸

Judge Shadur then addressed Mr. Martinez directly. He told Rudy that like many judges, he was troubled by the Guidelines that limit their ability to do justice in a particular case.⁸⁹ He noted that Congress' decisions "evidence [] more trust in prosecutors than in federal judges."⁹⁰ With that said, and recognizing the seriousness of Mr. Martinez's conduct, he sentenced him to 330 months on the drug conspiracy count (which was above the bottom of the range on that count).⁹¹ On the CCE count, however, the judge stated that he "simply does not have discretion" and he im-

86. *Id.* at 52 (Martinez stated, "I can't be upset with Mr. Safer or Ms. Pepper or Dvorak or Maloney. I can't be upset with no one but myself.").

87. *Id.* at 52-53.

88. *Id.* at 70.

89. *Id.* at 78.

90. *Id.*

91. *Id.* at 80.

posed the statutorily mandated life term.⁹² The judge concluded his remarks by telling Mr. Martinez that his comments about the sentencing laws in no way excused the “enormous seriousness of the offenses.”⁹³ His choices “affected the lives of an enormous number of people, the consumers of the drugs that are involved here.”⁹⁴

Later that year, Judge Shadur appeared on the *MacNeil/Lehrer Newshour* and spoke further about Mr. Martinez’s case. He said:

At the time of sentencing, this man gave an extraordinarily eloquent statement. . . . that [] led to the inevitable comment, gee, if he had only committed himself to something constructive, what could he have made of his life? It seems to me that it is – that it’s very difficult to say that, that someone in that position is sufficiently hopeless in terms of redemption.⁹⁵

Mr. Martinez is the father of two sons and he is very concerned about their future without him.⁹⁶ He told the judge, “I brought them into this world – me and Madeleine – and I am definitely responsible for them no matter where I go.”⁹⁷ In prison, Mr. Martinez reports that he has not given up on himself or the possi-

92. *Id.*

93. *Id.* at 82.

94. *Id.* Judge Shadur also noted that:

We are fighting what the administration likes to call a “War on Drugs.” It’s a war in that sense that I am afraid was lost before it began. But one reason that it was lost is that there is such profit in the trade, and because it becomes too easy to make the kind of choice that you made And I can understand why Congress has made the choices that it has, although in a lot of respects I do not agree with the method that has been chosen.

Id.

95. *MacNeil/Lehrer Newshour* (WNET New York television broadcast, Sept. 1, 1992) (transcript on file with the author). Judge Shadur also criticized cooperation agreements in this broadcast. He noted that the least culpable defendants are the ones least likely to be able to identify people higher up in the organization and the ones least likely to enter into cooperation agreements with the government. Thus, they are more likely to have to serve the full sentence. *Id.*

96. *Martinez* Presentence Report, *supra* note 64, at 15. Mr. Martinez told the probation officer, that if “he had healthy role models, perhaps he would not be in the position that finds himself in [].” *Id.*

97. *Martinez* Sentencing Transcript, *supra* note 63, at 51.

bility of freedom. He completed his GED and participates in a drug treatment program, parenting classes, and other educational opportunities.⁹⁸

The Lawrence Williams case provides another example of this category.⁹⁹ In that proceeding, Judge Matsch, who was appointed by President Nixon and served as both a state and federal prosecutor,¹⁰⁰ was required to sentence this defendant to a thirty-year term.¹⁰¹ Lawrence's father was wounded in Vietnam¹⁰² and his mother left the family when he was young.¹⁰³ His paternal grandmother raised him in what a family member called a gang-infested neighborhood.¹⁰⁴ While still in high school, Mr. Williams and his brothers began an anti-street gang society that became a group called TRIPS ("Total Reliance In Personal Success").¹⁰⁵ According to news reports, the group ran several legitimate businesses¹⁰⁶ and

98. Letter from Rudy Martinez, to Families Against Mandatory Minimums (Oct. 30, 1996) (on file with author).

99. This is the case from which I took Judge's Matsch quote. *See supra* note 2.

100. 1 ALMANAC OF FED. JUD. 11 (10th Cir. 2004). Judge Matsch was a bankruptcy judge for almost ten years before his elevation to the district court. *Id.* Lawyers similarly gave Matsch top marks for his legal knowledge and administration of the courtroom. *Id.* at 12-13. An example of a comment made by a lawyer who had practiced before Judge Matsch is, "[h]e is a top-rate judge in all categories: intelligence, demeanor, fairness. He's outstanding." *Id.* at 12. Criminal defense lawyers consider him fair and tough on both sides. *Id.* at 13. On sentencing, defense lawyers believe that Judge Matsch stays within the guidelines. *Id.* One said, "It really depends on the case. I guess I'd describe his sentencing as just." *Id.* However, another noted, "I'd say he tends to sentence at the middle-to-upper end of the guidelines." *Id.*

101. *Williams* Sentencing Transcript, *supra* note 2, at 42.

102. Presentence Investigation Report at 6, *United States v. Williams* (D. Colo. Jan. 3, 1996) (No 94-CR-254-03-M) (on file with author) [hereinafter *Williams* Presentence Report]. Williams's father died in 2001 of cancer, which may have been the result of exposure to Agent Orange during the Vietnam War. Letter from Lawrence P. Williams, to David Zlotnick, Associate Professor of Law, Roger Williams University School of Law (Dec. 4, 2003) (on file with author).

103. *Williams* Presentence Report, *supra* note 102, at 6.

104. *Id.*

105. *Id.* Mr. Williams claimed that the TRIPS organization was misunderstood by the authorities and was actually a legitimate endeavor. Judge Matsch concluded the jury verdict was correct but he did note at sentencing that the TRIPS group did do some good and positive things in the community. *Williams* Sentencing Transcript, *supra* note 2, at 27, 40.

