MEMORANDUM TO THE LEGISLATIVE COMMITTEE OF THE NATIONAL CAPITOL AREA ACLU ON THE PROPOSED MANDATORY SENTENCING INITIATIVE FOR THE DISTRICT OF COLUMBIA

The Initiative attached to this study as Appendix I has been circulated in the District of Columbia to obtain the requisite signatures for placement on the D. C. ballot for the September 1982 election. The Initiative calls for mandatory minimum sentences for offenders convicted of certain drug-related offenses and certain crimes committed while armed with a firearm. This study will analyze the legal and policy problems raised by the Initiative as well as attempt to ascertain the probable impact of the Initiative upon the relevant convictions obtained and sentences meted out in the District of Columbia. Part I of the study addresses the firearm provisions of the Initiative, Part II discusses the drug-related provisions, and Part III discusses the costs of the Initiative, and Part IV summarizes certain statistical data collected from various sources.

I. Commission of Crimes of Violence While Armed with a Firearm

A. Overview of Current Statute and the Initiative

There already is in effect in the District of Columbia a criminal statute relating to additional penalties for offenders convicted of committing a crime while armed ("the current statute"). See D.C. Code § 22-3202. A copy of the current statute is attached to the memorandum as Appendix II. The Initiative would amend Section 22-3202 rather than create a new

an "enhancement" penalty in the form of a period of imprisonment which may be as great as life imprisonment. The enhancement penalty is given on the basis of the fact of the firearm or dangerous weapon, and lengthens the penalty associated with the underlying crime of violence. 1/ Under the current statute, there is nothing "mandatory" or "minimum" about the enhancement penalty for the first time offender. The court has the discretion not to assess the enhanced sentence, and if an enhanced sentence is given, the offender is not required to serve the enhancement penalty prior to becoming eligible for parole. Finally, the current statute does not prohibit application of the Federal Youth Corrections Act to any first time offender whose age makes him or her eligible for sentencing under the Act. The provisions of the Federal Youth Corrections Act are discussed below at pages 6-11 .

The current statute treats offenders who previously have been convicted for committing a crime of violence while armed with a firearm or deadly weapon (the "repeat offenders")

1/ Section 23-112 of the D.C. Code provides that sentences for multiple offenses shall run consecutively unless the sentencing court expressly provides otherwise.

much more harshly than first time offenders. Section 22-3202 requires the sentencing court to assess an additional penalty. The penalty takes the form of an additional "indeterminate" sentence added to the sentence given for the underlying crime; that is, the additional sentence itself has minimum and maximum bounds (e.g., "five to fifteen years"). The current statute requires the court to sentence the repeat offender to an inderminate enhancement sentence at a minimum of at least five years and a maximum of at least three times the minimum. Thus, the lowest sentence that the court can impose on a repeat offender is "five to fifteen years." In contrast to its provisions for first time offenders, the current statute does create a mandatory minimum sentence for repeat offenders because 1) the court has no discretion to give the repeat offender an additional penalty of less than five years and 2) repeat offenders may not be released on parole until they have served the minimum number of years of the additional penalty imposed by the court. Also unlike its provisions for first time offenders, the current statute prohibits the application of the Federal Youth Corrections Act to cases involving repeat offenders.

Appendix III states Section 22-3202 as it would be amended by the Initiative. The Initiative would change Section

22-3202 with respect to offenders convicted of committing a crime of violence while armed with a firearm. The sentencing disposition of defendants convicted of committing a crime of violence while armed with a deadly weapon other than a firearm would not be affected by the Initiative. Moreover, the Initiative does not in any way change Section 22-3204 of the D.C. Code, which makes carrying a concealed firearm (without a license) or other dangerous weapon an offense punishable by a fine of not more than $1,000 and/or by a term of imprisonment of not more than one year. 2/

The Initiative significantly would change Section 22-3202 for first time offenders who carry a firearm while committing the underlying crime of violence and who are actually convicted of or plead guilty to the offense. The Initiative would mandate as an additional penalty the five year minimum sentence reserved under the current statute for the repeat offender who was armed with either a firearm or dangerous weapon. Parole would not be available to a first time offender who was armed with a firearm while committing a crime of violence. The Initiative retains the current statute's provision, however, that

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2/ Section 22-3204 also stipulates that offenders convicted for carrying a concealed firearm or other dangerous weapon will be subject to a term of imprisonment of not more than ten years if they have previously been convicted either of a felony or of a Section 22-3204 offense.

an offender eligible for treatment under the Federal Youth Corrections Act may be sentenced under that Act in lieu of the mandatory minimum set forth in the Initiative.

The Initiative would raise the mandatory minimum enhancement penalty from five years to ten years for the repeat offender who was armed with a firearm while committing the crime of violence. In all other respects, the application of Section 22-3202 to the repeat offender would remain unchanged. There is, however, some ambiguity under the Initiative as to whether the ten year sentence would apply to a repeat offender whose second conviction under Section 22-3202 is for committing a crime of violence while armed with a firearm but whose prior conviction was for commission of a crime of violence while armed with a deadly weapon (as opposed to a firearm). 3/

B. Analysis of the Firearm Provisions of the Initiative

1. The Deterrence and Incapacitation Goals of Mandatory Sentencing Are Inconsistent with the Federal Youth Corrections Act

The ACLU supports the Federal Youth Corrections (FYCA) and the Young Adult Offender Acts, which allow judges

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3/ The Initiative provides that the offender convicted of a "second offense while armed with any pistol or firearm" shall be imprisoned for a mandatory minimum term of not less than ten years. The Initiative is extremely ambiguous regarding whether

[Footnote continued]

discretion to impose a wide variety of sentences on offenders they classify as juveniles rather than adults. These Acts give deserving youths a chance to reform, where the automatic imposition of an adult sentence would lead to imprisonment and future criminal conduct. Under the Initiative, the Youth Corrections and Young Adult Offender Acts would still apply. Any first time offender who is under the age of twenty-two years at the time of his conviction ("the youth offender") and any first time offender of age twenty-two to twenty-six at the time of conviction ("the young adult offender"), could, in the sentencing court's discretion, be sentenced under the Federal Youth Corrections Act in lieu of receiving the mandatory minimum five year term set forth in the Initiative. See 18 U.S.C. § 5010. 4/ Under the FYCA, the youth or young adult offender may receive a

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[Footnote continued]

the offender whose prior Section 22-3202 conviction was for committing a crime with a deadly or dangerous weapon other than a firearm. Although the precise wording of the Initiative suggests that any prior conviction under Section 22-3202 would render the repeat offender subject to a ten year mandatory minimum, the language is uncertain. Also note that, technically, the Initiative only calls for application of the ten year mandatory sentence for a "second" offense and not any subsequent offenses.

4/ The provisions of the Federal Youth Corrections Act are always available to the court when sentencing a youth offender. See 18 U.S.C. §§ 5006(d), 5010. To sentence a young adult offender under the provisions of the Federal Youth Corrections Act, the court must find, after taking into consideration the previous criminal record of the defendant and other factors such as social background and mental and physical health, that there are reasonable grounds to believe that the defendant will benefit from treatment under the Act. See 18 U.S.C. § 4216.

suspended sentence with probation if the court is of the opinion that the offender does not need commitment for treatment. 5/ 18 U.S.C. § 5010(a). If the court feels that commitment to treatment is warranted, it can commit the youth or young adult offender to the Commissioner of the District of Columbia. 18 U.S.C. §§ 5010(b), 5025. Such a committed offender is treated in maximum, medium, or minimum security institutions, with the youth and young adult offenders segregated (when possible) from adult prisoners. The goal of such treatment is rehabilitation. Unless the sentencing court finds that the youth or young adult offender would benefit from longer treatment, the offender must be "conditionally released" (which means that the released offender is under supervision) prior to the expiration of four years from the date of his conviction. 18 U.S.C. §§ 5010(b), 5017(c). If the court has found that longer treatment is warranted, it stipulates at sentencing the length of treatment, and the youth or young adult offender must be conditionally released no later than two years before the expiration of the term imposed by the court. 18 U.S.C. §§ 5010(c), 5017(d). The parole board may conditionally release the youth offender or young adult offender at any time if it determines that such release would not

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5/ If the court desires additional information as to whether a youth offender will derive maximum benefit from treatment, it may order observation of the offender by the Commissioner. See 18 U.S.C. § 5010(e).

depreciate the seriousness of the offender's offense, promote disrespect for the law, or jeopardize the public welfare. 18 U.S.C. §§ 4206, 5017(a).

