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Mandatory Minimalism

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INTRODUCTION

Lengthy mandatory prison sentences in the federal system are under heavy fire. The basic critique of these "mandatory minimums" is well known and becoming more widely accepted: A mandatory minimum deprives judges of the flexibility to tailor punishment to the particular facts of the case and can result in an unduly harsh sentence. In the past, it was perhaps unsurprising to find federal judges—including Justices Stephen Breyer and Anthony Kennedy, and the late Chief Justice William Rehnquist[1]—voicing dismay at the excessive sentences they were required to pronounce and affirm.[2] But the most

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[1] *See* Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) [hereinafter Kennedy Speech] (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html); Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180 (1999); William H. Rehnquist, Luncheon Address (June 18, 1993), *in* U.S. SENT'G COMM'N, DRUGS AND VIOLENCE IN AMERICA 283, 287 (1993); *see also* Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California, U.S.*, L.A. TIMES, Feb. 4, 2010, at AA5.

[2] *See, e.g.*, Marcia Coyle, *Judges Give Thumbs Down to Crack, Pot, Porn Mandatory Minimums*, NAT'L L.J., June 16, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202462736591; *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 34-66 (2009) [hereinafter *Mandatory Minimums Hearing*] (statement of Hon. Julie E. Carnes, Chair, Criminal Law Comm. of the Judicial Conference of the U.S.), *available at* 2009 WLNR 13897800; David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1 (2008); John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311 (2004); Jack B. Weinstein, *Every Day is a Good Day for a Judge to Lay Down his Professional Life for Justice*, 32 FORDHAM URB. L.J. 131 (2004); Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on the Federal Sentencing Guidelines*, 15 FED. SENT'G REP. 215 (2003); Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001); MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL

interesting, and potentially influential, response to mandatory minimums has come from the political branches.

At various times in their careers, the past three presidents have doubted the wisdom of long mandatory sentences.[3] Likewise, some federal lawmakers, prosecutors, and even a former "Drug Czar" have disputed the justice of mandatory minimums.[4] In a much-publicized case, dozens of former federal prosecutors and high-ranking Justice Department officials filed amici curiae briefs *in support of the defendant*, who was facing a 55-year mandatory sentence for relatively minor marijuana deals and related conduct.[5] After the appellate court upheld the sentence and the Supreme Court denied certiorari, a conservative federal lawmaker "question[ed] some severe mandatory

CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997); Marc Miller & Daniel J. Freed, *Editors' Observations: The Chasm Between the Judiciary and the Congress over Mandatory Minimum Sentences*, 6 FED. SENT'G REP. 59 (1993); *see also infra* note 5; *cf.* Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 799-802 nn.218-29 (2002) (providing citations to judicial criticisms of drug-related sentences).

[3] *See* Senator Barack Obama, Address at the Howard University Convocation (Sept. 28, 2007) [hereinafter Obama Address] (transcript available at http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php); Frank Davies, *Drug Czar Vacancy Exposes Policy Divide in GOP*, MIAMI HERALD, Feb. 23, 2001, at A29 (quoting CNN interview with President-elect George W. Bush); Interview by Rolling Stone Magazine with President William J. Clinton (Nov. 2, 2000) (transcript available at http://clinton6.nara.gov/2000/12/2000-12-07-interview-of-the-president-by-rolling-stone-magazine-a.html). Moreover, President George H.W. Bush expressed opposition to mandatory minimums in 1970 while serving in Congress. *See* 116 CONG. REC. H33314 (Sept. 23, 1970) (statement of Rep. George H.W. Bush) [hereinafter Bush Speech], *reprinted in* 3 FED. SENT'G REP. 108 (1990).

[4] *See, e.g.*, Press Release, Rep. Bob Inglis, New Poll: Americans Oppose Mandatory Minimums, Will Vote for Candidates Who Feel the Same (Sept. 24, 2008), *available at* http://www.famm.org/NewsandInformation/PressReleases/CorrectingCoursereportandpollrelease.aspx; *Mandatory Minimum Sentencing Laws–The Issues: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Rep. Bobby Scott), *available at* http://judiciary.house.gov/hearings/printers/110th/36343.PDF; Christopher S. Wren, *Public Lives: A Drug Warrior Who Would Rather Treat Than Fight*, N.Y. TIMES, Jan. 8, 2001, at A12 (quoting former U.S. Drug Czar Barry McCaffrey); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192-95 (1993); *see also* Jiles H. Ship, Second Vice President, Nat'l Org. of Black Law Enforcement Execs., Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Hearing_Transcript.pdf); U.S. Conference of Mayors, 2006 Adopted Resolutions: Opposing Mandatory Minimum Sentences, 47-48 (2006), http://www.usmayors.org/resolutions/74th_conference/resolutions_adopted_2006.pdf; *infra* note 16 and accompanying text (referencing support for reform of crack cocaine law).

[5] The group included four former U.S. Attorneys General and a former Director of the F.B.I. *See* Brief for 145 Individuals, Including Former United States Attorneys General et al. as Amici Curiae Supporting Petitioner, Angelos v. United States, 549 U.S. 1077 (2006) (No. 06-26), 2006 WL 3090058; United States v. Angelos, 433 F.3d 738, 738-39 (10th Cir. 2005) (listing amici curiae); United States v. Angelos, 345 F. Supp. 2d 1227, 1256 & n.136 (D. Utah 2004) (same). 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 decision overturned. *Cf.* Erik Luna & Troy L. Booher, Op-Ed., *Mandatory Minimums Sound Good But Are Unjust*, DESERT MORNING NEWS, Dec. 21, 2006, at A22.

minimum sentencing laws, especially in the context of drug enforcement," adding that "[i]n the long run, it may be just as important to provide rehabilitation and treatment programs, instead of imposing unreasonably harsh sentences."[6]

Conservative commentators and organizations have spoken out against mandatory minimums as well.[7] Moreover, opinion polls suggest that opposition is growing within the general public. A recent survey found that a majority of those polled opposed mandatory minimums for non-violent offenses and stated that they would vote for a congressional candidate who supports ending such sentences.[8] Given changes in the political branches, it now appears that considerable interest exists in moving beyond a verbal critique of these laws to enacting statutory reforms.

After noting that then-President George W. Bush had been skeptical of lengthy sentences for first-time drug offenders, then-Senator Barack Obama stated: "I agree with the President. The difference is he hasn't done anything about it. When I'm President, I will. We will review these sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of non-violent offenders."[9] Shortly after taking office, Attorney General Eric Holder created a working group to examine federal sentencing policy and to make recommendations for reform.[10] In addition, Congress has

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6 Robert Gehrke, *Drug Deals Costly: 55 Years*, SALT LAKE TRIB., Dec. 5, 2006, *available at* http://www.sentencing.nj.gov/downloads/pdf/articles/2007/Jan2007/news25.pdf (quoting Sen. Orrin Hatch).

7 *See, e.g.*, *Mandatory Minimums Hearing*, *supra* note 2, at 66-70 (statement of Grover Norquist, President, Americans for Tax Reform), *available at* 2009 WL 2027216; *id.* at 117-19 (statement of David A. Keene, Chairman, American Conservative Union) [hereinafter Keene Testimony], *available at* http://judiciary.house.gov/hearings/printers/111th/111-48_51013.pdf; Timothy Egan, *The Nation: Hard Time; Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, § 4, at 41 (quoting Ed Meese, former U.S. Attorney General and Senior Fellow at the Heritage Foundation); David B. Muhlhausen, Senior Policy Analyst, The Heritage Found., Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Muhlhausen.pdf); *see also infra* note 16 and accompanying text (referencing support for reform of crack cocaine law).

8 *See, e.g.*, Families Against Mandatory Minimums, Omnibus Survey (2008), http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf [hereinafter Omnibus Survey]; *see also* EAGLETON INSTITUTE OF POLITICS CENTER FOR PUBLIC INTEREST POLLING, NEW JERSEY'S OPINIONS ON ALTERNATIVES TO MANDATORY MINIMUM SENTENCING (2004), *available at* http://www.famm.org/Repository/Files/NJ%20Eagleton%20Poll.pdf; PETER D. HART RESEARCH ASSOCS., OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM (2002), *available at* http://www.prisonpolicy.org/scans/CJI-Poll.pdf; *Survey Finds Support for Drug Law Reform*, N.Y. L.J., Mar. 29, 1999, at 1; *cf.* Julian V. Roberts, *Public Opinion and Mandatory Sentences of Imprisonment: A Review of International Findings*, 30 CRIM. JUST. & BEHAV. 483 (2003).

9 Obama Address, *supra* note 3.

10 *See* Sally Quillian Yates, U.S. Att'y, N. Dist. of Ga., Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Yates_DOJ.pdf); Eric Holder, U.S. Att'y Gen., Remarks at the

directed the U.S. Sentencing Commission to submit a comprehensive report on mandatory minimums by the end of October 2010.[11]

The most recent events also augur well for reform. On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, which reduces the sentencing disparity between crack and powder cocaine offenses.[12] Previously, possession with intent to distribute 50 grams (less than 2 ounces) of crack cocaine resulted in a 10-year mandatory sentence, while it would take 5000 grams (approximately 11 pounds) of powder cocaine to generate the same mandatory minimum. And while possession with intent to distribute 500 grams of powder cocaine is still necessary to trigger a 5-year mandatory term, simple possession of 5 grams (about a teaspoon) of crack cocaine used to carry a 5-year mandatory federal sentence.[13]

The Fair Sentencing Act eliminated the mandatory minimum for simple possession of crack cocaine—the first time a federal mandatory minimum had been repealed since the Nixon Administration—and it reduced the crack/powder disparity, from 100:1 to 18:1, by upping the required amount of crack cocaine to trigger a mandatory sentence.[14] Lauded as "a courageous and historic step" toward fairness in the federal criminal justice system,[15] the law received broad bipartisan support, including the backing of conservative lawmakers and commentators, as well as prominent law enforcement organizations.[16]

Both authors of this article believe that reforming the federal mandatory minimum scheme would be good for the country. At the same time, however, there are substantial political barriers to making any change. Although public support for mandatory minimums has waned in recent times, it is still possible to paint a legislator who votes to repeal mandatory minimums as being "soft on crime." For example,

2009 ABA Convention (Aug. 3, 2009) (transcript available at http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html).

11 *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4713, 123 Stat. 2190, 2843-44 (2009).

12 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (to be codified in scattered sections of 21 and 28 U.S.C.).

13 *See* 21 U.S.C. §§ 841, 844 (2006).

14 In other words, it now takes 28 grams of crack cocaine to trigger a 5-year mandatory sentence and 280 grams of crack cocaine to generate a 10-year mandatory sentence.

15 *See* Editorial, *Crack Breakthrough: The Fair Sentencing Act Corrects a Longtime Wrong in Cocaine Cases*, WASH. POST, Aug. 3, 2010, at A14; *see also* Editorial, *Compromising on Cocaine*, L.A. TIMES, July 31, 2010, at A24; Editorial, *Matter of Conviction*, DALLAS MORNING NEWS, July 29, 2010, at A20.

16 *See* Families Against Mandatory Minimums, The Fair Sentencing Act of 2010, http://www.famm.org/FederalSentencing/USCongress/BillsinCongress/TheFairSentencingActof2010.aspx (last visited Aug. 31, 2010) (providing support letters from U.S. Senators, conservative commentators and organizations, the National District Attorneys Association, the Federal Law Enforcement Officers Association, and the National Association of Police Organizations, as well as press releases from federal lawmakers and the U.S. Attorney General).

when then-presidential candidate Obama called for reexamination of mandatory minimum sentences, he was attacked as "oppos[ing] mandatory prison sentences for sex offenders, drug dealers, and murderers."[17]

No reform is immune from criticism, of course, and even the new crack cocaine law had its detractors. Among others, the ranking Republican on the House Judiciary Committee, Lamar Smith, argued that history and experience justified the mandatory minimum. "Reducing the penalties for crack cocaine offenders could expose our neighborhoods to the same violence and addiction that caused Congress to act in the first place."[18] Along the way, Rep. Smith posed a series of rhetorical questions:

- "[W]hy do we want to make it more difficult to take drug traffickers off the streets and easier for them to peddle their lethal product?"
- "[W]hy should we reduce the [punishment] for defendants who are more violent, more likely to have criminal records[?] Why are we coddling some of the most dangerous drug traffickers in America?"
- "Why enact legislation that could endanger our children and bring violence back to our inner-city communities?"[19]

The speech referenced an earlier House version of the crack cocaine bill, which would have eliminated the sentencing disparity altogether (i.e., a 1:1 ratio), emphasizing that the bill was reported *over Republican opposition*. "Mr. Speaker, the Democratic Party teeters on the edge of becoming the face of deficits, drugs, and job destruction," Rep. Smith concluded. "I cannot support legislation that might enable the violent and devastating crack cocaine epidemic of the past to become a clear and present danger."[20]

The effectiveness of such arguments has yet to be determined, but one could imagine similar rhetorical questions being posed in opposition to further changes in mandatory minimum law. Some might dismiss this as a game of polemics, merely intended to stir the political base or prod the electorate at large. To be fair, however, arguments made in support of the status quo deserve thoughtful consideration, either because of the truth they may contain or the popular and political

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[17] *See Fact Check: Does Obama Oppose Mandatory Prison Sentences for Violent Criminals and Drug Dealers?*, CNN.COM, Oct. 23, 2008, http://politicalticker.blogs.cnn.com/2008/10/23/fact-check-does-obama-oppose-mandatory-prison-sentences-for-violent-criminals-and-drug-dealers/?fbid=eYid2oTJ1AX.

[18] 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Lamar Smith), 156 Cong Rec H6196-01, at *H6197 (Westlaw).

[19] *Id.* at H6197-98.

[20] *Id.* at H6198.

sentiment they represent.[21] Regardless of the merits, the current environment may not be conducive to the broadest vistas of sentencing reform.

Although the new crack cocaine law is momentous, it directly impacts only one type of prospective federal defendant—the crack cocaine offender—leaving all other mandatory minimums in place.[22] The ultimate legislation also eschewed the reformers' desired 1:1 sentencing parity for crack and powder cocaine offenses, a change that would have faced powerful opposition. Moreover, the law itself demanded greater sentencing enhancements for *all* drug offenses—a provision that was specifically, and positively, referenced by law enforcement officials.[23]

In general, advocates of further reforms will face long-standing political hurdles. Even during periods of lower crime rates, the public has expressed fear of victimization and a belief that criminals are not receiving harsh enough punishment.[24] Lawmakers have responded in

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[21] For instance, powder and crack cocaine are pharmacologically identical, but the method of ingestion, sniffing versus smoking, may have different effects on the user.

> Although oral cocaine use might produce the same magnitude increase in dopamine as that of cocaine that is smoked or used intravenously, the rapid change in dopamine levels that occurs by these latter routes is more reinforcing. That is why smoking [cocaine] has greater abuse liability than snorted or oral routes of administration.

Margaret Haney, *Neurobiology of Stimulants*, *in* THE AMERICAN PSYCHIATRIC PUBLISHING TEXTBOOK OF SUBSTANCE ABUSE TREATMENT 143, 144 (Marc Galanter & Herbert D. Kleber eds., 4th ed. 2008) (citation omitted); *see also* David A. Gorelick & Jennifer L. Cornish, *The Pharmacology of Cocaine, Amphetamines, and Other Stimulants*, *in* PRINCIPLES OF ADDICTION MEDICINE 157, 161, 166 (Allan W. Graham et al. eds., 3d ed. 2003). Likewise, it has been argued that crack cocaine has a devastating effect on poor, mostly minority communities. *See, e.g.*, United States v. McMurray, 833 F. Supp. 1454, 1467 (D. Neb. 1993) ("[I]f 'crack' cocaine is as dangerous as Congress believes it to be, and poor people in general, and poor blacks in particular, are victimized more frequently by the sale of 'crack' than whites, the social costs of 'disproportionate' prosecution of African Americans might be deemed acceptable precisely so that other poor people, including poor blacks, are afforded some protection from the scourge of 'crack.'"); *see also* Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 184-93 (1996); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994). *But see, e.g.*, *infra* note 70 (discussing socially harmful effects of racial discrimination, real or perceived); *Impact of S. 1789, The Fair Sentencing Act of 2010*, FAMILIES AGAINST MANDATORY MINIMUMS, 1 (Aug. 2, 2010), http://www.famm.org/Repository/Files/S1789%20impact%20factsheet%203.pdf (referencing benefits of new crack cocaine law); *cf. infra* notes 46-65 and accompanying text (discussing arguments against mandatory minimums).

[22] The changes are not retroactive—in other words, they do not apply to offenders who were already serving a federal sentence or to those whose offenses occurred before the bill was signed into law. *Cf. infra* note 366.

[23] *See supra* note 16 (referencing law enforcement letters). Moreover, the law increased criminal fines. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 4, 124 Stat. 2372, 2372-73 (to be codified at 21 U.S.C. §§ 841, 960).

[24] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.2.39.2009 (2009), http://www.albany.edu/sourcebook/pdf/t2392009.pdf [hereinafter SOURCEBOOK ONLINE]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 140-41 tbl.2.47

kind with new crimes and stiffer penalties, including mandatory sentences.[25] Conversely, proposals for comprehensive reform have carried a career-ending risk for supporters, who could be labeled soft on crime by allegedly providing the means for dangerous criminals to escape with lenient sentences. This political dynamic has stymied previous efforts in Congress to reform mandatory minimums.

For these and other reasons, there may be insufficient political support for an across-the-board repeal of federal mandatory minimums. To date, systemic reform proposals have had little traction[26] and appear unlikely to be adopted in the near term. Ironically, the congressional directive calling for a review of mandatory minimum sentencing itself contained a new mandatory minimum, and several recent bills would extend federal mandatory sentences.[27] As a practical matter, then, any meaningful reform might have to be done in a careful, focused way to create a broad bipartisan consensus surrounding the changes. With this in mind, the two of us have considered how to modify the federal mandatory minimum scheme so as to ameliorate its most draconian and unfair expressions.

One of us (Cassell) is a former federal judge nominated by President George W. Bush, now a "conservative" scholar whose work is often supportive of law enforcement, the death penalty, and the rights of crime victims.[28] The other (Luna) is a "libertarian" who tends to be suspicious of government and adamant about abuses of power, including those by police and prosecutors, and his scholarship has expressed the need for wholesale criminal justice reform (especially in

(Ann L. Pastore & Kathleen Maguire eds., 2003) [hereinafter SOURCEBOOK 2003], *available at* http://www.albany.edu/sourcebook/pdf/t247.pdf.

25 *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) [hereinafter Luna, *Overcriminalization*].

26 *See infra* note 239 (referencing bills).

27 *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4712, 123 Stat. 2190, 2842-43 (2009) (to be codified at 18 U.S.C. § 1389) (setting mandatory minimum for battery of a United States serviceman); *see also infra* note 68 (referencing bills that would create additional mandatory minimums).

28 *See, e.g.*, DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (2d ed. 2006); HUGO BEDAU & PAUL G. CASSELL, DEBATING THE DEATH PENALTY: THE EXPERTS FROM BOTH SIDES MAKE THEIR CASE (2004); 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) [hereinafter Cassell, *The Guilty and the "Innocent"*]; Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); *see also* Dickerson v. United States, 530 U.S. 428, 441 n.7 (2000) (noting the Court's invitation to Cassell to argue against the *Miranda* rule).

the federal system).[29] 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. Whether or not modest congressional action spurs greater feats, however, our proposal is far from death defying. It is instead a fairly unpretentious yet principled modification.

Part I of this Article begins by briefly describing the background of mandatory minimum sentencing, including arguments for and against mandatory minimums and an analysis of their enactment in the federal system. Part II considers the resilience of mandatory minimums from a behavioral science perspective and then sketches a potential process of reform in light of the relevant phenomena. Part III discusses the concept of minimalism in philosophy and legal theory, proposing the idea of "political minimalism" as a justification for reform efforts that seeks consensus on basic principles accompanied by small legislative steps. Part IV provides specific changes to federal law consistent with a minimalist approach to statutory modification. Finally, Part V offers some suggestions for further reforms, with the hope of inspiring dialogue on the propriety of legislatively compelled, judicially unavoidable punishment.