106. *See* John C. Ensslin, *Gang Task Force Busts Big Drug Ring*, ROCKY MOUNT. NEWS, Aug. 27, 1994, at 1A. They sold pagers, ran an auto-body shop,

participated in volunteer anti-gang activities in Denver. The police asserted, however, that the group was also affiliated with drug gangs from the Chicago South Side, a charge Mr. Williams denied.¹⁰⁷ Nevertheless, a long-term investigation resulted in a multi-count indictment in which most of the participants pled guilty in exchange for cooperation agreements.¹⁰⁸

Mr. Williams went to trial and contested much of the evidence presented through cooperating witnesses.¹⁰⁹ The government's theory was that Mr. Williams was a mid-level supplier for the TRIP's crack cocaine business in Denver in the early 1990s.¹¹⁰ The jury acquitted on some charges, but convicted him of conspiracy to possess crack cocaine with the intent to distribute.¹¹¹ At sentencing, Lawrence continued to assert that more culpable co-defendants lied about his involvement to help themselves.¹¹² He told the judge that it was wrong that his refusal to "lie on some people I know nothing about" resulted in a sentence ten times more severe than others in the case.¹¹³ He concluded by telling the judge he was "seeking justice and fairness" and that his "life now is in your hands."¹¹⁴

Judge Matsch first expressed no doubt about the verdict and found that Mr. Williams should be held responsible for one and a half kilos of crack.¹¹⁵ Thus, although Mr. Williams had no previous record, his guideline range was 360 months to life.¹¹⁶ Judge Matsch went on to say,

And my discretion here is limited to whether there should

provided security services, ran a recording studio, did residential construction and remodeling, and ran party and club activities. *Williams* Presentence Report, *supra* note 102, at 8.

107. *Williams* Presentence Report, *supra* note 102, at 6.

108. *See id.* at 1; *see also Williams* Sentencing Transcript, *supra* note 2, at 39 (Williams claiming that he was convicted because of "perjury testimonies" that were exchanged for smaller sentences).

109. *See Williams* Sentencing Transcript, *supra* note 2, at 32-38 (discussing the conflicting testimony/evidence presented at trial).

110. *See* Government's Sentencing Statement at 12-13, *United States v. Williams* (No. 94-CR-254-M) (on file with author).

111. *See Williams* Presentence Report, *supra* note 102, at 2-3.

112. *Williams* Sentencing Transcript, *supra* note 2, at 39-40.

113. *Id.* at 40.

114. *Id.*

115. *Id.* at 37.

116. *Id.* at 41. His Guideline offense level was increased two points for his leadership role and two more for his possession of a gun. *Id.* at 37-38.

be any punishment greater than 360 months, and I'm not going to impose any punishment greater than that. That is a very great punishment all in and of itself. And the purpose of all of that, as I've already indicated, is to try to warn other people away from it, principally, and I've sentenced a lot of people and more keep coming. So I don't know. But that's what I must do here.¹¹⁷

Mr. Williams' prison reports are good. He has been working, taking classes, and immersing himself in the prison sports program.¹¹⁸ He is also involved with an at-risk youth counseling program called "Jericho Road."¹¹⁹ This program was founded at FCI Englewood in Colorado by inmate Peter Ninemire, who was pardoned by President Clinton in 1995.¹²⁰ Unlike predecessor programs like "Scared Straight," Jericho Road counselors seek to build rapport and trust with at-risk youth.¹²¹ Quoted in a newspaper article concerning the program, Lawrence states, "It's about showing a child someone cares and seeing life through their eyes. . . . We try to match their realities and show them that we've been down that path that they are going, and it's a dead end."¹²² Williams has several children, and in his writing from prison, he discusses his hope of returning to them before the expiration of his thirty-year sentence.¹²³ He also wrote to Judge Matsch about this subject in 1999, stating,

I'm having [a] very difficult time dealing with the preas-

117. *Id.* at 41.

118. See Brian Forbes, *Recreation as Religion*, COLUMBINE COURIER, June 11, 2003, at 10A. He explains that sports help to relieve stress and ease his mind to make the time go faster. When he was younger, he played semipro football in Portland and spent a year with the BC Lions in the Canadian Football League. *Id.*

119. See Keith Miller, *Rerouting a Dead-End Path*, COLUMBINE COURIER, June 4, 2003, at 14A.

120. *Id.*

121. *Id.*

122. *Id.*

123. Letter from Lawrence P. Williams, to the World (on file with author); see also Lawrence "Pierre" Williams, Prisoner of the Drug War available at <http://november.org/thewall/cases/williams-1/williams-1.html>. Williams initially reported to U.S. Pretrial Services Officers Joni A. Bedell that he had fathered approximately nine children. *Williams* Presentence Report, *supra* note 102, at 7. However, Williams subsequently reported that he has fathered only four children. *Id.*

ure [sic] of watching them grow up out there in that world without there [sic] father. I know I have made some very selfish decisions in my life to even be in a situation such as this one. Then although I am responsible, I was not aware of the consequence. Not only am I sentenced to 30 year[s]. My family is doing the time with me. My children are doing the time with me.¹²⁴

He concluded with a request for a sentencing adjustment based on his post-sentencing rehabilitation.¹²⁵ Judge Matsch replied in a brief note expressing his legal inability to change Mr. Williams sentence because the Court of Appeals had affirmed his sentence.¹²⁶ Williams has a commutation petition pending but he is not projected to be released until 2020.¹²⁷

III. DISPARITY, DISPARITY, DISPARITY

Shifting to another focus of my research, this Part examines three important aspects of the relationship between judicial discretion and sentencing disparity. First, while conservatives have argued that liberal judges are undermining Congressional and Sentencing Commission efforts to eliminate sentencing disparity, my interviews reveal a more nuanced and non-partisan explanation for why some judges depart more than others. Second, this Part explores how the federalization of crime has increased regional sentencing disparity. Thus, while chastising the judiciary, the Congressional role in aggravating sentencing disparity has been largely overlooked. Third, in many of my interviews judges argued that sentencing discretion cannot be eliminated from the criminal justice system no matter what Congress does. Thus, the past two decades of sentencing "reform" has largely transferred this power from the judiciary to the prosecution and police. Here, a case profile demonstrates how prosecutorial and police choices

124. Letter from Lawrence P. Williams, to The Honorable Chief Judge Richard P. Matsch, Federal District Court Colo. (March 2, 1999) (on file with author).

125. *Id.*

126. Letter from The Honorable Chief Judge Richard P. Matsch, Federal District Court Colo., to Lawrence P. Williams (Nov. 23, 1999) (on file with author).