To the extent that the drafters of the Initiative seek to "incapacitate" proven offenders, 6/ the Initiative will not achieve its goals with respect to the youth and young adult offenders who remain eligible for treatment under the FYCA. According to statistics obtained from the Prosecutor Management Information System (PROMIS), 22% of youths and young adults found guilty in 1974 of committing a crime of violence while armed with a firearm were committed to treatment under the FYCA rather than sentenced pursuant to the penalties provided in the criminal statutes of the D.C. Code. Although youth and young adult offender firearm crime data are unavailable for subsequent years, statistics obtained from the Department of Corrections for the District of Columbia reveal that approximately 13% of all offenders incarcerated as of July 1st, 1981 were being treated under the Federal Youth Corrections Act. Indeed, the percentage

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6/ Whether there exists sufficient expertise in the criminal justice system to predict accurately those offenders who are likely to commit subsequent crimes (thus justifying the application of criminal punishment for purposes of incapacitation) is an extremely open question. Moreover, there are serious philosophical issues raised by use of criminal punishment solely to incapacitate offenders, even assuming ability to predict recidivism. See discussion below at pages 21-25.

of youth and young adult offenders who are sentenced under the FYCA probably will increase if the Initiative passes, since a sentencing court confronted by a rigid mandatory five year sentencing alternative, which many judges are likely to consider too harsh for a first time offender who is under the age of twenty-six, is more likely to invoke the provisions of the FYCA. Of the offenders who began to serve terms of incarceration in 1981, 39 percent could have been sentenced under the FYCA.

In addition to attempting to incapacitate proven offenders, it is likely that the drafters of the Initiative seek to deter potential offenders from committing crimes of violence while armed with a firearm. To the extent that offenders are sentenced under the FYCA rather than under the statute, however, the deterrent effect claimed by some of the Initiative's proponents would be significantly diluted. Nearly 60 percent of all persons arrested for "crimes of violence" as defined in the Initiative are 24 years of age or less. See Table 17, Part IV. In 1980, 55.3 percent of all arrestees for murder, rape, robbery and assault were 24 or under. See Table 18, Part IV. Judges would have the discretion to impose lesser sentences than the mandatory minimum on any of these arrestees who were convicted.

The ACLU believes that treatment, rather than retribution through imprisonment, should be the primary goal in

sentencing young offenders. But given this assumption, any deterrent or incapacitation effects of mandatory sentencing are diluted. Mandatory sentencing simply is inconsistent with our dominant sentencing structure.

2. Mandatory Sentencing Has No Positive Impact on the Prosecution of Defendants

The ACLU approves of plea bargaining where "vigorous and fair rules" are followed (National ACLU policy statement). While the ACLU accepts the necessity of plea bargaining to increase the efficiency of the criminal justice system, the ACLU does not condone replacing judicial discretion with prosecutorial discretion where the prosecutor gains undue leverage over the defendant.

Unfortunately, most mandatory sentencing proposals simply redistribute, rather than reduce, discretion within the criminal justice system. In this respect, the system is "hydraulic": sentencing discretion suppressed at the judicial level (where the protection of due process is mandated) rises at the prosecutorial level, where formalities are few. See generally Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. Pa. L. Rev. 550 (1978); D. Horowitz, The Courts and Social Policy (1977); Heumann & Loftin, Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute, 13 Law & Soc. Rev. 393 (1979). In part because of the problems raised

by prosecutorial discretion, the American Bar Association continues to voice its concern regarding mandatory sentences. See ABA, Sentencing Alternatives and Procedures 94 (Tent. 2d ed. 1979). As U.S. District Court Judge Frank Kaufman noted,

> Fixed or minimum sentencing, which eliminates or minimizes the trial judge's opportunity to exercise discretion in sentencing, will only increase the present awesome power of law enforcement and prosecutorial officials to determine sentences. All persons committing the same crime are not similarly charged, whether because the apprehending officer or the prosecutor are 'nice guys" or are friends of the offender or his family, or want cooperation or information from the offender, or for many other reasons. Some defendants are charged with one or more crimes with sentences totalling fewer years or carrying only fines as penalties. Still other offenders plead guilty under beneficial plea agreements, and some are not charged at all. Thus, fixed or minimum sentencing does not eliminate sentencing disparities and does not provide equal and predictable treatment for each would-be offender. Kaufman, The Sentencing Views of Yet Another Judge, 66 Georgetown Law Review 1247 (1978).

The Initiative in the District of Columbia contains absolutely no provisions addressing this problem. It is difficult to determine exactly how the Initiative will affect plea bargaining. If the rate of plea bargaining remains constant, pressure on the entire criminal justice system will build. Because the Initiative would create mandatory minimum sentences that strip the sentencing court of any ability to reduce below five years (for first time offenders) or ten years (for repeat offenders) sentences for convictions under Section 22-3202 for carrying a firearm while committing a crime of violence, offenders are not likely to plead guilty to Section 22-3202

firearm charges. Instead, they likely will demand a trial, in the hope that the prosecutor's evidence will fail or that even in an "air-tight" case, the factfinder will not return a plea of guilty because the particular facts of the case do not appear to warrant the five year sentence. Indeed, this may have occurred in New York, where a reduction in plea bargaining and mandatory sentencing laws combined to drop the conviction rate from one-third to one-fifth of all arrests. Joint Committee on New York Drug Law Evaluation, The Nation's Toughest Drug Law at 15 (1977). See discussion below at page 17.

On the other hand, the rate of plea bargaining may increase. The prosecutor, aware that the District of Columbia court system simply does not have the resources to accommodate increased demands for jury or bench trials, may well opt to plea bargain with the defendant. Moreover, even in the case where court resources are available for the trial, the prosecutor may be moved to reduce the charge because there are no prison facilities available to carry through the mandatory minimum sentence. See Part III. Finally, the prosecutor may choose not to charge the Section 22-3202 offense simply because the prosecutor feels that the offense committed does not warrant the harsh five year sentence. Although the discretion to charge a less severe offense may alleviate the problems of the Initiative's over-inclusiveness and inflexibility discussed below at pages

17 - 21, almost all commentators agree that the judiciary, and not the prosecutorial division, should be the body charged with the final decision as to the impact that the relative culpability of the offender should have upon his sentence. See, e.g. Alschuler, supra.

It is critical to realize that removing discretion from the sentencing court only to place it with the prosecutor in the form of power to bargain with the offender will undermine the deterrent effects, if any, that the mandatory sentencing Initiative might otherwise have. See pages 14-20 below. Assuming that the Initiative is impotent in creating a deterrent effect, there is no justification for sentencing to a harsh term of imprisonment (without any possibility of parole) those offenders who, due to the vagaries of prosecutorial discretion and fluctuating resources, have been processed within the criminal justice system to the point of conviction and sentencing. The court should retain the power to tailor these offenders' sentences to reflect the severity of their criminal behavior and to reflect the relative treatment received by other offenders who pled to charges without mandatory penalties or received sentences under the Federal Youth Corrections Act.

3. Mandatory Sentencing Does Not Significantly Deter Individuals from Committing Crimes

Theories of general deterrence usually are based on the premise that human behavior can be influenced by incentives, and

that criminal sanctions are negative inducements whose imposition on detected offenders serves to discourage at least some others from engaging in similar criminal pursuits. Theories of deterrence predict a "negative association" between aggregate crime rates and sanction levels. See National Academy of Sciences, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 19 (1978) (hereinafter cited as Deterrence and Incapacitation).

It should be stressed at the outset that studies "empirically proving" the validity of the general deterrence theory have been the subject of criticism by other statisticians, and it is by no means certain that the deterrence theory is valid. See Cook, Punishment and Crime: A Critique of Current Findings Concerning the Preventive Effects of Punishment, 41 Law & Contemp. Prob. 164 (1977); Deterrence and Incapacitation 58 ("The current state of experimental and quasi-experimental research on deterrence, as reflected in the literature, is discouraging.") See generally Zimring and Hawkins, Deterrence: The Legal Threat in Crime Control (1973). As Judge David Bazelon stated,

> While the concept of deterrence may have application in the area of white collar crime, it has little or no meaning in the alienated world of violent street crime. This world is one of savage deprivation. Virtually all street crime comes out of wretched poverty, broken families, malnutrition, mental and physical illness, mental retardation, racial discrimination, and lack of opportunity. Street crime springs from anger and resentment of those who have been twisted by a culture

> of grinding oppression. The roots of street crime are thus imbedded deep within the inequities of our very social structure. So long as these inequities remain the roots will be continually refreshed and rejuvenated. To speak of incapacitation and deterrence in this context is to consign oneself to a treadmill, unable to stem the increasing crime rate -- despite a succession of repressive measures. Bazelon, Missed Opportunities in Sentencing Reform, 7 Hofstra Law Review 57 at 59 (1978).

Even among those authorities who adhere to the general deterrence theory, there is relatively widespread agreement that deterrence depends both on the severity of the sentence imposed and on the certainty of its imposition. See Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 176 (1968); Posner, Economic Analysis of Law § 7.2 (2d ed. 1977). Indeed, it may well be that certainty of some punishment is far more important in producing a deterrent effect than length of imprisonment. See Block & Lind, An Economic Analysis of Crimes Punishable by Imprisonment, 4 J. Legal Stud. 479 (1975); Deterrence and Incapacitation 37.