I. SOME BACKGROUND ON MANDATORY MINIMUMS

Enacted by statute, mandatory minimums set the lower limits for sentencing particular offenses and particular offenders. If a defendant is convicted of a given crime or has a certain criminal history—typically measured by objective criteria (e.g., the quantity of drugs possessed or the number of prior felony convictions)—then he must be sentenced to at least the legislatively prescribed prison term.[30] Some of the best examples in the federal system involve drug-related crimes. If a defendant possessed and intended to distribute 500 grams of

[29] *See, e.g.*, Erik Luna & Marianne Wade, *Prosecutors as Judges*, 68 WASH. & LEE L. REV. (forthcoming 2011); Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71 (2009) [hereinafter Luna, *Public Imagination*]; Erik Luna, *Drug Détente*, 20 FED. SENT'G REP. 304 (2008); Erik Luna, *Traces of a Libertarian Theory of Punishment*, 90 MARQUETTE L. REV. 263 (2007); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005) [hereinafter Luna, *Gridland*]; Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005); Luna, *Overcriminalization*, *supra* note 25; Erik Luna, *Race, Crime, and Institutional Design*, 65 L. & CONTEMP. PROBS. 183 (2003) [hereinafter Luna, *Institutional Design*]; Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 517 (2000) [hereinafter Luna, *Principled Enforcement*]; Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); *see also* Erik Luna, http://www.cato.org/people/erik-luna (last visited Aug. 31, 2010).

[30] Mandatory minimums may also be triggered by victim characteristics, such as selling drugs to someone under the age of eighteen. *See* 21 U.S.C. § 861 (2006).

methamphetamine, he must be sentenced to at least 10 years imprisonment.[31] As a general rule, mandatory minimum sentencing schemes follow a type of austere syllogism, where a defendant found guilty of X—the trigger, such as distributing a certain amount of contraband or carrying a firearm during a drug transaction—must then receive at least Y sentence (e.g., 5 years imprisonment).[32]

Federal mandatory minimums have existed throughout the nation's history, stretching back to 1790 with the enactment of life sentences for murder and piracy, and a 10-year minimum prison term for causing a ship to run aground by using a false light.[33] Since then, Congress has continued to add fixed sentencing floors to federal law, with dozens of such provisions in effect today.[34] Due to the number of mandatory minimums in the U.S. Code, a broad array of conduct might be eligible for inexorable levels of punishment. Nonetheless, most federal cases carrying mandatory minimums involve drugs, guns, or both—with, for instance, nearly two-thirds of all drug sentences subject to mandatory minimums.[35]

A. *Basic Arguments*

Mandatory minimum sentencing schemes have been the focus of relatively straightforward arguments—both on their behalf[36] and in

31 *See id.* § 844(b)(1)(A)(viii).

32 *See, e.g.*, 18 U.S.C. § 924(c)(1)(A)(i) (2006).

33 *See id.* § 1111 (murder); *id.* §§ 1651-1653, 1655 (piracy); *id.* § 1658 (false light); *see also* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6-11 (1991) [hereinafter SPECIAL REPORT], *available at* http://www.ussc.gov/r_congress/MANMIN.PDF (providing history of federal mandatory minimums).

34 *See Federal Mandatory Minimum Statutes*, FAMILIES AGAINST MANDATORY MINIMUMS (Feb. 23, 2010), http://www.famm.org/Repository/Files/FEDERAL%20MANDATORY%20MINIMUMS%202.23.10.doc; SPECIAL REPORT, *supra* note 33, at app. A (listing statutory provisions requiring mandatory minimum terms of imprisonment).

35 *See, e.g.*, *Mandatory Minimums Hearing*, *supra* note 2, at 124-55 [hereinafter Statistical Overview], *available at* http://judiciary.house.gov/hearings/printers/111th/111-48_51013.pdf (statistical overview report from the U.S. Sentencing Commission).

36 *See, e.g.*, Maxwell V. Jackson, Chief of Police, Harrisville City, Utah, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Jackson.pdf); David Hiller, Nat'l Vice President, Grand Lodge, Fraternal Order of Police, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Hiller_FOP.pdf); *Mandatory Minimums Hearing*, *supra* note 2, at 71-78 (statement of Michael J. Sullivan, Partner, Ashcroft Sullivan, LLC), *available at* 2009 WLNR 13385871; *Mandatory Minimum Sentencing Laws–The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 104 (2007) (statement of Richard B. Roper, U.S. Att'y, N. Dist. of Tex.), *reprinted in* 19 FED. SENT'G REP. 352 (2007) [hereinafter Roper Statement]; Jay Apperson, *The Lock-'em-Up Debate; What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994, at

favor of their repeal.[37] The following provides some of the more frequent claims that have been made over the years.

1. For Mandatory Minimums

Proponents of mandatory minimums point to the problems raised by the former federal sentencing system, which professionals and politicians of all political stripes described as "lawless"[38] and a major source of public cynicism. Historically speaking, federal trial judges had unguided discretion in determining sentences within broad statutory ranges. This discretion purportedly generated intolerable (even

C1; Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167 (1993); Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT'G REP. 230 (1992); *cf. Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279 (1999) (debate between Rep. Asa Hutchinson and U.S. District Court Judge Stanley Sporkin); SPECIAL REPORT, *supra* note 33, at 13-14 (listing purported goals of mandatory minimums); *supra* notes 18-20 and accompanying text.

[37] *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) [hereinafter Nachmanoff Testimony] (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Nachmanoff.pdf); Cynthia Hujar Orr, President, Nat'l Ass'n of Criminal Def. Lawyers, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Hujar_Orr_NACDL.pdf); Stephen A. Saltzburg, Professor of Law, George Washington Univ. Sch. of Law, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) [hereinafter Saltzburg Testimony] (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Saltzburg.pdf); Stephen J. Schulhofer, Professor of Law, N.Y. Univ. Sch. of Law, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) [hereinafter Schulhofer Testimony] (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Schulhofer.pdf); Erik Luna, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) [hereinafter Luna Testimony] (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Luna.pdf); Marc Mauer, Exec. Dir., The Sentencing Project, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) [hereinafter Mauer Testimony] (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Mauer_Sentencing_Project.pdf); Julie Stewart, President, Families Against Mandatory Minimums, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Stewart.pdf); Jay Rorty, Dir. of the Drug Law Reform Project, Am. Civil Liberties Union, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Rorty.pdf); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65 (2009); Symposium, *Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303 (2004); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993); Hatch, *supra* note 4; Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 FED. B. NEWS & J. 158, 161 (1993); SPECIAL REPORT, *supra* note 33; *see also supra* notes 1-17; *infra* notes 70-74 and accompanying text.

[38] *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

unconstitutional) disparities among defendants, with sentences turning on the temperament of a given judge or irrelevant factors like race and class. Mandatory minimums help eliminate these inequalities, proponents argue, by providing uniformity and fairness for defendants, certainty and predictability of outcomes, and a higher level of truth and integrity in sentencing.

Mandatory minimums allegedly serve the theoretical goals of punishment as well, guaranteeing that criminals receive the punishment they deserve (i.e., retribution) and are effectively deterred and incapacitated.[39] According to proponents, the ostensible subjects of mandatory minimums—high-level offenders who perpetrate violent and serious crimes—can only be assured of receiving their just deserts through long, compulsory sentences. Taking into consideration ordinal and cardinal scaling of punishment in America, few retributivists would balk at a life sentence for a serial murderer, for instance, and most mandatory minimums imposed for serious crimes of violence (e.g., forcible rape) will fall within the rough boundaries of deserved punishment. Without mandatory minimums, proponents thus claim, judges might issue undeservedly lenient sentences for these violent offenders.

With respect to deterrence, mandatory minimum sentences are sometimes justified as sending an unmistakable message to criminals. The certain, predictable, and harsh sentences forewarn offenders of the consequences of their behavior upon apprehension and conviction. Many mandatory minimums employ clear, often formulaic terms, giving them a bumper-sticker quality. "Use a gun, go to jail" is a classic example,[40] with the requisite punishment aimed at discouraging the convicted offender from ever using a firearm again (specific deterrence), as well as dissuading other people from committing gun-related crimes in the first place (general deterrence).

Proponents contend that mandatory minimums also incapacitate the most incorrigible criminals, particularly those with long rap sheets and no apparent hope of rehabilitation.[41] Anti-recidivist provisions, such as "three strikes" laws in various states, fall within this category. In California, an individual previously convicted of two serious or violent felonies who then commits another felony is literally

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[39] For overviews of major punishment theories and criticisms, see JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 29-75 (6th ed. 2008); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 207-42 (2003) [hereinafter Luna, *Punishment Theory*].

[40] *See, e.g.*, CAL. PENAL CODE § 1203.06 (West 2010).

[41] As far as we know, no plausible argument has been made that mandatory sentencing serves rehabilitation, the other major utilitarian goal of punishment.

incapacitated,[42] often put behind bars for the rest of his life and thereby prevented from committing crimes against the law-abiding public.

Another plausible argument for mandatory minimums is their ability to induce guilty pleas and cooperation. The threat of long, obligatory sentences tends to encourage plea bargaining, which, if successful, averts the substantial costs associated with trial. In fact, ninety-five percent of all federal prosecutions terminate by guilty plea,[43] with mandatory minimum sentences helping to keep that figure extremely high. Moreover, the possibility of a long sentence provides a powerful incentive for members of a criminal group to provide information to law enforcement and to assist in the prosecution of other offenders. Low-level participants can avoid mandatory minimums by fingering bigger players,[44] allowing prosecutors to move up the chain of command.

Some organized criminal enterprises may be impossible to unravel and eventually put out of business, supporters argue, unless the government has the leverage provided by severe punishment. Mob prosecutions provide a standard example, where much information and trial evidence might be unattainable without the stick of long sentences (and the carrot of immunity grants). The same obstacles may apply in other forms of concerted criminality, from violent street gangs to sophisticated white-collar offenders. Aside from its pragmatic benefits, a defendant might earn a form of moral credit through his willingness to cooperate with law enforcement. The provision of information and the acceptance of responsibility may demonstrate genuine remorsefulness on the part of the offender and a willingness to help redress the harm that he may have caused.[45]

Finally, prosecutors can temper mandatory minimums through the sound exercise of discretion, foregoing charges that would produce excessive punishment. According to supporters, federal law enforcement focuses on sophisticated, violent, long-term conspiracies, sometimes with international dimensions, meaning that the recipients of mandatory minimum sentences will be major players in such schemes or serious recidivists who use deadly weapons to further their illegal aims. Harsh federal sentences also complement state criminal justice systems, proponents claim, providing a backstop of sorts in cases of concurrent jurisdiction. When an offender would get off easily under a

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42 *See* CAL. PENAL CODE §§ 667(e)(2), 1170(c).

43 *See* U.S. SENTENCING COMM'N, 2008 ANNUAL REPORT fig.C (2008) [hereinafter 2008 ANNUAL REPORT], *available at* http://www.ussc.gov/ANNRPT/2008/FigC.pdf.

44 *See, e.g.*, *infra* note 72.

45 *See infra* text accompanying note 373 (mentioning moral relevance of defendant's assistance).

state regime, federal prosecutors can employ mandatory minimums to ensure an appropriate sentence.

2. Against Mandatory Minimums

Opponents of mandatory minimums sometimes challenge the image of vast disparity in punishment prior to the enactment of determinate sentencing in the federal system.[46] Even accepting the historical accuracy of the conventional narrative, however, mandatory minimums may have done little to eliminate punishment discrepancies among similarly situated defendants. Inconsistent application of mandatory minimums has only exacerbated disparities, opponents argue, expanding the sentencing differentials in analogous cases. According to most critics, the source of this problem is manifest: Mandatory minimums effectively transfer sentencing authority from trial judges to federal prosecutors, who may pre-set punishment through creative investigative and charging practices, producing troubling punishment differentials among offenders with similar culpability.[47]

Mandatory minimums may also conflict with the notion that a judge should ensure that the punishment fits the crime and the criminal, a precept "deeply rooted and frequently repeated in common-law jurisprudence."[48] They eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant, at least to the extent that these facts might call for a below-minimum sentence. For this reason, opponents believe it is far from obvious that mandatory minimums ensure an offender receives his "just deserts" or any other retributive formulation. All theories of retribution require that the punishment be proportionate to the gravity of the offense, and any decent retributive theory demands an upper sentencing limit.[49] Mandatory minimums are indifferent to proportionality concerns, however, and can pierce retributive boundaries with preordained punishment.

They may not fulfill consequentialist goals either, opponents continue, rejecting the idea that mandatory sentences provide meaningful deterrence or incapacitation.[50] Clarity and certainty of punishment are not synonymous with deterrence, which requires that a defendant not only know the rule, but also believe that the costs

46 *See infra* note 70 and accompanying text.

47 *See supra* note 37 and accompanying text; *infra* note 70 and accompanying text.

48 Solem v. Helm, 463 U.S. 277, 284-85 (1983).

49 *See generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 52-54 (5th ed. 2005).

50 *See infra* note 71 and accompanying text.

outweigh the benefits from violating the law and then apply this understanding to decision-making at the time of the crime. As opponents note, however, most offenders neither perceive this balance of costs and benefits nor follow the rational actor model.[51]

Incapacitation is only effective if: (1) the imprisoned person would otherwise be committing crime, and (2) he is not replaced by others. Mandatory minimums prove problematic on both criteria, opponents contend. Offenders typically age out of the criminal lifestyle, with long sentences requiring the continued incarceration of individuals who present little danger of further crimes.[52] Moreover, certain offenses subject to mandatory minimums can draw upon a large supply of potential participants; with drug organizations, for example, an arrested dealer or courier is quickly replaced by another.[53]

Aside from the goals of punishment, there is a genuine question as to the propriety of extracting information and guilty pleas through the threat of mandatory minimums. Opponents claim that such practices impose a "trial tax" on defendants who exercise their constitutional rights to trial by jury, proof beyond a reasonable doubt, and other trial-related guarantees—the tax being the mandatory minimum sentence that otherwise would not have been imposed.[54] Sometimes maximum leverage is obtained through a process known as "charge stacking" (or "count stacking"), whereby the government divides up a single criminal episode into multiple crimes, each carrying its own mandatory sentence that can then be stacked, one on top of the other, to produce heavier punishment.[55]

This practice seems particularly troubling when the government procures further crimes through its own actions, as when law enforcement arranges a number of controlled drug buys in order to

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[51] For discussions on the irrationality and myopic behavior of criminals, see, for example, David S. Lee & Justin McCrary, *Crime, Punishment, and Myopia* (Nat'l Bureau of Econ. Research, Working Paper No. 11491, 2005); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 GEO. L.J. 949, 953 (2003); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 4-7 (1999).

[52] *See, e.g.*, David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189 (1986); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983). It has also been argued that prisons serve as "colleges for criminals," where offenders learn new anti-social skills, for instance, and come out more likely to recidivate. *See, e.g.*, Luna, *Punishment Theory*, *supra* note 39, at 220.

[53] *See, e.g.*, Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 57 (1999). Moreover, arguments for incapacitation inevitably disregard crime committed in correctional facilities.

[54] *See infra* note 119 and accompanying text.

[55] *See, e.g.*, Luna, *Overcriminalization*, *supra* note 25, at 723-24; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) [hereinafter Stuntz, *Pathological Politics*].

achieve a lengthy sentence.[56] In multi-defendant cases, there is also an issue of fairness when disparate punishment is the result of a "race to the prosecutor's office," with the defendant who pleads first—sometimes the one who has the savviest or most experienced defense counsel—avoiding a long mandatory sentence.

Reasonable opponents do not doubt that federal law enforcement is well intentioned in most cases. However, they believe it is naïve to assume that prosecutorial discretion will prevent the misuse of mandatory minimums, with experience showing that governmental good faith will not always suffice. Although serious and violent offenders may have inspired some mandatory minimums, the statutes themselves are not tailored to these criminals alone and instead act as grants of power to federal prosecutors to apply the laws as they see fit, even to minor participants in non-violent offenses.[57] Opponents emphasize that prosecutors are influenced by the ordinary human motivations that may at times cause a loss of perspective—path dependence, career advancement, immodesty, and occasional vindictiveness[58]—leading to the misapplication of mandatory minimums.

To check potential abuses of executive power, American law has historically entrusted the courts with certain fundamental criminal justice decisions.[59] Among the issues properly assigned to the judiciary, opponents argue, is the appropriate sentence for a given offender. Under the current regime, however, no viable judicial check prevents the misapplication of mandatory minimums, which leads to several unsettling consequences. For instance, mandatory schemes can have a "tariff" effect, where some basic fact triggers the same minimum sentence regardless of whether the defendant was a low-level drug courier or instead a narcotics kingpin.[60] Opponents claim that the tariffs are often levied on the least culpable members in a criminal episode. Unlike those in leadership positions, low-level offenders often lack the type of valuable information that can be used as a bargaining chip with prosecutors.

In addition, mandatory minimums can have a "cliff" effect, drawing seemingly trivial lines with huge consequences. The most striking examples often involve illegal drugs, where offenders face steep cliffs at quantity cutoffs. Someone caught with, say, 0.9 grams of LSD might receive a relatively short sentence—but add on a fraction of a gram and a half-decade in federal prison necessarily follows, with the

56 *See, e.g.*, United States v. Angelos, 345 F. Supp. 2d 1227, 1253 (D. Utah 2004).
57 *See, e.g.*, Stuntz, *supra* note 55, at 549.
58 *See infra* note 115 and accompanying text.
59 *See infra* notes 203, 218 and accompanying text.
60 *See, e.g.*, United States v. Brigham, 977 F.2d 317 (7th Cir. 1992).

defendant falling off the metaphorical cliff.[61] Moreover, the mechanical nature of mandatory minimums can entangle all criminal justice actors in an oxymoronic process where facts are negotiable, from the amount of drugs to the existence of a gun. The participants figuratively "swallow the gun" in order to avoid a factual record that would require a mandatory sentence.[62]

Opponents might level two final objections against mandatory minimums, one skeptical of federal criminal justice and the other supportive of the national system. The former is concerned with federal encroachment on state prerogatives and the implementation of policies that appear to conflict with local choices. Most drug and weapons crimes amenable to federal mandatory minimums are actually prosecuted in state courts pursuant to state laws carrying much lower sentences.[63] It is hardly disputed, however, that the possibility of severe punishment can influence the choice of whether to pursue a federal or state prosecution. For some, this prospect raises serious questions about the propriety of bringing charges in federal rather than state court, particularly where the prosecution is pursued, not because the case implicates a special national interest, but because it jacks up the potential punishment.

Those who believe in broad federal powers may resist mandatory minimums for a different reason—the distortive impact on a system of federal sentencing guidelines that they see as finely tuned. Justice Breyer, a former U.S. Sentencing Commissioner, has raised objections on this precise ground, arguing that mandatory minimums thwart the Commission in its fundamental duty: "the development, in part through research, of a rational, coherent set of punishments."[64] Mandatory minimums can preclude the Commission from calibrating sentences based on normatively or empirically relevant factors, such as the defendant's role or culpability for a crime. All offenders thus receive the same minimum sentence once the basic statutory predicates are met, regardless of very real and morally significant differences. Opponents also point out that mandatory minimums distort sentences for entire classes of crimes.[65] Given that the Commission seeks continuity and

61 *See* 21 U.S.C. § 841(b)(1)(B)(v) (2006).

62 *See infra* note 302 and accompanying text.

63 *See, e.g.*, SOURCEBOOK ONLINE, *supra* note 24, at tbls. 5.17.2004, 5.38.2008, 5.44.2004, http://www.albany.edu/sourcebook/tost_5.html; United States v. Snyder, 954 F. Supp. 19 (D. Mass. 1997); Wallace, *supra* note 37.

64 Breyer, *supra* note 1; Hatch, *supra* note 4, at 194.

65 For example, the "penalty gap" between fraud and drug cases was used to pressure the Commission to amend U.S. Sentencing Guideline § 2B1.1. Although major corporate scandals provided the impetus for change, the resulting increase in sentences for all fraud offenders had the effect of limiting or precluding non-prison alternatives for many low-level offenders. *See* Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications*

consistency among similar offenses, a mandatory minimum for one crime may generate a type of sentencing inflation, skewing punishment upward for all related crimes.

B. *The Rise and Persistence of Mandatory Minimums*

The two of us often disagree on criminal justice issues. As mentioned earlier, one of us (Luna) is suspicious of government activity on principle and especially concerned about abuses of power in the criminal justice system, while the other (Cassell) tends to have more favorable views of law enforcement and is most concerned about the rights of crime victims. But we both agree that mandatory minimums can produce patently unjustifiable sentences and that some type of safeguard is necessary for such cases.

We are not alone. The need for reform has long been recognized by practitioners, researchers, public interest groups, and prominent legal organizations like the American Bar Association and the American Law Institute.[66] The growing opposition to mandatory minimums goes beyond the usual suspects (e.g., judges, legal scholars, criminal defenders, and civil liberties groups) and includes conservative commentators, politicians, and the general public. This developing consensus and loose political coalition would seem to portend significant reforms, presumably by Congress explicitly repealing some or all mandatory minimum sentences currently on the books.