127. U.S. DEPT. OF JUSTICE FEDERAL BUREAU OF PRISONS, PROGRESS REPORT LAWRENCE WILLIAMS, Reg. No. 25599-013 (Aug. 31, 2001).

result in extreme disparities that outrage the sentencing judge. This Part, however, should not be read as a condemnation of the Sentencing Guidelines by the author or the judges interviewed. Rather, discretion and its byproduct, disparity, should be managed with the help of the judiciary, not driven underground or transferred to a partisan. In addition, Congress must acknowledge its own contribution, not seek to place all the blame on the judiciary.

A. Judicially Created Disparity: Are Frequent Departers "Liberal" Law Breakers?

The ideal that similarly situated offenders should receive approximately the same sentence is unassailable. As recounted in the original debate over the Sentencing Reform Act of 1984, sentences for similar offenses should not vary widely from judge to judge in the same courthouse. Nor should a bank robber in North Dakota receive a twenty-year sentence while one in New York is put on probation. A tension exists, however, between the notion of equal treatment and the concept of individualized sentencing, which recognizes that each offense and offender is in some way unique. Even with guidelines that incorporate differences in criminal history and role in the offense, judicial sentencing discretion remains necessary because neither Congress nor a sentencing commission can ever anticipate all the variables that might be relevant to a particular case and defendant.

Nevertheless, to conservative critics in Congress and the Justice Department, judicially created sentencing disparity continues to be the primary problem in the federal criminal justice system. They believe that pockets of liberal judges are not just "tailoring" sentences to fit the offender, but rather are using their departure power to impose lenient sentences, thereby wrecking legislative and Commission efforts to eliminate sentencing disparity and severely punish criminals.¹²⁸ To support their claims, they have pointed to the ever-increasing percentage of sentences that fall

128. In support of the recent amendment that bears his name, Rep. Tom Feeney (R -Fl.) claimed that federal judges were giving sex offenders no more than a "slap on the wrist" and with "increasing frequency." Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary: Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, THE CHAMPION, June 2003, at 6, 8, available at Westlaw, 27-JUN CHAMP 6.

outside the presumptive Guideline range and an overall decrease in drug sentences over the past ten years.¹²⁹ Relying on these facts, Congress passed the divisive Feeney Amendment last year, which cut back even further on judicial sentencing discretion and outraged many members of the judiciary across the political spectrum.¹³⁰

While, as discussed in the next section, many of the conservative claims about judicial departures are patently false, one wonders whether there actually are “pockets” of liberal judges out there who routinely violate the Guidelines by granting downward departures because they disagree with the otherwise required stiff penalties. Because most of the judges in my study expressed disagreement with at least one sentence, it seemed logical to assume that my methodology would uncover these judges.¹³¹ Interestingly, the hundreds of cases and transcripts I reviewed reveal quite the opposite. In fact, like Judge Matsch and his predecessors in the ante-bellum North, the vast majority of federal judges enforce the law and the Guidelines as written, even when they are expressly unhappy with the result. To the extent that a strict application of a particular Guideline or statute is avoided, the parties, including the prosecutor, usually agree that justice will be better served.¹³²

My research, however, did identify a small group of judges who depart downward more than their colleagues. Moreover, the backgrounds of these judges do appear to be more “liberal” or defense oriented than the majority of the federal bench. Nevertheless, they constitute such a small percentage of the federal bench that their departures cannot be driving the numbers. But more importantly, in my interviews with some of these judges, their explanations for such departures are more complex and defensible than the conservative rhetoric suggests. First and foremost, the judges contend that every one of their departures is completely de-

129. Bowman and Heise, *supra* note 37, at 1065.

130. David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 229-236 (2004).

131. I found cases by reviewing inmate records at a public interest group that asked the inmates whether their judge had criticized sentencing policy or commented on the harshness of their sentence. To ensure a less biased sample, I also attempted to interview a random sample of judges in select jurisdictions.

132. *See supra* note 40.

fensible under the Guidelines. This claim appears valid because very few were appealed by the government, and fewer were reversed by the Courts of Appeals.

The judges explain that in most instances, the facts supporting the departure existed, but that someone – the judge, probation officer or defense attorney – simply had to dig deeper to find them. These judges believe that more judges do not depart more often because information is not brought to their attention and that they do not have the background or inclination to go looking for it. For example, rather than accept the government proffer on drug quantity, one judge stated that she sometimes decides *sua sponte* to hold a quantity hearing.¹³³ Or, the information necessary to justify an aberrant behavior or extraordinary family circumstances departure might require the probation officer to make a trip across the border to Mexico or have a witness brought into the country to testify. Thus, while the motivation for a more probing inquiry might be the judge's view that the proposed sentence is too high, judge-to-judge disparity in a Guideline regime can depend more upon the degree of effort exerted by the players and less upon illegal manipulation by a biased judge.¹³⁴

B. *Non-Judicially Created Disparity*

In 2003, the United States Sentencing Commission issued a report clearly refuting the notion that judges, liberal or otherwise, are the chief generators of sentencing disparity.¹³⁵ Ironically, according to this report, Congress and law enforcement currently ac-

133. Interview with anonymous federal judge (Nov. 17, 2003) (notes on file with author).

134. Of course, a small number of judges still sentence how they see fit, regardless of the law's clear mandates. See Dan Herbeck, *Elfvig Faces Scrutiny Over Lenient Drug Sentences*, BUFFALO NEWS, Sept. 5, 2003, available at 2003 WL 6458534. However, in those cases, appellate review should and does seem to be working to address these concerns. The extent of this sub-minority is very much in debate, even within the judiciary. At a sentencing conference I attended at Yale in 2002, a respected federal judge made a short impromptu speech decrying those judges who manipulate the Guidelines to lower sentences, arguing that such action was unprincipled and unlawful.

135. UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (Oct. 2003), <http://www.ussc.gov/depart rpt03/depart rpt03.pdf> [hereinafter 2003 SENTENCING COMMISSION REPORT].

count for almost 70% of all downward departures.¹³⁶ Specifically, the two largest types of downward departures in federal drug cases are the congressionally approved and government initiated fast-track programs and substantial assistance agreements.