The sponsors of the Initiative have said that their goal is to make punishment "swift and certain." Petitions Ask Fixed Terms for Some Crimes, Washington Post C-1 (March 5, 1980). As discussed above, certainty of imprisonment under the Initiative is dramatically reduced by the availability of sentencing under the FYCA for first time offenders and plea bargaining with the prosecutor for all offenders. Certainty of

punishment will also be reduced if the factfinder, whether that be a judge or a jury, circumvents the mandatory sentences simply by finding the offender not guilty of carrying a firearm in those cases where the elements of the offense technically are supported by the evidence but the factfinder believes that the mandatory sentence is too harsh given the facts of a particular case. This phenomenom was reported in Michigan after that state adopted mandatory minimum two year sentences for offenders who carried a gun while committing any felony. See Heumann & Loftin, Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute, 13 Law & Soc. Rev. 393, 417-420 (1979). The conviction rate also declined in New York after the imposition of mandatory minimum sentences for drug crimes, from one-third to one-fifth of all drug arrests. The number of convictions relative to dispositions fell from 86 percent in 1972 to 80 percent in 1976, after passage of the mandatory sentencing laws. A 1977 study on the New York Drug Laws concluded, "The total number of convictions for drug offenses in felony courts in the period 1974 to mid-1976 was lower than would have been expected during the same period under old law disposition patterns." See Joint Committee on New York Drug Law Evaluation, supra.

Finally, the Initiative does nothing to increase the probability that offenders will be detected or convicted, and to the extent that apprehension and conviction rates remain low

potential offenders will not perceive certainty of punishment. Offenders in the District have a 3.4 percent chance of being convicted of a Part I crime ("crime of violence," including crimes against property), and an 11 percent chance of a conviction of a crime against persons. See Tables 5 and 6, Part IV. Less than one crime in five results in an arrest, and the arrest rate has been declining for the past five years. See Table 4, Part IV. For crimes against persons, the arrest rate has also declined steadily since 1976, from 50 percent to 30 percent in 1980. See Table 4, Part IV. The available data for violent crimes committed with firearms shows much the same pattern. See Table 10, Part IV.

These low arrest and conviction rates make punishment unlikely. If deterrence is to have any chance of succeeding, the arrest and conviction rates must rise dramatically. The sentences imposed on offenders only affect those offenders who have been convicted -- a small fraction of those that commit crimes. Longer prison sentences will not bolster the low arrest and conviction rates that make punishment uncertain and deterrence weak. The net result may well be that notwithstanding the long sentences dictated by the Initiative, potential offenders will perceive that the chances are low of being apprehended, charged,

convicted, and sentenced under Section 22-3202, and they will not be deterred from committing the crimes covered by the Initiative.

To the extent that the possibility of a long prison sentence generates any deterrent effect, the issue of equity and fairness is raised whether the minimal deterrent effect generated by the selective imposition of long sentences on a relatively few offenders can be justified. Perhaps fairness dictates that rather than subjecting a few offenders to fairly draconian sentences, law enforcement resources should be committed to ensuring that more offenders are detected and receive some punishment. See Perlman & Stebbins, Implementing an Equitable Sentencing System, 65 Va. L. Rev. 1175, 1189 (1979) ("The use of one person as a means to prevent others raises serious philosophical questions and the temptation to economize by deterring with a big -- although seldom applied -- stick makes those who are concerned with equity uneasy").

Apart from the factors diluting the deterrent effect of the Initiative discussed above, the mandatory sentences may have little deterrent effect for crimes against persons committed with a firearm because the sentences being imposed by the courts are already severe. 7/ The number of prison sentences has increased

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7/ Judges often impose concurrent sentences on the same offender when that offender is convicted of multiple charges. There is no requirement that the additional sentence begin to run after the underlying sentence has been served.

dramatically since 1977; between one-third and one-half of all convictions for crimes against persons already result in incarceration. See Table 16, Part IV. Furthermore, sentences for the crimes of murder, rape and robbery already exceed or approximate (on the average) the proposed mandatory minimums for first time offenders. In 1974, 87% of offenders convicted of committing murder while armed with a firearm were incarcerated for minimum sentences (i.e., the time that must be served prior to parole eligibility) averaging almost 7 years; 83% of the offenders convicted for committing rape while armed with a gun were incarcerated for minimum sentences averaging almost 5 years; and 70% of the offenders convicted for committing robbery while armed with a gun were incarcerated for minimum sentences averaging almost 4 years. See Table 15, Part IV. Although the data on felonies committed while armed is not available for subsequent years, statistics available for all homicides, rapes and armed robberies for the years 1977 through 1980 reveal that offenders convicted of second degree murder, first degree murder, rape and armed robbery receive minimum average sentences exceeding or approximating the five years provided in the Initiative. See Table 14, Part IV. 8/

8/ It must be noted, however, that both the 1974 PROMIS statistics and the 1977-1980 statistics include sentences given to repeat offenders which may increase the average minimums significantly above those given to first time offenders. Unfortunately, statistics relating exclusively to first time offenders are not available.

4. The Use of Mandatory Sentences to Incapacitate Offenders Does Not Make Society Safer

There has long been controversy whether imprisonment of offenders for the purpose of precluding them from committing subsequent offenses is justified. Studies indicate that even where we examine each individual on a case-by-case basis, we lack the capacity to predict accurately those specific offenders who will become recidivists. "(C)riminal conduct tends to have two characteristics which make it resistant to accurate prediction," concluded a leading criminologist and legal scholar. "(1) It is comparatively rare. The more dangerous the conduct is, the rarer it is. Violent crime -- perhaps the most dangerous of all -- is the rarest of all. (2) It has no known, clearly identifiable symptoms." (von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 Buffalo Law Review 717 at 733 (1972)). Psychologists and behavioralists agree. A leading study concluded that attempts to "predict whether an offender will be dangerous to others if released" are "futile." According to the authors, the only controversy in the field is between those that believe "psychologists and pyschiatrists are utterly useless at predicting criminal behavior . . . and those that argue, poor as it is, predictive accuracy still exceeds coin flipping." The authors agreed with the former proposition. Monahan, Prediction Research and the Role of Psychiatrists in Correctional Institutions, 14 San Diego Law Review 1028 (1977).

The central problem in using the prediction of criminal behavior to impose prison sentences is the high percentage of

"false positives" any such predictions identify. False positives are those persons predicted to commit crimes in the future and incarcerated on those grounds who in fact would not have engaged in criminal behavior had they remained free. Von Hirsch states, "(T)he mistaken preventive confinement of actually nondangerous persons can no more be tolerated than the conviction of the innocent." Prediction of Criminal Conduct, 21 Buffalo Law Review 717 at 742. Prediction models of criminal behavior establish that the rate of false positives is often very high -- usually, over 50 percent. In California, a multivariable model for youth offenders that predicted future criminal behavior identified false positives in 86% of its cases. Wenk, Robinson and Smith, Can Violence Be Predicted?, 18 Crime and Delinquency 393 (1972). Another multivariable model had a 61.3 percent error rate in predicting recidivism. Kozol, The Diagnosis and Treatment of Dangerousness, 18 Crime and Delinquency 371 (1972).

As an attempt to incarcerate dangerous offenders, the Initiative makes no effort to identify which factors make the offenders that fall within its provision more dangerous than any other individuals. The offenders sentenced under the Initiative share two characteristics: conviction of a "crime of violence," and possession of a firearm. Neither variable adequately identifies which offenders are likely to recidivate. For example, fully 70 percent of all individuals arrested for robbery (a highly recidivistic crime) in 1971 had not been rearrested for

any crime by mid-1975. Eighty-two percent of those offenders convicted for robbery had never been reconvicted for any crime by mid-1975. Williams, The Scope and Prediction of Recidivism, 10 PROMIS Research Project at 6, 7 (1979). Imprisoning all robbery arrestees would incarcerate many more offenders who will not commit crimes in the future than it will incarcerate future recidivists.

Other studies demonstrate the futility of using the prediction of criminal behavior in the District to incarcerate dangerous offenders. Of the offenders convicted of robbery in the District, less than 18 percent are recidivists; of those potential offenders arrested for robbery and released, 25 percent recidivate; and of those defendants who are acquitted, 21 percent are recidivists. Rhodes, Plea Bargaining: Who Gains? Who Loses?, 14 PROMIS Research Project at 54 (1978). Moreover, the recidivism rates for offenders who use weapons and those who do not are nearly identical. Cook, Does the Weapon Matter?, 8 PROMIS Research Project at 25 (1979). In short, (1) the offenders who would be incarcerated under the Initiative are no more dangerous than persons arrested and released, acquitted, or convicted of crimes not covered by the Initiative; and (2) the

Initiative would incarcerate a large number of offenders who pose no future danger to society.

The impact of added incarceration on the crime rate is minimal, simply because there are too many crimes for which no one is apprehended or convicted. Increased incarceration has no effect on the 96.4 percent of all crimes of violence for which no one is convicted. Indeed, a Denver study, ignoring the effects of plea bargaining and prison terms on recidivism, predicted that imposing a mandatory prison term of five years on all convicted violent offenders (not simply those with firearms) would reduce crimes against persons by 5 percent, while increasing the prison population by 150 percent. Petersilia and Greenwood, Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations 69 J. of Crim. Law 604 (1978). Moreover, prison sentences in the District are already severe, with murder, rape and armed robbery sentences averaging at or above the five-year minimum. See Table 14.