Until recently, however, Congress had retained all mandatory minimum laws it had passed since 1970. In fact, mandatory sentencing remained politically popular well into the new millennium. "Every Administration and each Congress on a bipartisan basis has . . . supported mandatory minimum sentencing statutes for the most serious of offenses," a U.S. Attorney noted in 2007,[67] a position that continues to this day. Despite rising opposition to unduly severe punishment and inflexible sentencing regimes—epitomized by the passage of the new crack cocaine law—all federal mandatory minimums (save one) still

of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed, 1 OHIO ST. J. CRIM. L. 373, 387-435 (2004).

66 *See, e.g.*, James E. Felman, Am. Bar Ass'n, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS /20100527/Testimony_Felman_ABA.pdf); Tonry, *supra* note 37, at 65-66; *see also* Thomas W. Hillier, II, Member, Sentencing Initiative Blue Ribbon Comm., The Constitution Project, Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Hillier.pdf); Jeffrey B. Steinback, Practitioner's Advisory Grp., Testimony at Public Hearing Before the U.S. Sentencing Commission (May 27, 2010) [hereinafter Steinback Testimony] (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Steinback_PAG.pdf).

67 Roper Statement, *supra* note 36, at 352.

exist and are likely to stay on the books, we suspect, at least for the near term. Last year, for instance, several bills would have created additional mandatory minimums,[68] demonstrating that the political penchant for strict punishment remains in effect.

1. Dissonance of Mandatory Minimums

Michael Tonry recently wrote that "[t]he greatest gap between knowledge and policy in American sentencing concerns mandatory penalties."[69] So what accounts for this dissonance? For the most part, existing research tends to undercut the principal arguments supporting mandatory minimums, namely, that they serve the goals of punishment, prevent sentencing disparities among defendants, and are necessary for law enforcement to obtain cooperation from offenders.

For example, a number of studies suggest that the use of federal mandatory minimums has tended to generate disparate sentences among similarly situated offenders.[70] The claim of crime reduction has been

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[68] *See, e.g.*, Powder-Crack Cocaine Penalty Equalization Act of 2009, H.R. 18, 111th Cong. (2009); Illegal Immigration Enforcement and Social Security Protection Act of 2009, H.R. 98, 111th Cong. (2009); Respect for the Law Act of 2009, H.R. 128, 111th Cong. (2009); Internet Stopping Adults Facilitating the Exploitation of Today's Youth Act of 2009, H.R. 1076, 111th Cong. (2009) (same as S. 436, 111th Cong. (2009)).

[69] Tonry, *supra* note 37, at 65.

[70] *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO-04-105, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 (2003), *available at* http://www.gao.gov/new.items/d04105.pdf; Stephen Schulhofer & Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Era*, 91 NW. U. L. REV. 1284 (1997); BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (1994); *Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them?: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. (1993) (statement of Henry R. Wray, Director, Administration of Justice Issues, General Accounting Office), *available at* http://archive.gao.gov/d45t15/149743.pdf; Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); BARBARA S. MEIERHOEFER, FED. JUDICIAL CTR., THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED (1992), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf; SPECIAL REPORT, *supra* note 33, at 47-52; Statistical Overview, *supra* note 35, at 2-4.

Particularly disturbing is the appearance, if not reality, of disparities along racial or ethnic lines. *See, e.g.*, *id.* In a report by NYU's Brennan Center for Justice, a former U.S. Attorney recounted the following story:

> I had an [Assistant U.S. Attorney (AUSA) who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" and he said, "He is a rural guy who grew up on a farm. The gun he had with him was a rifle. He is a good ol' boy, and all the good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he [was] a gun-toting drug dealer, exactly.

contested as well, with most researchers finding no deterrent effect from mandatory sentencing laws.[71] The statistics also seem to belie categorical assertions of government necessity. The rate of cooperation (or "substantial assistance")[72] in mandatory minimum cases is comparable to the average in all federal cases,[73] while most recipients

BRENNAN CENTER FOR JUSTICE, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010) (alterations in original), *available at* http://www.brennancenter.org/page/-/Justice/Prosecutorial Discretion_report.pdf. In that case, "the question of whether to dismiss a gun charge carrying a statutory mandatory minimum sentence turned on the prosecutor's perception of the defendant's culpability, which was in turn informed in part by race." *Id.* Of course, there may be a correlation without causation; in other words, the disproportionate impact of mandatory minimums on minorities may be based on any number of factors other than race or ethnicity. Nonetheless, a relationship has emerged between mandatory punishments and people of color, which can have a profoundly harmful meaning and effect regardless of causation. *See, e.g.*, Luna, *Institutional Design*, *supra* note 29, at 183-87.

It might also be noted that some works have challenged the assumption that the previous federal sentencing regime was rife with disparity. *See, e.g.*, DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-90 (1993); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104-42 (1998). Moreover, there is a lively empirical debate as to whether the guidelines have reduced sentencing differentials. *Compare* U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT'S* MULTIVARIATE ANALYSIS (2010) [hereinafter DEMOGRAPHIC DIFFERENCES], *available at* http://www.ussc.gov/general/Multivariate_ Regression_Analysis_Report_1.pdf, *and* Ryan W. Scott, *The Effects of* Booker *on Inter-Judge Sentencing Disparity*, 22 FED. SENT'G REP. 104 (2009) [hereinafter Scott, *The Effects of* Booker], *with* Jeffrey T. Ulmer et al., Does Increased Judicial Discretion Lead to Increased Disparity? The "Liberation" of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision (Mar. 23, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract _id=1577238.

[71] *See, e.g.*, JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY? (1997); VINCENT & HOFER, *supra* note 70, at 11-16; SPECIAL REPORT, *supra* note 33; Tonry, *supra* note 37, at 90-100; *see also* UNDERSTANDING AND PREVENTING VIOLENCE 6-7 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993). To be clear, we are making a limited point here about the lack of unique deterrence from mandatory minimum sentences, not from criminal penalties generally. *Cf.* Paul G. Cassell, *In Defense of the Death Penalty*, *in* BEDAU & CASSELL, *supra* note 28, at 189-200 (discussing evidence supporting a deterrent effect from capital sentences).

[72] *See* 18 U.S.C. § 3553(e) (2006):

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

See also U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2010).

[73] *See* Statistical Overview, *supra* note 35, at 131-32 (stating that 19.5% of federal defendants subject to mandatory minimums were eligible for substantial assistance departures due to a government motion, with 13.8% receiving the departure); U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.27 [hereinafter 2008 SOURCEBOOK] (reporting that 13.5% of all federal defendants received a substantial assistance departure). In drug trafficking cases, where mandatory minimums are widely available, substantial assistance departures were granted in 25.9% of cases in 2008. The rate was comparable or even higher, however, in many types of cases without mandatory minimums: 79.2% in antitrust cases, 20% in arson cases, 28% in bribery cases, 26.1% in civil rights cases, 28.6% in kidnapping cases, 25.9%

of federal drug minimums are couriers, mules, and street-level dealers, not kingpins or leaders in international drug cartels.[74]

Despite this and other evidence, federal lawmakers—even those who might like to eliminate some or all mandatory sentencing laws—face a seemingly intractable problem in American democracy: the dysfunctional relationship of politics and criminal justice. Some have argued that Congress suffers from a sort of legislative schizophrenia on sentencing reform. "One side is dispassionate and learned, deliberating for decades in search of a rational, comprehensive solution. The other is impulsive, reckless, driven by unquenchable political passions, and impatient with its plodding alter-ego."[75] When it comes to mandatory minimums, federal lawmakers can both recognize their flaws and still vote in their favor.[76]

2. Over-Criminalization

As a conceptual matter, congressional support for mandatory minimums can be viewed as a troubling instance of a larger trend: over-criminalization and, more specifically, over-federalization. Over-criminalization refers to the continual expansion of criminal justice systems, through the creation of novel crimes, harsher punishments, broader culpability principles, and heightened enforcement, often in the absence of moral or empirical justification and without regard for statutory redundancy or jurisdictional limitations.[77]

For decades, scholars have discussed the phenomenon and its negative consequences, such as the greater potential for arbitrary enforcement by police and prosecutors. In his 1967 critique, Sanford Kadish warned that until over-criminalization is "systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue."[78] In

in money laundering cases, 25.7% in racketeering/extortion cases, and 19.9% in tax cases. *Id.*; *see also* Nachmanoff Testimony, *supra* note 37, at 15.

74 *See, e.g.*, U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 20-21, 85 (2007) [hereinafter COCAINE AND FEDERAL SENTENCING], *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf. Moreover, it has been suggested that mandatory minimums may be counterproductive by producing a "cooperation backlash," where people may be less likely to report suspicious behavior or cooperate with law enforcement out of concern that their neighbors may receive excessive punishment as a result. *See* Schulhofer Testimony, *supra* note 37, at 16-18; *see also infra* notes 304-305 and accompanying text.

75 Wallace, *supra* note 37, at 158.

76 *See, e.g.*, Hatch, *supra* note 4, at 193.

77 *See generally* Luna, *Overcriminalization*, *supra* note 25.

78 Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); *see also* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

the ensuing years, lawmakers have relentlessly added to American penal codes, in the face of equally relentless criticisms by scholars and public interest groups.[79]

Much of this expansion has taken place at the state level,[80] but arguably the most virulent form of over-criminalization—and certainly the most criticized[81]—is in the federal system. Congress has slowly but surely obtained a general police power to enact virtually any offense, adopted repetitive and overlapping statutes, criminalized behavior that is already well covered by state law,[82] created a vast web of regulatory offenses,[83] and extended federal jurisdiction to almost any sort of deception[84] or wrongdoing,[85] virtually anywhere in the world.[86] At last count, there were about 4500 federal crimes on the books,[87] with the largest portion enacted over the past four decades.[88]

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79 *See, e.g.*, Luna, *Overcriminalization*, *supra* note 25, at 703-11, 712 nn.48-51.

80 *See, e.g.*, Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005). *But see, e.g.*, Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007).

81 *See, e.g.*, ABA CRIMINAL JUSTICE SECTION, REPORT OF THE ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW 59-78 (1998) [hereinafter ABA CRIMINAL JUSTICE SECTION] (providing bibliography).

82 For instance, Congress enacted a "carjacking" statute that dealt with conduct fully addressed by existing state crimes (e.g., robbery and kidnapping). *See* 18 U.S.C. § 2119 (2006) (imposing federal criminal liability on those who take motor vehicles by force, violence, or intimidation and "with the intent to cause death or serious bodily harm"); Commonwealth v. Jones, 591 S.E.2d 68, 70 (Va. 2004) (detailing Virginia's definition of robbery, which prohibits the taking of *any* property of another by violence or intimidation); Spencer v. Commonwealth, 592 S.E.2d 400, 402 (Va. Ct. App. 2004) ("[C]arjacking is a species of robbery.").

83 *See* United States v. Park, 421 U.S. 658, 663-64, 670-73 (1975). *See generally* Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, HERITAGE FOUND., 3-12 (Apr. 17, 2003), http://s3.amazonaws.com/thf_media/2003/pdf/lm7.pdf.

84 *See* 18 U.S.C. § 1001(a)(2) (2006) (criminalizing false statements made pursuant to "any matter" within any branch of the federal government); *id.* § 1341 (proscribing various fraudulent transactions utilizing the Postal Service or private interstate mail carriers); *id.* § 1343 (prohibiting similar fraudulent transactions over interstate wire, radio, and television signals); *id.* § 1346 (defining "scheme or artifice to defraud" under § 1341 and § 1343 as including a plan to "deprive another of the intangible right to honest services"); *see also* Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (citing over three hundred federal proscriptions against fraud and misrepresentation).

85 *See, e.g.*, United States v. Welch, 327 F.3d 1081, 1090-1103 (10th Cir. 2003) (upholding, *inter alia*, a federal felony indictment for violation of Utah's commercial bribery statute, a misdemeanor under state law).

86 *See, e.g.*, Pasquantino v. United States, 544 U.S. 349 (2005) (affirming a defendant's federal conviction for violating Canadian tax law through the use of interstate wires); United States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (upholding federal conviction for violation of Honduran fishing regulations); Ellen Podgor & Paul Rosenzweig, *Bum Lobster Rap*, WASH. TIMES, Jan. 6, 2004, at A14 (criticizing the *McNab* prosecution and noting that the Honduran government believed that its laws had not been violated and had filed an amicus curiae brief in support of the *McNab* defendants).

87 *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf.

88 *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 81, at 7.

Like the growing opposition to mandatory minimums, over-federalization has been criticized by a broad band of organizations and by politicians on both the left and the right.[89] Indeed, mandatory minimums constitute a species of over-criminalization and over-federalization.[90] They are part of a punishment spree of unprecedented proportions that, along with other obligatory sentencing schemes in the states, have helped make America the single most punitive Western nation and the world's imprisonment leader.[91] Since 1980, for instance, the federal prison population has increased tenfold, while the average federal sentence has doubled and the average federal drug sentence has tripled, due in no small part to mandatory minimums.[92]

So what is the cause of over-criminalization, over-federalization, and overly broad and harsh mandatory minimums? Some thirty years after his original critique, Professor Kadish suggested a commonsensical explanation for the "creeping and foolish federal overcriminalization."

> Some dramatic crimes or series of crimes are given conspicuous media coverage, producing what is perceived, and often is, widespread public anxiety. Seeking to make political hay, some legislator proposes a new law to make this or that a major felony or to raise the penalty or otherwise tighten the screws. Since other legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze. That the chances of the legislation working to reduce crime are exceedingly low, and in some cases the chances of it doing harm are very high, scarcely seems to be a relevant issue.[93]

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89 *See, e.g.*, Adam Liptak, *Right and Left Join Forces*, N.Y. TIMES, Nov. 24, 2009, at A1.

90 *See, e.g.*, *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 52-67 (2009) (statement of Stephen A. Saltzburg, American Bar Association).

91 *See, e.g.*, Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14; Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, 33 CRIME & JUST. 1, 6 (2005); Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347 (2005); *see also* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard S. Frase eds., 2001); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

92 *See, e.g.*, Heather C. West & William J. Sabol, *Prisoners in 2007*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice), Dec. 2008, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p07.pdf; SOURCEBOOK 2003, *supra* note 24, at 519 tbl.6.57, *available at* http://www.albany.edu/sourcebook/pdf/t657.pdf; U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM ch. 2 (2004); Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENT'G REP. 12 (1999).

93 Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248 (1995) [hereinafter Kadish, *Overfederalization*].

Other scholars support this account, bolstered by the reports of legal groups and former federal officials.[94] Sensationalistic news coverage tends to increase the public salience of crime, generating fear and attendant calls for action.[95] Even in areas where concern may be unfounded, populist pressures create incentives for lawmakers to enact new crimes and harsher punishments. Such legislation is readily grasped by constituents, produces few opponents, permits the public to vent its outrage, and most importantly, gives politicians the tough-on-crime credentials that can fill campaign coffers and garner votes at election time.[96]

As Professor Kadish mentioned, the process can be set off by a string of crimes or even a single traumatic case that grabs news headlines and the public imagination. These events may trigger what social scientists have termed a "moral panic," where intense outbursts of emotion impede rational deliberation, lead individuals to overestimate a perceived threat and to demonize a particular group, and generate a public demand for swift and stern government action.[97] Although any resulting legislation will almost certainly be touted for its instrumental benefits, the law will serve as a symbolic gesture for politicians and

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[94] *See, e.g.*, THE 2009 CRIMINAL JUSTICE TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 1-12, 30-74 (2008), *available at* http://2009transition.org/criminaljustice/index.php?option=com_docman&task=doc_download&gid=10&Itemid=; Rachel Brand, *Making it a Federal Case: An Inside View of the Pressures to Federalize Crime*, HERITAGE FOUND., (Aug. 29, 2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm30.pdf; Edwin Meese III, *The Dangerous Federalization of Crime*, WALL ST. J., Feb. 22, 1999, at A19. In the words of former U.S. Attorney General Ed Meese,

> Because crime, particularly violent or street crime, concerns virtually every citizen, congressional candidates and officeholders find such legislation politically popular. Likewise, Congress frequently criminalizes crimes after notorious incidents that have received extensive media attention. This type of "feel-good" legislation often causes the public to feel that "something is being done" and creates the illusion of greater crime control.

Id.

[95] Professor Beale's scholarship has been particularly enlightening on the influence of the media (and other non-legal factors) on criminal justice policy. *See, e.g.*, Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413 (2003) [hereinafter Beale, *Still Tough on Crime?*]; Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997); *see also* Robert Reiner, *Media-Made Criminality: The Representation of Crime in the Mass Media*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 302 (Mike Maguire et al. eds., 4th ed. 2007); Luna, *Public Imagination*, *supra* note 29.

[96] *See, e.g.*, Luna, *Overcriminalization*, *supra* note 25, at 719-24.

[97] *See, e.g.*, Luna, *Public Imagination*, *supra* note 29, at 81-85. *See generally* STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS (1972) (articulating a theory of moral panics).

their constituents, expressing condemnation of the relevant act and actors.[98]

3. Application to Mandatory Minimums

This understanding of federal lawmaking helps explain the rise and persistence of mandatory minimums. Chief Justice Rehnquist noted that their enactment often does not involve "any careful consideration" of the ultimate effects. Instead, mandatory minimums "are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.'"[99] In fact, federal lawmakers have explicitly used phrases like "tough on crime" in their support of mandatory minimums,[100] with some of the most notorious sentencing laws originating from symbolic politics.

Consider, for instance, the enactment of 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968 (which itself was part of the Omnibus Crime Control and Safe Streets Act of 1968). The legislation was a response to public fear over street crime, civil unrest, and the shooting of Martin Luther King, Jr. The day after the assassination of Robert F. Kennedy, § 924(c) was proposed as a floor amendment and passed that same day with no congressional hearings or committee reports, only a speech by the amendment's sponsor about its catchphrase goal "to persuade the man who is tempted to commit a federal felony to leave his gun at home."[101] Since then, Congress has amended § 924(c) several times and converted it from a one-year mandatory minimum to one of the nation's most draconian punishment laws.[102]

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98 *See, e.g.*, Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 61-72 (2002) [hereinafter Luna, *Rorschach Test*]; Luna, *Principled Enforcement*, *supra* note 29, at 537-40; *cf.* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (2d ed. 1986) (discussing the symbolic politics underlying alcohol prohibition).

99 Rehnquist, *supra* note 1, at 287.

100 *See, e.g.*, *infra* note 110 and accompanying text; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 n.14 (2009) (quoting federal lawmakers).

101 *See* 114 CONG. REC. 22,231 (1968) (statement of Rep. Poff).

102 *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1223-24 (codified as amended at 18 U.S.C. §§ 921-928 (2006)); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2028, 2138 (codified as amended at 18 U.S.C. § 924(c)); Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 459 (1986) (codified as amended at 18 U.S.C. § 924); Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998) (codified as amended at 18 U.S.C. § 924); *see also* United States v. Angelos, 345 F. Supp. 2d 1227, 1233-35 (D. Utah 2004) (discussing legislative history and judicial interpretation of § 924(c)); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (discussing background of the Omnibus Crime Control and Safe Streets Act of 1968).

Another example comes from the passage of the Anti-Drug Abuse Act of 1986,[103] the law that instituted the crack/powder cocaine sentencing differential and created the basic structure of federal mandatory minimums for drug trafficking. A driving force behind these provisions was the cocaine overdose of basketball star Len Bias, which prompted a remarkable level of media attention and a moral panic about crack cocaine.[104] The bill was pushed forward in a headlong, result-oriented surge, enacted without hearings or input from experts.[105] Some lawmakers conceded that the legislation attempted to appease an electorate that had become hysterical over an alleged epidemic of crack cocaine,[106] which was fed in part by inflammatory claims about the drug.[107]

At the height of the Bias incident, a *Washington Post* editorial gibed that in the prevailing *can-you-top-this* environment, "an amendment to execute pushers only after flogging and hacking them" might have been enacted by Congress.[108] "The problem is that we have an epidemic," one senator argued.[109] "We have an enemy. We talk about a war [on drugs]. I love to use that term, because it sounds tough; it makes good talk, good speeches."[110] Ironically, it was later revealed

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103 Pub. L. No. 99-570, 100 Stat. 3207; *see, e.g.*, William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1250-56 (1996).

104 *See, e.g.*, 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Dan Lungren), 156 Cong Rec H6196-01, at *H6202 (Westlaw).

> [A]s someone who helped to write the Drug Control Act of 1986 that we seek to amend, I'd like to make a few observations to set the record straight. It is indeed true that the death of basketball star Len Bias served as an exclamation point concerning the threat posed to our Nation by the scourge of illegal drug use. The fact that someone who seemed bigger than life could fall prey to the growing cocaine epidemic brought home the reality of the danger to every home with a television set that had tuned into the University of Maryland basketball games. And that reality was not lost on this body.