A similar study by the United States General Accounting Office (GAO) provides further support for these contentions.¹³⁷ That study found that 56% of federal drug sentences were within the applicable guideline range. Of the remaining 44%, over half (28% of all drug sentences) were departures due to substantial assistance motions.¹³⁸ The GAO's findings on mandatory minimums were similar; slightly more than half of drug sentences fell below the mandatory minimum with about half of those departures due to substantial assistance motions.¹³⁹ The safety valve accounted for most of the remaining departures (as that is the only other legal means for going below a mandatory minimum).¹⁴⁰ The GAO's findings on fast-track departures are less conclusive due to record keeping gaps and inconsistencies, especially in the districts that made the most extensive use of the fast-track mechanism in the subject period.¹⁴¹

136. "When substantial assistance departures are combined with the other government initiated downward departures identified . . . the government accounts for over two-thirds (69.3%) of all departures below the guidelines." 2003 SENTENCING COMMISSION REPORT, *supra* note 135, at 67-68. "The Commission believes that fast-track programs account for a substantial proportion of government initiated downward departures." *Id.* at v; see also Mark Allenbaugh, *Fighting the Feeney Fear Factor: The Federal Courts Strike Back*, THE CHAMPION, Jan./Feb. 2004, at 46 (countering the assumption that federal judges are responsible for the downward trend in sentencing).

137. UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 (Oct. 2003), <http://www.house.gov/judiciary/d04105.pdf> [hereinafter 2003 GAO SENTENCING REPORT].

138. *Id.* at 12.

139. *Id.* at 14-15.

140. *Id.*

141. In fact, the GAO report notes that it only counted cases as fast-track departures where the judge explicitly listed that reason; thus not counting hundreds of cases that listed "plea bargain" as the reason for the departure, when in fact, the plea bargain was based a fast-track disposition. *Id.* at 26, 67-68. The Judicial Conference Committee on Criminal Law, in a letter written by Hon. Sim Lake, Chair, criticized the report for having only two categories of departures from the Guidelines, substantial assistance and "other departures." *Id.* at 77-78 (the GAO included the letter from Judicial Conference in the Appendix to the study). This latter category combines both fast-track departures, which are government initiated, with true judicial departures.

Without question, judicial departures have never exceeded 18.1% of all criminal sentences in a given year prior to 2001.¹⁴² This number sounds even more reasonable given that the first Sentencing Commission estimated that judicial departures would run about 20%.¹⁴³ While isolating judicial departures in just drug cases is problematic due to data collection difficulties, one interpretation of the recent data is that judicial downward departures made over government objection in drug cases have run only about 10%,¹⁴⁴ even less than the average for all cases. Of course, as discussed later in this section, government-initiated downward departures are just the tip of the iceberg of government's influence on the ultimate sentence. Investigation and charging decisions play an even a greater role, but those decisions are made behind closed doors and cannot be easily studied.

1. *Fast-Track Departures and Federalization of Crime*

Started on an ad hoc basis by the Justice Department,¹⁴⁵ and now formalized by statute,¹⁴⁶ the fast-track program allows the Justice Department to offer reduced sentences to defendants accused of certain crimes in exchange for quick guilty pleas and waiver of other rights, such as contesting deportation.¹⁴⁷ Currently employed in the border districts of the Southwest that have been overwhelmed by drug and immigration crimes, the fast-track system explicitly condones a separate guideline regime for these ju-

tures. This "overly general categorization of 'other downward departures' is not a meaningful way to analyze sentencing actions," the Committee wrote. *Id.* at 77. "Moreover, this approach to reporting the data has resulted in confusion, misinformation, and misuse by some who mistakenly infer that all 'other departures' are attributable to judges." *Id.* at 78. Thus, this database does not clearly indicate how many departures from the Guidelines are attributable solely to judges.

142. 2003 SENTENCING COMMISSION REPORT, *supra* note 135, at 31-32 (excluding statistics of substantial assistance downward departures the report states "18.1% was the average rate of downward departures in all 94 federal judicial districts"). This average was substantially less throughout the 1990s. *Id.* at 32.

143. See S. REP. NO. 98-223, at 49 n.71 (1983).

144. 2003 GAO SENTENCING REPORT, *supra* note 137, at 78.

145. Vanessa Blum, *Ashcroft Memo Endorses Plan for Swift Pleas: New Policy Codifies "Fast Track" Cases Processing in Border States*, LEGAL TIMES, Sept. 9, 2003, at 1, available at WL 9/29/2003 LEGALTIMES 1.

146. Pub. L. No. 108-21, 401(m)(2)(B), 117 Stat. 650, 675 (2003).

147. *Id.*

risdictions.¹⁴⁸ Now, immigration and drug defendants in New Mexico are, by law, treated differently than offenders convicted of the crimes in other jurisdictions. While defenders claim the fast-track system is a temporary measure to deal with emergency situations, it represents a formal abandonment of the principle of equal treatment for all defendants in the federal system mandated by the Sentencing Reform Act. More importantly, for purposes of the debate over judicial discretion, fast-track departures are not attributable to judges. Yet, the inclusion of the border state fast-track departures in national downward departure statistics has been improperly used to justify the recent attacks on judicial discretion.

But to federal judges, the fast-track program is just the tip of a more pernicious problem that contributes to sentencing disparity – the federalization of local crime. Since 1986, federal prosecutors have been bringing drug cases in the federal courts that in the past would have been handled in state courts.¹⁴⁹ Local drug crimes could be brought in federal court under federal law prior to the mid-1980s, but the low threshold mandatory minimums in the 1986 Act enticed police and prosecutors to dramatically increase the filing of those cases in federal court.¹⁵⁰ Because many federal drug cases are actually generated by the narcotics units of local police departments, the customs and priorities of these departments influence which cases (and how often) they will seek federal, rather than state, prosecution.¹⁵¹

148. According to Professor Frank Bowman “the Justice Department has let the camel’s nose under the tent.” Blum, *supra* note 145, at 1.

149. Sara Sun Beale, *Get Drug Cases Out of the Federal Courts*, WALL ST. J., Feb. 8, 1990, at A16, available at 1990 WL-WSJ 589385 (reporting on the rise in drug cases in the late 1980s in federal court).

150. “In the immediate aftermath of the guidelines and mandatory minimums, drug cases in federal district court constituted approximately forty percent of the federal docket and account[ed] for 44% of criminal trials and roughly 50% of criminal appeals.” *Id.*

151. The penalties in each state system also have an impact. While federal penalties are often higher, some states have their own draconian mandates which lead local police to state rather than federal court. See, e.g., Gary Heinlein, *Michigan Eases Drug Sentences*, DETROIT NEWS, Dec. 29, 2002, at 1, available at 2002 WL 102339705 (reporting Michigan’s repeal of its own mandatory minimum regime, known as the 650 lifer law, which was more severe than their federal counterpart).

