University of Dayton Law Review

Volume 20 | Number 2 Article 22

1-1-1995

Discretion Redux—Mandatory Minimums, Federal Judges, and the "Safety Valve" Provision of the 1994 Crime Act

Fred A. Bernstein

Discretion Redux—Mandatory Minimums, Federal Judges, and the "Safety Valve" Provision of the 1994 Crime Act

Cover Page Footnote

I am grateful for the guidance and support of Judge Weinstein; the views expressed, however, are entirely my own.

DISCRETION REDUX—MANDATORY MINIMUMS, FEDERAL JUDGES, AND THE "SAFETY VALVE" PROVISION OF THE 1994 CRIME ACT

Fred A. Bernstein[*]

Although we believe Ramirez's mandatory minimum sentence is unsuitable in light of his age, his health problems, his family situation, his minimal role in the drug trafficking operation, his lack of a criminal record, and the cost to society of his incarceration, we are bound by our precedent with respect to the constitutionality of § 841(b)'s mandatory minimum sentencing scheme.[1]

I. INTRODUCTION

On August 25, 1994, as part of a legislative package better known for midnight basketball and 11th-hour pork, Congress enacted a provision allowing judges to avoid applying mandatory minimum sentences for many first-time drug offenses.[2] This "safety valve" provision is one of several signs that a decade-

---

* J.D., New York University School of Law, 1994; Law Clerk to the Honorable Jack B. Weinstein, United States District Court for the Eastern District of New York. I am grateful for the guidance and support of Judge Weinstein; the views expressed, however, are entirely my own.

1. United States v. Ramirez, No. 93-30295, 1994 U.S. App. LEXIS 25021, at *7-8 (9th Cir. Sept. 7, 1994) (affirming 10-year sentence for cocaine possession).

2. The provision, Section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1985, was codified at 18 U.S.C. § 3553(f). It provides that judges

> shall impose a sentence . . . without regard to any statutory minimum sentence, if the court finds at sentencing . . . that—
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
> (3) the offense did not result in death or serious bodily injury to any person;
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

The statute is applicable to sentences imposed after September 23, 1994. *Id.* An amendment to the Sentencing Guidelines repeats the provision essentially verbatim. United States Sentencing Commission, *Guidelines Manual*, § 5C1.2 (1994).

For an analysis of the five criteria, *see* Vincent L. Broderick, *Flexible Sentencing and the Violent Crime*

long experiment in determinate sentencing is ending.[3] The provision will, this Article suggests, have a salutary impact on the federal courts, in which district judges' efforts to do justice in individual cases, and circuit judges' efforts to enforce determinate sentencing laws, have fostered inter- and intra-court strains.[4]

The effects of mandatory minimum sentences on criminals are becoming well-known.[5] Editorial pages carry arguments for and against,[6] while news

---

Control Act of 1994, 7 FED. SENTENCING REP. 128 (1994); Michael Dowd, *The Implementation of New Guidelines Section 5C1.2* (unpublished manuscript, on file with the author); Shendur v. United States, No. 89-495, 1995 U.S. Dist. LEXIS 1300 (S.D.N.Y. Jan. 30, 1995).

For background on the "safety valve" provision, see Paul J. Hofer, *Mandatory Penalty Reform: The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 FED. SENTENCING REP. 63 (1993) (describing "safety valve" proposals); Naftali Bendavid, *Crime Bill Caper Infuriates Some in Congress; Federal Prosecutors' Late Lobbying Didn't Toe the DOJ Line*, AM. LAW. NEWS SERV., Sept. 15, 1994 (describing last minute wrangling over provision). The wrangling continues. In early 1995, a bill was introduced in Congress to substantially weaken the safety valve provision. Under the proposed amendment, a defendant who has *any* criminal history points may not take advantage of the provision. The firearm provision is also more strict, requiring that the defendant not have had any *knowledge* that a coconspirator possessed a weapon. Finally, the defendant could not have financed any part of the offense, and may not have owned or sold any of the drugs involved in the offense. See 141 CONG. REC. S 688, *S 690 (Jan. 10, 1995) ("Flexibility in Application of Mandatory Minimum Sentence Provisions in Certain Circumstances").

3. *See, e.g.*, United States Sentencing Commission, Draft Revisions to Guidelines § 2D1.1 (reported at 56 CRIM. L. REP. 2079, Jan. 11, 1995) (proposals to reduce importance of drug quantity as a sentencing factor).

4. Professor Harold Berman describes three roles of the legal system as described by Coke, Selden, and Hale: "It was their understanding . . . that law . . . has both a moral character (its purpose is to do legal justice) and a political character (its purpose is to maintain legal order), but it also has a historical character (its purpose is to preserve and develop the legal traditions of the people whose law it is)." Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1731 (1994).

This author suggests that the "characters" identified by Professor Berman correspond, roughly, to the functions of the district, circuit, and Supreme courts. Arguably, the function of the district courts is largely "moral," that of the circuit courts largely "political," and that of the Supreme Court largely "historical." While by no means a complete description of the roles of these courts, this may be a useful model for describing their primary functions. The author also does not mean to suggest that appellate court judges are less concerned about morality than are their district court colleagues. However, it does seem fair to say that justice at the appellate court level is less particularized than at the trial court level, perhaps because trial judges *see* the people their decisions affect.