Id.; *see also* 132 CONG. REC. S13741-01 (1986), 132 Cong Rec S13741-01 (Westlaw); MOLLY M. GILL, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS 18, 34 n.60 (2008), *available at* http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf; Wallace, *supra* note 37, at 159 (quoting Rep. Robert Dornan).

105 "Much of the [standard] procedure was circumvented," a former House staff member recounted. "In essence, the careful, deliberate procedures of Congress were set aside in order to expedite passage of the bill." Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition, Politics and Reform*, 40 VILL. L. REV. 383, 408 (1995); *see also* COCAINE AND FEDERAL SENTENCING, *supra* note 74, at 117; GILL, *supra* note 104, at 18, 34 n.61 (statement of Sen. Mathias).

106 *See, e.g.*, GILL, *supra* note 104, at 18, 34 nn.59-61.

107 *See, e.g.*, *id.* at 18, 34 n.58 (quoting Sen. D'Amato and Sen. Chiles); *see also id.* at 34 n.66 (quoting Rep. Hunter).

108 Wallace, *supra* note 37, at 159 n.30.

109 132 CONG. REC. S13741-01 (1986), 132 Cong Rec S13741-01 (Westlaw) (statement of Sen. DeConcini).

110 *Id.*

that Bias died from ingesting powder cocaine, not crack.[111] But by then, it did not matter.

The resulting inequities were ameliorated in part by the recent crack cocaine law, including the elimination of the mandatory minimum for simple possession. As mentioned, however, federal law still maintains a sentencing disparity between crack and powder cocaine, and the reform law itself called for new enhancements for all drug-related crime. Moreover, the reforms that were achieved took nearly a quarter-century to be enacted, despite, for instance, repeated attempts by the U.S. Sentencing Commission to persuade lawmakers to eliminate the crack/powder sentencing differential.[112]

Law enforcement also has an interest in the expansion of criminal justice. Although aspirational language may describe the prosecutorial function as an impartial "minister of justice,"[113] there should be little doubt that American prosecutors see themselves as advocates in a sometimes brutally adversarial process.[114] The adversarial role conception can be exacerbated by prosecutorial incentive structures, where the success and career prospects of both lead and line prosecutors are sometimes measured by the rate of convictions and the aggregate amount of punishment.[115] For fairly obvious reasons, these motivations

111 *See, e.g.*, Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, BOSTON GLOBE, July 5, 2006, at 7.

112 *See, e.g.*, Gary Fields, *Sentencing Guidelines Face New Scrutiny*, WALL ST. J., Dec. 26, 2006, at A4 ("The commission has tried since 1995 to bring the penalties for crack crimes more in line with powder cocaine but the Republican-controlled Congress has ignored past attempts."). For the Sentencing Commission's opposition to the crack/powder sentencing differential, see U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf.

113 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2007).

114 *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 61-96 (2001); *see also* Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653 (2007); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993).

115 *See, e.g.*, Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005); Richard T. Boylan, *What do Prosecutors Maximize? Evidence From the Careers of U.S. Attorneys*, 7 AM. LAW & ECON. REV. 379 (2005); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1599-1600 (2005) [hereinafter Brown, *Decline of Defense Counsel*]; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-76 (2004); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 902-03; MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 207 (2004) [hereinafter TONRY, THINKING ABOUT CRIME]; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-35 (2004); Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271 (2002); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW

are served by over-criminalization: The more crimes on the books and the harsher the punishments, the more power law enforcement can exercise throughout the criminal process.[116]

In the words of a former Justice Department official, "it is not surprising that the federal agency charged with preventing, solving, and punishing federal crimes is not aggressively attempting to shrink the federal code."[117] Of particular relevance here, the Justice Department has frequently lobbied Congress for tougher sentences, including mandatory minimums.[118] Again, this should not be surprising, considering the incentive structure of federal prosecutors. With drastic increases in potential punishment, sometimes by charging multiple counts for a single course of conduct, defendants are given every reason to cooperate with the prosecution by providing information, entering into plea agreements, and waiving their constitutional rights. All of this enhances the power of prosecutors, who can obtain more and cheaper convictions via plea bargaining or, if that fails, deploy against their opponents the potent weapon of unavoidable sentences.

Several years ago, a federal trial judge wrote about "the essential key to an understanding of federal sentencing policy today."

> [The Justice] Department is so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming

& SOC'Y REV. 247 (1998); DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE (1996); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor*, 15 AM. J. CRIM. L. 197 (1988). Moreover, many young attorneys stay in a prosecutor's office only for a few years, seeking to build their resumes and credentials as a means to achieve a high-paying job in the private sector. *See, e.g.*, TONRY, THINKING ABOUT CRIME, *supra*, at 208.

116 William Stuntz's work has been especially insightful on these issues. *See, e.g.*, Stuntz, *Pathological Politics*, *supra* note 55; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

117 Brand, *supra* note 94, at 1-2.

118 *See, e.g.*, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004: Hearing on H.R. 4547 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) (statement of Catherine M. O'Neil, Assoc. Deputy Att'y Gen.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:94636.pdf (arguing in favor of increased mandatory minimums for drug crimes, which allow the government to move "effectively up the chain of supply using lesser distributors to prosecute larger dealers, leaders and suppliers"); *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov't Reform*, 106th Cong. 62 (2000) (statement of John Roth, Chief, Narcotic & Dangerous Drug Section, Criminal Div., Dep't of Justice) (stating that mandatory minimum sentences for drug crimes provide "an indispensable tool for prosecutors" to induce defendants to cooperate); *see also* Barkow, *supra* note 100, at 880 ("Representatives from the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants.").

> conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.[119]

As a result, a fraction of federal cases go to trial—roughly 5% since 2002—of which only a small percentage result in acquittal. In other words, the prosecutor wins virtually every case he pursues.[120] The threat or imposition of mandatory minimums helps ensure that the prosecutor's choice of punishment prevails in court.[121]

II. REFORMING MANDATORY MINIMUMS

With this background, the question becomes how reform efforts might be pursued. The courts provide one possible forum, particularly since the judiciary is considered a primary safeguard against political excesses, at least to the extent that the action in question raises serious constitutional concerns. In the present context, extreme mandatory sentences might conflict with the Eighth Amendment's prohibition of "cruel and unusual punishment."[122] Such a ruling could be based on a relatively broad, liberal interpretation of constitutional judicial review, where the courts vigorously scrutinize the punitive tendencies of the political branches. A more sophisticated approach might rely upon, *inter alia*, political process theory.[123] One might argue that the dysfunctional politics of mandatory minimums renders them impervious to the usual "channels of political change,"[124] for instance, or that the laws result from prejudice against "discrete and insular minorities," which curtails the protections usually provided by the political process.[125]

In reality, however, the Supreme Court's jurisprudence in this area, described by some as an abandonment of the field, makes clear that judicial review will not provide much of a check on excessive

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119 United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004). To be clear, the judge was discussing prosecutorial behavior under the pre-*Booker* mandatory guidelines regime. However, his words apply to mandatory minimums with equal, if not greater, force.

120 *See, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

121 Some defense attorneys claim that the threat of mandatory minimums is regularly used to dissuade defendants from filing motions to suppress evidence, or to waive their rights to appeal the sentence, attack it collaterally, move for resentencing pursuant to 18 U.S.C. § 3582(c)(2) (2006), and forego arguments for a lower sentence under § 3553(a).

122 U.S. CONST. amend. VIII.

123 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

124 *Id.* at 103.

125 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

punishment. Except for death penalty cases, Eighth Amendment challenges to criminal sentences are rarely successful. Much of the judicial reluctance might be attributed to the lack of clear-cut standards to assess when a term of imprisonment becomes unconstitutional: What makes a sentence "cruel and unusual" anyway?[126] As a conceptual matter, the requisite finding of gross disproportionality might be informed by the punishments available elsewhere—asking whether the present jurisdiction is out of line with the others and, if so, by how much—an inquiry that would seem to have at least some basis for objectivity.[127] But as a matter of contemporary practice, only one Supreme Court decision and a handful of lower court decisions have ever invalidated an adult prison term as cruel and unusual punishment.[128] This means that significant reform will come, if at all, by Congress.

This presents quite a challenge for the very body that created mandatory minimums to begin with and maintained them despite evidence of ineffectiveness and abuse. Federal lawmakers have often struggled with the more general problem of how to save Congress from itself and prevent the passage of foolish and harmful laws. When all is said and done, however, "the principal protector against bad laws is the political branches themselves," Justice Elena Kagan argued during her recent confirmation hearing.[129] With this in mind, the following considers whether the long-standing adherence to mandatory minimums might change under the right conditions, with Congress itself remedying the injustices of obligatory punishment.

A. *Behavioral Science and Mandatory Minimums*

As seen in the previous Part, mandatory minimums provide a fascinating (though disquieting) case study on the influences and incentives in political decision-making on issues of criminal justice. To a large extent, official support for mandatory minimums is compatible

126 Harmelin v. Michigan, 501 U.S. 957, 998-1000 (1991) (Kennedy, J., concurring); *see also infra* notes 193-194 and accompanying text (discussing the "countermajoritarian difficulty").

127 *See* Ewing v. California, 538 U.S. 11, 23-24 (2003); *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring); Solem v. Helm, 463 U.S. 277, 292 (1983).

128 *See Solem*, 463 U.S. 277 (striking down non-violent recidivist's sentence of life imprisonment without possibility of parole for uttering "no account" check); Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004) (striking down defendant's 25-years-to-life sentence for his third shoplifting offense); *see also* Graham v. Florida, 130 S.Ct. 2011 (2010) (striking down juvenile offender's sentence of life imprisonment without the possibility of parole).

129 *Continuation of the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2010), 2010 WLNR 13149042; *see also* Adam Liptak, *Kagan Reminds Senators: Legislation is Your Job*, N.Y. TIMES, July 2, 2010, at A16.

with the rational choice model of microeconomics and its assumption of methodological individualism. This model maintains that individuals are the only relevant agents of human behavior, where "man is a rational maximizer of his ends in life," that is, his self-interest.[130] The application of economic principles to politics—typically referred to as *public choice theory*—leads to a number of somber conclusions about the self-interested behavior of politicians and the uninformed nature of the electorate.[131]

Although criminal justice issues may not (ordinarily) implicate political manipulations like "log-rolling" and "rent-seeking," decision-making about mandatory minimums does seem to follow the rational actor assumption. As just discussed, lawmakers can appear tough on crime and can mollify fits of public anxiety by enacting harsh sentencing provisions, which also serve the interests of law enforcers by increasing their plea-bargaining leverage and thus the rate and amount of convictions. While the passage of mandatory minimums can enhance a representative's prospects for reelection, efforts to reform such laws may be perceived as a political liability, allowing an opponent to assail the incumbent as being soft on crime.

To be sure, politicians may genuinely believe in the case for mandatory minimums, regardless of evidence undermining the principal arguments. Research in cognitive psychology suggests that individuals experience intellectual boundaries that systematically impede rational decision-making.[132] People adopt rules of thumb to deal with unmanageable or incomplete information, and their decisions can be shaped by subtle but powerful prejudices. Although wholly speculative, one could imagine how various biases and heuristics may impact the decisions politicians make about mandatory minimums. Consider, for instance, the following:

- An official might overestimate the necessity of harsh punishment, based on a less-than-rigorous case analogy or the mental availability of a high-profile incident that would seem to call for a mandatory sentence.[133]

130 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (7th ed. 2007); *see also* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

131 *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

132 *See, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 748 (1990). *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY].

133 *See, e.g.*, Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1188-90 (1997) [hereinafter Sunstein, *Behavioral Analysis*] (discussing availability and case-based heuristics); *see also* Jolls et al., *supra* note 132, at 1518-20; Cass R. Sunstein, *Selective Fatalism*, 27 J. LEGAL STUD. 799, 806 (1998) [hereinafter Sunstein, *Selective Fatalism*]; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999);

- Government actors may be unrealistically optimistic about the ability of such laws to reduce crime or prevent future tragedies, preferring the strictness of a mandatory minimum that supposedly eliminates all risk of further offending, rather than a more nuanced and economically sensible option that reduces, but does not eliminate, the perceived danger.[134]

- Once adopted, official positions on a mandatory minimum may be difficult to change, even when confronted with new information and experiences. Politicians may simply alter their attitudes and beliefs to minimize any dissonance between the goals of mandatory sentencing and the law's actual effects.[135]

- Moreover, the sentencing status quo might be seen as preferable, if not inevitable,[136] while the perceived costs of eliminating mandatory minimums may appear ominous and far greater than any benefits, particularly if the costs (e.g., reduced prosecutorial leverage) will accrue sooner than the benefits (e.g., lower prison expenses).[137]

JUDGMENT UNDER UNCERTAINTY, *supra* note 132, at 11-14, 163-208; Itzhak Gilboa & David Schmeidler, *Case-Based Decision Theory*, 110 Q.J. ECON. 605 (1995).

134 *See, e.g.*, Sunstein, *Behavioral Analysis*, *supra* note 133, at 1182-84, 1191 (discussing over-optimism, certainty, and ambiguity); *see also* Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1658-63 (1998); Jennifer Arlen, *The Future of Behavioral Law and Economics*, 51 VAND. L. REV. 1765, 1773-75 (1998); Sunstein, *Selective Fatalism*, *supra* note 133, at 807-09; Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCIENCE 1232 (1989); Craig R. Fox & Amos Tversky, *Ambiguity Aversion and Comparative Ignorance*, 110 Q.J. ECON. 585 (1995).

135 *See, e.g.*, Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1146-47 (1986) (discussing cognitive dissonance). *See generally* ELLIOT ARONSON, THE SOCIAL ANIMAL (7th ed. 1995); JON ELSTER, SOUR GRAPES (1983); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

136 *See, e.g.*, Sunstein, *Behavioral Analysis*, *supra* note 133, at 1185, 1191-92 (discussing hindsight and status quo biases); *see also* Sunstein, *Selective Fatalism*, *supra* note 133, at 809; Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 359-62 (1996); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988).

137 *See, e.g.*, Sunstein, *Behavioral Analysis*, *supra* note 133, at 1179-81, 1184-85, 1193-94 (discussing endowment effect, loss aversion, inter-temporal utility bias, and hindsight bias); *see also* Arlen, *supra* note 134, at 1771-72; Colin Camerer, *Individual Decision Making*, *in* THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 665-70 (John H. Kagel & Alvin E. Roth eds., 1995); RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 63-78 (1992); RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 203 (1991); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 274-89 (1979); Daniel Kahneman, *New Challenges to the Rationality Assumption*, *in* THE RATIONAL FOUNDATIONS OF ECONOMIC BEHAVIOR (Kenneth Arrow et al. eds., 1996); Jolls et al., *supra* note 132, at 1538-41; David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997); George Loewenstein & Richard H. Thaler, *Intertemporal Choice*, *in*

- If a mistake is to be made—comparing the potential costs and benefits from repealing mandatory minimums versus retaining them—lawmakers may well prefer the error of omission and keep the laws on the books.[138]

The history of federal crack cocaine law exemplifies some of these concerns. As mentioned, the original legislation was propelled forward by a single tragic case, the death of Len Bias. The quarter century of congressional inaction that followed, in the face of new empirical evidence and calls for change, demonstrated a collective risk aversion and status quo bias, consistent with the conventional wisdom on harsh punishment. As Rep. Smith put it, "Why do we want to risk another surge of addiction and violence by reducing penalties?"[139] In general, conscientious lawmakers might agree that mandatory minimums can produce injustices in particular cases and yet balk at explicit legislative repeal or any large-scale reforms.

A broader understanding of the rise and persistence of mandatory minimums would also take into consideration powerful social influences on individual behavior. Sociological theory teaches us that humans may be moved by more than their economic self-interests; they may act in pursuit of social status, for instance, and they may be guided or inhibited by conventions, customs, habits, ideas, attitudes, and so on.[140] These "social norms" can be both descriptive (i.e., what most people do) and prescriptive (i.e., what people ought to do);[141] they can be effected by appreciation of duty, desire for social approval, or fear of reprobation;[142] and they may be shared by a peer group, a community, a geographic region, or even an entire nation.

RESEARCH ON JUDGMENT AND DECISION MAKING: CURRENTS, CONNECTIONS, AND CONTROVERSIES 365 (William M. Goldstein & Robin M. Hogarth eds., 1997).

138 *See, e.g.*, Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 589-94 (2003) (discussing omission bias); *see also* Sunstein, *Behavioral Analysis*, *supra* note 133, at 1180 n.22; Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, 3 J. BEHAV. DECISION MAKING 263 (1990).

139 156 CONG. REC. H6197 (daily ed. July 28, 2010) (statement of Rep. Lamar Smith), 156 Cong Rec H6196-01, at *H6197 (Westlaw).

140 *See, e.g.*, Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1255 (1999); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350-52 (1997) [hereinafter McAdams, *Regulation of Norms*]; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) [hereinafter Sunstein, *Social Norms*]; Eric A. Posner, *Law, Economics, and Efficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996); Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2079 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 128-31 (1991).

141 *See, e.g.*, Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 587 (1998).

142 *See, e.g.*, Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 955-57 (1997); Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 634-35.

For present purposes, social norms can be defined as a group's expectations of its members, in terms of their attitudes and conduct, producing generally followed, non-legal obligations backed by informal sanctions.[143] They represent an important constraint on individual behavior, particularly when one's peer group generates the norm. As social animals, humans naturally seek the affection and respect of those people who are most significant in their lives.[144] An individual adopts the group's norms in pursuit of social acceptance, with his perception of peer beliefs, values, and conduct thereby influencing his own actions.[145] Social norms can also serve as a signaling device, where an individual may behave consistent with a norm to indicate that he is a "good type" of person, someone with whom others would want to associate and cooperate.[146]

When the relevant act is political, it can symbolize a group's perspective, enhance the members' status, and affirm their particular worldview.[147] As suggested above, mandatory minimums are pervaded by symbolism. This is nothing new—criminal law has historically been used to legitimize prevailing norms, delineating the "ins" from the "outs" in a political community and providing a basis for social cohesion. Moreover, a symbolic act and the resulting divide between groups, even if failing to modify conduct directly, can have political consequences.

For instance, a person's reaction to an official gesture often indicates (correctly or incorrectly) his traits, ethics, and lifestyle. For the politician, a vote for mandatory minimums can signal that he is tough on crime, an advocate of law-and-order policies, a friend of the law-abiding community, a foe of social deviants, and a team player with like-minded officials. In contrast, a politician's failure to endorse harsh sentencing laws may be perceived by others as opposition to (or at least insufficient deference for) the underlying anti-crime symbol.

All told, the politics of mandatory minimums may involve a confluence of economic, sociological, and psychological phenomena. Moreover, the continued support for these laws has itself become a type of norm for federal officials, both as a positive description and as a matter of expectations. Congress not only enacts and maintains mandatory minimums, but its members seem to believe that they *ought*

143 *See, e.g.*, Luna, *Institutional Design*, *supra* note 29, at 199-200; Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997).

144 *See, e.g.*, McAdams, *Regulation of Norms*, *supra* note 140, at 355-75.

145 *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350-53 (1997); Luna, *Institutional Design*, *supra* note 29, at 200.

146 *See, e.g.*, ERIC POSNER, LAW AND SOCIAL NORMS (2000).

147 *See supra* note 98 and accompany text.

to support such laws.[148] This norm is "sticky" to the point of near reflexivity for some lawmakers, who might be resilient to new information about the negative consequences of mandatory minimums and therefore unlikely to engage in a meaningful reexamination of the laws or consideration of the alternatives.

B. *Theories of Change*

Although for years the laws and supporting arguments have been imbedded in political agendas, several factors make the prospects for change somewhat less daunting. Because public opposition to mandatory minimums appears to be growing—consistent with the opinion of virtually all criminal justice scholars and policy analysts, and an increasing number of commentators and officials—careful reforms would neither fly in the face of legal and empirical studies nor be met by uniform hostility from pundits and the populace. Moreover, such reform efforts may be bolstered by three considerations: (1) some norms may be more amenable to change through small moves than sweeping transformations; (2) small changes to a social norm can have rapid and dramatic effects; and (3) politicians can be agents of change for reasons other than self-interest.

1. The Value of Small Moves

Social norms have a stabilizing function for interpersonal relationships, providing conventions for individual behavior and a ready means to assess the bona fides of others. When the norms generally result in appropriate judgments (at least as measured by some external standard like economic efficiency), individuals may act without constantly reassessing the propriety of that behavior. Instead, they may focus their attention on more significant, complex, or rare issues.[149] As just noted, however, some social norms may persist well after they have been disputed by empirical studies and denounced by scholars and policy analysts. This stickiness makes it difficult to alter beliefs and attendant behaviors, despite good reasons to do so. People may continue to abide by an obsolete norm regardless of its inefficiency or

[148] *Cf.* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1523-26 (2008).