Because no uniform rules govern federal prosecutor's discretion over which cases to accept for prosecution in district court, different choices made by federal prosecutors in separate jurisdictions result in tremendous variation. Thus, the decision about where to prosecute a case in the first place is perhaps the most pernicious and immeasurable cause of disparate treatment of like offenders in the current system. Some of these decisions are based on workload. During the cocaine epidemic in the late 1980s, the U.S. Attorney's Office in the Southern District of Florida rarely took a federal cocaine case not involving multiple kilos.¹⁵² In the same period in the District of Columbia, ideology ruled and resources were greater. Thus, that office's policy required that every case that qualified for a mandatory minimum be brought in federal court.¹⁵³

Federalization issues lead to more disparity even after indictment. Many federal prosecutors and judges had their start in the local system. Many of these players have not completely discarded the local values and customs towards these offenses. Thus, there tends to be an uneven implementation of the harsh federal penalties depending on the degree of fealty of the local U.S. Attorney to Washington and varying degrees of autonomy for line prosecutors in a given office. Moreover, some variation in U.S. Attorneys' charging and plea practices are not just the result of idiosyncratic traditions, but often reflect rational choices about local crime patterns. Thus, a uniform policy for accepting cases or plea practices arguably would not make good prosecutorial sense either.

For example, while possession with intent to distribute a kilo of cocaine carries a single penalty under federal law, the crime can be committed under very different circumstances and by different kinds of offenders across the nation. Prosecutors and judges in Arizona might very likely look at a poor Mexican defendant paid \$100 to carry a kilo of cocaine across the desert into Arizona quite

152. Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, And Other Lessons in Learning to Love the Federal Guidelines*, 1996 WIS. L. REV. 679, 739 n.219 (1996); see also Karl Ross, *Commissioners Go Lukewarm on Boosting Tribe's Autonomy*, MIAMI HER., Apr. 11, 2003, at 2003 WL 17410398 (discussing the district's continued prosecution of cocaine trafficking only for large quantities).

153. See Zlotnick, *supra* note 130, at 222 n.78.

differently than the defendant who possessed the same quantity of cocaine with the intent to distribute it in \$500 bags to a bunch of Wall Street investment bankers. Yet, for purposes of the mandatory minimum, the quantity is the sole determinant.¹⁵⁴

2. *Substantial Assistance Disparity*

While charging policies and federalization are problematic, the chief complaint of federal judges is the impact of substantial assistance agreements. Like charging decisions, cooperation disparities run in every direction, both intra- and inter-case, and from district to district. With regard to intra-case disparity, cooperation agreements allow judges to disregard both the mandatory minimum and the sentencing guidelines. Thus, in these cases, judges who disagree with the harshness of the regime can sentence as they see fit. This gulf between sentences for non-cooperating and cooperating co-defendants can be enormous. The cooperation system also punishes defendants that were charged alone or who were marginal participants or romantic partners. These later defendants often have insufficient information, or legitimate fears of retribution, which results in their having to serve mandatory minimums while more culpable cooperators get lesser sentences.

Cooperation agreement disparity is particularly egregious in cases where the government turns a “big-fish” against his retail dealers, and then seeks leniency for their cooperator at sentencing.¹⁵⁵ Efforts to litigate cooperator disparity issues, however, are almost never successful. For example, in Rudy Martinez’s case, his counsel sought a downward adjustment because the cooperating defendants received substantially reduced sentences from another judge.¹⁵⁶ Under controlling law, Judge Shadur had to reject this intra-case disparity argument.¹⁵⁷ In doing so he noted, however,

154. 2003 GAO SENTENCING REPORT, *supra* note 137, at 13.

155. In some cases, prosecutors have recommended a light sentence, even probation. In most, they tend to stand silent or simply recount the level and kind of cooperation.

156. *Martinez* Sentencing Transcript, *supra* note 63, at 30-32. The judge ultimately gave Mr. Martinez a two point adjustment for acceptance of responsibility though that did not affect the statutory life sentence on the CCE count. *Id.* at 79.

157. *Id.* at 33. Judge Shadur now writes, “my recollection is that Pluff was a materially larger player in the drug market than Martinez – he was not her

he would not have accepted the pleas from and sentences for these codefendants because "I view [] that as swallowing the gun."¹⁵⁸ He concluded that this kind of disparity argument has "for better or worse [been] consistently rejected [] in some quite horrifying decisions."¹⁵⁹

The lack of any rules for sentencing under cooperation agreements also allows for unreviewable disparities between judges, the bugaboo of the Sentencing Reform Act. Some judges, cognizant of this unfairness, give less credit for cooperation to reduce intra-case disparities.¹⁶⁰ In some districts, judges have experimented with standardized downward departures for cooperation.¹⁶¹ They depart downward according to a schedule that specifies a number of guideline levels or downward percentage of the original Guideline sentence. Because there is no cooperation guideline from the Commission, however, these efforts at self-regulation have led, in turn, to regional disparities in the treatment of cooperators.¹⁶²

Disparity in the sentencing of cooperators from judge to judge can be measured and studied. For example, cooperator disparity is readily apparent in the Martinez and Williams cases discussed in Part II.¹⁶³ However, some judges suspect that an additional level of disparity exists in cooperation cases long before their sentencing decisions. They believe prosecutors routinely assist cooperators in reducing their sentencing exposure by failing to disclose all the relevant conduct that might impact the initial guideline offense level. In some cases, this agreement is formalized in a plea agreement that stipulates to a drug quantity far below the amounts that could be discovered with additional investigation, or were already known to investigators. This preferential treatment

only supplier. And that made it all the more troublesome that she was able to strike a deal that didn't at all reflect the seriousness of her criminal involvement, in contrast with that of Martinez (as serious as his activities were)." Letter from Milton I. Shadur, Senior Judge, U.S. Dist. Court for the N. Dist. of Ill., to David Zlotnick, Associate Professor of Law, Roger Williams University School of Law (Nov. 24, 2003) (on file with author).

158. *Martinez* Sentencing Transcript, *supra* note 63, at 33.