Finally, assuming that imprisoning certain offenders gives society some benefits in added security, incarceration also reduces societal security. Studies show that lengthy prison terms, such as those proposed by the Initiative, are likely to increase the recidivism rate for a given offender. Overcrowded and violent facilities, coupled with a lack of adequate educational programs, embitters offenders and leads them to

commit further crimes upon their release. See Silberman, Criminal Violence, Criminal Justice, 505 n. (1978); von Hirsch, Prediction of Criminal Conduct, 21 Buffalo Law Review 717 (1972). Thus, the Initiative will incarcerate a number of additional offenders, who may or may not be dangerous before their imprisonment, but who will assuredly be more dangerous upon their release.

5. The Mandatory Sentencing Initiative Is Overinclusive, Inflexible and Unfair

The Initiative raises serious issues of equity for those cases in which the offender must actually be sentenced to the mandatory minimum term of imprisonment. Mandatory minimum sentences have long been criticized because they strip the sentencing court of all ability to sentence the offender to a punishment that reflects fairly the severity of his particular crime.

The Initiative would result in inequity at three levels. First, the length of the sentence for offenders convicted of committing crimes of violence while armed with a firearm would for some classes of crime be disproportionate to the lengths of sentences given to offenders who commit the same underlying crime but do not use a firearm. For example, although in 1974 offenders convicted in the District of Columbia of assault with a gun received almost the same average minimum sentence as offenders

convicted of assault with some other weapon (18 months for assaults involving guns; 17 months for assaults involving other weapons, Cook, Does the Weapon Matter?, 8 PROMIS Research Project at 51 (1979), the effect of the Initiative would be to force courts to sentence first time offenders armed with a gun to five years while allowing the sentences to remain much lower for first time offenders of assaults with other types of dangerous and deadly weapons. Assuming that for the reasons discussed above at pages [13 - 16] the Initiative will have only a limited effect in deterring potential assaulters from carrying a gun, the essential issue becomes whether the fact of the gun warrants imprisoning first-time offenders convicted of assault with a firearm for periods far exceeding the sentences given to first-time offenders who commit the same underlying crime but who were not carrying a gun at the time of commission.

Second, the Initiative includes within its scope several classes of crimes differing significantly in their severity. The list of offenses included as "crimes of violence" ranges from "murder" to "larceny" to "assault with intent to commit any offense punishable by imprisonment in the penitentiary." As discussed above, average minimum sentences imposed for the years 1977-1980 for homicides, rapes, and armed robbery approximated or exceeded the Initiative's mandatory minimum of five years. As to these crimes, the Initiative would have little impact upon sentences. For the lesser crimes such as

assault with a deadly weapon, however, many offenders receive probation and the average prison sentences hover around 2 years. The Initiative will force the courts to raise the sentences for these less severe crimes so that they approximate the sentences given for the more severe crimes. To this extent, the Initiative is overinclusive; that is, it reduces the ability of the criminal justice system to treat offenders fairly by giving them sentences reflecting the relative severity of their criminal offense. This phenomenom is aggravated by the fact that the Initiative includes attempt convictions as subject to the mandatory minimum sentences.

Third, the Initiative would create unfairness among defendants convicted of the same offense because it would strip the court of its ability to consider the particular characteristics of the offender's criminal behavior when fashioning a sentence. According to Judge David Bazelon,

> The assumption that defendants or offenses can be categorized in a meaningful way is problematic. The variety of possible situations simply defies such bright lines . . . There are an infinite number of ways of characterizing any individual defendant, and which characteristics are relevant must be determined by the particular circumstances of the specific case. Bazelon, Missed Opportunities in Sentencing Reform, 7 Hofstra Law Review 57 at 62 (1978).

The formal elements of a particular crime admit of widely varying offender behavior with respect to such characteristics as how the offender treated his victim and whether the offender "master-minded" the criminal endeavor or merely participated as a relatively inactive co-defendant. Perhaps the most important

such factor in sentencing an offender convicted under Section 22-3202 is how the offender used the firearm. Presumably, an offender who relied upon the firearm to coerce his victim should receive a harsher sentence than the offender who was merely discovered upon arrest to have been carrying a concealed firearm at the time of the offense. Assuming that there are certain classes of crimes of violence for which a sentencing court would be unwilling to mete out sentences longer than the mandatory minimum (such as assault with a deadly weapon), however, the Initiative forces the sentencing court to render the same sentences to an offender who carried a concealed firearm and an offender who actively used the firearm.

In summary, to the extent that the criminal justice system should be designed to provide sentences reflecting the relative severity of the offender's criminal behavior, the Initiative undermines the sentencing court's ability to achieve that goal because 1) at least for some classes of crimes of violence, it draws too much of a distinction between offenders who carried firearms while committing a particular offense and offenders who possessed a deadly weapon other than a firearm; 2) it makes a wide range of criminal behavior subject to the same mandatory minimum; and 3) it deprives the sentencing court of the ability to consider the particular characteristics of an offender's criminal behavior.

6. Impact of the Initiative on Sentencing by the Race of the Offender

The Initiative targets crimes for which the minority arrest rate is highest. Table 19, Part IV indicates that the minority arrest rates for homicide, rape, robbery and assault, as well as for all violent crimes, are higher than the overall arrest rate and the Part I arrest rate. Likewise, the arrest rate for drug crimes among minorities is higher than the overall arrest rates.

This data shows that if the Initiative succeeds in increasing incarceration rates and sentence lengths, more blacks will go to prison. The percentage of blacks in prison might increase, as well.

The data also indicates that the present high rate of imprisonment of blacks is due, at least in part, to the disproportionate number of blacks that are arrested. Disparities in sentencing and incarceration between whites and blacks reflect the arrest disparities.

II. Drug-related Offenses

A. Overview of Current Statute and Changes Proposed by Initiative

Last year, the District of Columbia Uniform Controlled Substances Act of 1981 was adopted. The Initiative would amend this New Act to provide mandatory minimum sentences for persons convicted of knowingly or intentionally manufacturing,

distributing or possessing with intent to manufacture or distribute controlled substances or counterfeit substances. The Initiative adopts the following three mandatory minimum sentences: 1) four years for offenses involving narcotic substances listed in Schedule I and II of the Act; 2) twenty months for offenses involving nonnarcotic substances classified in Schedule I, II, or III, or counterfeit substances thereof; and 3) one year for offenses involving any substance classified in Schedule IV or V, or counterfeit substances thereof, if the "retail value" of the substances involved in the offense exceeds $15,000. Under the Initiative, offenders receiving the mandatory minimum sentence could not be released on parole, granted probation, or granted suspension of sentence prior to serving the mandatory minimum.

The following chart compares the penalties available under the current provisions of the District of Columbia Uniform Controlled Substances Act for sentencing persons convicted of knowingly or intentionally manufacturing, distributing or possessing with intent to manufacture or distribute controlled substances with the penalties that would be mandated under the Initiative:

Drug Classification	Penalty
Narcotic drug classified in Schedule I or II	Current Act: imprisonment of up to 15 years and/or fine of not more than $100,000. Initiative: mandatory minimum of four years.

Any counterfeit of a substance classified in Schedule I or II which is a narcotic drug	Current Act: imprisonment of up to ten years and/or fine of not more than $100,000. Initiative: mandatory minimum of four years.
Any non-narcotic drug classified in Schedule I, II or III, or counterfeit thereof	Current Act: imprisonment of up to five years and/or fine of not more than $50,000. Initiative: mandatory minimum of twenty months.
Any substance classified in Schedule IV, or counterfeit thereof	Current Act: imprisonment of up to three years and/or fine of not more than $25,000. Initiative: mandatory minimum of one year if retail value exceeds $15,000.
Any substance classified in Schedule V, or counterfeit thereof	Current Act: imprisonment of not more than one year and fine of not more than $10,000. Initiative: mandatory minimum of one year if retail value exceeds $15,000.

The Initiative would create an exception to its own mandatory minimum sentences that could have significant impact upon the applicability of the sentences. The sentencing court may, in its discretion, "waive the mandatory- minimum sentencing provisions . . . when sentencing a person who has not been previously convicted in any jurisdiction in the United States for knowingly or intentionally manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance included in Schedule I, II or III if the Court determines that the person was an addict at the time of the violation . . . and that such person knowingly or intentionally

manufactured, distributed or possessed with intent to manufacture or distribute [the controlled substance] for the primary purpose of enabling the offender to obtain a narcotic drug which he required for his personal use because of his addiction to such drug." The Initiative defines "addict" as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drug as to have lost the power of self-control with reference to his addiction." The term "narcotic drug" is already defined by the Uniform Controlled Substances Act to include opium and certain opium derivatives such as morphine.