[149] *See, e.g.*, Amitai Aviram & Avishalom Tor, *Overcoming Impediments to Information Sharing*, 55 ALA. L. REV. 231, 250-51 (2004).

immorality, sometimes out of habit but also due to lingering fears of social disapproval.[150]

Several years ago, Dan Kahan explored the problem of sticky norms in the context of enforcing socially contested crimes.[151] Where society is divided over the wrongfulness of the underlying conduct, criminal justice decision-makers may be ambivalent toward the crime and attached penalty but nonetheless willing to apply the law based on their desire to carry out their legal duties. However, if lawmakers determine that the behavior is not only wrongful but merits greater condemnation, a substantial increase in punishment may have a perverse effect in practice. "[T]he decisionmaker's personal aversion to condemning too severely will dominate her inclination to enforce the law," and her unwillingness "will strengthen the resistance of other decisionmakers, whose reluctance will steel the resolve of still others, triggering a self-reinforcing wave of resistance."[152]

A legislative "hard shove," as Professor Kahan calls it, might only entrench the norm that lawmakers were seeking to change. Statutory reforms intended to crack down on socially contested criminal behavior may be nullified by the case-based decisions of police, prosecutors, and courts.[153] In contrast, if lawmakers make only incremental changes in condemnation through a "gentle nudge" of criminal liability, criminal justice actors may apply the new law consistent with their civic duties, and by doing so, strengthen the predisposition of their colleagues to enforce the law.[154] Although Kahan focuses on legislative expansions of liability, this basic pattern can be seen in other areas as well.[155] More

150 *See, e.g.*, *id.* at 251-52; *see also* Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537 (2000).

151 *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) [hereinafter Kahan, *Gentle Nudges*].

152 *Id.* at 608.

153 As examples, Professor Kahan discusses statutory changes concerning date rape, domestic violence, and drunk driving. *See id.* at 608-09, 623-25, 628-31, 633-34; *see also* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PENN. L. REV. 729 (2010) (employing cultural cognition theory to examine debate over rape law reform).

154 According to Professor Kahan, the incremental transformation of anti-drug laws in the early twentieth century from a taxation and orderly marketing scheme to an outright prohibition provides an example of how an initial legislative nudge can lead to major changes in the criminal justice system. *See* Kahan, *Gentle Nudges*, *supra* note 151, at 631-33.

155 For instance, successful litigation strategies may pursue incremental changes to legal decisions that embody and even protect problematic social norms. While a comprehensive frontal assault at the outset might only reaffirm anachronistic case law, small challenges that draw upon shared experiences and principles may, over time, lead a court to reevaluate the norm and eventually reject its prior decision. The best example is provided by the NAACP Legal Defense Fund's brilliant litigation strategy to overturn *Plessy v. Ferguson* and the Jim Crow system of the South, culminating in the Supreme Court's decision in *Brown v. Board of Education* and its progeny. *See generally* ROBERT J. COTTROL ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION (2003); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001); MARK V.

importantly, there is no theoretical barrier to applying the concept to moderations of criminal liability.

2. The Nature of Tipping Points

This leads into the second point: Small changes to a social norm can have rapid and dramatic effects. The basic idea draws upon epidemiological models of disease transmission and sociological theories on the propagation of ideas and social customs. When a "tipping point" is reached—more or less, a threshold of affected individuals—a virus will spread at a nonlinear rate and an innovation or norm will be adopted suddenly by a large number of people. The impetus for this type of movement, what makes something *tip*, can be a relatively marginal change. In the mid-1950s, sociologist Morton Grodzins coined the term tipping point in suggesting that when a community's minority population reaches a certain percentage, most white residents will leave the neighborhood.[156] In the following years, scholars, policymakers, and jurists discussed this issue of "white flight" and debated the validity of measures enacted to prevent neighborhoods from tipping.[157]

Although racial segregation has been a primary topic, tipping point analysis applies to all sorts of trends, from fads of fashion and restaurant popularity to crime rates and the incidence of suicide. When a sufficient number of individuals are behaving in a particular way—what economist Thomas Schelling described as a "critical mass"[158]—large groups of people may suddenly adopt that behavior. In 2000, author Malcolm Gladwell popularized the tipping point in his best-selling book of the same name, applying the concept to a wide and seemingly disparate variety of social phenomena that nonetheless follow a similar pattern.[159] "Ideas and products and messages and behaviors spread like viruses do."[160] Because behavior is contagious, Gladwell argues, little

TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

156 *See* Morton Grodzins, *Metropolitan Segregation*, SCI. AM., Oct. 1957, at 24.

157 *See, e.g.*, Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891; Bruce Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Gautreaux v. Chi. Hous. Auth., 503 F.2d 930 (7th Cir. 1974); Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122 (2d Cir. 1973).

158 *See* THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 94 (1978).

159 MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).

160 *Id.* at 6. Gladwell's examples include the surprising popularity of Hush Puppies and the precipitous decline in violent crime in New York City. *Id.* at 1-9, 19-22, 133-51.

changes can have huge effects and social epidemics can be triggered at a single dramatic moment.

Scholars have characterized these types of rapid changes as "bandwagon," "snowball," and "cascade" effects, all of which might help explain remarkable shifts in social norms.[161] Once again, norms may be so entrenched that they remain in effect well beyond their usefulness, even if they are recognized as dysfunctional or immoral. These norms might maintain only a thin, uninformed allegiance, however, making them susceptible to swift change once a tipping point is reached. An "informational cascade" may occur when a critical mass of people begin to act in a particular way, signaling to others that the behavior is well informed and appropriate under the circumstances.[162] In a similar manner, if a sufficient number of individuals appear to endorse a belief through their words and deeds, people may join a "reputational cascade" in order to curry the favor of others or avoid their censure.[163] Small shifts in social norms can thus produce large, rapid changes as more and more people alter their views and behaviors.[164]

Any number of events might provide an exogenous shock that pushes a norm to a tipping point—like a natural disaster or, as mentioned earlier, a horrifying crime or series of crimes[165]—generating a cascade throughout a population. But oftentimes change is only possible through the facilitation of specific types of individuals, variously known as "change agents," "opinion leaders," and "norm entrepreneurs," whose native abilities and social positions can encourage others to adopt a new norm.[166] They may have extensive and diverse personal relationships that allow the rapid spread of new ideas. They may have knowledge about a vast array of issues or a technical expertise that gives credibility to the information and opinions they

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161 *See generally* Kuran & Sunstein, *supra* note 133; TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 250-60 (1995); David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, *in* THE NEW ECONOMICS OF HUMAN BEHAVIOR 188 (Mariano Tommasi & Kathyrn Ierulli eds., 1995); Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992); Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183 (1950); Sunstein, *Social Norms*, *supra* note 140; SCHELLING, *supra* note 158.

162 *See, e.g.*, Bikhchandani et al., *supra* note 161, at 994.

163 Scholars have pointed to myriad examples of norm cascades in effect, including socio-political revolutions like the sudden demise of European communism some two decades ago. *See, e.g.*, Kuran & Sunstein, *supra* note 133, at 685-87.

164 *See, e.g.*, KURAN, *supra* note 161, at 261-88; Sunstein, *Social Norms*, *supra* note 140, at 929-30; Kuran & Sunstein, *supra* note 133.

165 *See, e.g.*, *supra* notes 95-97 and accompanying text; Robert C. Ellickson, *The Evolution of Social Norms: A Perspective From the Legal Academy*, *in* SOCIAL NORMS 49-51 (Michael Hechter & Karl-Dieter Opp eds., 2001).

166 *See, e.g.*, EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 26-27 (4th ed. 1995); Ellickson, *supra* note 165, at 51-52; Sunstein, *Social Norms*, *supra* note 140, at 909, 929-30; GLADWELL, *supra* note 159, at 30-74.

provide. They may be especially convincing in their arguments and possess a high "social intelligence"[167] that lets them recognize the value of change. Or they may have a combination of these and other attributes.

3. The Existence of Statesmen

Which brings us to the third point: Politicians can be change agents and may act for reasons other than self-interest. Some of the most successful political actors recognize the problems with specific norms and have the ability to persuade others to adopt new ones. As Cass Sunstein notes, these actors "can exploit widespread dissatisfaction with existing norms by (a) signaling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial."[168] Especially talented political leaders will use their communication skills to bring attention to issues, and even to reframe them in a way that resonates with their audience, changing how the underlying norms are viewed. Of course, politicians may seek to change a social norm to serve their own self-interests, as predicted by public choice theory. Worse yet, they may appeal to prejudice and base emotions, their demagoguery inflaming the public to support change that might otherwise be rejected as unjustifiable.

What is interesting is not that lawmakers may use their political skills toward their own ends, however, but that history is marked by officials who have disregarded or downplayed their self-interests to do what is best for society. Often referred to as "statesmen" (or "stateswomen"), they take positions that could be perceived as unpopular and politically dangerous, and then seek to change the views of others through sensible lines of reasoning supported by reliable evidence.[169] "What the statesman is most anxious to produce," Aristotle opined, "is a certain moral character in his fellow citizens, namely, a disposition to virtue and the performance of virtuous actions."[170] Compared to other politicians, this type of leader is less self-centered or short-sighted in his decision-making process and ultimate judgments. Rather than acting solely for future elections and

167 *See, e.g.*, Ellickson, *supra* note 165, at 45.

168 Sunstein, *Social Norms*, *supra* note 140, at 929.

169 *See, e.g.*, Charles Rowley's Blog, http://charlesrowley.wordpress.com/2010/01/15/the-statesman (Jan. 15, 2010, 09:41 EST).

170 THE ETHICS OF ARISTOTLE 31 (J.A.K. Thomson ed., 1953).

partisan victories, he is interested in the success of the nation and the welfare of subsequent generations.[171]

The statesman thus demonstrates what has been described as "bounded self-interest."[172] Studies suggest that people are concerned about fairness and the well-being of others, including those with whom they have no intimate or personal contact; and their political choices may be purely altruistic and in pursuit of collective aspirations.[173] To some, this behavior might demonstrate the limits of the rationality assumption, with individuals sometimes contravening their own economic self-interests and acting "nicer . . . than the agents postulated by neoclassical theory."[174] Others might argue that, in microeconomic terms, these individuals' utility functions place a stronger emphasis on the pursuit of truth and doing what they believe is right, for example, and might include genuine concerns about the legacies they leave.[175] By either explanation, however, the statesman defies cynical expectations, going beyond what is perceived to be in his own narrowly drawn political self-interests, and in doing so, encouraging his colleagues to do the same.

C. *Application and Limitations*

Together, these points offer a vision of how mandatory minimums might be reformed. For the reasons discussed in the previous Part, a bill that explicitly and completely purges mandatory sentences from the federal system is likely to be a political nonstarter in Congress. In contrast, a modest proposal that draws upon common principles and values may be less likely to provoke soft-on-crime anxieties among lawmakers or a backlash from federal prosecutors.[176] In other words, this type of limited reform offers a gentle nudge toward a new norm that challenges the propriety of excessive punishment. A congressional statesman might forward the proposal, persuading his colleagues and

171 *Cf.* THE NEW DICTIONARY OF THOUGHTS: A CYCLOPEDIA OF QUOTATIONS 476 (C.N. Catrevas & Jonathan Edwards eds., Standard Book Company 1944) (1877) ("A politician thinks of the next election; a statesman of the next generation. A politician looks for the success of his party; a statesman for that of his country. The statesman wishes to steer, while the politician is satisfied to drift." (quoting nineteenth-century theologian and scholar James Freeman Clarke)).

172 *See* Jolls et al., *supra* note 132, at 1479.

173 *See, e.g.*, *id.*; Sunstein, *Social Norms*, *supra* note 140, at 960; *see also* Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73 (2001); Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973, 979 (2000).

174 Jolls et al., *supra* note 132, at 1479.

175 *See, e.g.*, Charles Rowley's Blog, *supra* note 169.

176 Such values may be akin to law enforcement's general desire to enforce the law and fulfill it civic obligations. *See supra* text accompanying notes 151-53.

constituents through sound arguments about the ineffectiveness of mandatory minimums, the glaring injustices they produce, and the minimal nature of the reform itself.

As in the past, supporters may have to contend with the conventional wisdom about the pro-punishment politics of criminal justice. The task might be far less difficult than assumed, however, given the potentially tenuous hold of the long-standing norm favoring harsh punishment. In fact, this norm might be reaching a tipping point, as evidenced by growing opposition to mandatory minimums among the public and political class. If so, a small reform backed by an influential change agent might trigger an informational and reputational cascade in Congress, with more and more representatives hopping on the bandwagon in support of the proposal. If the initial change proves successful, other reforms might follow as officials come to embrace a new norm regarding crime and punishment.

Admittedly, this is only a theory of how the process might take place. Such speculation is largely unavoidable considering the dearth of congressional reductions in criminal liability. Not unlike the new crack cocaine law, however, earlier reforms were enacted in a tough-on-crime political environment. Largely due to a moral panic about drugs, Congress passed the Boggs Act of 1951,[177] which imposed a series of harsh mandatory minimums for federal drug crime.[178] A decade and a half later, Richard Nixon swept into office on an anti-crime platform, including a call for tougher punishment, echoed by federal lawmakers.[179] But in the first year of his administration, President Nixon changed course and suggested that severe sentences were not the inevitable solution to America's crime problems.

Bolstered by conservative proponents, Congress sought to eliminate almost all mandatory minimum penalties as part of a comprehensive drug reform bill.[180] Lawmakers argued that mandatory sentences were "inconsistent, illogical, and unduly severe in some cases," and had "little or no deterrent value."[181] Speaking in favor of the proposed law, then-Congressman George H.W. Bush made the following comments on the House floor:

> Contrary to what one might imagine, [a repeal of mandatory minimums] will result in better justice and more appropriate

[177] Pub. L. No. 82-235, 65 Stat. 767 (1951) (codified as amended at 21 U.S.C. § 174) (repealed 1970); *see, e.g.*, GILL, *supra* note 104, at 12-17.

[178] *See, e.g.*, Wallace, *supra* note 37.

[179] *See, e.g.*, Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN L. REV. 1211, 1265-66 (2004) [hereinafter Miller, *Domination*].

[180] *See, e.g.*, *id.* at 1267. *See generally* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 801 (2006)).

[181] 116 CONG. REC. 33,313-14 (1970) (statement of Rep. Beall).

> sentences. For one thing, Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion. . . . As a result [of this bill], we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences. Mr. Chairman, these penal reforms have been a long time in coming. Now that we have them, let us not delay in moving them to the President's desk.[182]

Ultimately signed by President Nixon, the law attempted to address criticisms of mandatory sentencing that sound eerily similar to those heard today, forty years later.

Mandatory minimums remain sticky, as suggested by decades without repeal and the quarter-century resilience of the crack/powder cocaine differentials in mandatory sentencing. But while attempts to completely eliminate the later disparity were unsuccessful, more modest changes were enacted with widespread support that crossed political lines, including a unanimous vote in the Senate.[183] So although an across-the-board elimination of mandatory minimums may be impracticable today, this history seems to suggest that it is not altogether impossible to achieve some measure of reform. A moderate, principled proposal, supported by influential political actors, might receive bipartisan support and set the stage for further change.

Some important caveats should be mentioned about the premises of this undertaking, however. To begin with, the behavioral sciences have no normative agenda. They cannot tell you what is *right* or *good*, only what *is* and what *could be*. "Social meaning does no work on its own," philosopher Martha Nussbaum notes.[184] Instead, "it offers an invitation to normative moral and political philosophy."[185] This invitation presents both conceptual and practical perils for those who wish to use economic, sociological, and psychological theories in pursuit of a particular end. The fact that we can regulate social norms or respond to biases and heuristics to support government action does not imply that we ought to do so. It can be argued that such interference is inherently illiberal, a newfangled social engineering that manipulates its audience toward particular choices, in service of the engineer's own conception of the good.[186] Wielded by government, the tools of the behavioral sciences are available to both the benevolent and the exploitative.

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182 Bush Speech, *supra* note 3.

183 *See, e.g.*, *supra* notes 12-23 and accompanying text.

184 Martha Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 696 (1998); *see also* Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. 1987, 2014 (1996); Lessig, *supra* note 140, at 1101; Kahan, *Gentle Nudges*, *supra* note 151, at 640-41.

185 Nussbaum, *supra* note 184, at 696.

186 *See, e.g.*, Lessig, *supra* note 140, at 1016-19; Posner, *supra* note 143, at 367; *see also* Tibor Machan, *The Scope of Public Choice Theory*, THE FUTURE OF FREEDOM FOUND. (Sept. 1, 2008),

Besides the "darker side"[187] to this enterprise, there are questions as to whether behavioral insights can be effectively harnessed to serve a particular goal, or whether attempts at norm management might backfire and only make things worse. Scholars who have utilized these insights have been criticized for, among other things, an alleged lack of scientific rigor, the manipulation of ambiguous terms, the absence of a distinct analytical methodology, the exploitation of anecdotes and trivial findings, the facile logic of policy prescriptions, and the inattention to moral and constitutional theory.[188]

We do not mean to enter into this important debate here. Instead, drawing upon theories of economics, sociology, and psychology, we sought an explanation for the enactment and retention of mandatory minimums, which exist today despite empirical refutation and growing public and political opposition. The behavioral sciences offer such an account, but we do not deny that some other story might fit just as well. We also try to provide a plausible understanding of how reform might take place given current conditions (or at least perceptions thereof). Most importantly, we are not trying to modify the preferences and behaviors of the general public. Instead, the ultimate target is the people's representatives, in the hope that lawmakers will do what is supported by research, legal and moral analysis, and the people themselves. For this reason, we believe that the posited process is not only conceivable as a descriptive matter, but also normatively justified.

If it turns out that our understanding of the relevant facts and values is incorrect, then the process and its conclusions are also flawed and may well be irrelevant. This discussion is moot, for instance, if it turns out that the opposition to mandatory minimums is so overwhelming, categorical, and politically effective that it forces lawmakers to immediately eliminate the laws in one fell swoop. Conversely, if the perceived opposition turns out to be illusory or weak, a key predicate is absent and the likelihood of reform substantially undermined. And if the public and political class believe that mandatory minimums are an unmitigated good, well, this entire project is simply wrongheaded and a nonstarter from the outset. But if the opposition is real and growing and normatively justified, and if reform

http://www.fff.org/comment/com0809a.pdf; *The New Chicago School: Myth or Reality?*, 5 U. CHI. L. SCH. ROUNDTABLE 1, 20-22, 26 (1998) (comments of Richard Epstein); Edna Ullmann-Margalit, *Revision of Norms*, 100 ETHICS 756, 764 (1990).

187 *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 691 (1998).

188 For critiques of social norms scholarship, see, for example, Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467 (2003); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603 (2000); Mark Tushnet, *"Everything Old Is New Again": Early Reflections on the "New Chicago School,"* 1998 WIS. L. REV. 579 (1998).

efforts are currently inhibited by a sticky but fragile norm among federal lawmakers, the process we describe might provide a reasonable means of change. What is more, the initial minimalist proposal discussed below will have beneficial effects in and of itself, even if it does not generate further reforms.

In the following pages, we will not engage in the perilous task of naming potential norm entrepreneurs in Congress, except to say that we are confident that such statesmen and stateswoman exist. Nor will we offer suggestions on how to promote reform in the media and halls of Congress, other than to describe those principles that inform our specific proposal. The difficult questions of public relations are best left to interested organizations and the lawmakers themselves. Instead, we will focus on an overarching theory of minimalist reform, the principles that could inform such efforts and provide grounds for consensus, and a specific legislative proposal that could achieve the reform objectives.

III. MINIMALISM

The idea of minimalism has been a topic of debate in both political philosophy and legal theory, motivated by the very nature of liberal society and its institutions. As a philosophical question, how can governments that anticipate, protect, and even encourage diverse worldviews nonetheless ensure stability, harmony, and sound public policy? Liberal constitutional democracies like the United States are often composed of a citizenry profoundly divided by incompatible, even incommensurable ideologies. A case in point is the wide range of reasonable sentencing justifications, both consequentialist and non-consequentialist. As recounted by Justice Breyer, the diversity of views made it impossible for the U.S. Sentencing Commission to construct a single theoretically grounded punishment scheme: "We couldn't because there are such good arguments all over the place pointing in opposite directions."[189] In general, then, how are we to get along and act collectively for the betterment of society?

The object here is not just a political compromise, which tends to provide only a temporary *modus vivendi* and can carry significant error costs. In the worst-case scenario, a compromise on moral principles can be counter-productive, especially if antagonists engage in "face-smashing"[190] operations along the way, leaving open wounds and scores

189 Jeffrey Rosen, *Breyer Restraint*, NEW REPUBLIC, July 11, 1994, at 19, 25 (quoting Breyer). The resulting compromise by the Commission has been roundly criticized by some scholars, including one of us. *See* Luna, *Gridland*, *supra* note 29, at 45-46.