159. *Id.*

160. Interview with anonymous federal judge (Nov. 17, 2003) (notes on file with author).

161. Interview with anonymous federal judge (Nov. 3, 2003) (notes on file with author).

162. 2003 GAO SENTENCING REPORT, *supra* note 137, at 4.

163. See *supra* notes 63-127 and accompanying text.

leads to disparities that cannot be detected by the regular reporting methods, even the new ones mandated by the Feeney Amendment. One judge interviewed for my study told an even more disturbing tale. He had heard of a case or cases in which cooperators were prosecuted in state court where there were no mandatory minimums, while the people they “snitched on” went to federal court where they faced mandatories and much higher sentences.¹⁶⁴

3. *Law Enforcement Created Disparity*

Judges and commentators are also starting to focus on how police and prosecutorial discretion create hidden disparity in non-cooperation cases. Here, the differences are based not upon efforts to help a defendant, but by degrees of investigative diligence and the prosecutorial fervor of particular agents and prosecutors. First, the police make choices in their investigations that affect both charging and relevant conduct calculations. In undercover operations, the number of controlled buys made and the quantities requested from a target before an arrest will often determine whether and which mandatory minimum will apply.¹⁶⁵ After a conspiracy is busted, efforts to “flip” members and obtain detailed debriefing also vary. Sometimes, the case is presented to the grand jury and tried simply based on the drugs seized in a single bust, whereas other agents and prosecutors endeavor to develop a historical record that leads to an indictment that covers a much longer period of time (and hence greater quantities).¹⁶⁶ In cases where many defendants cooperate and only a few go to trial, each

164. Interview with anonymous federal judge (Nov. 17, 2003) (notes on file with author).

165. Some defendants assert that informants or undercover cops ask for much larger amounts than the defendants normally dealt in order to meet a mandatory minimum threshold. *E.g.*, *United States v. Watkins*, 179 F.3d 489, 503 (6th Cir. 1999). Others assert that they were specifically asked for crack rather than powder so that the 100:1 ratio would apply. *E.g.*, *United States v. Shepherd*, 102 F.3d 558, 565-67 (D.C. Cir. 1996). The doctrine of sentencing entrapment can address a few of the most outrageous cases, but in most cases there is no relief available.

166. Defendants, too, contribute in a minor way to these disparities by the decisions they make as well. A drug courier who invokes his *Miranda* rights and does not cooperate will likely be sentenced only for the amount of drugs he is caught with whereas the one who admits to ten previous trips may end up with substantially more relevant conduct.

cooperator seeks to attribute a greater role to the remaining defendants. Agents and prosecutors who are conscientious and careful when they debrief cooperating witnesses may be able to elicit and corroborate accurate information but others seem to accept drug quantity estimates from cooperators at face value or inadvertently give cooperators information or hints about what they want to hear.

Prosecutorial charging decisions also play a tremendous role in determining the ultimate sentence. What offenses to charge as well as decisions about whether to file recidivist enhancement papers, request role adjustments, or include all possible relevant conduct lead to tremendous variations in the sentences of similarly situated defendants. Attorney General Ashcroft clearly recognized this issue in a September 22, 2003 memorandum to all federal prosecutors in which he instructed them to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts."¹⁶⁷ That means, Ashcroft wrote, the offenses that "generate the most substantial sentence or mandatory minimum."¹⁶⁸ Whether this directive from on high will work is debatable, since local U.S. Attorneys' offices and individual assistants have historically had a great deal of autonomy.¹⁶⁹

One example of disparity created solely by the police investigative tactics and charging policy is the Michael Prikakis case from the Northern District of Florida. Michael Prikakis was born on a farm in Greece and immigrated to the United States in 1985 after he married a staff sergeant in the U.S. Air Force.¹⁷⁰ He and

167. Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing*, at 2 (Sept. 22, 2003) <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrghmem.pdf>.

168. *Id.*

169. "The first fundamental flaw of the federal mandatory minimum penalty scheme is the elimination of judicial discretion and the increase in prosecutorial discretion, especially in charging and substantial assistance motions for a guidelines departure." Celesta A. Albonetti, *The Effects of the "Safety Valve" Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offenders Ethnicity*, 87 IOWA L. REV. 401, 407-08 (2002).

170. Presentence Report at 8, *United States v. Prikakis*, (N.D. Fl. 1991) (No. 91-03099-01/RV) (on file with author) [hereinafter *Prikakis* Presentence Report].

his wife had two children together.¹⁷¹ He had owned a restaurant in Greece but helped to support his family in America as a commercial painter.¹⁷² Though both Michael and his wife were working in 1991, they had more than \$5,000.00 in credit card debts and liens against their cars.¹⁷³

Mr. Prikakis had no prior contacts with the law until a confidential informant tipped off the Walton County police that he was selling powder cocaine in the area.¹⁷⁴ Over a seven day period in September, 1991, Prikakis sold a total of 86 grams of powder cocaine to a team of undercover officers – approximately \$5,000.00 worth of drugs – during three controlled buys.¹⁷⁵ Under the Guidelines, the sentence for this amount of cocaine would have been fifteen to twenty-one months.¹⁷⁶ The undercover agents, however, reported that Prikakis had a pistol with him during each sale.¹⁷⁷ Because of the presence of the gun, the prosecutor elected to charge him with three separate counts of selling cocaine and three separate counts of possession of a firearm during a drug trafficking offense.¹⁷⁸ Prikakis admitted selling the cocaine and pled guilty to the drug charges, but contested the gun counts at trial and was convicted.¹⁷⁹

Under the prevailing law in the Eleventh Circuit, each gun charge carried a consecutive and escalating mandatory minimum – five years for the first count and twenty years for each subsequent count – thereby adding forty-five years to the initial fifteen

171. *Id.*

172. *Id.* at 9.

173. See Families Against Mandatory Minimums, Profiles of Injustice: Federal Case Profiles, #02712-017 Michael Prikakis, http://www.famm.org/Fed%20men/prikakis_profile.htm.

174. *Prikakis* Presentence Report, *supra* note 170, at 3.

