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REMARKS

ADDRESS BY THE HONORABLE STANLEY SPORKIN AT THE AMERICAN UNIVERSITY LAW REVIEW ANNUAL DINNER*

It is a great pleasure for me to have been invited to speak on this important occasion. There is nothing I like better than meeting with law students. This is because you have not yet been corrupted by the business of law. You are still to some degree idealistic and are not yet absorbed by the practicalities of the practice of law. You still view the law on a theoretical basis.

As law students you have a healthy, skeptical approach to the law and are totally irreverent to the lions at the Bar. Because the vast majority of law students have not been exposed to large salaries yet, you are a particularly good audience with which to explore legal theory instead of legal economics. While I use the word irreverence, I do not want you to take that concept to its extreme.

Several weeks ago, I was invited to address students at another prestigious law school. I had just undergone a root canal procedure and the left side of my face was swollen. I resembled the two-headed monster that many of my detractors claim I am. Despite my discomfort, and operating under the premise "the show must go on," I traveled to Philadelphia only to find that the lecture hall had only half the anticipated audience. I soon learned the other half decided they would rather sunbathe on the law school steps than listen to some judge from Washington ask, "Where were the lawyers during the savings and loan crisis?"

Tonight is obviously different. I am not competing with a beautiful day. This is an important evening for all of you, and the only thing I have to worry about is not taking too much of your time

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* The Washington Hilton Hotel, April 20, 1991.

since I know you would like to start your dancing as soon as possible.

Some of you might think that I have come here to make a pitch for you to commit yourselves to some form of public service upon entering the practice of law. You can all rest assured that I have left that speech at home. Instead, I would like to discuss an extremely serious topic with you.

We live in the greatest nation in the world. As citizens, we have opportunities that cannot be matched by any other nation. We also live in the most exciting era in the history of the world. There has never been another time, at least in my lifetime, when society generally has been less fearful of a world under nuclear attack.

Most significant, on a macro basis, is the change that is taking place at such an amazing pace that it truly boggles one's mind. When I talk about change, I am referring to every segment of our society. We are experiencing political, social, economic, and technological changes.

What I have referred to so far is the good news. But along with all the positive changes that are occurring, in our midst are some disturbing developments that are eroding some of our basic liberties. Liberties that we, as citizens of this great nation, have taken for granted for many decades. When we are faced with a problem that is not easily solvable, we become frustrated and sometimes adopt measures that are draconian. Our inability to deal with the drug problem, for example, has brought about certain measures that we, as citizens, should be looking at with a critical eye. But, I must tell you these practices are receiving little if any consideration by the citizenry. There are several specific areas that I would like to discuss with you this evening.

First, virtually each Congress during the past decade has passed a new crime-control or anti-narcotics bill.[1] On each occasion that Congress has visited the subject, it has added more stringent criminal penalties. Congress has taken the concept of mandatory minimum sentences and made them into an art form. I do not know whether many of you realize that a mandatory minimum sentence means just that. If an individual is caught possessing five grams or more of crack cocaine, that individual must be sentenced to a minimum sentence of five years in prison.[2] If you listened to what I just

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1. *See generally* Comprehensive Violent Crime Control Act of 1991, H.R. 1400, 102d Cong., 1st Sess., 137 CONG. REC. 1669 (1991); Victims of Crime Act of 1984, Pub. L. No. 98-473, § 1404, 98 Stat. 2170 (1984) (codified at 42 U.S.C. §§ 10601-10605 (1988)); Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(b), 96 Stat. 1248 (1982).

2. *Cf.* Sturgess, *Mandatory Sentence Draws Increased Fire*, The Recorder, May 7, 1991, at 1.

said, I referred to the crime of simple possession as carrying a minimum five-year mandatory sentence. I would dare say that many of you thought that an individual possessing drugs for personal use would be guilty of nothing more than a misdemeanor. Ladies and Gentlemen, that was the old law, not the new law. If you think the government does not mean business, I would suggest you visit my courtroom on a sentencing day and observe the number of years I am required to impose on the defendants appearing before me.

As you have been reading in the newspaper, Congress is now considering the latest version of a new crime control bill.[3] Congress is really getting tough this time—no more multiple-year mandatory minimum-sentence enhancements. This time around it's the death penalty.[4]

Coupled with the mandatory minimum sentence phenomenon, since November 1987 the United States has had what is known as Guideline Sentencing,[5] or as some refer to it, "sentencing by the numbers." The concept here is to achieve uniformity in sentencing regardless of the particular sentencing judge.

It is interesting to note that virtually the only critics who have raised any question about what is happening have been the members of the judiciary. Indeed, one United States District Court Judge recently resigned because of the injustice he perceived in the system. Let me quote from a newspaper article of some months ago:

> **Criticizing Sentencing Rules, U.S. Judge Resigns**
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> Federal District Judge J. Lawrence Irving, who has presided over a series of highly publicized cases in San Diego has announced that he is resigning because he believes Federal sentencing guidelines are too harsh.
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> "If I remain on the bench I have no choice but to follow the law," Judge Irving said Thursday, when his resignation was announced. "I just can't in good conscience, continue to do this."
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> Judge Irving said he believed he was the first Federal judge in the nation to resign over sentencing guidelines. The guidelines, which went into effect on Nov. 1, 1987, require longer minimum

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3. *See* Comprehensive Violent Crime Control Act of 1991, H.R. 1400, 102d Cong., 1st Sess., 137 CONG. REC. 1669 (1991).

