2-2011

Sense and Sensibility in Mandatory Minimum Sentencing

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I. Introduction

Criticisms of mandatory prison sentences in the federal system have become well known and are increasingly accepted. These mandatory minimums are said to deprive judges of the flexibility to tailor punishment in individual cases and can result in unduly harsh sentences. As such, they are inconsistent with the tradition of individualized sentencing in federal courts and the deeply rooted principle of proportionality.[1] Mandatory minimums can also conflict with the separation of powers doctrine by transferring punishment decisions from the judiciary to the executive branch, thereby converting federal prosecutors into de facto sentencers.[2] Many mandatory minimum cases implicate federalism concerns as well, given that gun and drug prosecutions in U.S. District Courts involve conduct already criminalized by the states and handled predominantly by local courts.[3]

In practice, statutory minimums can distort the processes and outcomes of the federal system. Inconsistent applications of mandatory minimums generate disparate sentences among similarly situated offenders.[4] Some basic fact may trigger the same minimum sentence for a low-level drug courier and a narcotics kingpin, for example, while enormous differences in punishment can result from the seemingly arbitrary lines drawn for drug-quantity thresholds. Disparate sentences may also result from a race to the prosecutor's office, with the defendant who pleads first avoiding a long mandatory minimum by agreeing to testify against his codefendants.

Moreover, mandatory minimums raise concerns about the erosion of transparency and the truth-seeking function of the criminal justice system. The often dispositive prosecutorial decisions to invoke these laws are made in a largely opaque process without clear oversight to prevent haphazard (or even abusive) applications. The mechanical nature of mandatory minimums can also entangle criminal justice actors in a truth-obscuring stratagem of negotiating critical facts, from the amount of drugs to the existence of a gun. Worse yet, a few recent cases have demonstrated how mandatory minimums can generate fabricated testimony and wrongful convictions.[5]

To be sure, arguments can be made on behalf of mandatory sentences. For instance, some claim that these laws are necessary to create incentives for low-level dealers to provide information against those higher up in drug distribution chains. As currently structured, however, mandatory minimums all too often spawn public perceptions that can undermine the legitimacy of the criminal justice system. The disparate racial impact of federal mandatory minimums breeds suspicion in minority communities, creating the risk that some community members will be less likely to report crime and cooperate with law enforcement. If crimes are prosecuted, individual jurors may engage in jury nullification—preventing a conviction not because allegations against a defendant are unproven, but out of fear of an unjust sentence. And when victims of violence see that their assailants receive shorter terms than those imposed on nonviolent offenders via mandatory minimums, they may feel that the government cares less about their pain and suffering than some abstract objective, like winning the war on drugs.

Considering the problems associated with mandatory minimums, it is perhaps unsurprising that numerous federal judges (including members of the U.S. Supreme Court) have voiced dismay at the excessive sentences they were required to pronounce and affirm. But mandatory minimums have also come under fire from the political branches. At various times in their careers, the last four Presidents have doubted the wisdom of long mandatory sentences. Likewise, some federal lawmakers and former law enforcers have spoken out against mandatory minimums, joined by a chorus of commentators and organizations of all political stripes.

What is more, opinion polls suggest that opposition is growing among the general public.[6] It now appears that significant interest exists in moving beyond a verbal critique to enacting statutory reforms, as evidenced by, among other things, a congressional directive to the U.S. Sentencing Commission to study mandatory minimums.[7] Most recently, the Fair Sentencing Act of 2010 eliminated the five-year mandatory sentence for simple crack cocaine possession, representing the first repeal of a statutory minimum since the Nixon administration.[8]

Any further repeal will still face substantial political barriers to making further changes. Public support for mandatory minimums may have waned, but it remains

Federal Sentencing Reporter, Vol. 23, No. 3, pp. 219–227, ISSN 1053-9867 electronic ISSN 1533-8363.
 DOI: 10.1525/fsr.2011.23.3.219.

possible to paint a legislator who votes to repeal mandatory minimums as being soft on crime. Recent events must be kept in perspective as well. After all, the congressional directive calling for a review of mandatory minimum sentences ironically contained a new mandatory minimum,[9] and the Fair Sentencing Act affects only one type of prospective defendant, the crack cocaine offender.

Political concerns have stymied previous efforts to reform federal criminal law. Even during periods of lower crime rates, the public has expressed fears of victimization and beliefs that criminals are not receiving harsh enough punishment. Lawmakers have responded in kind with new crimes and stiffer penalties, including mandatory sentences. In turn, proposals for comprehensive reform have carried a career-ending risk for the campaigning politician, whose opponents could label him as soft on crime for allegedly providing the means for dangerous criminals to escape with lenient sentences. This political dynamic could thwart any change to federal mandatory minimums, at least if proposed in the form of an outright repeal.