175. See *id.* at 4.

176. See *id.* at 5-7.

177. See *id.* at 4.

178. See *id.* at 5-7.

179. *Id.* at 3. During the first sale, the officers reported that Mr. Prikakis threatened them with the gun and warned them not to cause him any trouble. During the second sale, also according to the undercover officers, the gun was on the armrest of his car. During the third sale, when he was arrested, the government simply reported confiscating the gun. *Id.* at 4. Mr. Prikakis admits the gun was in the car when he was arrested but denies ever threatening the officers or displaying the weapon. Letter from Michael Prikakis, to Families Against Mandatory Minimums (no date provided) (on file with author).

to twenty-one month sentence for the drugs.¹⁸⁰ The fact that the same legally registered gun was used each time was irrelevant. The stacked gun counts resulted in a final sentence of forty-six and one half years.¹⁸¹

Judge Vinson was the presiding judge. He had been appointed by President Reagan after a career in private practice.¹⁸² When Judge Vinson appeared before the Senate Judiciary Committee in 1983, he concurred that drugs are “the most serious overall crime problem facing this country,” and therefore he “would favor maximum sentences in those cases.”¹⁸³ Nevertheless, Judge Vinson thought that the Prikakis case was “[t]he most absurd situation I’ve ever seen, and to me it constitutes an abuse of the prosecutorial discretion . . . to impose a forty-five year mandatory minimum consecutive sentence for this offense.”¹⁸⁴

It was, as Judge Vinson put it, essentially one drug bust and there was “no evidence to connect him with any kind of a [distribution] ring.”¹⁸⁵ Judge Vinson also expressed his concern that because the case involved controlled buys, the government had complete and unfettered discretion to increase the defendant’s mandatory time by prolonging the investigation and making more buys. “[I]t leaves it entirely in the discretion of the law enforcement and the prosecutorial arm to determine the sentence of the defendant, knowing that you’ve got this [924(c)] statute.”¹⁸⁶ He said the prosecutor was “essentially bypassing the judge’s discretion” by charging the defendant in this way.¹⁸⁷ Judge Vinson also thought that the jury that convicted Mr. Prikakis would be shocked to learn of the sentence; “I think they would rise up in in-

180. *Prikakis* Presentence Report, *supra* note 170, at 7.

181. *Id.*

182. 1 ALMANAC OF THE FEDERAL JUDICIARY 27 (11th Cir. 2004).

183. *Id.* at 26-27. Lawyers give Judge Vinson favorable marks for legal ability and demeanor. One typical comment in lawyers surveyed was, “He is a fine person and a good judge.” Criminal defense lawyers say Vinson is fair but one noted that he is “prosecution oriented because the system is prosecution oriented.” Criminal defense lawyers say he sentences within the moderate to heavy range but he can be persuaded to depart. *Id.*

184. Sentencing Transcript at 15, *United States v. Prikakis*, (N.D. Fl. 1991) (No. 91-03099-01/RV) (on file with author) [hereinafter *Prikakis* Sentencing Transcript].

185. *Id.* at 14-15, 56.

186. *Id.* at 49.

187. *Id.* at 46.

dignation, as anybody else would, if they know about how this law is being applied and construed in circumstances such as this, which is essentially one underlying offense."¹⁸⁸

Judge Vinson compared this case to reports of the penalties imposed in other countries and said the case was more reminiscent of the kinds of outlandish drug penalties in countries like Turkey or Iran.¹⁸⁹ He added

And I don't think this court can be silent as I impose a sentence that clearly to me is totally unwarranted, is certainly cruel and unusual, constitutes to me a violation of due process by the way it was brought about, and in every respect cannot be viewed as being something that the people of this country are going to have faith in. If this is the kind of punishments that have to be meted out without any discretion of the courts, if I'm here simply as a machine to impose a sentence in accordance with some statutory mandate, then our system has gone far awry. . . . I find this violates my conscience, to tell you the truth.¹⁹⁰

188. *Id.* at 17.

189. The judge's exact words were:

In the near past we have all been amazed and astounded at some of the penalties imposed in other countries, Turkey, for example, or Greece or Iran about penalties imposed for drug convictions that we consider to be cruel and unusual and outlandish; and this probably is more outlandish than anything I've ever heard of.

Id. at 15.

190. *Id.* at 16. Judge Vinson went on to criticize mandatory minimums, stating:

I don't think any judge will agree that mandatory sentences are a good idea; and, in fact, anybody who studies criminology, I think, has to reach the conclusion that these mandatory sentences run counter to the intent and purpose of the guideline sentencing procedure itself. Clearly, you can't have guidelines if they're all trumped by mandatory sentences. Clearly, you end up with disproportionate sentences for different people. In other words, it completely obliterates the sentencing goal of taking into account the individual, which is supposed to be the function of the guideline sentencing to try to end up with similar sentences for similarly situated offenders under similar offenses.

Id. at 54-55.

CONCLUSION

The conservatives in Congress and the current Justice Department believe that the Sentencing Guidelines and mandatory minimums are effective crime fighting tools. To the extent some low-level offenders and “girlfriend” defendants received somewhat excessive sentences, the conservative storyline is that the problem has been addressed by the safety-valve and a few other guideline fixes over the past ten years. Therefore, any current complaints must be emanating from holdover liberal judges and their allies in the press.

My research refutes this rosy, limited picture of judicial attitudes towards current sentencing policy. The fact that a majority of judges are now reasonably comfortable with a sentencing guideline regime does not mean that the judiciary is always happy with the resulting sentences, or more importantly, with the trumping mandatory minimums. Judicial complaints about arbitrary and harsh penalties continue, though in a more muted fashion. Some of these cases continue to be the classic “girlfriend” cases. While the safety-valve has alleviated some of the worst injustices, the reach of the conspiracy statute and weight-based penalties ensure that this type of low-level offender continues to be swept up in drug enforcement operations.

This essay has also shown that judicial dissatisfaction is not limited to the long jail terms for the girlfriend cases that garner the most press, but also includes draconian sentences for more serious drug dealers. These complaints come not from so-called liberal judges, for, in fact, those are now few and far between, but rather, from Republican appointees and former prosecutors, as they dutifully but unhappily follow the laws written by Congress and implemented by the Justice Department. These voices, while often measured and restrained, are a clear sign that sentencing policy has become so punitive that even a largely conservative judiciary feels something is amiss.