190 *See, e.g.*, Luna, *Rorschach Test*, *supra* note 98, at 61-74.

to settle and setting the stage for further conflict. If any of the political camps wants to gain the high ground, they may simply abandon the agreement to improve their position. Moreover, political horse trading is an infrequent vehicle of broad social agreements and unlikely to provide principles for further progress on the issue in question. In the present case, meaningful sentencing reform with a realistic prospect for further improvements may require a political consensus grounded in mutually agreed upon principles.

A. *Minimalism—Philosophical, Judicial, and Political*

In his book, *Political Liberalism*, John Rawls developed the idea of an "overlapping consensus" as an answer to the plurality of reasonable but incompatible theories in a liberal society.[191] Obviously, advocates of different moral and religious doctrines will not agree all the way down, so to speak. But consistent with their respective worldviews, they may nonetheless concur on certain constitutional principles that together comprise a conception of justice.[192] People will agree on these principles for their own reasons, affirming, rather than compromising, their espoused comprehensive doctrines. This provides the best motivation to support, defend, and act upon the principles within the overlapping consensus, without disparaging or denying the theoretical commitments of others. The overlapping consensus thus suggests that highly particularized conflict among comprehensive doctrines can be overcome through abstraction and principled agreement on a constitutional structure, which can then provide the basis for political action.

In contrast, minimalism in legal theory has focused on the specific role of the courts within a constitutional democracy. The problem posed by judicial review of the political branches is well known—the "countermajoritarian difficulty," as Alexander Bickel called it—with politically unaccountable judges able to thwart the will of the majority as expressed through elected officials.[193] This great power must be tempered with prudence, Bickel argued in the early 1960s, in order to sidestep unnecessary conflicts with the political branches. By using a variety of jurisprudential techniques, the Supreme Court could avoid deciding problematic cases, or at least the substantive issues they

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191 *See* JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993); *see also* John Rawls, *Reply to Habermas*, 92 J. PHIL. 132 (1995).

192 For Rawls, this conception is "justice as fairness." *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

193 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

presented.[194] As a result, the Justices neither legitimized a dubious political act nor placed the Court at odds with the political branches and the public, thereby providing time for reflection while gathering information and resources for future review should the issue not be resolved through democratic means.

Cass Sunstein offers a contemporary account of judicial minimalism, based on his notion of "incompletely theorized agreements."[195] Like Rawls, Sunstein seeks an approach to deal with conflict among reasonable views, in particular, theories of judicial interpretation. Aficionados of originalism, textualism, political process theory, precedent, natural law, moral reading, and so on, entertain deep disagreements over interpretive methodology and even the Supreme Court's *raison d'être*. Nonetheless, judges with different worldviews can still agree on an appropriate decision in the case before them without assenting to a single theory that justifies that outcome.

The result is an incompletely theorized agreement, a small step that is consistent with but does not invoke any jurist's grand theory. The decision is shallow in that it leaves foundational issues unanswered, and it is narrow by resolving the precise issue before the Court while putting off related issues for another day. This judicial minimalism facilitates decisions where more ambitious judgments would be impossible. Minimalist decisions can also reduce error costs in the face of limited information, show respect for those who embrace rival theories, quiet social controversy while promoting incremental change, and inspire discussion and further reform through the democratic process.

We would like to suggest that philosophical and judicial minimalism could have a cousin of sorts, what might be called "political minimalism." The relevant body is not the entire populace of a liberal society *à la* Rawls, although the public is a critical audience for the ensuing decisions. Federal judges will be the ones directly applying any resolution to specific cases—but in contrast to the theories of Bickel and Sunstein, courts are not the primary focus. Instead, national representatives are the crux of political minimalism. They are the ones who will be the subject of an overlapping consensus on basic principles and can bring about small but critical steps in the reform of mandatory minimum sentencing. Unlike Rawls's hypothetical interlocutors,

194 *See id.*; Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). The techniques include discretionary denial of jurisdiction, doctrines such as vagueness and political question, and case or controversy requirements. *But see* Gerald Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 COLUM. L. REV. 1 (1964) (providing a devastating critique of Bickel's thesis).

195 *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

federal officials have to get down to details if decisions are to be made. It is not enough to just agree on a conception of justice. And unlike Bickel and Sunstein's minimalist judges, lawmakers have explicit political platforms and constituents. They will have to run for office again, and opponents may try to skewer them on their legislative record.

Political minimalism nonetheless draws upon the wisdom offered by scholarly advocates of theoretical and judicial minimalism. As Rawls notes, abstraction to constitutional principles "is a way of continuing public discussion when shared understandings of lesser generality have broken down."[196] To connect particularized conflicts and concerns with something recognizable and indispensable, we must turn to "the fundamental ideas implicit in the public political culture."[197] Per Bickel, prudential moves can avoid unnecessary clashes by sidestepping large substantive issues that might put a decision-maker at odds with the citizenry. In the meantime, the relevant body can gather data and resources for further action. Likewise, shallow and narrow decisions in the Sunsteinian model facilitate small but otherwise unattainable agreements, which allow each participant to maintain their theoretical commitments, minimize the societal costs of error and the professional costs of public backlash, and establish the groundwork for further action.

As we see it, political minimalism may involve at least three steps: (1) articulating mutually agreed upon principles that can inform and justify a political decision; (2) locating the appropriate vehicles and materials for the decision; and (3) operationalizing the decision into the language of law. For the reform of mandatory minimums, the first two steps will be discussed immediately below, and the third step will be the topic of Part IV.

B. *Principles for Political Minimalism*

In searching for principles to support minimalist decision-making on mandatory sentencing, the objective is to find constitutional or socio-political concepts that receive widespread support among lawmakers and their constituents. It is not necessary for politicians and the public to agree on particular *conceptions* of these principles. For example, virtually all Americans endorse the concept of free speech despite disagreement on its application to commercial advertising, pornography, campaign contributions, and so on. But as long as a decision is truly minimalist—a small, consciously under-theorized step that skirts any

196 RAWLS, *supra* note 191, at 46.
197 *Id.*

larger controversy—such differences need not hinder the process. Each participant can remain true to their chosen ideology and credibly argue that the decision is consistent with highly valued principles.

The minimalist approach hopes to provide justification for the many officials who, we believe, could support at least some reform of mandatory sentencing. Each lawmaker can point out that the new law affirms the separation of powers doctrine, for instance, and the value of proportionality in sentencing, given that reasonable conceptions of these principles are in harmony with the reform we propose in the next Part. Presumably, constituents would be inclined to adopt the position of their respective representatives, whose interpretations of constitutional principles are likely to be shared by those within his or her home district (or even state). Whatever conception comes to mind is likely to be positive (e.g., the virtuous images associated with the term "equality") and consistent with minimalist action.

As will be seen below, lawmakers concerned about campaign consequences can note that the reform is not a legislative repeal of mandatory minimums but instead a narrow exception applied in extreme circumstances. Since the laws remain on the books, die-hard supporters of mandatory sentencing can still rely on the purported advantages of such schemes (e.g., deterring potential offenders and providing prosecutorial leverage in serious cases). Nonetheless, criminal justice actors will recognize that a minimalist law can still serve as a decision rule in a particular case, presenting a psychological and, if necessary, a practical check on abusive deployment of mandatory minimums. In turn, those who oppose mandatory minimums in any form can view this as the first step and a foundation for future reforms.

Most importantly, the basic principles might offer grounds for consensus among all groups. Here are some possible principles that could inform a minimalist proposal and animate discussion about reforms to mandatory sentencing:

- *Separation of Powers*. One of the central concerns of liberal society is the arbitrary, oppressive authority that stems from the accumulation of too much power in too few hands. The traditional solution is to create a system of checks and balances, distributing power across government institutions in a manner that precludes any entity from exercising excessive authority and sets each body as a restraint on the others.[198] Along these lines, the U.S. Constitution employs a pair of structural devices, the first being the separation of powers among co-equal

[198] *See, e.g.*, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6 (Thomas Nugent trans., 1914) (1748), *available at* http://www.constitution.org/cm/sol.txt; THE FEDERALIST NO. 47 (James Madison).

branches—the legislative, executive, and judicial[199]—each having "mutual relations" in a series of checks and balances.[200]

- *Constitutional Roles*. Within this framework, prosecutors and judges occupy distinct but overlapping roles in the criminal justice system. The prosecution has the discretionary authority to instigate charges against a defendant, amass evidence of crime, and seek convictions as an adversary in the trial process. The prosecutor has a personal stake in the outcome,[201] however, and cannot be described as an ordinary party, considering the vast power he wields and the principal he represents.[202] In contrast, the function of the judge is to serve as a neutral arbiter and dispassionate decision-maker in individual cases. Moreover, an independent judiciary was meant to protect individuals from the prejudices and heedlessness of lawmakers and executive officials.[203]

- *Federalism.* The division of power between national and state governments provides the second structural device to prevent the arbitrary, repressive tendencies of concentrated authority. Grounded in the text and context of the Constitution,[204] federalism limits the powers of national government and prevents federal interference with the core internal affairs of the states.[205] One of the areas that the Framers sought to reserve to the states was "the ordinary administration of criminal and civil justice."[206] Although there are various arguments in favor of federalism, such as pluralistic decision-making and local experimentation,[207] "the principal benefit of the federalist system" is the

199 U.S. CONST. arts. I-III.

200 THE FEDERALIST No. 51, at 263 (James Madison) (Ian Shapiro ed., 2009).

201 *See supra* notes 114-14 and accompanying text.

202 *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).

203 *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 200, at 405-06; *see also* Johnson v. United States, 333 U.S. 10, 14 (1948).

204 Specifically, federalism was enshrined in the U.S. Constitution by expressly enumerating the powers of the federal government, *see* U.S. CONST. art. I, §8, and by declaring that all other powers were "reserved to the States respectively, or to the people." *Id.* amend. X; *see also* THE FEDERALIST NO. 45 (James Madison), *supra* note 200, at 292-93.

205 *See, e.g.*, THE FEDERALIST NO. 45 (James Madison), *supra* note 200, at 292-93.

206 THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 200, at 120. The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism. *See* U.S. CONST. art. I, §8, cl. 6 (counterfeiting); *id.* art. I, § 8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations); *id.* art. III, § 3 (treason).

207 *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987). In a pluralistic society, citizens in different communities are likely to have distinct views on the substance and process of criminal justice. State and local decision-makers are more likely to be attuned to such preferences, given their closeness to constituents and the greater opportunity for citizens to be involved in state and local government, including the legal system. Unencumbered by national dictates, states may even become laboratories of experimentation in criminal justice. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

protection of individual liberties by preventing the concentration of power and the ensuing danger of government overreaching.[208]

- *Proportionality*. Among the restraints liberalism places on the criminal process is a prohibition on excessive sentences.[209] As explicated in current doctrine, this limit concerns not only barbaric penalties but also punishment disproportionate to the underlying offense.[210] For many, the idea of proportionality between crime and punishment expresses a universal principle of justice and a restriction on government power that has been recognized throughout history and across cultures.[211] Proportionality analysis naturally takes into consideration the gravity of the offense and the severity of the punishment. The assessment might also look within and without the relevant criminal justice system by examining how the jurisdiction punishes arguably more serious crimes and how other jurisdictions treat the same offense.[212]

- *Equality*. The concept of equality—that all people are equal before the law and that any legal distinction requires justification—is embedded in liberal thought and considered fundamental to a just society.[213] Equality in the Aristotelian sense requires decision-makers to treat like cases alike,

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208 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *see also* United States v. Lopez, 514 U.S. 549, 566 (1995).

209 U.S. CONST. amend. VIII (banning "cruel and unusual punishments"); Universal Declaration of Human Rights, G.A. Res. 217A (III), ¶ 5, U.N. Doc. A/810 (Dec. 10, 1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment."); International Covenant on Civil and Political Rights, G.A. Res. 2200A, ¶¶ 7, 10, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966), *reprinted in* 999 U.N.T.S. 171 (similar); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/708 (Dec. 10, 1984) (similar).

210 *See, e.g.*, Solem v. Helm, 463 U.S. 277, 284 (1983).

211 *See* Luna Testimony, *supra* note 37, at 1 n.3.

212 All of these considerations are part of the Supreme Court's Eighth Amendment test to determine whether a term of imprisonment amounts to cruel and unusual punishment. In *Solem v. Helm*, the Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem*, 463 U.S. at 289. According to the *Solem* Court, "proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. This three-part test was later adopted by Justice Kennedy in his concurrence in *Harmelin v. Michigan*, in which he concluded that the Eighth Amendment forbids "extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring). The *Solem-Harmelin* three-part analysis is now the governing Eighth Amendment standard for terms of imprisonment. *See* Ewing v. California, 538 U.S. 11, 23-24 (2003) (noting that "Justice Kennedy's concurrence [in *Harmelin*] guide[s] our application of the Eighth Amendment"). As mentioned above, however, the test has been essentially toothless in the courts.

213 *See* Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 529, 590 n.246 (2004).

and just as importantly, to treat dissimilar cases differently.[214] It would thus be a violation of equality for relevantly similar offenders to receive disparate sentences and for relevantly dissimilar offenders to receive analogous sentences.

- *Truth & Transparency*. All decent criminal processes are concerned about honesty and openness. The pursuit of truth presents a primary, commonly understood goal of the American trial process.[215] Indeed, truth-seeking appears to be a cross-cultural criterion of legitimacy in criminal justice, to the point that justice is considered largely unachievable without truth.[216] Likewise, transparency is not only a well-established norm of American public law, but also a background assumption of representative democracy. Open government is widely regarded as a necessary condition to effectively monitor and assess official actions, and it provides an important basis for trust between citizen and state.[217]

Although the full meaning and appropriate application of these principles can be debated *ad nauseam*, a consensus may still be reached regarding the core values of each principle. Consider, for instance, the separation of powers and the role of the judiciary. As a matter of history and experience, an autonomous court system under the guidance of impartial jurists has proven to be an indispensable aspect of American constitutional democracy.[218] The trial judge stands as the only experienced decision-maker in a federal courtroom without a personal interest in the outcome of a case. For this reason, the trial court's central functions have traditionally included dispositive criminal justice issues that demand evenhanded judgment, among them, the appropriate sentence in particular cases.

Coming from judges themselves, this position on court prerogatives would not be altogether unexpected. But similar (if not stronger) attitudes have been expressed by some conservative commentators, who oppose mandatory minimums based on an originalist interpretation of the separation of powers doctrine and the role of the courts in sentencing.[219] What is more, the vast majority of

214 *Cf.* ARISTOTLE, THE POLITICS 97 (Carnes Lord trans., 1984).

215 *See, e.g.*, WAYNE R. LAFAVE ET AL., 1 CRIM. PROC. § 1.5(b) (3d ed. 2009).

216 *See, e.g.*, Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 172 (2003).

217 *See, e.g.*, Luna, *Transparent Policing*, *supra* note 29.

218 *See, e.g.*, LEARNED HAND, THE SPIRIT OF LIBERTY 172-82 (1952); Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284 (2004).

219 *See, e.g.*, Keene Testimony, *supra* note 7, at 117-18:

> [M]y opposition to mandatory minimums . . . is rooted in conservative principles; namely, reverence for the Constitution and contempt for government action that ignores the differences among individuals. . . . James Madison, for one, believed that a clear separation of powers was more vital to protecting freedom than the Bill of Rights.

Americans, both Democrat and Republican, believe that courts are generally the proper bodies to be making sentencing judgments in individual cases.[220]

Reflection upon the other principles would yield comparable conclusions. Although the federal government was not provided a general police power in the Constitution,[221] Congress has assumed such authority in criminal matters, occasionally with a nod to an enumerated power, usually the regulation of interstate commerce. Whether or not this arrogation of authority is constitutional, it is surely here to stay. This does not mean, however, that politicians, courts, and commentators have been or should be oblivious to considerations of federalism. At times, both liberals and conservatives have expressed such concerns about government policies.[222] Although political partisans may not invoke federalism in the same cases, they appear to agree on its core value.

Admittedly, the principles of proportionality and equality raise difficult issues in sentencing. In measuring the gravity of an offense for proportionality analysis, one might look to, among other things, "the harm caused or threatened to the victim or society."[223] Although harm is a notoriously thorny idea,[224] most agree that the basic criminal harms involve acts or threats of physical violence and non-consensual or fraudulent deprivations of others' property.[225] Another difficult issue

> Yet mandatory minimums undermine this important protector of liberty by allowing the legislature to steal jurisdiction over sentencing, which has historically been a judicial function. The attempt by legislatures and the Congress to address perceived problems in the justice system by transferring power from judges to prosecutors and the executive branch violate these principles and have, in the process, given prosecutors unreviewable authority to influence sentences through their charging decisions and plea bargaining power.

Id.

220 *See* Omnibus Survey, *supra* note 8.

221 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995); Brown v. Maryland, 25 U.S. 419, 443 (1827).

222 *See, e.g.*, Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 265 (1990); Kadish, *Overfederalization*, *supra* note 93, at 1247; *see also infra* note 309 and accompanying text (citing and quoting court cases).

223 Solem v. Helm, 463 U.S. 277, 288-93 (1983); *see also* Rummel v. Estelle, 445 U.S. 263, 275 (1980).

224 Consider, for instance, the scholarly debate regarding Mill's theory of the liberal state and his famous "harm principle." *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 13 (Stefan Collini ed., 1989) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."). The theory elides the difficulties in distinguishing between "self-regarding" and "other regarding" harm; moreover, Mill acknowledged that "offences against decency" could provide a basis for criminalization. *See id.* at 98. *See generally* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

225 *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, INTUITIONS OF JUSTICE: IMPLICATIONS FOR CRIMINAL LAW AND JUSTICE POLICY 1 (2007).

concerns the facts or circumstances that should be relevant to equality in punishment. As evinced by many modern sentencing schemes, however, there appears to be some concurrence on pertinent factors, such as the gravity of the offense, the defendant's criminal history, and his prospects for reform or recidivism.[226] At this level of abstraction, proportionality and equality could receive broad political consensus.

There are obvious limits to the principles of truth and transparency. Although truth is a core value in the criminal justice system, it is sometimes trumped by other concerns, such as privacy, autonomy, and human dignity. Under current jurisprudence, courts may exclude from trial reliable evidence probative of the truth,[227] and weighty considerations may also limit the level of openness of law enforcement.[228] Nonetheless, reasonable exceptions do not undermine the general rule that government action should be transparent and the criminal process should pursue the truth. When the issue is punishment, a legitimate system would not allow fictions to be presented as facts through an obscure process.

All of these principles might be evident in the new crack cocaine law, although considerations of equality (and proportionality) tended to dominate the debate. Of particular relevance were the issue of racial disproportionality in drug sentencing and the concomitant distrust of law enforcement. For instance, five prominent conservatives argued that the law "will increase confidence in the criminal justice system by reducing the perception of racial bias."[229]

> According to analyses by the U.S. Sentencing Commission, the disparity between crack and powder cocaine sentences has had a disproportionately negative impact on African Americans. Blacks use crack at about the same rate as whites but nearly 80 percent of federal crack defendants in 2009 were African American, and crack sentences were, on average, over two years longer than sentences for powder cocaine offenses. Law enforcement and criminal justice

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226 *Compare, e.g.*, 18 U.S.C. § 3553(a) (2006) (listing purposes of criminal sentences), *with* ALASKA STAT. § 12.55.005 (2006) (same).

227 Evidence may be suppressed if, for instance, government agents violated a defendant's protection against unreasonable searches and seizures, his privilege against self-incrimination, or his right to an attorney. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). It should be noted that one of us (Cassell) has been a leading opponent of the exclusionary rule. *See supra* note 28 (listing work in opposition to *Miranda*); *see also* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751 (1993).

228 For example, law enforcement may not disclose information about ongoing criminal investigations in order to prevent the destruction of evidence and witness intimidation, as well as to ensure that suspects do not flee the jurisdiction. *See, e.g.*, Luna, *Transparent Policing*, *supra* note 29, at 1165.

229 Letter from Pat Nolan et al., to Hon. John A. Boehner, House Minority Leader (May 25, 2010), *available at* http://www.famm.org/Repository/Files/BOEHNER%20LETTER.pdf.