Both authors of this article believe that it would make a lot of sense for Congress to reform the federal mandatory minimum scheme. But we also recognize that any renovation in this area raises political sensibilities that are not easily assuaged. As a practical matter, any meaningful reform may have to be done in a careful, focused way to create a broad, bipartisan consensus surrounding the changes. With this in mind, we have considered how to alter the federal scheme to ameliorate its most draconian and unfair expressions. The two of us espouse very different legal and political theories, and we often disagree on criminal justice issues. If we could find common ground on ways to modify federal mandatory minimums, we hoped that policymakers might share this agreement, perhaps sowing the seeds of further reforms.

In another article, we employed insights from the behavioral sciences to understand the resilience of mandatory minimums and to sketch a potential process for their reform.[10] We then suggested that the process could be justified by a theory of political minimalism, which seeks consensus on basic principles accompanied by small legislative steps. Almost all lawmakers agree on the importance of proportionality, equality, separation of powers, federalism, truth seeking, and transparency—principles that not only illuminate the core problems with mandatory minimums but also help inform the means to their modification. In the following, we will describe the relevant vehicles and materials and the specific statutory changes to achieve the goals of reform. If nothing else, we hope to inspire dialogue on the propriety of legislatively compelled, judicially unavoidable punishment.

II. Reforming Mandatory Minimums

Although modifying mandatory minimums presents quite a challenge for federal lawmakers, a successful reform in this area occurred within the lifetimes (but may not be in the memories) of many current politicians and criminal justice actors. Largely due to a panic over drugs, Congress passed the Boggs Act of 1951, which imposed a series of tough mandatory minimums for federal drug crimes.[11] A decade and a half later, Richard Nixon swept into office on an anticrime platform that called for harsher punishment. In the first year of his administration, however, President Nixon suggested that severe sentences were not the only solution to America's crime problems. Bolstered by conservative proponents, Congress eliminated almost all mandatory minimum penalties as part of a restructuring of federal drug law.[12]

Although an across-the-board repeal may be a nonstarter today, this historical example suggests that it is not impossible to reform mandatory minimums. As we discuss at greater length elsewhere, the most viable approach would involve a modest proposal that comports with common principles and values.[13] Supporters may have to contend with the conventional wisdom about the pro-punishment politics of criminal justice. But the task might be far less difficult than expected, as growing opposition to mandatory minimums could indicate that the norm of inflexibly harsh punishment maintains only a tenuous hold over the lawmaking process. If so, a small reform backed by influential political actors might trigger a cascade of support in Congress.

Assuming both the need for some reform and the possibility of its achievement, the question becomes the vehicle for legislative modification. In contrast to maximalist strategies, such as directly repealing mandatory minimum punishments en masse, a minimalist approach might create exceptions to obligatory sentences when reasons exist to believe that such punishment would be unjust in a particular case. One option is to craft a safety valve that permits a judge to sentence a defendant below a mandatory minimum when certain criteria are met. A few states have such provisions to prevent injustices under their mandatory sentencing laws[14]—and, in fact, the federal system contains a safety valve as well.

The current federal provision allows judges to go below an otherwise applicable mandatory minimum sentence in low-level drug cases involving essentially nonviolent, first-time offenders who have disclosed all relevant information to the government.[15] The provision is commonly seen as a successful means of preventing unjust punishments without hampering the general objectives of sentencing. The current federal safety valve is rather limited, however, and applicable only to certain drug crimes. A minimalist reform could expand the application of the safety valve so that it is available to defendants who might otherwise receive an excessive prison sentence. The tricky point, of course, is identifying those cases in which mandatory minimum sentences would be unjust. An overly broad safety valve provision would be politically vulnerable to allegations that it effectively repealed all mandatory minimum sentences by creating a loophole for the worst-of-the-worst offenders.

As it turns out, federal law already has a possible method for identifying situations in which mandatory minimum sentences may be excessive. A quarter-century ago, Congress created the U.S. Sentencing Commission as an expert agency to promulgate a set of sentencing guidelines for every federal offense. These guidelines were designed to take into consideration all relevant issues and provide a recommended sentence. When the guidelines propose a punishment that is lower than that required by a statutory minimum, there may be good reason to believe that the application of the mandatory sentence would be excessive. To be sure, legal scholars and jurists have debated the merits of the guidelines system for several decades. In fact, one of us has questioned the constitutionality and wisdom of the entire enterprise, expressing a strong preference for razing the entire system.[16] Nonetheless, we both recognize that the Commission and its guidelines are here to stay, at least for the near future.