B. Analysis of Drug Offense Provisions of the Initiative

1. The Initiative Prematurely Amends the Uniform Controlled Substance Act of 1981

Because the District of Columbia Uniform Controlled Substances Act did not become effective until the summer of 1981, there has been scant opportunity to evaluate the impact of the Act as currently enacted. With respect to the offenses for which the Initiative sets forth mandatory minimum sentences, the Controlled Substances Act has already given the courts far more power than they previously had to sentence an offender to a significant term of imprisonment. Prior to the adoption of the Act, a court could only sentence an offender convicted for the

first time of the manufacture, distribution or possession with intent to distribute drugs to a term of not more than one year and a fine of up to $1,000. D.C. Code § 33-524 (1980). Rather than enacting mandatory minimum sentences that will rigidly limit the sentencing court's sentencing alternatives (at least with respect to nonaddict offenders), it would be far wiser to wait to see the impact of the new provisions upon disposition of drug offenders. If the Act is allowed to remain in effect in its present form, it may well be that over a period of time the Act will prove to be as effective in meeting the problem of drug-related offenses as the Initiative, yet without the drawbacks inherent in mandatory minimum sentencing schemes.

2. Applicability of the Federal Youth Corrections Act

As with the mandatory sentencing provisions of the Initiative relating to first time offenders convicted of committing crimes of violence while armed with a firearm, the drug sentencing provisions of the Initiative do not bar the court from sentencing youths under the age of twenty-six pursuant to the FYCA. For the reasons discussed above in the analysis of the firearm provisions, this will undermine to a certain extent the deterrent or incapacitative effect claimed by the proponents of the Initiative.

3. Prosecutorial Discretion

There would be only three options available to the prosecutor handling the case of an offender charged with a

drug-related offense that is subject to a mandatory mimimum under the Initiative. First, the prosecutor can proceed to trial (assuming that most defendants would demand a trial rather than merely plead to a statute that contains a mandatory minimum sentence). Second, the prosecutor can plea bargain by agreeing to reduce the charge to simple possession, which offense would continue under the Initiative to be a misdemeanor, subject only to a penalty of up to one year's imprisonment, to be levied in the discretion of the sentencing court. Third, the prosecutor could simply drop the charges. These are the only three options available to the prosecutor, because the Initiative's mandatory sentences of 4 years, 20 months, and 1 year apply to distinct and mutually exclusive offenses: the four year sentence to Schedule I and II narcotic drug offenses; the twenty month sentence to Schedule I, II and III nonnarcotic drug offenses; and the one year sentence to Schedule IV and V offenses where the involved substances exceed a retail value of $15,000. Therefore, for example, where the evidence shows possession of a Schedule I narcotic drug, there is no "plea" charge available to the prosecutor other than the simple possession charge.

The foreclosure of plea bargaining will greatly increase the costs to the criminal system of convicting the drug offender: more defendants will demand trial and all convicted offenders not able to assert the "addict exception" will be thrust into the prison system for fairly long periods of time.

The Initiative does nothing to provide for increased revenues to meet these costs. The ironic result may be that the prosecutor will be forced to reduce the charge in many cases to simple possession or perhaps even to drop the charge altogether because imposition of the mandatory minimum would bankrupt the District's criminal justice system.

Because the inability of the prosecutor to engage in plea bargaining may well result in a greater certainty that the detected offender will receive a relatively long sentence (assuming the additional revenues to try the offender and to house him during his term of imprisonment were somehow generated), it could be argued that the deterrent effect of the drug-related sentencing provisions will be high. We believe, however, that because of the special nature of drug offenses, the Initiative will not effectively reduce drug trafficking. First, very few drug dealers are ever detected, and this fact significantly dilutes the deterrent effect of mandatory minimum sentencing. Second, because the drug trafficking industry is a highly lucrative one in which demand for drugs is constant, the threat of a mandatory sentence even as long as four years may be insufficient to dissuade potential offenders from stepping in and taking advantage of a ready-made market left behind by an offender who was detected and convicted. Third, the "addict exception" to the mandatory minimum sentences, which is discussed in detail below, will mean that a body of potential drug

traffickers, i.e. addicts, will perceive the threat of harsh punishment to be reduced. Similarly, the potential offenders whose age renders them eligible for sentencing under the FYCA will perceive the reduced threat of punishment and will inject themselves as drug traffickers to the extent that the opportunity for such activity is generated by the reluctance of other potential offenders to risk exposure to mandatory minimum sentences.

4. The "Addict Exception" to Mandatory Sentence Is Inequitable and Inefficient

If the sentencing court finds that the offender is an addict who committed the drug offense for the primary purpose of obtaining narcotics to satisfy his addiction, the sentencing court has the discretion, but is not obligated, to waive the mandatory minimum sentence. While the impulse behind this provision may be laudable, there are serious equity issues raised by the addict exception.

First, it is not entirely clear that an offender who trafficks in drugs to satisfy his own addiction needs is any less culpable then the drug trafficker who deals in drugs for the purpose of meeting other pressing monetary concerns, such as food, shelter, health care, and housing. Second, even assuming that the fact of the addiction warrants more lenient treatment for addicts than for nonaddicts, individual judges may make general policy decisions as to whether they will apply the addict

exception in cases coming before them and they will carry through that decision in almost all such cases. There appear to be no particular factors upon which to distinguish addicts who deserve to have the mandatory sentence waived and addicts who do not. Assuming individual judges reach different policy decisions respecting waiver under the addict exception, similarly situated offenders may receive vastly different sentences based simply on the individual judge's policy assessment as to the desirability of waiver. Third, the addict exception will increase the burdens on an already crowded judicial system. Every offender who pleads that he is an addict may be entitled to a finding of fact by the court, essentially requiring a trial on the offender's status as an addict within the trial for the original offense. The problems of proving addiction may force judges to allow the introduction of evidence that relates peripherally to the case, and will further dray out the trial. Finally, because of the perceived severity of the mandatory minimum sentences, a high percentage of drug offenders will plead that they fall under the addict exception, further overcrowding the courts.

Moreover, the addict exception may decrease the certainty of punishment for drug offenders. The current law does not mandate lesser punishment for addicts; the Initiative would encourage judges to reduce the levels of punishment for addicts. Thus, the addict exception dilutes the deterrent and incapacitative effects of the Initiative.

5. Deterrence of Drug Crime and Incapacitation of Drug Offenders

Unlike crimes against property and persons, few commentators claim that deterrence or incapacitation plays a major role in decreasing drug crimes, even when those crimes are the manufacture or sale of drugs. First, few drug crimes result in conviction. A New York study on drug abuse estimated that only one drug crime in 100 is reported. Staff Report of the Drug Law Evaluation Project, Association of the Bar, New York City, The Effects of the 1973 Drug Laws on the New York State Courts at 3-10 (1970)(hereinafter The Effects of the 1973 Drug Laws on New York State Courts). Of the reported crimes, about one in four results in conviction in the District of Columbia. See Table 12, Part IV. Furthermore, of the convictions, sentences imposed under the Federal Youth Corrections Act or the "addict exception" to the mandatory sentences in the Initiative would be unaffected by the proposed mandatory minimum sentences. See Table 18, Part IV.

Second, unlike Part I crimes, which are often crimes of opportunity, drug crimes (excluding simple possession) are crimes that are demanded by their "victims," the users of drugs. Only by reducing the demand for drugs will the number of sellers and manufacturers of drugs decline. The number of drug offenders does not respond to more severe punishment.

An examination of New York's 1973 mandatory minimum sentencing law for drug crimes supports this analysis. The New York law imposed minimum sentences of 1.5 to 4.5 years for the possession or sale of dangerous drugs. A 1977 study of drug abuse in New York reported, "Heroin use was as widespread in mid-1976 as it had been when the 1973 revision took effect, and ample supplies of the drug were available." The report continued, "Most evidence suggests that the illegal use of drugs other than narcotics was more widespread in 1976 than in 1973." Part of the problem with the law, the report noted, was that the arrest rate remained low for drug crimes, and the rates of indictments and convictions actually declined under the new law. The report concluded, "The criminal justice system as a whole did not increase the threat to the offender . . . . Drug traffickers as a group were not likely to see the new law as a serious threat." See Joint Committee on New York Drug Law Evaluation, supra.

While the Initiative may not reduce drug crime or lengthen certain drug offenders' sentences, it may dramatically increase the number of convicted offenders who go to prison. Before the passage of the Uniform Controlled Substances Act of 1981, 90 percent of all drug offenders convicted of felonies received probation. See Table 13, Part IV. The 1981 law allows judges to impose much longer sentences, but no data is available to indicate the length and number of prison terms meted out under

the 1981 law. The Initiative, however, would prohibit a sentence of probation on any drug offender convicted of a charge falling within the mandatory sentencing umbrella. Therefore, sentencing under the Initiative may substantially increase the number of offenders incarcerated for drug crimes, but without affecting the amount of drug crime in the District.

III. Costs of the Initiative

Mandatory minimum sentencing proposals are politically attractive schemes for reducing crimes because their costs are hidden. Proponents of mandatory minimum sentences often assert that even if mandatory sentencing does not dramatically reduce crime, at least it makes a beginning, with the implication that the "beginning" effort does not impose extra costs on the citizens it seeks to protect. This assumption is false on two counts. First, to be effective, mandatory minimum sentencing proposals impose enormous monetary costs on taxpayers, in terms of the costs of longer trials, the maintenance of greater number of people in prison, and the construction of new prisons. Second, the mandatory sentencing proposals divert resources -- both monetary and psychological -- away from effective means of fighting crime, thereby raising the levels of frustration and fear of citizens who contnue to be victimized by crime. Far from being a panacea in the battle against rising crime, mandatory minimum sentences often make the problem worse.