> experts say that these discriminatory effects undermine trust in the criminal justice system, especially in minority communities.[230]

In the end, the reform was minimalist in scope, reducing the crack/powder differential and eliminating the 5-year mandatory minimum for simple possession. A few lawmakers called for broader reforms,[231] while others said they would not have supported a major transformation.[232] However, most officials described the new law as a step in the right direction and a potential foundation for further change.[233]

C. *Vehicles and Materials for Political Minimalism*

Accepting the need for legislative modification, informed by the aforementioned principles (or others like them), we can now turn to the vehicle for a minimalist approach. Again, the goal of political minimalism is to take a small step that limits the impediments to reform, offering a change that lawmakers may espouse on principle and providing a potential starting point for further reforms. In contrast to maximalist strategies, such as directly repealing mandatory minimum punishments *en masse*, the minimalist approach to reform might create exceptions to obligatory sentences when reasons exist to believe that such punishment would be unjust in a particular case. One means is to fashion 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[234]—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 non-violent, first-time offenders who have

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230 *Id.*

231 For instance, Congressman Ron Paul referred to the law as "the *Slightly Fairer* Sentencing Act" and advocated the repeal of all federal drug crimes. 156 CONG. REC. H6202-03 (daily ed. July 28, 2010) (statement of Rep. Ron Paul), 156 Cong Rec H6196-01, at *H6202-03 (Westlaw); *see also id.* at H6198-202 (bill proposed by Rep. Sheila Jackson Lee).

232 *See, e.g.*, *id.* at H6202 (statement of Rep. Dan Lungren).

233 *See, e.g.*, *id.* at H6197 (statement of Rep. Bobby Scott).

234 *See, e.g.*, CONN. GEN. STAT. ANN. § 29-37(b) (West 2010) (stating that any person guilty of carrying a gun without a permit "shall be imprisoned not less than one year or more than five years" but allowing a reduction of the one-year mandatory minimum if there are "mitigating circumstances as determined by the court"); ME. REV. STAT. ANN. tit. 17-A, § 1252(5-A)(B) (2010) (creating an exception to mandatory minimum sentences for certain drug crimes if the court finds, *inter alia*, that imposing the mandatory minimum "will result in substantial injustice to the defendant"); MONT. CODE ANN. § 46-18-222 (2010) (listing exceptions to mandatory minimum sentences); OR. REV. STAT. § 137.712 (2010) (same).

disclosed all relevant information to the government.[235] The provision is commonly seen as a successful means of preventing unjust punishments without hampering the general objectives of sentencing. But the current federal safety valve is rather limited and applicable only to certain drug crimes.[236] In fact, some prosecutors may charge non-covered drug offenses in order to preclude the court from applying the safety valve to potentially eligible defendants.[237] Moreover, the safety valve requires that each criterion be met, drastically narrowing the pool of defendants who qualify for relief. An offender might be ineligible because he possessed (but did not brandish) a firearm, his criminal history precludes his classification as a first-time offender, or he is charged under mandatory sentencing laws unrelated to drug crime.

A minimalist reform could expand the application of the safety valve so that it is more generally available to defendants who might otherwise receive an excessive prison sentence.[238] The tricky point, of course, is identifying those cases in which a mandatory minimum sentence would be unjust. Most agree that at least some offenders who receive mandatory minimums have committed sufficiently serious crimes to merit those sentences. An overly broad safety valve provision would be politically vulnerable to the charge that it effectively repealed all mandatory minimum sentences, creating a loophole for the worst-of-the-worst offenders.[239] As it turns out, however, federal law already has

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235 18 U.S.C. § 3553(f) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2010).

236 Specifically, it only applies to defendants convicted under 21 U.S.C. §§ 841, 844, 846, 960 and 963. *See* 18 U.S.C. § 3553(f).

237 *See, e.g.*, Nicholas T. Drees, Fed. Pub. Defender, N. & S. Dists. of Iowa, Testimony at Public Hearing Before the U.S. Sentencing Commission, at 8-9 (Oct. 21, 2009) (transcript available at http://www.ussc.gov/AGENDAS/20091020/Drees_Testimony.pdf).

> [The safety valve] does not include 21 U.S.C. § 860, which prohibits drug activities within 1000 feet of schools, playgrounds, and other protected locations. Thus, defendants convicted under this statute cannot obtain safety valve relief. In districts where substantial portions of small towns and cities fall within protected zones, prosecutors can, and some do, charge violations of 21 U.S.C. § 860 for the purpose of preventing safety valve relief for low-level offenders with little or no criminal history who would otherwise qualify. In the Northern District of Iowa, prosecutors often include a violation of 21 U.S.C. § 860 among the other charges in an indictment. The Southern District does not follow this practice. Based on my survey of Defenders, similar manipulations occur in four other districts.

Id.

238 *See, e.g.*, Cory L. Andrews, Wash. Legal Found., Testimony at Public Hearing Before the U.S. Sentencing Commission, at 5 (May 27, 2010) (transcript available at http://www.ussc.gov/AGENDAS/20100527/Testimony_Corey_Andrews_WLF.pdf) (advancing such a proposal).

239 Two congressional bills would allow a court to "impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating" the purposes of punishment. *See* The Common Sense in Sentencing Act, H.R. 2934, 111th Cong. (2009); The Ramos-Compean Justice Act of 2009, H.R. 3327, 111th Cong. (2009). Although Luna generally supports these bills, given his aversion to many mandatory minimum sentencing laws, he recognizes that the proposals are likely infeasible as a political matter.

a possible method to identify situations where mandatory minimum sentences may be excessive.

In 1984, Congress created the U.S. Sentencing Commission as an expert agency that would promulgate a set of sentencing guidelines for every federal offense. These guidelines, which came into effect in 1987, were designed to consider all relevant issues and provide a recommended sentence. When a defendant's punishment under the guidelines 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. For many, this belief would be justified by the composition of the Commission and the general convergence between public opinion and guidelines sentences.[240]

Legal scholars and jurists have debated the merits of the Sentencing Commission and its guidelines for nearly two decades. Some have questioned the alleged expertise of the Commission, the mechanical and sometimes incomprehensible nature of guidelines calculations, and the machinations by practitioners to avoid otherwise inevitable sentences—not to mention doubts about whether the guidelines provide uniformity in any meaningful sense or serve the consequentialist and non-consequentialist goals of punishment.[241] Moreover, critics raised doubts about the constitutionality of the entire endeavor. In a memorable dissent in the 1989 case, *Mistretta v. United States*, Justice Antonin Scalia could find no place for an agency like the Commission that acts as "a sort of junior varsity Congress," describing as disastrous "in the long run the improvisation of a constitutional structure on the basis of currently perceived utility."[242]

Nonetheless, the *Mistretta* Court upheld the Sentencing Commission and the guidelines scheme against several structural constitutional challenges. According to the eight-member majority, the legislation did not produce an excessive delegation of legislative power because Congress created intelligible principles for the Commission's rule-making. Likewise, the Court found that the scheme did not violate the separation of powers doctrine, relying on the fact that the congressional delegation to the judiciary involved policy creation "on a

240 *See, e.g.*, United States v. Wilson, 355 F. Supp. 2d 1269 (D. Utah 2005) (Cassell, J.) (*Wilson II*); United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) (Cassell, J.) (*Wilson I*); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004); PETER ROSSI & RICHARD BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997).

241 *See, e.g.*, United States v. Jaber, 362 F. Supp. 2d 365 (D. Mass. 2005) (Gertner, J.); United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (Adelman, J.); Luna, *Gridland*, *supra* note 29; STITH & CABRANES, *supra* note 70; Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010).

242 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

matter uniquely within the ken of judges."[243] Although one of us (Luna) has expressed a strong preference for razing the entire system, he recognizes that the Commission and its guidelines are here to stay, at least for the foreseeable future.[244]

Some concerns about the guidelines stemmed from their construction as a judicial straightjacket, with punishment effectively limited to the prescribed sentencing range absent a defendant's cooperation with law enforcement.[245] As such, this critique mirrors a key criticism of mandatory minimums: The guidelines regime eliminated a judge's discretion to craft a punishment that fits the offense and the offender, and it even encouraged the parties to massage the facts to avoid an otherwise preordained sentence.[246] In 2005, however, a groundbreaking Supreme Court decision tempered at least part of the dispute over the guidelines.

In *United States v. Booker*,[247] the Court held that it violated the Sixth Amendment jury trial right to increase a guidelines sentence based on facts that were neither admitted by the defendant nor found true beyond a reasonable doubt by a jury. For present purposes, however, the most relevant portion of the Court's opinion was the remedy it endorsed. By excising a pair of statutory provisions, *Booker* rendered the guidelines advisory rather than mandatory for sentencing judges, subject to appellate review for "reasonableness."[248] For guidelines skeptics, the Court's decision opened up new possibilities for federal punishment[249]—and if nothing else, it held out the hope that a district court could ensure that a sentence fits the offense and the offender consistent with the valid goals of punishment. With overt sentencing discretion restored, some cheered that "federal judges can be federal judges again."[250]

The *Booker* decision did not license ad hoc sentencing, however. The Commission's work product was still the only complete set of criteria available to district court judges. Moreover, some warned that haphazard application of the guidelines might not only produce unwarranted disparities among defendants, but it could also provoke a punitive response by Congress "through such blunderbuss devices as mandatory minimum sentences."[251] With these caveats in mind, most

243 *Id.* at 412 (majority opinion).
244 *See, e.g.*, Luna, *Gridland*, *supra* note 29, at 89; STITH & CABRANES, *supra* note 70, at xi.
245 *See, e.g.*, *supra* note 72.
246 *See, e.g.*, Luna, *Gridland*, *supra* note 29.
247 543 U.S. 220, 245 (2005) (merits majority).
248 *Id.* at 259 (remedial majority).
249 *See, e.g.*, Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of* Booker*?*, 37 MCGEORGE L. REV. 787 (2006).
250 *Id.* at 287 (quoting sources).
251 *Wilson I*, 350 F. Supp. 2d at 1288.

jurists and commentators have eschewed a post-*Booker* "free at last" approach that would simply ignore the guidelines.[252] 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.[253]

In practice, the federal judiciary continues to give considerable weight to the guidelines,[254] which, as a statistical matter, remain the dominant feature of federal sentencing.[255] 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 were appropriate for most federal crimes.[256] Conversely, two-thirds of the judges think that mandatory minimum sentences are too high.[257] To be sure, some critics still have reservations about the guidelines even in their now-advisory role,[258] but those concerns may 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 instances of excessive mandatory sentencing would be an improvement over the current status quo.

A few illustrations may help clarify how the guidelines system could be used to identify miscarriages of justice under mandatory minimums. Consider the case of *United States v. Weldon Angelos*,[259] where a young, first-time offender was convicted of dealing marijuana and related offenses. The critical events in the case were three "controlled buys" by a government informant, each involving approximately $350 worth of marijuana.[260] Both the prosecution and

252 *See, e.g.*, United States v. Jaber, 362 F. Supp. 2d 365, 370 (D. Mass. 2005).

253 *See, e.g.*, Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post*-Booker *World*, 18 FED. SENT'G REP. 310, 312-13 (2006) [hereinafter *Post*-Booker *World*], *available at* 2006 WL 5001562; *see also* CONSTITUTION PROJECT SENTENCING INITIATIVE, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT (2006), http://www.constitutionproject.org/manage/file/34.pdf; Brief for Douglas A. Berman et al. as Amici Curiae Supporting None of the Parties, Claiborne v. United States, 551 U.S. 87 (2006) (No. 06-5618), 2006 WL 3747721; Brief for Douglas A. Berman et al. as Amici Curiae Supporting None of the Parties, Rita v. United States, 551 U.S. 338 (2006) (No. 06-5754), 2006 WL 3747721.

254 *See, e.g.*, *Wilson I*, 350 F. Supp. 2d at 910; *Wilson II*, 355 F. Supp. 2d at 1269; *Jaber*, 362 F. Supp. 2d at 365; United States v. Ranum, 353 F. Supp. 2d 984, 984 (E.D. Wis. 2005); Luna, *Gridland*, *supra* note 29, at 58-60, 60 n.208.

255 *See* 2008 ANNUAL REPORT, *supra* note 43, at tbl.N, *available at* http://www.ussc.gov/ANNRPT/2008/TableN.pdf (showing 85% of sentences either within guidelines range or below guidelines range only because of government motion).

256 *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 11 tbl.8 (2010), http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

257 *Id.* at 5 tbl.1.

258 *See, e.g.*, Luna, *Gridland*, *supra* note 29, at 62-64, 72-106.

259 345 F. Supp. 2d 1227 (D. Utah 2004); *see also supra* notes 5-6.

260 *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1231 (D. Utah 2004).

the defense agreed that the appropriate guidelines range for the defendant's sentence was 78-97 months.[261] 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: 5 years for the first possession, followed by 25 years for the second possession, topped off by another 25 years for the third possession, all to be served consecutively.[262] Although decrying the punishment as "cruel, unjust, and irrational," the trial court reluctantly sentenced the defendant to a mandatory 55-year prison term for the firearm possession counts (plus one day for all the other counts), which was subsequently affirmed by the Tenth Circuit.[263]

Another instructive case is *United States v. Marion Hungerford*.[264] The defendant, a fifty-two-year old mentally disturbed woman with no prior criminal record, was convicted of conspiracy, robbery, and using a firearm in relation to these crimes. She never touched a firearm or threatened anyone, and her role in the criminal episode was limited, particularly compared to that of her companion, the gun-wielding principal who committed the robberies. While her boyfriend pled out and received a 32-year sentence, the defendant "tragically refused to cooperate with the government and plead guilty, most likely because her mental illness caused her to hold a fixed belief that she was innocent."[265] The defendant's range of incarceration was 57-71 months under the sentencing guidelines. But because of the applicable mandatory minimums, she received a prison sentence of 159 years, which was affirmed by the Ninth Circuit. Although he felt bound to concur in the judgment, one appellate judge underscored "how irrational, inhumane, and absurd the sentence in this case is, and moreover, how this particular sentence is a predictable by-product of the cruel and unjust mandatory minimum sentencing scheme adopted by Congress."[266] The only question, he concluded, was whether lawmakers would ameliorate this scheme and bring rationality back to the federal system.[267]

Now consider *United States v. James Lewis Moore*,[268] a case recently decided by the Third Circuit. A sex crime investigation conducted by Australian officials led the FBI to the defendant's house, where he admitted to possessing child pornography. A subsequent consent search of his computer revealed 321 pornographic images,

261 *Id.* at 1232; *see also infra* note 283.
262 *See Angelos*, 345 F. Supp. 2d at 1232.
263 *Id.* at 1230; *see also* United States v. Angelos, 433 F.3d 738 (10th Cir. 2005).
264 United States v. Hungerford, 465 F.3d 1113 (9th Cir. 2006).
265 *Id.* at 1121 (Reinhardt, J., concurring in the judgment).
266 *Id.* at 1118.
267 *Id.* at 1122.
268 No. 09-3060, 2010 WL 1293369 (3d Cir. Apr. 6, 2010).

"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."[269] The defendant was convicted of receiving and distributing child pornography, which carried a 5-year mandatory minimum sentence. Under the guidelines, however, the applicable sentencing range was 135-168 months' imprisonment.[270] The district court eventually issued a 10-year sentence—15 months below the bottom of the guidelines range—balancing the serious nature of the crime versus the defendant's personal history and characteristics.[271] The sentence was affirmed on appeal as substantively reasonable.[272]

A final example is provided by *United States v. Emory James Zastrow*.[273] In that case, law enforcement received reports that the defendant had had sexual contact with a prepubescent girl. The exploitation had begun before the victim's eighth birthday and was evidenced by sexually explicit photographs taken by the defendant.[274] He was charged in federal court with sexual exploitation of a child by persuading, enticing, or coercing a minor victim to engage in sexually explicit conduct for the purpose of producing visual depictions. The crime carried a 15-year mandatory minimum sentence, but the applicable guidelines range exceeded the minimum by several years (210-262 months). Ultimately, the trial court adopted the guidelines range, sentencing the defendant to 20-years imprisonment, and the Eighth Circuit affirmed the sentence as reasonable.[275]

This is not the place to decide whether the 10-year sentence in *Moore* or the 20-year sentence in *Zastrow* were 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.[276] But as a matter of prioritizing any reform, it makes some sense for efforts to be directed away from those cases where the guidelines are *higher* than the mandatory minimums and toward the more clearly extreme cases where the guidelines are lower. In the latter situation, defenders of the sentencing guidelines would have to agree that the mandatory minimum

269 *Id.* at *1.
270 *See id.* at *1 n.1.
271 *See id.* at *2 n.3.
272 *See id.* at *2-3.
273 *See* United States v. Zastrow, 534 F.3d 854 (8th Cir. 2008).
274 *See id.* at 856.
275 *See id.* at 856-57.
276 *Compare* A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 21, 2010, at A1, *with* Ernie Allen, President, Nat'l Ctr. for Missing & Exploited Children, Testimony at Public Hearing Before the U.S. Sentencing Commission (Oct. 20, 2009), *available at* http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4144.

sentence could well be too high. After all, the guidelines that they believe specify the appropriate punishment nonetheless point toward a sentence below the mandatory minimum. Accordingly, situations where the guidelines call for a lower sentence than the statutory minimum—such as in the *Angelos* and *Hungerford* cases—might serve as a convenient means to flag cases where the mandatory sentence may be unjustified.

IV. OPERATIONALIZING MINIMALIST REFORM

Assuming that a minimalist approach would only implicate those cases where 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. This section details two statutory modifications to operationalize the envisioned reform. First, federal judges should have the authority to depart downward whenever the guidelines provide for the possibility of a lower sentence than a mandatory minimum. Second, the U.S. Sentencing Commission should be licensed to set guidelines ranges where it deems them to be appropriate, without automatically pegging the guidelines to existing mandatory minimums. We discuss these two modifications in turn and suggest how they comport with the aforementioned principles.

A. *Departures when Guidelines Sentences Are Lower than Mandatory Minimums*

The first change 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 <u>in accordance with any applicable mandatory minimum sentence, subject to subsections (e) and (f). The sentence shall be</u> 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 consistent with 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; and

(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.

(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) The sentence that the court imposes shall not be lower than the minimum provided in the applicable sentencing guidelines.
>
> (4) 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.[277]

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, considering 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.[278] Under the new formulation, however, the safety valve goes beyond first-time, low-level drug offenders. Previous prerequisites, like the absence 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 and evidence related to his criminal conduct, listing the government's representations regarding such cooperation as a factor in whether the court should employ the safety valve. It thus supports the prosecutorial interest in obtaining information for law enforcement purposes. Nonetheless, the provision

[277] Hereinafter "Proposed Safety Valve, 18 U.S.C. § 3553(f)."

[278] Moreover, a sentence reduction via a prosecutor's motion remains a possibility for full, up-front cooperation with law enforcement. *See supra* note 72.

applies even if the defendant has gone to trial, or if he lacks relevant or new information for governmental use, thereby permitting the court, in appropriate cases, to enter a sentence over a prosecutor's objections.

In order to help indicate appropriate cases, our proposal incorporates some relatively objective components of the Supreme Court's standard for constitutionally excessive terms of imprisonment.[279] Specifically, the safety valve includes both intra-jurisdictional and inter-jurisdictional comparisons: (1) the punishment imposed on other federal offenders, where lower sentences for more serious crimes and criminals would suggest an excessive sentence in the defendant's case; and (2) the punishment that other jurisdictions (i.e., the states) would impose for the offense in question, with lower sentences again indicating excessive punishment for the defendant.

We recognize, however, 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 myriad cases that judges face cannot be reduced to a simple equation.[280] As such, the best approach may be to exclude inappropriate factors and crimes (e.g., the defendant's race[281] or offenses that cause death), specifically permit consideration of those factors that seem highly relevant (e.g., the defendant's criminal history or the presence of a firearm), and provide some leeway for evaluating other issues pertinent to the goals of sentencing. The latter is accomplished by allowing judges to incorporate any other information relevant to the purposes of punishment listed in federal sentencing's governing law.

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

279 *See supra* note 212. As a matter of constitutional law, Cassell is not sure he agrees that sentence length should be subject to constitutional attack. Nonetheless, he accepts that the standard first articulated in *Solem* is appropriate for the new safety valve provision.

280 *Cf.* Luna, *Gridland*, *supra* note 29, at 74-87; Luna, *Punishment Theory*, *supra* note 39, at 258-87.

281 *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").

mitigate, sometimes magnify, the crime and the punishment to ensue."[282]

However, 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 55 years, the required sentence would have been at least 97 months.[283] 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.[284] However, the approach rests on the fact that, as a practical reality, any changes to mandatory minimums may have to be made incrementally pursuant to the idea of political minimalism.