Judge Posner, in an intriguing economic analysis of judicial behavior, suggests that district judges would tend to oppose determinate sentencing schemes because such schemes reduce their "pleasure in choosing," *i.e.*, their discretion. *See* Richard A. Posner, *What Do Judges Maximize?*, OVERCOMING LAW 109, 125 (1995). On the other hand, he suggests that "leisure-seeking" judges might prefer sentencing schemes that enable them to avoid "hassle" by claiming that their decisions are dictated by "the law." *Id.* at 124. Judge Posner also notes that while all judges tend to seek prestige and popularity, district and appellate judges may do so in different ways. District judges, he observes, appear "more or less continuously in open court," and thus are constantly being evaluated by the public and the bar, *id.* at 112, while "[a]ppellate judges are largely . . . shielded from direct evaluations of their work." *Id.*

Similarly, Professor Mark Cohen has observed that, for district judges, "the ability to exercise discretion is . . . one of the most rewarding aspects of [the job]." Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J. LAW, ECON., & ORGANIZATIONS 183, 186-87 (1991). Cohen also found that 90% of district judges believe determinate sentencing schemes have made sentencing "more time-consuming." *Id.* at 186 (citing Marcia Coyle, *Proposals on Courts Debated: Some Reforms Threaten to Re-Ignite Firestorms*, NAT'L L.J., Feb. 12, 1990, at 1). Interestingly, Cohen's research suggests that district judges who support determinate sentencing schemes are more likely to be "promoted" to appellate courts. *Id.* at 189.

5. *See generally* United States Department of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories (Feb. 4, 1994) (describing costs of imposing lengthy sentences on minor drug offenders). Commentators have found that: "[M]andatory minimum sentencing laws shift discretion from judges to prosecutors, result in higher trial rates and case processing times, arbitrarily fail to acknowledge salient differences between cases, and often punish minor offenders much more harshly than anyone involved

sections report on the fate of minor drug offenders serving lengthy terms.[7] An advocacy group, Families Against Mandatory Minimums, ensures that the issue will continue to receive wide-spread attention.[8]

The effects of mandatory minimums on the judiciary have received less attention.[9] These effects include increasing judges' workload,[10] forcing real decision-making "underground,"[11] and worsening relations between trial and appellate benches.[12] Judicial opposition to the mandatory minimums, which has been almost universal,[13] reflects the effects of the minimums not only on defendants, but on the judiciary itself.

---

believes warranted." Marc Miller & Daniel J. Freed, *Editors' Observations: The Chasm Between the Judiciary and Congress Over Mandatory Minimum Sentences*, 6 FED. SENTENCING REP. 59 (1993); *see also Judges on Mandatory Minimums: Testimony of the President of the Federal Judges Association, Honorable John M. Walker, Jr., Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee* (July 28, 1993), 6 FED. SENTENCING REP. at 72, 73 ([M]andatory minimums are not only ineffective, but also counterproductive, weapons in the war on crime."); *Wardens Advocate Prevention, Not Mandatory Minimums, to Stop Crime*, THIRD BRANCH (newsletter of the federal courts), Jan. 1995, at 12.

6. *See, e.g.*, Julie Stewart, *Let the Sentencing Guidelines Work*, LEGAL TIMES, Sept. 13, 1993, at 28 (arguing for repeal of mandatory minimums); *Cocaine Injustice*, N.Y. TIMES, May 31, 1994, at A16 (describing crack/cocaine debate); *see also* Robert S. Stein, *Crime & Mandatory Punishment*, INVESTOR'S BUS. DAILY, Nov. 2, 1994, at A1 (reviewing arguments for and against "safety valve" provision).

7. *See, e.g.*, Joseph Williams, *Families Continue Fight on Sentences*, MIAMI HERALD, Sept. 12, 1994, at B5 (describing plight of Kellie Ann Mann, sentenced to 10 years for mailing LSD to a former boyfriend, her first offense).

8. *See, e.g.*, Stephen Power, *Families Call on U.S., State to Repeal Mandatory Minimum Sentences*, BOSTON GLOBE, Aug. 9, 1993, at 47.

9. Much more attention has been focused on the Guidelines. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992). But because the Guidelines sentences for drug offenses were based on the existing mandatory minimums, the latter affect every drug sentence, directly or indirectly. *See* Barbara S. Vincent & Paul J. Hofer, *FJC Report on Mandatory Minimum Penalties: The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 FED. SENTENCING REP. 33 (1994) ("[T]he mandatory minimums have influenced, and some would say distorted, the guidelines and thus the entire federal sentencing structure."); Hon. William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 405 (1993) ("[I]t is impossible to disentangle the effect of mandatory minimum statutes from those of the sentencing guidelines."); *id.* at 406 ("[N]o database exists that separates out sentences imposed under mandatory minimum laws."); *see also* Freed, *supra*, at 1752 ("The contemporaneous reign of guidelines and mandatory penalties has markedly tilted the Commission's work and reduced the tolerance with which judges might have responded to guidelines alone.").

10. Schwarzer, *supra* note 9, at 411.

11. *See infra* notes 44-48 and accompanying text.

12. *See, e.g.*, Freed, *supra* note 9, at 1728-30.

13. "[F]ederal judges are almost unanimously opposed to mandatory minimums." Jose A. Cabranes & Leonard Orland, *Lessons from the Federal Courts Study Committee*, 5 FED. SENTENCING REP. 203, 203 (1993); *see also* Broderick, *supra* note 2, at 131 ("The federal judiciary is virtually unanimous in its opposition to statutorily mandated . . . sentencing."); *Judges Oppose Mandatory Minimums*, THIRD BRANCH (newsletter of the federal courts), Nov. 1993, at 1 (survey of federal judges showed that 92% oppose mandatory minimum sentences). Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings 1 (1994) ("In recent years, evidence has accumulated . . . that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system."). "The judicial councils of all twelve federal circuits . . . passed resolutions in 1990 and 1991 asking Congress to reconsider federal mandatory sentencing laws." HON. LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 5 (1994).

The "safety valve" provision was supported by judges. *See* Letter from Congressman Don Edwards to Article III Judges, Aug. 30, 1994 (on file with author) ("[S]uccess in adoption of the safety valve was in large part due to the eloquent statements of federal judges who consistently described the unfair and inequitable results of mandatory minimum sentences.").