Some concerns about the guidelines stemmed from their limits on judicial discretion, with punishment effectively limited to the prescribed sentencing range absent a defendant's cooperation with law enforcement. This issue mirrors a key criticism of mandatory minimums: The guidelines regime eliminated a judge's ability to craft a punishment fitting the offense and the offender. In 2005, the Supreme Court tempered at least part of the dispute through its groundbreaking decision in *United States v. Booker*, which held that it violated the Sixth Amendment jury-trial right to increase a guidelines sentence based on facts that neither the defendant admitted nor a jury found true beyond a reasonable doubt.[17] For present purposes, however, the most relevant portion of the Court's opinion was the ultimate remedy: By excising a pair of statutory provisions, *Booker* rendered the guidelines advisory rather than mandatory for sentencing judges, subject to appellate review for "reasonableness."[18]

For guidelines skeptics, the Court's decision held out hope that a district court could ensure that a sentence fits the offense and the offender, consistent with the valid goals of punishment. Even so, the *Booker* decision did not license ad hoc sentencing. The Commission's work-product was the only complete set of criteria available to district court judges. In addition, some warned that haphazard application of the guidelines would produce unwarranted disparities among defendants and could provoke a punitive response by Congress "through such blunderbuss devices as mandatory minimum sentences."[19] With such caveats in mind, most jurists and commentators have eschewed a post-*Booker* free-at-last approach that would simply ignore the guidelines.[20] Instead, they accept the guidelines as a given (at least for now) and have sought a jurisprudence that makes the system more rational and fair.

In practice, the federal judiciary continues to give considerable weight to the guidelines, which, as a statistical matter, remain the dominant feature of federal sentencing. A recent survey of U.S. district courts found that a substantial majority of the judges support the current system and believe that the guidelines ranges are appropriate for most federal crimes. In contrast, two thirds of the judges think that mandatory minimum sentences are too high.[21] Some critics still have reservations about the guidelines even in their now-advisory role,[22] but those concerns pale in comparison to the very real injustices that can occur with mandatory minimums. In other words, almost everyone (including guidelines skeptics) would agree that using the guidelines to ameliorate the worst cases of excessive mandatory sentencing would be an improvement over the current status quo.

A couple of examples may help clarify how the guidelines system could identify injustices under mandatory minimums. Consider the case of *United States v. Angelos*,[23] in which a young, first-time offender was convicted of dealing marijuana and other related offenses. The critical events in the case were three controlled buys by a government informant, each involving approximately $350 worth of marijuana. Both the prosecution and the defense agreed that the appropriate guidelines range for the defendant's sentence was seventy-eight to ninety-seven months. But because he was also convicted of possessing a gun three times in connection with his marijuana dealing, he faced additional mandatory minimum penalties under federal law: five years for the first possession, followed by twenty-five years for the second possession, topped off with another twenty-five years for the third possession, all to be served consecutively. After decrying the punishment as "cruel, unjust, and irrational,"[24] the trial court reluctantly sentenced the defendant to a mandatory fifty-five-year prison term for the firearm possession counts (plus one day for all the other counts), which was subsequently affirmed by the Tenth Circuit.

Now consider *United States v. Moore*,[25] a case recently decided by the Third Circuit. A sex crime investigation conducted by Australian officials led the FBI to the defendant's house in Florida, where he admitted to possessing child pornography. A subsequent search of his computer revealed 321 pornographic images, "virtually all of minors under the age of twelve engaging in sexually explicit conduct" and including "portrayals of sadistic conduct whereby babies were physically restrained."[26] The defendant was convicted of receiving and distributing child pornography, which carried a five-year mandatory minimum sentence. Under the guidelines, however, the applicable sentencing range was 135–168 months' imprisonment. The district court eventually issued a ten-year sentence—fifteen months below the bottom of the guidelines range—balancing the serious nature of the crime versus the defendant's personal history and characteristics. An appellate court affirmed the sentence as substantively reasonable.

This is not the place to decide whether the sentence in *Moore* was necessarily correct. Reasonable minds can differ on such issues, given general disagreement about the

wisdom of the federal sentencing scheme and concerns regarding the severity of some guidelines. But as a matter of prioritizing any reform, it makes some sense for efforts to be directed away from those cases in which the guidelines are *higher* than the mandatory minimums and toward the more clearly extreme cases in which the guidelines are lower. Accordingly, situations in which the guidelines call for a lower sentence than the statutory minimum—such as in *Angelos*—might serve as a convenient means for flagging cases in which the mandatory sentence may be unjustified.