The monetary costs of the Initiative make it one of the most expensive crime-fighting proposals in the history of the District of Columbia. According to the Department of Corrections, each additional offender sent to Lorton Prison costs the District $15,000 per year; each offender sent to the D.C. Jail costs $18,000 per year. Furthermore, Lorton and the Jail have already exceeded their capacities for housing inmates. The Jail houses 1,700 prisoners, 345 over capacity; Lorton Prison holds 2,371 inmates, 321 over capacity. The Federal prison system in the immediate area is also overcrowded; the D.C. Department of Corrections stated that Federal prisons are trying to return prisoners to the District. The Department stated that new prisons would need to be constructed to provide for large numbers of additional inmates. Without new prisons, offenders sentenced under the Initiative -- many of them nonviolent drug offenders -- would replace inmates imprisoned for other crimes, who would then be back out on the streets. The construction costs for new prisons range from $50,000 to $100,000 per cell. According to the Department of Corrections, a new prison would house one prisoner in each cell. The total prison costs per additional inmate would be $65,000 to $68,000 for one year, and $15,000 to $18,000 for every year thereafter.

These prison expenses would make the cost of the Initiative enormous. If the Initiative's only impact was to incarcerate the 500 drug offenders on probation, the cost would

be $7.5 million per year, and $25 million for prison construction. Imprisoning 1,000 additional offenders would cost $15 million every year, and $50 million in prison construction costs. An additional 2,000 inmates would cost $30 million a year, and $100 million in construction costs.

The experiences of other states with mandatory minimum sentencing statutes support these predictions. New York State's mandatory sentences for drug crimes generated new prison construction at an expense of $160 million. A Pennsylvania legislative report estimated that mandatory sentencing proposals considered in 1976 would cost the state $54 million a year in operating expenses and $105 million in construction costs. See Testimony of William G. Nagel, Executive Vice President of American Foundation's Institute of Corrections, Joint Committee on the Judiciary, Connecticut General Assembly, March 18, 1977.

Court expenses are another cost of the Initiative. If prosecutors charged offenders with the proposed measure, and judges sentenced defendants under the sentencing provisions, most defendants would go all the way through the trial process, rather than plea bargaining for a minimum year sentence. The plea bargaining data for crimes against persons and property support this analysis. Convictions for violent crimes carry longer sentences than property crime convictions. In 1977, 90.5 percent of the property crime convictions came as pleas; but only 71.8% of the violent crime convictions were by plea. In 1978, property

crime convictions were 91.1% pleas, and crimes against persons convictions were 81.0% pleas. Crime and Justice Profile: The Nation's Capitol, 101 (1979).

Trial costs are far more expensive than plea bargaining costs. Jury trials in California average 24.2 hours at $3000 per trial. A guilty plea took 15 minutes and $215 (including all processing costs). Rhodes, supra at 61. New York spent an additional $32 million to enforce and implement its mandatory sentencing laws.

The secondary costs of the Initiative are also high. The $10 million, $25 million, $50 million or $100 million that the Initiative costs will come from reductions of other services -- police, education, fire-fighting -- and from higher taxes. The perception of citizens that they have wasted their tax dollars on illusory crime prevention will destroy their confidence in the District's police, courts, and government, and increase their despair that nothing can be done to fight crime.

The proponents of the Initiative have correctly stated, "(P)oor people and minorities have been most seriously victimized (by violent and drug crime). They cannot afford to withdraw their children from public schools, upon discovery that drugs are being sold in the hallways. They cannot afford to move away from the areas of the city with the highest incidence of crime. And, they cannot afford the high cost of burglar alarms, iron bars and attack dogs." But neither can poor people and minorities afford

the Initiative, with its haphazard imprisonment of more offenders, the higher taxes caused by prison construction and prisoner maintenance, and the frustration and despair induced by the illusory promises that mandatory sentences reduce crime.

IV. Statistical Summary of the Criminal Justice System in the District of Columbia

A. Crimes, Arrests, Convictions and Sentencing in the District

The District of Columbia imprisons a higher percentage of its citizens than any other jurisdiction in the nation and the world. In a city of 637,000, 4,662 people (.7%) are behind bars. Of the 4,662, 4,475, or 96%, are black. See Boyd, Demographic Characteristics of the Incarcerated Population - DCDC (As of July 1, 1981). Office of Planning and Program Analysis, D.C. Department of Corrections. According to the D.C. Department of Corrections, nearly 2% of the District's black males are in prison at any given time.

Table 1

Reported Crime Rate in Twelve Cities in 1980
Number of Crimes per 100,000 Residents

	Part I Crimes	Crimes Against Persons
St. Louis	14,264	1,421
Boston	13,455	2,216
Oakland	13,013	2,221
Denver	11,954	1,122
Seattle	10,791	1,053
San Francisco	10,372	1,872
Cleveland	10,038	1,998
Washington D.C.	9,984	2,003
Baltimore	9,749	2,106
Minneapolis	9,656	1,055
New Orleans	9,610	1,465
Milwaukee	6,514	520

Source: Crime and Arrest Profile. The Nation's Capitol, 1980, Monograph, Office of Criminal Justice Plans and Analysis (hereafter D.C. Crime Profile, 1980).

The District's crime rate does not explain the high rate of incarceration. In 1980, there were 64,035 reported crimes against people. 9/ This crime rate is about average for other metropolitan areas; as Table 1 shows.

9/ Crimes against people: Homicide, Rape, Robbery, Assault. Part I crimes: violent crimes plus burglary and larceny.

Table 2

Case Flow of Part I Crime in the District of Columbia

Year	Number Reported	Arrests	Prosecutions	Convictions	Number Imprisoned
1973	51,046	12,524 (24.5%)	[n/a]	[n/a]	[n/a]
1974	54,644	14,253 (26.1%)	2,138	1,853	[n/a]
1975	55,166	13,875 (25.2%)	[n/a]	[n/a]	[n/a]
1976	49,726	12,698 (25.5%)	[n/a]	[n/a]	[n/a]
1977	49,812	10,693 (21.5%)	2,031	1,708	369
1978	50,950	10,697 (21%)	1,182 */	997 */	416
1979	56,721	11,932 (21%)	[n/a]	[n/a]	507
1980	63,668	11,169 (17.5%)	[n/a]	[n/a]	580

*/ Does not include cases that were ongoing in mid-1979.

Sources: Crime and Justice Profile, The Nation's Capitol, Government of the District of Columbia (October, 1979) (hereafter D.C. Crime Profile, 1978)

Crime and Arrest Profile: The Nation's Capitol 1979, Office of Criminal Justice Plans and Analysis (December 1980) (hereafter D.C. Crime Profile, 1979).
D.C. Crime Profile, 1980
Department of Corrections, District of Columbia
Rhodes, supra.

Table 3

Case Flow of Crimes Against Persons in the District of Columbia

Year	Number Reported	Arrests	Prosecutions	Convictions	Number Imprisoned
1973	11,631	5,042 (43%)	1,608	1,340	[n/a]
1974	11,590	5,632 (49%)	[n/a]	1,346	[n/a]
1975	12,713	4,324 (34%)	[n/a]	[n/a]	[n/a]
1976	10,399	5,214 (50%)	[n/a]	[n/a]	[n/a]
1977	9,835	4,084 (42%)	1,316	1,078	305
1978	9,515	3,579 (38%)	704 */	583 */	319
1979	10,553	3,891 (37%)	[n/a]	[n/a]	373
1980	12,772	3,835 (30%)	[n/a]	[n/a]	409

*/ Does not include cases that were ongoing in mid-1979.

Sources: D.C. Crime Profile, 1978
D.C. Crime Profile, 1979
D.C. Crime Profile, 1980
Department of Corrections, District of Columbia
Rhodes, supra.

Table 4

Reported Crimes and Arrests in the District of Columbia, 1973-1980

Year	Part I Crimes		Crimes Against Persons	
	Number Reported	Arrests	Number Reported	Arrests
1973	51,046	12,524 (24.5%)	11,631	5,042 (43%)
1974	54,644	14,253 (26.1%)	11,590	5,632 (49%)
1975	55,166	13,875 (25.2%)	12,713	4,324 (34%)
1976	49,726	12,698 (25.5%)	10,399	5,214 (50%)
1977	49,812	10,693 (21.5%)	9,835	4,084 (42%)
1978	50,950	10,697 (21%)	9,515	3,579 (38%)
1979	56,721	11,932 (21%)	10,553	3,891 (37%)
1980	63,668	11,169 (17.5%)	12,772	3,835 (30%)

Sources: D.C. Crime Profile, 1978
D.C. Crime Profile, 1979
D.C. Crime Profile, 1980

Although the number of serious crimes in the District has risen steadily since 1977 (see Table 4), the arrest rate has decreased dramatically during the past five years. In 1976, 25.5 percent of reported Part I crimes resulted in an arrest. Four years later that rate had dropped to only 17.5 percent. Similarly, the arrest rate for crimes against people has declined steadily since 1977, and for all crimes, the arrest rate has dropped considerably since 1974.