This Article will examine those effects. It will focus, in part, on a representative case—*United States v. Ekwunoh*.[14] In addition to being the first published case to apply the "safety valve,"[15] *Ekwunoh* may be the only case in which a defendant was first sentenced to a mandatory minimum term, then resentenced under the "safety valve" provision. Thus, it brings the effects of the new provision into high relief.

II. THE FEDERAL SENTENCING SCHEME

Sentencing for nearly all federal crimes is covered by the Guidelines.[16] Under the Guidelines, sentences are based on two factors: the severity of the offense (including related conduct, if any[17]), and the criminal history of the offender. A chart, with offense levels (from 1 to 43) on one axis, and "criminal history categories" (from I to VI) on the other, determines the applicable sentencing range.[18] For example, a defendant with an "offense level" of twenty-six and a criminal history category of V receives a sentence of 110 to 137 months.

Mandatory minimums, which are most commonly applied in drug cases,[19] are statutory provisions calling for a sentence of "no less than . . ." for a given offense (adjusted for criminal record).[20] When the mandatory minimum and Guidelines sentences differ, the minimum controls.[21]

For the most part, the Guidelines and minimum sentences coincide—the

---

14. 813 F. Supp. 168 (E.D.N.Y. 1993), *vacated*, 12 F.3d 368 (2d Cir. 1993), *on remand*, No. 91-684, 1994 U.S. Dist. LEXIS 1847 (E.D.N.Y. Feb. 23, 1994), *resentencing pursuant to Guidelines*, 1994 U.S. Dist. LEXIS 17948 (E.D.N.Y. Dec. 9, 1994); *see infra* Part V.

15. Daniel Wise, *Judge Cuts Prison Term Under New Federal Law*, N.Y.L.J., Dec. 8, 1994, at 1.

16. *See* GUIDELINES MANUAL 10 (1994) ("[T]he Guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts."). For a description of the Guidelines system, see Elizabeth T. Lear, *Double Jeopardy, The Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOK. L. REV. 725, 729-34 (1994); Stephen G. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

17. *See* U.S.S.G. § 1B1.3.

18. This chart, which appears on the inside back cover of every sentencing manual, is the equivalent of a tax table, with income on the vertical axis and filing status on the horizontal.

19. *See* Vincent & Hofer, *supra* note 9, at 33 ("Ninety-one percent of the defendants sentenced under statutes with mandatory minimums provision during a recent six-year period were convicted of drug offenses."); *see also* Freed, *supra* note 9, at 1691 n.45. Freed observes:

> During the same period in which the guidelines were being developed, Congress spawned an array of federal mandatory penalty laws . . . . Inspired by the outcry over society's inability to control drug trafficking and drug violence, these laws form the bases upon which mandatory minimums were imposed in nearly 60,000 cases between 1984 and 1990.

Id. For a list of federal mandatory minimum sentences, see FEDERAL SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES REPORT (1991) (Appendix A) (listing mandatory minimum provisions of 60 federal statutes).

20. If the Guidelines are like a graduated income tax, with a variety of brackets and a number of possible deductions, a mandatory minimum is the equivalent of a system with only a few brackets and no deductions. The lengths people will go to to avoid higher brackets are easily imagined; they have been dubbed the "cliff effect." Robert S. Mueller III, *Mandatory Minimum Sentencing*, 4 FED. SENTENCING REP. 230, 230 (1990).

21. United States v. Sharp, 883 F.2d 829, 831 (9th Cir. 1989) (per curiam); U.S.S.G. § 5G1.1.

Sentencing Commission set the bottom of the Guidelines range for most offenses just above the corresponding minimum, if any.[22] For example, the mandatory minimum for possession of more than one kilogram of heroin is ten years.[23] The same crime, under the Guidelines, corresponds to an offense level of thirty-two, which in turn calls for a sentence of 121 to 151 months for a first-time offender. Ostensibly, in such cases, the operation of the minimums and the Guidelines is redundant.[24]

In practice, the two systems are very different. The Guidelines provide for an elaborate system of departures, which, in some districts, are applied in nearly one quarter of cases.[25] Such departures are permitted for reasons enumerated in the Guidelines[26] as well as for reasons that were not considered, or, in the view of the sentencing judge, were not *adequately* considered, by the authors of the Guidelines.[27] Only a few factors—such as the defendant's race—are excluded from consideration.[28] Several other factors are listed as not "ordinarily" permitting departure, giving courts leeway to consider them in unusual cases. For example, family ties are "not ordinarily relevant" to sentencing under the Guidelines.[29] However, in *United States v. Johnson*[30] the Second Circuit permitted a ten-point departure for family ties, when the defendant was the sole support of three young children. Without the departure, the defendant would have been sentenced to between forty-six and fifty-seven months in prison; with the departure for family circumstances, she received six months' home detention.[31]

By contrast, under the statutory minimums, a sentencing judge can "depart" *only* on the government's motion—usually made in a letter indicating that the defendant provided substantial assistance to the prosecution.[32] The decision to

---

22. *See* Vincent & Hofer, *supra* note 9, at 33 (explaining effort to key Guidelines to mandatory minimums for drug offenses).

23. 21 U.S.C. § 841(b) (1988).

24. There are some differences in applications of the two sentencing systems. For example, the Guidelines require judges, in determining drug quantity, to aggregate "all acts . . . that were part of the same course of conduct . . . as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Under the mandatory minimums, however, most courts consider only the offense of conviction. *See, e.g.*, United States v. Darmand, 3 F.3d 1578, 1581 (2d Cir. 1993).

25. *See* Freed, *supra* note 9, at 1729 n.245 (describing departure rates in various districts).

26. For example, a defendant could obtain a four-point reduction for his minimal role in the offense, and a two-point reduction for acceptance of responsibility. U.S.S.G. §§ 3B1.2, 3E1.1 (1994).