III. Operationalizing Reform

Assuming that a minimalist approach would only implicate those cases in which mandatory minimums are clearly excessive—as demonstrated by a lower guidelines range—the question becomes how to translate the change into a principled law capable of achieving political consensus. To operationalize the envisioned reform, our suggested statutory modification would allow judges to go below a mandatory minimum if the relevant sentencing guidelines are lower. One way to draft such a statute would begin by cross-referencing a general safety value provision:

> **18 U.S.C. § 3553. Imposition of a sentence**
> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence in accordance with any applicable mandatory minimum sentence, subject to subsections (e) and (f). The sentence shall be sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

This modification (i.e., the underlined text) would preserve mandatory minimums as the default rule for the trial judge, who must impose a sentence pursuant to federal statutes unless a case falls within the purview of the safety valve provision. The new safety valve would then replace its limited predecessor as follows:

> **18 U.S.C. § 3553. Imposition of a sentence**
> (f) (1) Notwithstanding any other provision of law, the court may impose a sentence below an otherwise applicable mandatory minimum sentence (including a consecutive mandatory minimum sentence), if the minimum of the applicable sentencing guidelines for the defendant's conduct provides for a total sentence lower than what would otherwise result from application of the mandatory minimum sentence, provided that:
> (A) the defendant's offense or offenses did not result in death or serious bodily injury to any person;
> (B) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement; and
> (C) a sentence imposed pursuant to this subsection shall not be lower than the minimum provided in the applicable sentencing guideline for the defendant's conduct.
> (2) In determining whether to impose a sentence pursuant to this subsection, the court may consider:
> (A) the Government's representations about whether the defendant has truthfully provided all information as required by subsection (f)(1)(B);
> (B) the defendant's criminal history as determined under the sentencing guidelines;
> (C) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense or offenses;
> (D) the defendant was not an organizer, leader, manager, or supervisor of others in the offense or offenses, as determined under the sentencing guidelines, and he was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848(c);
> (E) the sentences imposed on other offenders under the sentencing guidelines;
> (F) the sentences imposed for commission of the defendant's offense or offenses in other jurisdictions; and
> (G) any other information relevant to the factors listed in 18 U.S.C. § 3553(a).
> (3) In the written order of judgment and commitment, the court must state with specificity the reasons for imposing a sentence pursuant to this subsection. On appeal, the sentence and its reasons shall be subject to review for reasonableness.

This formulation tracks some of the language in the current safety valve provision but also makes key changes. It retains the condition that no one was killed or suffered serious bodily injury as a result of the defendant's actions—a seemingly reasonable limitation, given the importance of harm for sentencing assessments and related concerns about proportionality and equality, as well the reality that the punishment provided by mandatory minimums will rarely be inappropriate in such circumstances. Under the new formulation, however, the safety valve goes beyond first-time, low-level drug offenders. Previous bars, such as the presence of a firearm, are now factors that courts should consider, but they do not automatically disqualify application of the safety valve.

The new provision still requires that a defendant truthfully provide law enforcement with all information related to his criminal conduct, listing the government's representations regarding such cooperation as a factor for the court to weigh in deciding whether to employ the safety valve. It thus supports the prosecutorial interest in obtaining evidence for law enforcement purposes. But the provision applies even if the defendant has gone to trial or if he lacks relevant or new information for

governmental use, thereby authorizing the court, in appropriate cases, to enter a sentence over a prosecutor's objections.

In order to help courts identify appropriate cases, our proposal incorporates some relatively objective components, such as the punishment other jurisdictions would impose for the offense in question. However, we recognize that it is difficult, if not impossible, to capture in a formula all of the information that could be relevant in deciding whether to invoke the safety valve. The best approach may be to exclude inappropriate factors and crimes (e.g., the defendant's race[27] or offenses that cause death), specifically permit consideration of highly relevant factors (e.g., the defendant's criminal history or the presence of a firearm), and provide some leeway to tailor sentences to meet the goals of punishment. The latter is accomplished by allowing judges to incorporate any other information relevant to the objectives listed in the governing law of federal sentencing.[28]

This type of discretion—ensuring that the punishment fits the crime and the criminal and, in the present context, gathering information as to whether to impose a sentence below an otherwise compulsory term of imprisonment—is essential to meaningful proportionality and equality in sentencing. Indeed, this authority lies at the heart of what it means to be a judge. The proposal thus attempts to harmonize mandatory minimums with "the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[29]

Our proposal precludes unfettered discretion by substituting the lower guidelines range as a new sentencing floor. In the *Angelos* case, for example, instead of a mandatory minimum sentence of fifty-five years, the required sentence would have been at least ninety-seven months. This part of our proposal will be less than ideal for opponents of mandatory minimums, as it means that judges will continue to be bound to impose a base sentence in all cases where mandatory minimums currently apply.[30] However, this approach rests on the fact that, as a practical reality, any changes to mandatory minimums may have to be made incrementally.