This essay also challenged the key conservative proposition in the sentencing debate; if enough restraints are placed on judges so that they can be prevented from exercising their personal preferences, sentencing disparities can be eliminated. Both recent studies, as well as my research, prove that disparity persists despite

ever stricter limits on judicial discretion.¹⁹¹ All the available literature and research leads to the unavoidable conclusion that discretion squeezed from the judiciary has simply emerged elsewhere. The new reality is that the combination of investigatory and charging discretion, together with prosecutor initiated cooperation agreements, is responsible for far more disparate and unfair sentencing outcomes than the departure practices of the federal bench.¹⁹² Because police and prosecutor disparity is harder to detect and virtually unreviewable, and because politicians have no incentive to face this new reality, the harsh spotlight has remained on the judges.

Ultimately, any future efforts to reform sentencing policy must deal with the inescapable fact that discretion cannot be eliminated, only managed. The federal criminal justice system is simply too diverse, the actions of each defendant, police investigator and prosecutor are too complex and organic to be reduced to a one size fits all formula. A truly fair and rational sentencing regime, therefore, would seek to fairly apportion power between prosecutors and judges. Based upon my interviews, I believe

191. See *supra* notes 135-142 and accompanying text.

192. Another Judge Vinson case captures almost all the issues discussed in this essay. Stephanie George is now serving a life sentence for crack. Her misfortune was to be prosecuted in a Pensacola federal court which handed out the harshest drug sentences in the country. Her own continuing mistake was to date crack dealers, including her co-defendant in the final case. In 1996, a raid on her home resulted in the arrest of Ms. George and her latest boyfriend, Mr. Dickey, and the discovery of \$14,000 in cash, cocaine, and equipment for cooking crack cocaine. Dickey told police that the money and drugs were his but that he paid Stephanie, who was no longer his girlfriend, to let him use the house for his drug business. Stephanie decided to go to trial and was convicted. In addition to the cocaine seized in her house, several cooperating defendants testified about other episodes in which she assisted Mr. Dickey and previous boyfriends, resulting in relevant conduct of one and a half kilos of crack. Ms. George also had prior state convictions for selling crack for these other men. As the result of her prior convictions and the drug amount, she was subject to a mandatory life sentence. This seemed unduly harsh to Judge Vinson who told her at sentencing, "Even though you have been involved in drugs and drug dealing for a number of years . . . your role has basically been as a girlfriend and a bag holder and money holder. So certainly, in my judgment, it doesn't warrant a life sentence." The reason for the life term in Ms. George's case was the prosecutor's refusal to withdraw the career offender enhancement. William Greider, *Mandatory Minimums: A National Disgrace*, ROLLING STONE, Apr. 16, 1998 at 42; see also Presentence Report, *United States v. George*, (N.D. Fl. 1997) (No. 3:96CR78-002) (on file with author).

judges would support such an approach, not merely because they would get some of their power back, but also because they have come to believe this would be fair. While there was a huge outcry against the Guidelines when they were released, today, a majority of judges surveyed by the Commission, and of those I interviewed, would support a guideline regime, so long as it was more flexible than the current one, and was not distorted by a mandatory minimum regime.¹⁹³

Both political¹⁹⁴ and philosophical considerations stand in the way of such reform. In particular, one must recognize that at the heart of the conservative attack on judicial discretion are two important motivating beliefs. First, conservatives believe that the offense or conviction is the primary, if not the exclusive determinant, of the appropriate sentence. Thus, offender characteristics and other factors which judges see as critical to individualized sentencing, crime control advocates relegate to a minor role.¹⁹⁵ Second, conservatives view punishment as the primary goal of sentencing. Rehabilitation, they argue, is too difficult to predict and they warn that incorrect assessment will endanger public safety.

Without question, these viewpoints continue to resonate with Congress and the voters, and, thus, must have a role in any new sentencing regime. Most judges, too, especially the post-Guideline crop, agree with the proposition that it would be unwise to return to a system of unfettered sentencing discretion. But my research

193. As early as 1996, 66.8% of federal district court judges surveyed indicated a preference for an advisory, rather than mandatory, guideline system. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, *THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 4* (1997) (available in the Federal Judicial Center 2002 Catalog of Publications at www.fjc.gov).

194. For a discussion of the political considerations, see Zlotnick, *supra* note 130.

195. Many senior judges have argued, and some recent studies agree, that the extent that judicial discretion led to sentencing disparities in the pre-Guidelines period was actually misunderstood and overstated. There were some gross disparities and outlier judges with extreme sentencing practices. But, the total percentage of these outliers was quite small. In fact, most judges in a given district were reasonably close in sentencing practices, the result of formal and informal information sharing and the product of local culture. To the extent that regional disparities existed and persist, that says more about the federalization of essentially local crime than about judicial discretion run amok. *Id.* at 216, n.26.

reveals the current judiciary – one that is largely centrist and conservative – is nevertheless deeply unhappy with Congress' micro-management of sentencing policy. Thus, politicians should take note that, perhaps, the pendulum has swung so far to the right and the time is ripe for a fresh look. This is in fact happening in some state criminal justice systems as the financial burden of overly punitive sentencing policies has become too expensive.

On the federal level, the time has come to listen to the voices of reason. In a democracy that claims much of its strength from the power of an independent judiciary, we must heed the moment when its judges proclaim that democratically made laws are nevertheless morally flawed. While by rule and role, many judges feel compelled to restrain their voices, even small efforts may matter. Like the "Whos" of "Whoville" in the Dr. Seuss classic,¹⁹⁶ sometimes all it takes is one more voice. Now that the Justices of the Supreme Court are weighing in more forcefully, these voices of conscience may be heard above the din of political posturing. Perhaps, too, these judicial voices will provide political cover to a courageous politician of either party willing to take on this issue.¹⁹⁷ Until that day, however, sentencing under the dual mandatory minimum and Guidelines regimes continues with prosecutors essentially serving as both partisan and judge. To federal judges, chosen for their experience and judgment, this makes a travesty of the justice they have sworn to uphold.

196. DR. SUESS, *HORTON HEARS A WHO!* (Random House 1982) (1954).

197. Although the author in no way endorsed this candidate, Howard Dean's campaign for the 2004 democratic nomination for president offered alternatives to the political mainstream on a number of issues. For example, Dean, on his website, actually took a reform-oriented position on the issue of mandatory minimums. See Dean for America, available at www.deanforamerica.com.