27. U.S.S.G. § 5K2.0; *see, e.g.*, United States v. Gonzalez, 945 F.2d 525, 526-27 (2d Cir. 1991) (vulnerability to physical attack); United States v. Joyner, 924 F.2d 454, 461 n.3 (2d Cir. 1991) (ill health).

28. *See* U.S.S.G. § 5H1.10 (1994) (excluding race and gender as sentencing factors).

29. U.S.S.G. § 5H1.6 (1994).

30. 964 F.2d 124, 129 (2d Cir. 1992) ("If the Commission had intended an absolute rule that family circumstances many never be taken into account in any way, it would have said so.").

31. 964 F.2d at 126. *See also* Karen R. Smith, *United States v. Johnson: The Second Circuit Overcomes the Sentencing Guidelines' Myopic View of "Not Ordinarily Relevant" Family Responsibilities of the Criminal Offender*, 59 BROOK. L. REV. 573, 593-94 (1993).

32. *See* U.S.S.G. § 5K1.1 (1994); United States v. Hawley, 984 F.2d 252, 254 (8th Cir. 1993) (court cannot go below minimum without government motion). *But see* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 550 (1992) ("As the gap widens between what AUSAs individually think the defendant deserves and what the mandatory minimum or guidelines sentence requires, the standard of what constitutes substantial assistance is relaxed."). As a result of this and other forms of

issue such a letter is entirely within the government's control.[33] In the absence of a cooperation letter, the judge's task is largely ministerial; a computer could impose the mandatory term.[34]

The key federal drug laws—18 U.S.C. § 841 (possession with intent to distribute) and § 846 (conspiracy)—provide for mandatory minimums ranging from five years to life. For example, conviction for possession of more than one hundred marijuana plants requires a ten-year minimum sentence.[35] The harmful effects of lengthy incarceration, on both defendants and society, have been described at length, often by trial judges.[36] For purposes of this Article it is sufficient to note two aspects of mandatory minimums that sentencing judges have found particularly troubling. First, since sentences are based almost entirely on drug quantity, a mule and a kingpin will receive the same sentence if both are caught with the same quantity of drugs.[37] Second, it is easier for a higher-up than for a minor offender—who is unlikely to have information useful to the prosecution—to obtain a cooperation letter; thus the minor offender is more likely to serve the minimum term.

III. THE EFFECTS OF MANDATORY MINIMUMS ON THE BEHAVIOR OF JUDGES

Before the 1980s, judges enjoyed "unfettered" discretion in sentencing.[38] Circuit courts rarely reviewed sentencing decisions; when they did, they tended to defer to the district courts' ability to fashion appropriate sentences in

---

prosecutorial discretion, "mandatory minimums have not reduced disparity; race and gender are still significant determinants of sentence." BARBARA S. MEIRHOEFER, THE GENDER EFFECTS OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED (Fed. Judicial Center 1992); Barbara S. Meirhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367 (1992).

33. *See, e.g., Hawley*, 984 F.2d at 254; *see also* U.S.S.G. § 5K1.1 (1994). By contrast, under the "safety valve," the determination whether a "defendant has truthfully provided to the Government all information and evidence the defendant has" is to be made by the court. *See* United States v. Aristizabal, No. 93-1091, 1994 U.S. Dist. LEXIS 17441 (S.D.N.Y. Dec. 8, 1994); *see also* Shendur v. United States, No. 89-495, 1995 U.S. Dist. LEXIS 1300, at *10 (S.D.N.Y. Jan. 30, 1995) (under "safety valve," government views on cooperation are not controlling).

34. Although sentences above the minimum are, obviously, permitted, "the minimum is generally so high that the exercise of upward discretion is not a significant factor in the operation of mandatory minimum statutes." Schwarzer, *supra* note 9, at 407 n.8.

35. 21 U.S.C. § 841(b)(1)(B)(vii) (1988 & Supp. V 1993).

36. *See, e.g.*, FORER, *supra* note 13.

37. This is one of the most oft-criticized aspects of the current sentencing regime. *See, e.g.*, Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENTENCING REP. 63 (1990) ("The process has produced indiscriminately harsh . . . penalties for . . . kingpins and . . . couriers alike."); Marc Miller & Daniel J. Freed, *The Disproportionate Imprisonment of Low-Level Drug Offenders*, 7 FED. SENTENCING REP. 3 (1994) (describing inequities in quantity-based sentencing scheme); Douglas A Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 FED. SENTENCING REP. 247 (1994) (same); Jon O. Newman, *Five Guideline Improvements*, 5 FED. SENTENCING REP. 190 (1993) (urging Sentencing Commission to "[a]bandon the current excessive reliance on the drug quantity table").

38. *See, e.g.*, United States v. Restrepo, 946 F.2d 654, 665 (9th Cir. 1991) ("The Guidelines represent an historic break from the practice of endowing trial judges with the virtually unfettered discretion.").

individual cases.[39]

Under current sentencing law, judges are required to consider the traditional purposes of punishment before imposing a sentence.[40] They are also required to consider all the facts or circumstances of the case[41] and to communicate with the defendant.[42] Given these mandates, the only effect of a determinate sentencing scheme, it would appear, is to prevent a judge from using all the information she acquires. This makes the judge's job not easier, but harder. As Professor Freed has observed: "A sense of justice is essential to one's participation in a system for allocating criminal penalties. When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice."[43]

When a mandated sentence seems unjust,[44] the judge may try to "finesse" the gap between what she would like to do and what the law tells her she must do.[45] One approach is to write the sentencing opinion by beginning at the bottom line, and working backwards.[46] In Guidelines cases, this phenomenon is well-established.[47] According to one judge who responded to an anonymous survey,

---

39. *See, e.g.*, United States v. Anderson, 15 F.3d 278, 280 (2d Cir. 1994) ("[A]lthough judicial discretion undoubtedly may result in some sentencing disparities, it is also that which enables our courts to fashion individualized sentences essential to just administration of the criminal law.").