A second limitation on discretion requires the sentencing judge to provide in writing specific reasons for employing the safety valve in a particular case, thereby demanding that the trial court justify its use of the provision and provide a written record that can be examined by an appellate court. Consistent with the standard of review pronounced in *Booker* and refined in subsequent decisions,[31] appellate judges would ensure the reasonableness of these sentences, which, over time, could help create a jurisprudence that guides trial courts in their use of the safety valve.

To be clear, there is significant debate whether reasonableness review reins in wayward judges after *Booker*. But we both think it is appropriate to at least make the effort toward appellate reasonableness review. A statement of reasons for punishment below the statutory minimum helps ensure fairness in an individual case, requiring articulated justifications from the sentencing judge that can then be reviewed by an appellate panel with due respect for the trial court's fact-finding abilities. Such statements also offer a potential basis for comparing those cases within the safety valve's ambit and thus provide some degree of consistency in punishment.

The expanded safety valve still maintains sufficient incentives for defendants to cooperate with authorities—explicitly incorporating a degree of deference to representations by government—while at the same time preventing the worst cases of *trial tax* and other problems related to strategic deployment of mandatory minimums. As before, there remains only one guaranteed way to avoid a mandatory sentence: a government motion that the defendant provided substantial assistance through his full disclosure and cooperation.[32]

The new provision may also reduce troubling disparities in punishment by incorporating intrajurisdictional and interjurisdictional comparisons, derived from the Supreme Court's standard for constitutionally excessive terms of imprisonment.[33] Under our proposal, a court may consider the sentences imposed on other offenders pursuant to the sentencing guidelines. Certainly, the existence of lower sentences for more serious crimes and criminals would suggest an excessive sentence in the defendant's case. But the court might also take into account the sentences (if any) received by an offender's cohorts and, in appropriate cases, reduce a mandatory minimum-based punishment gap that is unrelated to the differential culpabilities among the offenders.

Likewise, a judge could consider whether mandatory minimums would have been employed by another U.S. Attorney's Office and, if so, the number of counts that would have been brought.[34] In turn, the proposal's interjurisdictional comparison—the sentences imposed for commission of the defendant's offense or offenses in other jurisdictions—allows a judge to weigh the expected punishment had the defendant been prosecuted in state court. This factor thereby incorporates federal-state disparities into a court's sentencing evaluation, hopefully stemming the possibility of abusive forum shopping. Both comparisons could foster real equality in sentencing, ensuring that punishment does not vacillate wildly among districts and circuits, with the interjurisdictional analysis also serving the constitutional principle of federalism.

To illustrate the proposal, consider once again the *Angelos* case. At trial, the defendant was found guilty on sixteen counts, including three gun charges under 18 U.S.C. § 924(c). The gun charges carried a mandatory minimum of fifty-five years' imprisonment, and the other thirteen counts could have added another seventy-eight to ninety-seven months to the sentence—for a grand total of at least sixty-one years. Ultimately, the district court *only*

imposed the fifty-five-year term pursuant to the mandatory minimums. In the absence of the § 924(c) counts, taking into consideration all crimes at issue, the guidelines would have called for a prison term of no more than ten years. Therefore, the basic prerequisite for the new safety valve has been met, with the guidelines sentence some forty-five years less than required by the relevant mandatory minimums.

Turning to the safety valve's second step, it is clear that not *all* facts or factors would support a below–mandatory minimum sentence. The jury found that Angelos possessed firearms in connection with his marijuana dealing, and for the sake of argument, we can assume that the government would have opposed the reduction and would have made representations unfavorable to the defendant's case.[35] On the other hand, Angelos was a first-time offender under federal law, and he did not use violence or credible threats of violence during the commission of these crimes. A comparative analysis also points toward the prescribed mandatory sentence being excessive. No other jurisdiction would have imposed a fifty-five-year sentence for the crimes in this case, and had the defendant been charged in local state court, he might have served five to seven years imprisonment and likely would have been paroled after two to three years.