B. Crimes Covered by the Mandatory Minimum Sentencing Initiative

The Initiative seeks to impose mandatory minimum sentences on offenders convicted of committing a "crime of violence" while armed with a firearm, or a drug crime (excluding simple possession of drugs). "Crimes of violence" are defined as Part I crimes, including property crimes.

1. Gun Crimes

Table 9

Firearm Crimes

Year	Number	% of Violent Crimes Against Persons	% of Part I Crimes
1977	3,876	39.4	7.8
1978	3,547	37.3	7.0
1979	3,811	36.1	6.7
1980	5,182*	40.6	8.1

*excludes rape

Sources: D.C. Crime Profile, 1978;
D.C. Crime Profile, 1979;
D.C. Crime Profile, 1980.

Reported gun crimes make up a small percentage of all Part I crimes, but a significant fraction of the crimes against persons -- homicide, rape, robbery and assault (Table 9). Crimes against persons almost exclusively make up the number of reported firearm crimes, because property crimes rarely involve the use of a gun. Although property crime offenders might carry a firearm during the commission of the crime, unless the offender is caught

result in arrest, and 13.2% in conviction; 24% of the arrests result in conviction; 49.8% of all convictions result in incarceration.

2. Drug Crimes

Table 11

Drug Crimes in the District

Year	Number reported	Number of arrests
1977	2,125	2,384
1978	2,643	2,830
1979	3,433	3,915
1980	3,567	4,556

Source: Department of Corrections, District of Columbia D.C. Crime Profile, 1978; D.C. Crime Profile, 1979; D.C. Crime Profile, 1980.

The number of reported drug crimes and arrests for drug crimes in the District are listed in Table 11. */ Drug crimes are not "reported" in the sense of victims reporting a crime; most reports arise out of arrests. The number of actual drug crimes is much greater than the number of reported crimes or arrests. A New York Drug Law study estimated that only one drug

*/ The District combines all narcotics and drug violations into a single reporting category, "drug crimes." Before 1981, all first offender possession crimes were misdemeanors; second offender possession crimes went unprosecuted or were pled down to misdemeanors, according to the U.S. Attorney's office. The statistics on drug crime, then, almost entirely represent the number of non-possession drug crimes: manufacture, sale, possession with intent to distribute, and smuggling. These are the crimes that are covered by the mandatory minimum sentencing initiative.

felony in 100 is reported, which means there may be as many as 3 million drug felonies in the District each year. The Effects of the 1973 Drug Laws on the New York State Courts, at 3-10.

Table 12

Case Flow of Drug Crimes, 1974

Arrests	Prosecutions	Convictions	Imprisonment
2,147	714	551	49

Source: PROMIS

Table 13

Drug Crime Sentences, 1974

Minimum term	Number of sentences with longer minimum terms
3 years	2
2 years	3
1 year	14

Source: PROMIS

448 probation; 19 FYCA

Detailed data was available only for 1974 drug crimes. Table 12 illustrates the flow of cases, from arrest to incarceration, of drug offenders. Only one in four arrestees is convicted; and only one in 10 of those convicted have prison terms. Of the 49 offenders imprisoned in 1974, 19 had minimum

sentences of over one year. Many of those may have been multiple offenders. 448 of the sentences were probation.

C. Impact of the Initiative on Sentencing in the District

1. Type of Offense

Table 14

Imposed Minimum Sentences, 1977 - 1980

Charge	1977 Mean Sentence/Number Length		1978 Mean Sentence/Number Length		1979 Mean Sentence/Number Length		1980 Mean Sentence/Number Length	
HOMICIDE								
First Degree Murder	20.0	11	18.0	6	11.0	2	13.6	8
2nd Degree Murder	5.8	18	7.4	26	9.4	19	9.7	15
RAPE								
Rape	9.0	14	6.3	9	7.5	11	10.1	7
Attempted Rape	3.4	8	2.1	7	1.6	7	4.1	13
ROBBERY								
Armed	5.9	62	4.2	75	5.2	73	5.7	94
Attempted	3.7	41	1.4	63	2.1	91	2.0	94
(Unarmed	2.9	103	2.2	78	2.4	116	2.5	101)
ASSAULT								
Dangerous Weapon	2.0	40	2.3	48	2.1	48	2.0	67
Intent to Kill	4.0	8	5.6	7	2.2	6	4.8	10
PROPERTY CRIMES								
Burglary I	5.5	9	5.0	14	4.0	12	4.1	20
(Burgl. II	2.0	41	2.3	50	2.3	79	2.2	107)
(Larceny	1.6	14	1.4	33	1.6	43	1.9	44)
TOTALS:								
Crimes against persons where weapons were present or likely to be present:		202		241		257		308
Crimes against persons where weapons were not present:		103		78		116		101
Property crimes where weapons present or likely:		9		14		12		20
(Weapons not present):		55		83		122		151.
Person and property crimes:		369		416		507		580
All crimes:		394		472		597		694

Source: Department of Corrections, District of Columbia.

Table 14 indicates that the mean minimum sentence lengths for homicides, rape, armed robbery and first degree burglary from 1977 to 1980 were near or above five years. The sentencing figures understate the sentences of those convicted of the offense while using firearms, because they also reflect sentences for offenders who may have been unarmed during the commission of the crime. Normally, the use of a firearm lengthens the sentence; in California, for example, the use of a firearm automatically adds two years to the sentence. In 1974, offenders who committed crimes against persons with a firearm received longer sentences in the District of Columbia than offenders of the same crimes who did not use firearms. Cook, Does the Weapon Matter?, 51. Therefore, the sentences in Table 13 are shorter than the sentences imposed on most firearm crime offenders. Even with the shorter sentences for homicide, rape, armed robbery and Burglary I, the table shows that a minimum 5 year sentence would have little impact on the sentencing of those offenders who are incarcerated for those offenses.

Lighter sentences are imposed in cases of attempted rape, attempted robbery, and assault. Many attempted robberies and rapes occur without the presence of a firearm, and those that do use a firearm often result in additional charges, such as assault with intent to kill or assault with a deadly weapon. On

the other hand, about 30% of all assaults are committed with the use of a firearm. See D.C. Profile on Crime, 1980.

Table 15

Crimes-against-persons offenders who used a firearm - 1974

Offense	Number of Defendants	Number of Convictions	% Incarcerated	Average Minimum Prison Sentence (years)
Murder	165	71	87	6.9
Rape	66	26	83	4.9
Robbery	937	337	70	3.9
Assault	1020	316	22	1.5

Source: Cook, Does the Weapon Matter?, at 44-51.

Table 15 shows that the incarceration rate for offenders convicted of assault with a firearm is 22%, as compared to over 70% for the other categories. The average sentence length for assault, 1.5 years, is likewise much shorter than the sentence lengths for robbery, rape and murder convictions.

Table 16

Crimes Against Persons: Incarceration Rates in the District of Columbia

Year	Number Convicted	Number Imprisoned	% Imprisoned
1977	1,078	305	28.2%
1978	583	319	54.7%
1979	[n/a]	373	[n/a]
1980	[n/a]	409	[n/a]

Sources: Department of Corrections
D.C. Crime Profile, 1978; D.C. Crime Profile, 1979; D.C. Crime Profile, 1980

Table 17

Part I Arrests by Age

Year	Total Part I Arrests	Arrests of persons under 25	Percentage of Arrestees under 25
1977	10,693	6,880	64.3
1978	10,697	7,067	66.0
1979	11,932	6,433	53.7
1980	11,169	6,574	58.9

Sources: D.C. Crime Profile, 1978; D.C. Crime Profile, 1979; D.C. Crime Profile, 1980.

Table 18

Crimes-Against-Persons Arrests by Age

Year	Murder	Rape	Robbery	Assault	Total	Drugs
1977						
under 25	82	129	1,446	644	2,301	n/a
total	196	212	1,987	1,689	4,084	
%	42%	61%	73%	38%	56.3%	
1978						
under 25	69	99	1,325	620	2,113	n/a
total	162	180	1,722	1,515	3,579	
%	43%	55%	77%	41%	59.0%	
1979						
under 25	72	89	1,223	581	1,965	1,918
total	173	199	1,832	1,687	3,891	3,915
%	42%	45%	67%	34%	50.5%	49.0%
1980						
under 25	64	75	1,294	687	2,120	2,004
total	162	162	1,822	1,689	3,835	4,556
%	40%	46%	71%	41%	55.3%	44.0%

Sources: D.C. Crime Profile, 1978; D.C. Crime Profile, 1979; D.C. Crime Profile, 1980.