40. *See* 18 U.S.C. § 3551 (1988 & Supp. V 1993) (requiring judge to consider purposes of incapacitation and specific and general deterrence in imposing sentence); *see also* Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENTENCING REP. 326 (1991).

41. *See* 18 U.S.C. § 3661 (1988) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

42. *See* United States v. Gangi, No. 94-1092, 1995 U.S. App. LEXIS 472 (2d Cir. Jan. 10, 1995) (sentencing court must give defendant opportunity to be heard); United States v. Axelrod, No. 93-1591, 1995 U.S. App. LEXIS 417, at *2 (2d Cir. Jan. 11, 1995) ("Under Federal Rule of Criminal Procedure 32(a)(1)(C), the district court at sentencing must 'address the defendant personally and determine if the defendant wishes to make a statement and to present any information . . . .'").

43. Freed, *supra* note 9, at 1687; *see also* Broderick, *supra* note 2, at 128 ("Mandatory minimum sentencing . . . is contrary to the function of the judiciary under Article III of the Constitution.").

44. One aspect of "justice" is the requirement that similarly situated defendants receive similar terms. However, a determinate sentencing system is not the only means of eliminating disparity (assuming it eliminates disparity at all). *See, e.g.*, Meierhoefer, *supra* note 32. Prior to enactment of the Guidelines, judges in the Eastern District of New York met periodically to discuss sentences, an informal method of ensuring consistency between chambers. This type of consultation has disappeared. *See* Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 15 (1994) (describing pre-Guidelines practice).

45. The judge may also resign from the bench. *See* FORER, *supra* note 13 (describing decision to step down rather than impose a mandatory minimum term); *id.* at 4-5 (describing similar decisions by other sentencing judges).

46. A tax return metaphor is once again apt. Like the tax table that comes in the mail every January, the chart at the back of each Guidelines manual has a peculiar graphic advantage: it enables the user to work backwards. Just as a taxpayer may first decide how large a refund he wants to receive, then translate that into the "right" deductions, the Guidelines permit judges to first determine a just sentence, then determine the appropriate departure.

47. *See* Jonathan M. Moses, *Many Judges, in Low Key Revolt, Go Around Sentencing Guidelines*, WALL ST. J., May 7, 1993, at B12; Bruce Frankel, *Judicial Revolt Over Sentencing Picks Up Steam: Jurists Say Guidelines Not Working*, USA TODAY, May 3, 1993, at 9A; John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551 (1993); *see also Comments on Jury Nullification, Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit*, 145 F.R.D. 149, 170 (1993) (Panel Discussion—Jury Nullification) ("[T]rial

"[t]he Guidelines . . . have made charlatans and dissemblers of us all. We [judges] spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result."[48]

Under the minimums, judges have less room to maneuver. In a typical case, the defendant has been convicted of possession with intent to distribute a controlled substance, in a quantity sufficient to trigger a minimum sentence. The judge may believe that to impose the minimum would be unjust. One would expect such a judge to work backwards, as under the Guidelines. Judge William Schwarzer has observed that "the tougher and more rigid [a sentencing scheme] is, the more determined the effort . . . to circumvent it."[49] Yet so restrictive are the minimums that judges rarely challenge their application.[50]

IV. OPTIONS FOR AVOIDING APPLICATION OF MANDATORY MINIMUMS

In a typical drug case, in which quantity determines the minimum term, a defendant has several possible arguments against imposition of the minimum sentence:

- The government should not be allowed to count the weight of blotter paper containing LSD.[51]
- The government should not be allowed to count the number of male marijuana plants.[52]
- The government should not be allowed to count the entire weight of a suitcase made of a mixture of cocaine and acrylic.[53]
- Because she expected to receive a smaller amount, the defendant lacked

---

judges are . . . nullifying the guidelines.").

48. *Quoted in* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) (emphasis in original).

49. Schwarzer, *supra* note 9, at 407.

50. Not only are district judges reluctant to court reversal, but defendants are reluctant to appeal. *See* Freed, *supra* note 9, at 1729 ("Some observers believe that the perceived hostility of a circuit court toward downward departures is responsible, not for fewer departures . . . but for fewer appeals."). *Accord*, Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 625 (1992) ("[Appellate review of sentences] is as much preventative as curative.").

51. *See* Chapman v. United States, 500 U.S. 453, 461 (1991) (calling assertion that Congress intended courts to include weight of medium the "unanimous conclusion" of the circuit courts).

52. Male plants contain less THC. *See, e.g.*, United States v. Proyect, 989 F.2d 84, 87 (2d Cir.) ("[I]f Congress wanted to make a distinction between male and female plants, plants that produced relatively more or relatively less of a usable marijuana product, it could have done so."), *cert. denied*, 114 S. Ct. 80 (1993). Other circuits have held that "Congress intended to outlaw all plants popularly known as marijuana to the extent that those plants possess THC." United States v. Honneus, 508 F.2d 566, 574-75 (1st Cir. 1974) ("Congress meant to include any and all marijuana-producing Cannabis when specifying 'Cannabis sativa L.'"), *cert. denied*, 421 U.S. 948 (1975); United States v. Madkour, 930 F.2d 234, 239-40 (2d Cir.) (courts may not disregard clear congressional mandate requiring mandatory minimum sentence for 100 or more marijuana plants, however ill-advised they may think Congress' exercise of authority to be), *cert. denied*, 502 U.S. 911 (1991). *But see* United States v. Edge, 989 F.2d 871 (6th Cir. 1993) (marijuana cutting with callus tissue, without more, is not a plant for purposes of sentencing statute).

53. *See* United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.) (rejecting argument), *cert. denied*, 502 U.S. 1009 (1991).