Moreover, Angelos's sentence is longer than the punishment imposed on far more serious federal offenders. His punishment exceeds the federal sentence for, among others, an aircraft hijacker, a second degree murderer, a kidnapper, a child rapist, and a spy who gathers top-secret information. Ironically, the fifty-five-year sentence for possessing a firearm three times in connection with minor marijuana offenses is four times the sentence for a marijuana dealer who shoots an innocent person during a drug transaction. But whatever facts and factors are relied on by a sentencing judge, the proposal would require the court to explain, with precision, why the safety valve is properly employed in the case at bar, setting forth a written statement for review in appellate proceedings. In other words, the safety valve cannot be summoned frivolously.

In this way, the proposal would avert mandatory minimum sentences only in those situations where they produce the most manifestly unjust results, with the safety valve triggered when the mandatory minimums prescribe sentences higher than the relevant sentencing guidelines. As a statistical matter, the safety valve might be relevant in a sizable percentage of cases in which mandatory minimums apply. In fiscal year 2008, the mandatory minimum sentence was higher than the guidelines range in 41.3 percent of all cases (8,292 of 20,127).[36] Opponents of mandatory minimums may argue that our formulation does not go far enough, leaving long, inescapable sentences in place. But we again note that the proposal can be viewed as an initial measure that could lead to further reforms.

From the other side, proponents of mandatory minimums might criticize our proposal as going too far. The revised safety valve could allow judges to dole out lower sentences to violent criminals, including those who have used firearms to commit crimes of violence. Although the new scheme still excludes offenders who have caused death or serious bodily injury, it allows those who have displayed or even discharged a firearm to seek application of the safety valve. In the latter cases, however, the sentencing guidelines typically provide extremely tough penalties, including specific weapons enhancements, making a light sentence unlikely for those who brandish or discharge firearms. The proposal thus maintains significant incentives for defendants to cooperate with prosecutors and gain a government motion for a sentence below the guidelines. Besides, the safety valve provides the assurance of a sentencing floor in cases where a mandatory minimum would otherwise apply.

Using the guidelines as a mechanism for flagging cases of unjustified mandatory minimum sentences is vulnerable to another attack. Critics of our proposal might note that the guidelines themselves are often pegged to the mandatory minimums. It is no accident that the basic guidelines ranges for drug crimes often turn out to be about the same sentence prescribed by the mandatory drug provisions. This is not because the Commission necessarily agreed that a mandatory minimum was appropriate; instead, it appears the Commission recognized that a statutory minimum will trump anything in the guidelines. As a result, a defendant may be subject to a guidelines sentence at or above a mandatory term set by statute, despite the fact that the Commission might have established a lower guidelines range absent the skewing effect of the mandatory minimums.

One solution is to permit the Commission to use its own independent judgment about sentencing guidelines without requiring it to parrot every mandatory minimum penalty. Just as critics of mandatory minimums have raised the cry "Let Judges be Judges," one could argue that it is time to "Let Commissioners be Commissioners" (admittedly, a less catchy phrase). The Sentencing Commission is supposed to be the expert body designed to review sentencing policy, and as mentioned in the introduction, Congress itself has called on the Commission to review thoroughly the array of federal mandatory minimums. In view of this explicit invitation from Congress, we would urge the Commission to consider ways to decouple the guidelines from arbitrary punishments specified in statutory minimums.

It is debatable whether current law necessarily requires the Commission to follow precisely every mandatory minimum sentence. As a practical matter, the guidelines do not always track these provisions, and the Supreme Court has squarely held that the guidelines are not required to mimic every contour of a mandatory minimum.[37]

Nonetheless, the current statutory language can be read by the Commission as encouraging it to defer to sentences prescribed by mandatory minimums even where its expert opinion suggests otherwise. So although the Commission could perhaps decouple the guidelines on its own initiative, federal lawmakers may provide a firmer foundation for the undertaking. In particular, Congress could adopt legislation that invites the Commission to consider the mandatory minimums provided by statute but not necessarily rig the guidelines to these penalties. For instance, lawmakers might amend the statute spelling out the duties of the Commission as follows:

> **28 U.S.C. § 994. Duties of the Commission**
> (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and giving due consideration to ~~consistent with~~ all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—
> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case . . . .
> . . .
> (b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that gives due consideration to ~~is consistent with~~ all pertinent provisions of title 18, United States Code.

This change would make clear that Congress wants the Commission to exercise its own judgment on appropriate sentencing policy and to construct guidelines that take advantage of the Commission's expertise.

IV. Further Reforms

The proposed reform does not involve a direct congressional repeal of any mandatory minimum sentence. Instead, it suggests a small step informed by principles subject to broad consensus, enacted through readily available vehicles and materials, and narrowly tailored to prevent injustices. In concluding this article, we want to mention a few other changes to the federal system that might attract bipartisan support, building upon a successful minimalist reform like the one we have proposed.