. Race of Offender

Table 19

Number of Arrests in the District of Columbia, By Race

ɜar	All crime	Part I crime	Crimes Against Persons	Murder	Rape	Robbery	Assault	Drug Crir
)77								
ɔnwhite		10,556	3,930	187	209	1,925	1,609	
ɔtal	[n/a]	10,693	4,084	196	212	1,987	1,689	[n/a]
nonwhite		94	96.2	95.4	98.6	96.9	95.3	
)78								
ɔnwhite		9,564	3,428	157	178	1,668	1,425	
ɔtal	[n/a]	10,697	3,579	162	180	1,722	1,515	[n/a]
nonwhite		89.4	95.8	96.9	98.9	96.9	94.0	
)79								
ɔnwhite	24,846	11,161	3,703	168	194	1,773	1,568	3,463
ɔtal	28,684	11,932	3,891	173	199	1,832	1,687	3,738
nonwhite	86.6	93.5	95.2	97.1	97.5	96.8	92.9	92.6
)80								
ɔnwhite	29,642							3,748
ɔtal	34,022	[n/a]	[n/a]	[n/a]	[n/a]	[n/a]	[n/a]	4,107
nonwhite	87.1							91.3

ɔurces: D.C. Crime Profile, 1978
D.C. Crime Profile, 1979
D.C. Crime Profile, 1980
Metropolitan Police Department, Annual Report 1979
Metropolitan Police Department, Annual Report 1980

APPENDIX I

SHORT TITLE

DISTRICT OF COLUMBIA

MANDATORY-MINIMUM SENTENCES INITIATIVE OF 1981

SUMMARY STATEMENT

Provides that persons convicted of committing crimes of violence while armed with a firearm shall be sentenced to mandatory-minimum terms of five years for first offenses and ten years for second offenses. Provides that persons convicted of manufacturing, distributing or possessing with intent to manufacture or distribute certain controlled drugs shall be sentenced to mandatory-minimum terms of from one year to four years, depending on the classification of drug involved. Provides that any person sentenced under these provisions shall not be paroled or have his sentence suspended until he has been imprisoned for the full mandatory-minimum term.

INITIATIVE MEASURE NO.

BY THE PEOPLE OF THE DISTRICT OF COLUMBIA

To implement mandatory-minimum sentences for those convicted under certain laws of the District of Columbia.

BE IT ENACTED BY THE PEOPLE OF THE DISTRICT OF COLUMBIA, That this measure may be cited as the "District of Columbia Mandatory-Minimum Sentences Initiative of 1981."

Sec. 2. The purpose of this initiative is to propose to the registered qualified electors of the District of Columbia the question of imposing mandatory-minimum sentences for those who are convicted of committing a crime of violence, as defined in Title 22, Section 3201, when armed with a firearm; or for knowingly or intentionally manufacturing, distributing or possessing with intent to manufacture or distribute a controlled substance.

Sec. 3. Title 22, Section 3202 of the District of Columbia Criminal Code, titled "Committing Crime When Armed--Added Punishment," is amended as follows:

(a)(1) Immediately following the phrase, "which may be up to life imprisonment;", insert

"and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than five (5) years;".

(a)(2) Immediately following the phrase, "which may be up to life imprisonment;", insert

"and shall, if convicted of such second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than ten (10) years."

Sec. 4. Subsection (c) of Title 22, Section 3202, shall be repealed.

Sec. 5. A new subsection (c) shall be added to Title 22, Section 3202, as follows:

"(c) Any person sentenced pursuant to paragraph (1) or (2) of subsection (a) above for a conviction of a crime of violence while armed with any pistol or firearm, shall serve a mandatory-minimum term of five (5) years, if sentenced pursuant to paragraph (1) of subsection (a), or ten (10) years, if sentenced pursuant to paragraph (2) of subsection (a), and such person shall not be released on parole, granted probation, or granted suspension of sentence, prior to serving such mandatory-minimum sentence."

Sec. 6. Subsection (d) of Title 22, Section 3202, shall be changed to subsection (e), and the remaining subsections will be changed to conform accordingly.

Sec. 7. A new subsection (d) shall be added to Title 22, Section 3202, as follows:

"(d) Except as provided in subsection (c) of this section, any person sentenced under subsection (a)(2) of this section may be released on parole in accordance with Chapter 2 of Title 24, at any time after having served the minimum sentence imposed under that subsection."

Sec. 8. Section 102 of the District of Columbia Uniform Controlled Substances Act of 1981 shall be amended to include: "'Addict' means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drug as to have lost the power of self-control with reference to his addiction.", and

"'retail value' means the value in the market in which the substance was being distributed, manufactured or possessed, or the amount which the person possessing such controlled substance reasonably could have expected to receive upon the sale of the controlled substance at the time and place where the controlled substance was distributed, manufactured or possessed."

Sec. 9. Section 401(c) of the District of Columbia Uniform Controlled Substances Act of 1981 shall be changed to 401(d), and the remaining subsections will be changed to conform accordingly.

Sec. 10. A new section 401(c) shall be added to the District of Columbia Uniform Controlled Substances Act of 1981, as follows:

"(c)(1) Except as hereinafter specifically provided in this subsection (c), any person who violates subsection (a)(1) or (b)(1) shall be imprisoned for a mandatory-minimum term as hereinafter prescribed and shall not be released on parole, granted probation, or granted suspension of sentence prior to serving such mandatory-minimum sentence.

"(A) Any person who violates subsection (a)(1) or (b)(1) with respect to a controlled or counterfeit substance classified in Schedule I or II, which is a narcotic drug, shall serve a mandatory-minimum sentence of not less than four (4) years;

"(B) Any person who violates subsection (a)(1) or (b)(1) with respect to any other controlled or counterfeit substance classified in Schedule I, II or III shall serve a mandatory-minimum sentence of not less than twenty (20) months;

"(C) Any person who violates subsection (a)(1) or (b)(1) with respect to any other controlled or counterfeit substance classified in Schedule IV or V shall, if the quantity of such substance or counterfeit substance involved in such violation shall exceed $15,000 in retail value at the time of such violation, serve a mandatory-minimum sentence of not less than one (1) year."

"(c)(2) Notwithstanding the provisions of subsection (c)(1), the Court may, in its discretion, waive the mandatory-minimum sentencing provisions of subsections (A) and (B) when sentencing a person who has not been previously convicted in any jurisdiction in the United States for knowingly or intentionally manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance included in Schedule I, II or III if the Court determines that the person was an addict at the time of the violation of subsection 401(a)(1) or (b)(1), and that such person knowingly or intentionally manufactured, distributed or possessed with

intent to manufacture or distribute a controlled substance included in Schedule I, II or III for the primary purpose of enabling the offender to obtain a narcotic drug which he required for his personal use because of his addiction to such drug."

Sec. 11. This measure shall take effect as provided for initiative measures of the Electors of the District of Columbia in section 5 of Public Law 95-526 §(3), amending the Initiative, Referendum, and Recall Charter Amendment Act of 1977 (D.C. Law 2-46), and in section 602(c) of the District of Columbia Self-Government and Government Reorganization Act.

APPENDIX III

Section 22-3202 as it Would be Amended by the Initiative

Note: Underlined language = new provisions added by Initiative
Bracketed language = provisions of current statute repealed by Initiative

§ 22-3202. Additional penalty for committing crime when armed.

(a) Any person who commits a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machinegun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles):

(1) May, if he is convicted for the 1st time of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment; and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than five (5) years.

(2) Shall, if he is convicted more than once of having so committed a crime of violence in the District of

Columbia, be sentenced, in addition to the penalty provided for such crime, to a minimum period of imprisonment of not less than 5 years and a maximum period of imprisonment which may not be less than 3 times the minimum sentence imposed and which may be up to life imprisonment; and shall, if convicted of such second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than ten (10) years.

(b) Where the maximum sentence imposed under this section is life imprisonment, the minimum sentence imposed under subsection (a) of this section may not exceed 15 years imprisonment.

[(c) Any person sentenced under subsection (a)(2) of this section may be released on parole in accordance with Chapter 2 of Title 24, at any time after having served the minimum sentence imposed under that subsection.]

(c) Any person sentenced pursuant to paragraph (1) or (2) of subsection (a) above for a conviction of a crime of violence while armed with any pistol or firearm, shall serve a mandatory-minimum term of five (5) years, if sentenced pursuant to paragraph (1) of subsection (a), or ten (10) years, if sentenced pursuant to paragraph (2) of subsection (a), and such person shall not be released on parole, granted probation, or granted suspension of sentence, prior to serving such mandatory-minimum sentence.

(d) Except as provided in subsection (c) of this section, any person sentenced under subsection (a)(2) of this section may be released on parole in accordance with Chapter 2 of Title 24, at any time after having served the minimum sentence imposed under that subsection.

[(d)] (e) (1) Chapter 402 of Title 18 of the United States Code (Federal Youth Corrections Act) shall not apply with respect to any person sentenced under paragraph (2) of subsection (a) of this section.

(2) The execution or imposition of any term of imprisonment imposed under paragraph (2) of subsection (a) of this section may not be suspended and probation may not be granted.

[(e)] (f) Nothing contained in this section shall be construed as reducing any sentence otherwise imposed or authorized to be imposed.

[(f)] (g) No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section.