"mens rea" for the full quantity of drugs in her possession.[54]

- Because the quantity was determined by an undercover agent, the defendant was a victim of sentence entrapment.[55]
- The government's measurements could be wrong, and doubts should be resolved in favor of the defendant.[56]
- Imposing a lengthy prison term on a minor drug offender violates the Eighth Amendment.[57]
- Eliminating judges' sentencing discretion deprives defendants of due process.[58]
- The sentencing statutes' differentiation between crack and powder cocaine,[59] when the former is more often used by African-Americans, is impermissible racial discrimination.[60]

Each of these arguments has been made to district judges. Some have been accepted, and forcefully argued, *by* district judges in sentencing opinions.[61]

For example, in *United States v. Clary*[62] the district court examined the role of racism in drug enforcement since the late seventeenth century, a subject that

---

54. *See, e.g.*, United States v. Cordoba-Hincapie, 825 F. Supp. 485 (E.D.N.Y. 1993); *see also infra* notes 64-77 and accompanying text.

55. *See generally* Robert E. Underhill, Note, *Sentence Entrapment: A Casualty of the War on Crime*, 1994 N.Y.U. ANNUAL SURVEY OF AMERICAN LAW 165. Sentence entrapment has been described as "'outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities' for the purpose of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant." United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993) (quoting United States v. Lenfesty, 923 F.2d 1293, 1300 (8th Cir.)), *cert. denied*, 111 S. Ct. 1602 (1991). In late 1994, the Ninth Circuit Court of Appeals became the first circuit to permit a downward departure under the Guidelines for sentence entrapment. *See* United States v. Staufer, 38 F.3d 1103, 1107-08 (9th Cir. 1993). Other "[c]ourts have not generally adopted the concept of sentencing entrapment." United States v. Barth, 990 F.2d 422, 424 (8th Cir. 1993), *reversing* United States v. Barth, 788 F. Supp. 1055 (D. Minn. 1992).

56. *See* United States v. Rivera, 821 F. Supp. 868, 869 (E.D.N.Y. 1993) (Guidelines case describing possibility of error in the weighing of heroin-filled balloons).

57. Section 841's mandatory minimums have withstood numerous Eighth Amendment challenges. *See, e.g.*, United States v. Kidder, 869 F.2d 1328, 1334 (9th Cir. 1989) (upholding a mandatory minimum five year sentence for possession of cocaine). Such challenges are effectively foreclosed by Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding sentence of life imprisonment for cocaine possession).

58. "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." Chapman v. United States, 500 U.S. 453, 467 (1991) (citing *Ex Parte* United States, 242 U.S. 27 (1916)); *id.* at 465 n.5 (finding that every circuit to consider the question has found system of mandatory minimums rational).

59. 21 U.S.C. § 841(b) provides for a ten-year minimum sentence for possession of 5,000 grams of powder cocaine. 21 U.S.C. § 841(b)(1)(A)(ii) (1988). The same sentence is imposed for possession of just 50 grams of crack. *Id.* § 841(b)(1)(A)(iii).

60. *Compare* United States v. Davis, 864 F. Supp. 1303, 1309 (N.D. Ga. 1994) ("reluctant[ly]" concluding that penalty provisions "set out a scientifically meaningless distinction between cocaine and cocaine base") *with* United States v. Davis, 36 F.3d 1424, 1437 (9th Cir. 1994) ("Congress' decision to punish the sale of crack more severely than the sale of powder cocaine was based on a broad and legitimate basis."). As part of the 1994 Crime Act, Congress directed the United States Sentencing Commission to study "the differences in penalty levels that apply to different forms of cocaine." Pub. L. 103-322, § 28006 (Sept. 13, 1994); *see Commission Suggests Crack Sentences Be Reduced*, NAT'L L.J., Mar. 13, 1994, at A16 (citing Sentencing Commission reported dated Feb. 28, 1994).

61. *See infra* notes 62-66 and accompanying text.

62. 846 F. Supp. 768, 797 (E.D. Mo.), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

has received significant academic attention.[63] The court then analyzed the possibility that the mandatory minimum scheme that treated crack as "worth" 100 times as much as cocaine, its chemical equivalent,[64] was racially discriminatory. In a fifty-eight page opinion, Judge Cahill found the statute to be the product of "unconscious racism."[65] Holding the provision invalid, the judge sentenced the defendant—an eighteen year old first offender—as if he had possessed powder cocaine rather than crack.[66]

The Circuit Court, after lauding the district court's "painstakingly crafted opinion," reversed.[67]

This response exemplifies the Circuit Courts' treatment of determinate sentencing laws. In the case of the Guidelines, Professor Daniel Freed characterizes the circuits as having

> adopted surprisingly restrictive standards in reviewing district court departures. Torn between enforcing the unpopular guidelines of an administrative agency that sentences no one and respect for the expertise and the firsthand experience of district judges who sentence everyone, appeals judges . . . have opted [for the former].[68]

As the following case will illustrate, minimums, which are acts of Congress, have received even greater deference from the circuit courts.

V. A REPRESENTATIVE CASE

A defendant should not be sentenced for possessing a quantity of drugs he did not know, and could not reasonably foresee, that he possessed.[69] This simple principle is supported by centuries of Anglo-American jurisprudence.[70]

---

63. *See, e.g.*, DAVID F. MUSTO, THE AMERICAN DISEASE 244-45 (1987) (describing race-based motivations of drug substantive and sentencing law).

64. *See supra* note 59 and accompanying text.

65. *Clary*, 846 F. Supp. at 774.

66. As a result, instead of serving the ten year statutory minimum for crack possession, the defendant served three. *Id.*

67. United States v. Clary, 34 F.3d 709 (8th Cir. 1994).

68. Freed, *supra* note 9, at 1730. At least one commentator—an Assistant United States Attorney—has argued that the Circuit Courts *should be* more concerned with consistent application of sentencing laws than with individualized justice. *See* Zipperstein, *supra* note 50, at 655 ("The appellate courts need to be cognizant of their proper role .... [R]elying on their own subjective judgments about the harshness and appropriateness of particular sentences, instead of upon the Sentencing Commission's formulation of the guidelines, compromises [Congress'] goals.").