For instance, federal law could encourage jury participation in determining whether a mandatory minimum sentence is excessive. As an institution, the jury occupies a position of great historical and constitutional significance in America, serving as a check and balance on government power and offering a direct means for citizen participation and community representation. In the present context, the jury process may provide a mechanism for identifying cases of unjust punishment while lending credibility to federal sentencing. Public support is a necessary component of a legitimate criminal justice system, and as mentioned, there are signs that the populous has grown disenchanted with mandatory minimums.

The *Angelos* case demonstrates how this reform might be implemented. After the defendant was convicted, the judge provided the jury with "relevant information about Mr. Angelos's limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos."[38] As noted previously, none of the jurors recommended a term close to the effective life sentence required by the mandatory minimums.[39] Along these lines, juries could provide additional means for flagging those cases in which a mandatory minimum sentence would produce an unjust prison term. Legislation could be crafted requiring this process only in cases where a defendant was convicted of crimes carrying long prison sentences, such as terms of more than ten years. In these situations, the judge would provide the defendant's criminal history and other relevant information to the jury, which would then deliberate and recommend a sentence to the court. If that recommendation was less than the mandatory minimum, the judge would then be authorized to impose a sentence below the mandatory term.

Other reforms might go beyond the ambit of our safety valve proposal. Federal lawmakers might reconsider the stacking of mandatory minimum sentences pursuant to 18 U.S.C. § 924(c). As seen in the *Angelos* case, a defendant can rack up decades of prison time by possessing a gun in several separate criminal offenses, even where those offenses are all part of the same episode. This problem can be traced to the Supreme Court's decision in *Deal v. United States*,[40] which construed the statute as stacking penalties even for crimes committed over the course of a few days. This interpretation has produced a fearsome mandatory minimum provision that is not a true recidivist law. The stacking aspect cannot be justified on grounds that it punishes the repeat offender who did not learn his lesson, because a defendant will not have been convicted and imprisoned in the time between § 924(c) violations. For these and other reasons, Congress should overturn *Deal* by amending § 924(c) to be a true recidivist law.

Another possible reform would bring back parole for prisoners serving long prison terms, particularly where those sentences resulted from mandatory minimums. Like our other proposals, this reform would not involve a direct attack on statutory minimums. Instead, it would call for the reenergizing of the U.S. Parole Commission, which currently has the limited authority to review sentences for prisoners who committed their offenses before November 1, 1987. Congress might extend this power to allow the Parole Commission to determine whether it makes sense to continue to incarcerate an inmate who has served a significant amount of his prison term (e.g., fifteen years).[41]

When it passed the federal sentencing guidelines, Congress abolished parole in order to ensure that offenders served a set amount of prison time. The broader crusade for truth in sentencing was intended to deter potential offenders and guarantee the public that a criminal would not receive a mere slap-on-the-wrist penalty. Regardless of whether these goals were in any way served by the guidelines regime, at some point the diminishing returns of punishment are outweighed by the concrete (and substantial) costs of incarcerating prisoners. Precisely where that point lies is, no doubt, a subject of debate. But we think that there might be a political consensus that after a prisoner has been incarcerated for a significant amount of time, the Parole Commission could investigate whether conditional release should be granted.

These further reforms go beyond a strictly minimalist approach, but the success of a small step like the one suggested in the previous sections might inspire greater changes. Moreover, the ideological diversity of those who have called for a reexamination of sentencing policy carries the possibility that congressional sponsors could have unassailable law-and-order credentials. Like the adage that "only Nixon could go to China," maybe a well-respected, politically impervious legislator could help rouse support for meaningful change in mandatory minimum sentencing.

Notes

1 *See, e.g.*, Koon v. United States, 518 U.S. 81, 113 (1996); Solem v. Helm, 463 U.S. 277, 284–85 (1983).

2 *See, e.g.*, Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html (critiquing the "transfer of sentencing discretion from a judge to an Assistant U. S. Attorney" through mandatory minimums).

3 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995).

4 *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 18–19 n.70 (2010) (citing studies that examine inconsistent applications of mandatory minimums that create disparate sentences).

5 *See, e.g.*, Michael Nachmanoff, Fed. Pub. Defender, E. Dist. of Va., Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010), at 13–14, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Nachmanoff.pdf. However, one of us (Cassell) has expressed some doubts about the causes and extent of wrongful convictions in the United States. *See, e.g.*, Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

6 *See* Luna & Cassell, *supra* note 4, at 1–5 (referencing opposition to mandatory minimums).