4. *Id.* § 102 (establishing use of death penalty for federal drug offenses).

5. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1987 (1984) (empowering United States Sentencing Commission to draft mandatory sentencing guidelines); UNITED STATES SENTENCING COMMISSION, UNITED STATES SENTENCING GUIDELINES AND POLICY STATEMENTS, 52 Fed. Reg. 18,046 (1987) (implementing and publishing federal sentencing guidelines).

sentences and no parole, even for first offenders. Judges are left with little or not [sic] discretion to modify sentences.

Judge Irving once ruled the Federal guidelines unconstitutional, but was overruled by higher courts. In January 1989, the Supreme Court upheld the constitutionality of the guidelines.

"I've had a problem with mandatory sentencing in almost every case that's come before me," he said.

Split Sentence In Drug Case

As an example he cited a 19-year-old man charged with possession and intent to distribute cocaine.

The judge, under the old law, gave him a split sentence: six months in prison with five years' probation," the judge said. "The young man understood that if he violated probation he'd go back to prison to serve out the rest of his term."

"He did his six months, and after that he remained free of drugs—we know this because of regular testing," the judge continued. "He completed his education, got married, had a child and became a productive, tax-paying member of society."

Under mandatory sentencing guidelines, the judge said, the defendant would have been sentenced to 20 years in prison with no possibility of parole.

"That's heavy," he said. "And that's my problem. I just can't do it anymore."

Colleagues' Support Cited

In an interview on Friday, Judge Irving said he had received dozens of calls from judges as far away as Little Rock, Ark., who support his stand.[6]

The questions I must ask those of you who oversee the legal literature in this nation are, "Where are the law reviews and law journals on these issues? Why has the public been so silent?" Several weeks ago the attention of the middle class was aroused when they opened their morning papers to find that police, looking for drugs, raided a number of social fraternities, in a university south of Washington, D.C.[7] In addition to arresting a number of students, the police seized the fraternity houses themselves under another provision of the drug laws. It is going to be interesting to see how this university community reacts when it sees its young college students being sent away for fairly long jail terms.

A second area of concern in the judiciary is the way some of our

6. N.Y. Times, Sept. 30, 1990, Section 1, at 22, col. 1.

7. *See* N.Y. Times, March 23, 1991, Section 1, at 22, col. 1 (stating that raid at three University of Virginia fraternities made by federal, state, and local law enforcement officers and resulting in arrest of eleven students, was first of its kind in country).

basic constitutional provisions are being construed. Over the years the protective standard of the fourth amendment has gone from probable cause to a lesser standard verbalized as "articulable suspicion." We have even gone so far as to allow dog sniffing to form the basis for allowing searches of personal property.[8]

In recent times, some courts, including those in the District of Columbia, have allowed people in bus and train stations to be stopped by police officers without any basis whatsoever and have authorized the search of such individuals based upon their purported consent.[9] This practice has caused one court to eloquently state:

> [T]he evidence in this cause [sic] has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who had temporary power in the Government. The specter of American citizens being asked, by badge-wielding police for identification, travel papers—in short a raison d'etre—is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. . . .[10]

Where has the public been in this debate as to how far the government should be permitted to go in this all-out "anything-goes" war on drugs? I do not want anyone to misconstrue my remarks here this evening. The drug problem is serious and we must deal with it vigorously, using all the means our nation can assemble to deal with the problem. Having said that, though, the point is that our war on drugs must be fought on a basis well within the framework of the Constitution, in a way that is proportional to the anti-social conduct involved. We must make a greater effort to target the drug king pins and allocate more of our resources to accomplishing that goal. We are not going to defeat the enemy by giving unduly long prison terms to the users of banned substances or the couriers that transport them. We must do more to get the drug transporter, to identify his or her supplier, and sentence *that* individual to a long prison term.

Law schools have an important role to play in the matters I have

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8. *See* United States v. Place, 462 U.S. 696, 707 (1983) (upholding initial seizure of narcotics based on sniffing of luggage by police dog).

9. *See* United States v. Springs, No. 90-3208, 1991 U.S. App. LEXIS 13250 (D.C. Cir. June 28, 1991) (affirming conviction of woman who upon leaving D.C. bus station was stopped and asked to consent to search of her belongings by drug-interdiction detective); *see also* Florida v. Bostick, 111 S. Ct. 2382, 2389 (1991) (holding random bus boardings and searches are not *per se* unconstitutional).

10. State v. Kerwick, 512 So. 2d 347, 348 (Fla. 1987).

been discussing tonight. Law schools must stop being historical preservation societies. They must get away from living in the past, and their incessant slavish devotion to examining precedent must give way to efforts to shape the law. Particularly, the time has come for law schools to become bolder and speak out where they find some of our basic legal tenets in jeopardy. The message I leave tonight is that law schools should become more relevant.