69. *See* Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENTENCING REP. 121 (1994).

70. This requirement of mens rea was the basis for the recent, unexceptional decision of the New York Court of Appeals in People v. Ryan, 82 N.Y.2d 497, 505 (1993). The *Ryan* court stated:

> The Legislature has decided that persons who illegally possess larger quantities of controlled substances should be punished more severely; their conduct is more repugnant and presents a greater threat to society. Because drug possession is not a strict liability crime, however, an individual is not deserving of enhanced punishment unless he or she is aware that the amount possessed is greater. A purpose of the knowledge requirement, then, is to avoid over-penalizing someone who unwittingly possesses a larger amount of a

Nonetheless, a survey of one circuit's recent treatment of mens rea found that it had "relied almost exclusively on Congress' deterrence objective to dismiss the importance of . . . mens rea" in the drug sentencing context.[71] That, essentially, is what happened in the case of *United States v. Ekwunoh*.[72]

Caroline Ekwunoh, a thirty-three-year-old Nigerian living in the United States, had sole responsibility for the support and care of her three young children. She was steadily employed, selling clothes and working part-time as a home attendant.

In 1991, Ms. Ekwunoh, at the request of her boyfriend, met a courier at Kennedy Airport. The courier, who turned out to be a DEA informant, handed her an attaché case containing 1,013 grams of heroin. Ms. Ekwunoh placed the case in the trunk of a car without examining its contents. She was arrested.

Ms. Ekwunoh pled guilty to a single count of possessing heroin with intent to distribute, in violation of 21 U.S.C. § 841(a). At the sentencing hearing she testified that, based on past dealings on behalf of her boyfriend, she believed the attaché case would contain no more than 400 grams of heroin. The district judge found her to be "at all times a candid and credible witness."[73] On the basis of her testimony, as well as his knowledge of the drug trade, the judge found that Ms. Ekwunoh did not know that the case contained more than 400 grams, and that this belief was reasonable for a person in her position.

At the time of the sentencing, the mandatory minimum penalty for possession of more than one kilogram of cocaine was ten years' imprisonment without possibility of parole.[74] By contrast, an offense involving between 100 grams and one kilogram carried a five-year minimum sentence.[75] The court sentenced Ms. Ekwunoh based upon the amount of heroin she had believed she possessed.[76] The government appealed.

The Second Circuit Court of Appeals reversed. The majority—two members of the three-judge panel—found that the district court's determination of Ms. Ekwunoh's mental state was "clearly erroneous."[77] It made this finding on the basis of a cold record, without observing the defendant, and without acknowledging the Circuit's own prior pronouncement that "the state of the defendant's mind, his mens rea, is always a matter for the trial court to decide."[78]

---

controlled substance than anticipated.

Id.; *see also* People v. Hill, No. 34, 1995 N.Y. LEXIS 138 (Feb. 16, 1995) (extending *Ryan* holding).

71. United States v. Cordoba-Hincapie, 825 F. Supp. 485, 531 (E.D.N.Y. 1993) (reviewing Second Circuit opinions on mens rea); *see also* United States v. de Velasques, 28 F.3d 2 (2d Cir. 1994) (rejecting mens rea defense when defendant knew she was carrying drugs, but not drugs planted in her shoes), *cert. denied*, 115 S. Ct. 679 (1994).

72. 813 F. Supp. 168 (E.D.N.Y. 1993), *vacated*, 12 F.3d 368 (2d Cir. 1993), *on remand*, No. 91-684, 1994 U.S. Dist. LEXIS 1847 (E.D.N.Y. Feb. 23, 1994), *resentencing pursuant to Guidelines*, 1994 U.S. Dist. LEXIS 17948 (E.D.N.Y. Dec. 9, 1994).

73. *Ekwunoh*, 1994 U.S. Dist. LEXIS 17948, at *2.

74. 21 U.S.C. § 841(b) (1988).

75. *Id.*

76. *Ekwunoh*, 813 F. Supp. at 173-74.

77. *Ekwunoh*, 12 F.3d at 370.

78. United States v. Shonubi, 998 F.2d 84, 86 (2d Cir. 1993).

Instead, it noted that it was "prepared to assume" that a defendant could be sentenced "only for the quantity of drugs he knows or reasonably should have foreseen that he possessed"[79] but then declined to apply that rule to this case.[80]

In a concurrence, the Chief Judge of the Circuit disagreed that the question was one of fact. Instead, the Chief Judge argued, the issue of what a defendant reasonably believes is a question of law, and thus is available for de novo review.[81] In this way, the Chief Judge avoided finding clearly erroneous the district court's finding of fact, while reaching the same result as the majority. The Court of Appeals ordered the district judge to sentence the defendant for the full amount of heroin in her possession.[82]

Both the prosecution and defense agreed with the district judge that a ten-year sentence was unwarranted in this case. The defense petitioned the Circuit Court to amend its mandate. The district court stayed the resentencing while the Circuit Court reviewed the petition. It explained:

> The Court of Appeals has ordered this court to add five years in prison without parole to the five year sentence already imposed on this twenty-eight-year-old female defendant with three children, aged seven, six and five years, for whom she is the sole support and caretaker. This cruel mandate will burden taxpayers with thousands of dollars in unwarranted prison expenses. In the view of the district court, it is mistaken on the facts and constitutes a gross departure from traditional principles of criminal law.[83]

The Court of Appeals denied the petition.