7 *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4713, 123 Stat. 2190, 2843–44 (2009) (directing study on federal mandatory minimums). In addition, the attorney general created a working group to examine federal sentencing policy, including mandatory minimums. Eric Holder, U.S. Att'y Gen., Remarks at the 2009 ABA Convention (Aug. 3, 2009), *available at* http://www.justice.gov/ag/speeches /2009/ag-speech-090803.html.

8 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

9 *See* 18 U.S.C. § 1389 (setting mandatory minimum for battery of a United States serviceman).

10 *See generally* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

11 Pub. L. No. 82-235, 65 Stat. 767 (1951) (codified as amended at 21 U.S.C. § 174 (repealed 1970)).

12 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970); *see also* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN L. REV. 1211, 1265–67 (2004).

13 *See generally* Luna & Cassell, *supra* note 4.

14 *See, e.g.*, CONN. GEN. STAT. ANN. § 29-37(b) (2010); ME. REV. STAT. ANN. tit. 17-A, § 1252(5-A)(B) (2010); MONT. CODE ANN. § 46-18-222 (2010); OR. REV. STAT. § 137.712 (2010).

15 18 U.S.C. § 3553(f) (2010); U.S.S.G. § 5C1.2 (2010).

16 *See, e.g.*, Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 62–64, 72–106 (2005).

17 543 U.S. 220, 245 (2005) (merits majority).

18 *Id.* at 259 (remedial majority).

19 United States v. Wilson, 355 F.Supp.2d 1269, 1288 (D. Utah 2005).

20 United States v. Jaber, 362 F.Supp.2d 365, 370 (D. Mass. 2005).

21 *See* U.S. SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 (June 2010), *available at* http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_ 201006.pdf.

22 *See, e.g.*, Luna, *supra* note 16, at 62–64, 72–106 (2005).

23 345 F.Supp.2d 1227 (D. Utah 2004). In the interest of full disclosure, the Angelos case was decided by Cassell while a U.S. District Court Judge for the District of Utah. Luna served as appellate counsel for Mr. Angelos in seeking to have Cassell's sentencing decision overturned.

24 *Id.* at 1230.

25 United States v. Moore, No. 09-3060, 2010 WL 1293369 (3d Cir. Apr. 6, 2010).

26 *Id.* at *1.

27 *See* 28 U.S.C. § 994(d) (2006) (requiring federal sentencing to be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders").

28 The Supreme Court has advocated this type of approach in its post-*Booker* jurisprudence. *See, e.g.*, Gall v. United States, 552 U.S. 38, 49–52 (2007).

29 *See, e.g.*, Koon v. U.S., 518 U.S. 81, 113 (1996).

30 Luna would prefer to see this provision lifted entirely, based on his general opposition to mandatory minimums and his prior concerns regarding the Commission's methodology in establishing guideline ranges. Nonetheless, he accepts that a hard floor for the safety valve may be politically necessary and, if nothing else, it is consistent with a minimalist approach.

31 *See, e.g.*, Kimbrough v. United States, 552 U.S. 85 (2007); Gall v. United States, 552 U.S. 38, 49–52 (2007); Rita v. United States, 551 U.S. 338 (2007).

32 *See* U.S.S.G. § 5K1.1 (2010); *see also* 18 U.S.C. § 3553(e).

33 *See* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (advocating three-part standard); Solem v. Helm, 463 U.S. 277, 292 (1983) (providing initial formulation of standard).

34 *See, e.g.*, Nachmanoff, *supra* note 5, at 6 (providing illustration); *Angelos*, 345 F. Supp. 2d at 1252–54 (discussing

inconsistent prosecutorial policies regarding § 924(c) in various judicial districts).

[35] For instance, one might expect that the government would claim that Angelos should be classified as an "organizer, leader, manager, or supervisor" in a continuing criminal enterprise. Moreover, an appellate panel in Angelos drew a less favorable picture of the defendant. *See* United States v. Angelos, 433 F.3d 738 (10th Cir. 2005).

[36] Nachmanoff, *supra* note 5, at 5 (recounting data from the U.S. Sentencing Commission).

[37] *See* Kimbrough v. United States, 552 U.S. 85, 106 (2007) (noting that various crack cocaine–powder cocaine sentencing guidelines do not follow the 100:1 ratio established in mandatory minimum sentences).

[38] *Angelos*, 345 F.Supp.2d at 1242.

[39] Judge James Gwin and other federal judges in the Midwest recently repeated the *Angelos* experiment in jury polling on a larger scale. *See* James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 175 (2010).

[40] 508 U.S. 129 (1993).

[41] *See* Miller, *supra* note 12, at 1268 n.201 (advancing a variant of this idea).