VI. ENTER THE SAFETY VALVE

Before the district judge could carry out the Circuit Court's mandate, requiring him to sentence Ms. Ekwunoh to ten years, Congress passed the "safety valve" provision. A proposed retroactivity clause—which would have permitted the resentencing of defendants already doing time—was not included in the final legislation.[84] However, the court was free to apply the safety valve at Ms.

---

79. *Ekwunoh*, 12 F.3d at 370.

80. The court seemed determined to see Ms. Ekwunoh serve the mandatory term. Retribuivist leanings may explain the contrary treatment of cases in which consideration of mens rea leads to an *increased* sentence. *Compare* United States v. Joyner, 924 F.2d 454, 457-59 (2d Cir. 1992) (affirming district court judgment that defendant who pled guilty to distributing two vials of crack was "otherwise accountable for" 586 vials seized from co-defendant, because amount was reasonably foreseeable) *with* United States v. Ivonye, 30 F.3d 275 (2d Cir. 1994) ("as a general proposition," reasonable foreseeability is no bar to sentencing defendant for full amount in his possession).

81. *Ekwunoh*, 12 F.3d at 373.

82. *Id.* at 370.

83. United States v. Ekwunoh, CR 91-684, 1994 U.S. Dist. LEXIS 1847, at *1 (E.D.N.Y. Feb. 23, 1994) (citation omitted).

84. *See* Bendavid, *supra* note 2 (describing failure of retroactivity provision); letter from William W. Wilkins, Jr., Chairman, United States Sentencing Commission, to Article III Judges (Sept. 13, 1994) (on file with author) (describing final provision as a "limited version" of safety valve endorsed by the Judicial Conference of the United States). For cases holding the provision not retroactive, *see, e.g.*, United States v. Gilmer, No. 94-H41, 1995 U.S. Dist. LEXIS 1470 (D. Ala. Feb. 6, 1995); United States v. Mitchell, No. 94-

Ekwunoh's *resentence*.[85] Thus the Guidelines, not the statutory minimum, controlled.

Under the Guidelines, the base level for importation of 1,013 grams of heroin is thirty-two.[86] However, the court repeated its earlier findings that Ms. Ekwunoh was a "minimal participant" operating under the domination of her boyfriend, and deducted four levels.[87] It also reiterated its finding that she had accepted responsibility for her act, and deducted three additional points.[88]

The court made two additional findings that led to an additional downward departure. First, it found that because Ms. Ekwunoh was the sole support of her three young children, one of whom was suffering emotional difficulties related to her incarceration, she was entitled to a reduction for family responsibilities.[89] The court also recognized the impact on Ms. Ekwunoh of the post-conviction legal proceedings, which, it found, had magnified the psychological effects of her incarceration.[90] She was, in the court's view, a broken woman.[91] With the concurrent thirteen point departures, the court was permitted to sentence her to thirty months—the time she had already served.[92]

The "safety valve" resulted in Ms. Ekwunoh's immediate release.[93]

VII. CONCLUSION

Without the safety valve, Caroline Ekwunoh would have spent 120 months in prison. The benefits to her of the new law are clear.

And what of the legal system? Had the safety valve been in place three years ago, it would have been deprived of a spirited defense of mens rea by a district court judge, and a repudiation of the principle by the Second Circuit

---

3511, 1994 U.S. Dist. LEXIS 19132 (D. Kan. Dec. 14, 1994).

85. *See* 18 U.S.C. § 3553(a)(4) (1988) (court must use Guidelines in effect at time of sentencing); U.S.S.G. § 1B1.11(a) (1994) (same); United States v. Bermudez, 974 F.2d 12, 14 (2d Cir. 1992) ("on remand, the current Guidelines should be consulted in resentencing defendant"); *see also* United States v. Ekwunoh, CR 91-684, 1994 U.S. Dist. LEXIS 17948, at *8-11 (E.D.N.Y. Dec. 9, 1994) (discussing "law of the case" doctrine in context of resentencing after a change in controlling law); Guide Lines (newsletter of the United States Sentencing Commission), Feb. 1995, at 3 ("safety valve" applies at resentencing on remand). Before applying the safety valve, the court found that Ms. Ekwunoh met the five threshold requirements of the provision. *Ekwunoh*, 1994 U.S. Dist. LEXIS 17948, at *11.

86. *See* U.S.S.G. § 2D1.1 (1994) (drug quantity table).

87. United States v. Ekwunoh, 813 F. Supp. 168, 180 (E.D.N.Y. 1993); see also U.S.S.G.. § 3B1.2(a) (1994).

88. *Ekwunoh*, 813 F. Supp. at 180; *see also* U.S.S.G. § 3E1.1(b) (1994).

89. *Ekwunoh*, 1994 U.S. Dist. LEXIS 17948, at *16.

90. *Id.; cf.* Soering v. United Kingdom, 11 E.H.R.R. 439 (July 7, 1989) (LEXIS, Europe Library, Cases File) (holding that to extradite a German citizen to the United States for trial on a capital crime would violate the European Convention for the Protection of Human Rights and Fundamental Freedoms, not because of the possibility of a death sentence, but because the years spent on death row, as legal proceedings ground on, would be tantamount to torture).

91. *Ekwunoh*, 1994 U.S. Dist. LEXIS 17948, at *16.

92. *Id.*

93. For a later case applying the "safety valve," see United States v. Hart, No. 93-380, 1995 U.S. Dist. LEXIS 1931 (D.D.C. Feb. 10, 1995) (reducing sentence from 120 months to 78 months). The safety valve is far from perfect. The provision's five criteria may create a "cliff effect" of their own. *See* Dowd, *supra* note 2, at 29 (proposing "sliding scale" application of "safety valve" for offenders who satisfy some, but not all five, of its requirements).

Court of Appeals. The years of litigation left both judges and jurisprudence diminished.

Under the mandatory minimums, the federal judiciary has done hard time. For the courts, as well as for Ms. Ekwunoh, the "safety valve" holds promise of a new beginning.