Moreover, just as mandatory minimums create certain extreme "cliff" effects in sentencing, completely ending mandatory minimum sentences where there is a lower guidelines range could potentially do the same thing in reverse. Consider two defendants who both face a 120-month mandatory minimum sentence. If the first defendant's lower guidelines range is, say, 121 months while the second defendant's lower range is 110 months, the latter could conceivably receive probation (i.e., 0 month sentence) in the absence of a mandatory provision. This could make the reform vulnerable to political attack as being too easy on offenders and creating unwarranted sentencing disparities.

The case for making the low end of the guidelines range mandatory may have been bolstered by a new empirical study of sentencing

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[282] Koon v. United States, 518 U.S. 81, 113 (1996). One district court even described individualized sentencing as "required by the Due Process Clause of the Fifth Amendment." United States v. Dyck, 287 F. Supp. 2d 1016, 1020 (D.N.D. 2003).

> The concept of individualized sentencing is deeply rooted in our legal tradition and is a fundamental liberty interest. This due process right arises at sentencing because sentencing involves the most extreme deprivation of personal liberty and therefore calls for a highly individualized process where a person must be assessed and sentenced as an individual.

Id. (internal citations omitted).

[283] *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1241 (D. Utah 2004).

> Setting aside the three firearms offenses covered by the § 924(c) counts, all of Mr. Angelos's other criminal conduct results in an offense level of 28. Because Mr. Angelos is a first-time offender, the Guidelines then specify a sentence of between 78 to 97 months. It is possible to determine, however, what a Guidelines sentence would be covering all of Mr. Angelos's conduct, including that covered by the § 924(c) counts. If this conduct were punished under the Guidelines rather than under § 924(c), the result would be an additional two-level enhancement, increasing the offense level from a level 28 to a level 30. This, in turn, produces a recommended Guidelines sentence for Mr. Angelos of 97 to 121 months.

Id.

[284] Luna has some reservations about this limitation, based on his general opposition to mandatory minimums and his prior concerns regarding the Commission's methodology in establishing guidelines 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.

disparity before and after *Booker*.[285] The results suggested a post-*Booker* increase in inter-judge disparity in terms of sentence length and guidelines sentencing patterns. Interestingly, average sentences increased over time—contrary to concerns raised by the previous Justice Department—but individual judges tended to cluster around distinct sentencing ranges, with the data revealing an average inter-judge disparity of more than two years in prison. Likewise, the U.S. Sentencing Commission recently released a follow-up report that found a correlation between guidelines sentences and various demographic differences, including race.[286]

Both studies can be challenged, of course, along with any conclusions that might have been drawn from them. In fact, within days of the release of the Commission's report, another study reached the exact opposite conclusion: The *Booker* decision was reducing whatever racial differences may be found in the federal system.[287] Moreover, other studies have linked mandatory minimums to racial disparities, thereby undercutting any suggestion that obligatory sentencing resolves such discrimination.[288] Nonetheless, the new guidelines studies may raise concerns of unjustifiable disparity in the federal system and prompt further calls for mandatory minimums.[289] Needless to say, the new safety valve should not exacerbate the situation.

A second limitation on discretion requires the sentencing judge to provide in writing specific reasons for employing the safety valve in a given 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*, 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. The requirement of reasoned explanation has been advocated by, among others, a bipartisan, blue-ribbon committee report on federal sentencing in a post-*Booker* world:

> Such careful statements of reasons are essential to meaningful appellate review of sentencing decisions. They are extraordinarily useful to other sentencing judges faced with analogous cases. They form an important component of the feedback to sentencing

285 *See* Scott, *The Effects of* Booker, *supra* note 70; Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. (forthcoming Dec. 2010).

286 *See* DEMOGRAPHIC DIFFERENCES, *supra* note 70.

287 *See* Ulmer et al., *supra* note 70.

288 *See, e.g.*, Mauer Testimony, *supra* note 37, at 8-10; *supra* note 70.

289 For instance, one proposed response to *Booker* was across-the-board enactment of mandatory sentencing laws as a means to prevent disparity and leniency. *See, e.g.*, Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005) (congressional bill that sought to "fix" *Booker* via statutory mandatory minimums).

> rulemakers necessary for improving any sentencing system. And they inform litigants, the Sentencing Commission, Congress, and the public about how the law is being applied, which is essential if the country is to understand and have confidence in the federal sentencing system.[290]

To be clear, there is considerable debate whether reasonableness review reins in wayward judges after *Booker*.[291] 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. Likewise, such statements offer a potential basis for comparing those cases within the safety valve's ambit and thus provide some degree of consistency in punishment, as well as generating material for scrutiny by non-litigants, whether they are lawmakers, sentencing commissioners, or the general public. It thus responds to concerns of proportionality and equality through an intra-branch check on sentencing courts.

The expanded safety valve still maintains sufficient incentives for defendants to cooperate with authorities—specifically 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 for the defense to avoid a mandatory sentence: a government motion that the defendant provided substantial assistance through his full disclosure and cooperation.[292] When adversarialism has outrun its ability to do justice, however, in cases of manifestly unfair sentences, the new safety valve would allow a district court to impose punishment below the mandatory minimum. This serves the constitutional roles of the prosecutor and judge, reaffirming the exclusive prosecutorial authority to charge and whatever leverage it provides, while also ensuring that law enforcement officials cannot unilaterally bind the hands of the judiciary in the exercise of its own core functions.

The new provision might even foster greater accuracy and transparency throughout the criminal justice system, which can only increase the chances for proportionality and equality in sentencing. For

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290 *Post*-Booker *World*, *supra* note 253, at 18; *see also* Luna, *Gridland*, *supra* note 29.

291 *See, e.g.*, Stephanos Bibas et al., *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1384-85 (2009); Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 471-85 (2009); *see also* United States v. Pruitt, 502 F.3d 1154, 1173 (10th Cir. 2007) (McConnell, J., concurring) (analogizing reasonableness review to Boy Scout "snipe hunts"—searches for elusive and non-existent creatures).

292 *See supra* note 72.

instance, Stephen Schulhofer has argued that mandatory minimums are not mandatory at all, but instead discretionary sentencing laws susceptible to the haphazard and even perverse charging and plea bargaining decisions of federal prosecutors.[293] These often dispositive decisions are made in a largely opaque process with almost no external oversight.[294] As mentioned earlier, mandatory minimums can also create an incentive to manipulate the facts in order to achieve particular results, where the actors ignore evidence to avoid triggering a statutory minimum.[295] The laws may even have a backlash effect, making community members less likely to report suspicious behavior and cooperate with law enforcement out of concern that their neighbors (especially youth involved in the drug trade) may receive draconian punishment.[296]

Moreover, mandatory minimums may undermine the principal benefit of transparency and truth: accurate outcomes. In an important study, Ronald Wright describes how the accumulation of power by federal prosecutors through severe sentencing laws has resulted in a dramatic shift from trials to plea bargains and the near extinction of acquittals.[297] As a result, some defendants who might have been acquitted at trial are now convicted by plea bargaining, which diminishes the chances of discovering the truth through the trial process and, in exceptional cases, may increase the possibility of wrongful convictions.[298] Although Professor Wright's study focused on the pre-*Booker* mandatory guidelines, his critique applies with equal force to statutory minimums. In fact, recent cases have demonstrated how mandatory minimums can even generate fabricated testimony and wrongful convictions in extreme situations.[299]

The travesty of false testimony and convicted innocents needs no discussion here. But other machinations, such as the process of "fact bargaining," may still appear reasonable by allowing participants to avoid excessive sentences in difficult cases. Regardless of benign intent, however, the distortive effect of mandatory minimums on transparency and truth can only undercut the legitimacy of the criminal

293 *See* Schulhofer Testimony, *supra* note 37.

294 *See id.* at 5.

295 *See supra* note 62 and accompanying text.

296 *See* Schulhofer Testimony, *supra* note 37, at 16-18; *see also* Steinback Testimony, *supra* note 66.

297 *See* Wright, *supra* note 120.

298 *See id.* at 150-54; *see also* Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006); Brown, *Decline of Defense Counsel*, *supra* note 115, at 1598-99.

299 *See, e.g.*, Nachmanoff Testimony, *supra* note 37, at 13-14; *see also* Wright, *supra* note 120, at 153. It must be noted, however, that one of us (Cassell) has expressed some doubts about the causes and extent of wrongful convictions in the United States. *See, e.g.*, Cassell, *The Guilty and the "Innocent," supra* note 28; Markman & Cassell, *supra* note 28.

justice system and its actors. The moral authority of criminal law depends on the perception of both substantive and procedural justice, and a system that allows, if not requires, duplicity tends to breed contempt for the law.[300] A legitimate, properly functioning criminal justice system would not tolerate such deception and instead would demand that the case facts be true, not from some kind omniscient perspective, but as best as humans can discern. This is not something that results from an outcome-based, largely concealed process that simply maintains a sufficient degree of *truthiness* in sentencing.[301]

For these reasons, it is hoped that the new safety valve would diminish, if not eliminate, whatever motivation exists to massage the factual predicates of mandatory punishment. Judges will be able to invoke the provision even if a firearm was found in the defendant's home, for example, meaning that no one has to "swallow the gun."[302] The existence of some factor or another[303] simply does not preclude application of the safety valve, and as a result, participants need not evade the truth to achieve a fair sentence. The new safety valve may also help prevent at least some of these injustices by allowing a defendant to avoid an excessive mandatory sentence by providing truthful information, even if it does not assist law enforcement in convicting others.

Moreover, proper usage might assuage any public backlash from the perceived injustices under mandatory minimums. Defendants are not the only ones concerned about proportionality and equality in sentencing; as suggested, the specter of excessive punishment may render community members less likely to assist law enforcement. In turn, when victims of actual violence notice that their assailants receive shorter terms than imposed on non-violent offenders via mandatory minimums, the message received is that their pain and suffering is less important than abstract governmental objectives, like winning the "war on drugs."[304] Over the long haul, lay citizens may refuse to cooperate with prosecutors and conscientious jurors may engage in nullification,

300 Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also* Luna, *Transparent Policing*, *supra* note 29, at 1154-65.

301 *See* Kelly Heyboer, *In All Truthiness*, STAR-LEDGER (NEW JERSEY), Dec. 31, 2006 (defining *truthiness*, coined by Stephen Colbert, as "truth that comes from the gut, not books" or the "quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true"). As one federal judge noted several years ago, "Facts are like flint—whether a defendant pleads or goes to trial, the facts should theoretically remain the same." Berthoff v. United States, 140 F. Supp. 2d 50, 63 n.24 (D. Mass. 2001).

302 *See, e.g.*, United States v. Mercer, 472 F. Supp. 2d 1319, 1323 (D. Utah. 2007); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645, 674-75 (2004); Wallace, *supra* note 37, at 161.

303 To reiterate, the Proposed Safety Valve excludes crimes that cause death or serious bodily injury, which, as discussed above, would likely foreclose any legitimate argument about a term of imprisonment being excessive.

304 *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004).

not because they believe the defendant to be innocent or the allegations unproven, but out of fear that an unjust sentence will necessarily ensue.[305] Used appropriately, however, the safety valve may prevent the precise type of excessive sentences that raise witness and juror anxieties and confound victims of violence.

The new provision may also inhibit troubling disparities in punishment. Under our proposal, a court may consider "the sentences imposed on other offenders under the sentencing guidelines," which could lead to a pair of considerations. First, the court might bear in mind 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 differential culpability among offenders. Second, 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.[306]

Likewise, the proposal allows for inter-jurisdictional comparisons—"the sentences imposed for commission of the defendant's offense or offenses in other jurisdictions"—with a judge able to consider the expected punishment had the defendant been prosecuted in state court.[307] This factor thereby incorporates federal-state disparities into a court's sentencing evaluation, hopefully stemming the possibility of abusive forum shopping. Both factors could foster real equality in sentencing, ensuring that punishment does not vacillate wildly among districts and circuits, with the inter-jurisdictional comparison also serving the constitutional principle of federalism. "Under our federal system, the States possess primary authority for defining and enforcing the criminal law," the Supreme Court opined in 1995.[308] "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction."[309] The proper application of the safety valve can help address issues of federalism raised by the exploitation of federal mandatory minimums.

In fact, we believe that the new provision supports another fundamental principle of American constitutional law: the separation of powers. The concern here is not the creation of a "new Branch,"[310] as

305 *See id.* at 1252.

306 *See, e.g.*, Nachmanoff Testimony, *supra* note 37, at 6 (providing illustration); *Angelos*, 345 F. Supp. 2d at 1252-54 (discussing inconsistent prosecutorial policies regarding § 924(c) in various judicial districts).

307 For an example of such a comparison, see *Angelos*, 345 F. Supp. 2d at 1259.

308 United States v. Lopez, 514 U.S. 549, 561 n.3 (1995).

309 *Id.*; *see also* Cohens v. Virginia, 19 U.S. 264, 426, 428 (1821) (Marshall, C.J.) (noting that federal lawmakers have "no general right to punish murder committed within any of the states" and "cannot punish felonies generally").

310 Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

Justice Scalia warned in his *Mistretta* dissent, given that mandatory minimums were duly enacted by Congress. Instead, the present problem implicates the independent role of judges in sentencing and the effective transfer of that power to the executive branch.[311] Sentencing is a quintessential, historically recognized judicial function, with a judge imposing punishment on another human in response to the commission of a crime and its aftermath.[312] There is "wisdom, even the necessity, of sentencing procedures that take into account individual circumstances,"[313] and draw upon the court's familiarity with the case and "face-to-face contact with the defendants, their families, and their victims."[314]

With mandatory minimums, prosecutors effectively exercise judicial power, as the ultimate sentences inevitably follow from their charging decisions. Expressing a view held by many jurists, Justice Kennedy described as "misguided" the "transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant."

> Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.[315]

No doubt, sentencing involves various actors beyond the judge—the legislature establishes boundaries of punishment, the prosecution brings the specific charges, and the jury adjudicates guilt. But there is something fundamental in the trial judge's imposition of a sentence, a duty that should not be converted into a ministerial deed. The proposed general safety valve recognizes the overlapping roles in America's tripartite system, while at the same time respecting the vital, analytically separate role of the judge at sentencing.

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311 *See, e.g.*, Miller, *Domination*, *supra* note 179.

312 *See, e.g.*, United States v. Sidhom, 144 F. Supp. 2d 41, 41 (D. Mass 2001) ("In the long tradition of the common law, it was the judge, the neutral arbiter, who possessed the authority to impose sentences which he deemed just within broad perimeters established by the legislature.").

313 Koon v. United States, 518 U.S. 81, 92 (1996).

314 United States v. Dyck, 287 F. Supp. 2d 1016, 1019 (D.N.D. 2003).

315 Kennedy Speech, *supra* note 1.

> Thus, the government, not only has the authority to prosecute crime and to decide the nature of the criminal charge to be preferred, but now has the power to determine the severity of the punishment. As a result, courts are required to react passively as automatons and to impose a sentence which the judge may personally deem unjust.

Sidhom, 144 F. Supp. 2d at 41.

Most importantly, we believe that the proposal would be politically viable. The legislative branch would maintain supremacy, with Congress's mandatory minimums still on the books and the procedural escape mechanism shaped and adopted by lawmakers themselves. Prosecutors would still be free to bring charges carrying mandatory minimums, and their views remain critical under our proposal. But should a mandatory sentence prove excessive, the judiciary has the leeway to impose a more proportionate term of imprisonment, so long as it is based in sound legal reasoning.

Consider once again the *Angelos* case. At trial, the defendant was found guilty on sixteen counts, including three charges under 18 U.S.C. § 924(c). The latter gun charges carried a mandatory minimum of 55 years imprisonment, and the other thirteen counts could have added another 78-97 months to the sentence—for a grand total of at least 61½ years. Ultimately, however, the district court "only" imposed the 55-year term pursuant to the mandatory minimums.[316] In the absence of the § 924(c) counts, taking into consideration all crimes at issue, the guidelines would call for a prison term of no more than 10 years.[317] The basic safety valve requirement is thus met, with the guidelines sentence some 45 years less than required by the relevant mandatory minimum.[318] Moreover, Angelos's conduct did not result in death or serious bodily injury to any person,[319] and we can presume that had the safety valve been available, the defendant would have attempted to provide law enforcement with any information he had relating to the crimes in question.[320]

Moving on 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,[321] and for the sake of argument, let's assume that the government would oppose the reduction and would make representations unfavorable to the defendant's case.[322] On the other

316 United States v. Angelos, 345 F. Supp. 2d 1227, 1260-61 (D. Utah 2004).

317 *See supra* note 283. The guidelines themselves have a provision that conforms sentences to any mandatory minimums. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(a) (2010) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."). For purposes of this article, we ignore this conforming provision and assume that it would be amended or eliminated consistent with our proposed reforms.

318 Proposed Safety Valve, 18 U.S.C. § 3553(f)(1), *supra* note 277.

319 *Id.* § 3553(f)(1)(A).

320 *Id.* § 3553(f)(1)(B); *see Angelos*, 345 F. Supp. 2d at 1258 ("Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person."); *id.* at 1232 (noting Angelos's attempt to reopen plea negotiations).

321 *See* Proposed Safety Valve, 18 U.S.C. § 3553(f)(2)(C), *supra* note 277.

322 For instance, one might expect that the government would claim that defendant Angelos should be classified as an "organizer, leader, manager, or supervisor" in a continuing criminal

hand, Angelos was a first-time offender under federal law,[323] and he did not use violence or credible threats of violence during the commission of these crimes.[324] In addition, a comparative analysis points toward the prescribed mandatory sentence being excessive.[325] No other jurisdiction would have imposed a 55-year sentence for the crimes in this case, and had the defendant been charged in local state court, he might have served between 5 to 7 years imprisonment and likely would have been paroled after 2 to 3 years.[326] Moreover, Angelos and the government's informant allegedly committed virtually identical acts (i.e., selling drugs and possessing firearms). But while Angelos received a 55-year mandatory federal sentence, state charges against the informant were dismissed in favor of federal prosecution, which was never commenced.

Worse yet, Angelos's sentence is longer than the punishment imposed on far more serious federal offenses and 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.[327] "Indeed, Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three kidnappings, and three rapes."[328] Ironically, the 55-year sentence for possessing a firearm three times in connection with minor marijuana offenses is more than twice the federal sentence for a kingpin of a major drug trafficking ring in which a death results, and more than four times the sentence for a marijuana dealer who shoots an innocent person during a drug transaction. Even the habitual offender who receives a "life sentence" under the federal three-strikes provision could serve a shorter term than Angelos.[329]

Pursuant to the new safety valve's catch-all provision, a sentencing judge may consider other, non-enumerated factors which bear on the goals of punishment.[330] For instance, the jury in *Angelos* was asked what it believed to be an appropriate sentence in this case, with the jurors recommending a median sentence of 15 years and a mean of about 18 years.[331] This information is not only highly relevant—given that the jurors had heard the entire trial and had the opportunity to

enterprise. *See id.* at § 3553(f)(2)(D). Moreover, an appellate panel drew a less-than-favorable picture of the defendant. *See* United States v. Angelos, 433 F.3d 738, 751-53 (10th Cir. 2005).

323 *See* Proposed Safety Valve, 18 U.S.C. § 3553(f)(2)(B), *supra* note 277.

324 *See id.* § 3553(f)(2)(C).

325 *See id.* § 3553(f)(2)(E)-(F).

326 *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1243-48, 1258 (D. Utah 2004).

327 *See id.* at 1242-43, 1259.

328 *See id.* at 1246, 1258.

329 *See id.* at 1248-51.

330 Proposed Safety Valve, 18 U.S.C. § 3553(f)(2)(G), *supra* note 277.

331 *See Angelos*, 345 F. Supp. 2d at 1242; *see also infra* notes 350-351 and accompanying text.

assess each witness and piece of evidence—it also serves as a reflection of what average citizens would deem to be an appropriate outcome and, we believe, supports the Supreme Court's recent concerns about the right to trial by jury.[332]

Whatever facts and factors are relied upon 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.[333] It would be expected that a judge would have to produce a coherent, persuasive rationale for imposing a sentence below the otherwise binding 55-year mandatory minimum term of imprisonment in *Angelos*. In other words, the safety valve is not to 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 applicable sentencing guidelines. As a statistical matter, the safety valve might be relevant to a sizable percentage of cases in which mandatory minimums applied. In fiscal year 2008, the mandatory minimum sentence was higher than the guidelines range in 41.3% of all cases (8292 of 20,127).[334] Opponents of mandatory minimums may argue that our formulation does not go far enough, however, 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. In the next Part, we will address some other changes that lawmakers might consider.

From the other side, proponents of mandatory minimums might criticize our proposal as going too far. In particular, 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. While the new scheme still excludes offenders who have caused death or serious bodily injury, it does allow those who have, for example, displayed or even discharged a firearm to seek application of the safety valve. In the latter cases, however, the sentencing guidelines

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332 At first blush, our proposal might appear to violate the Sixth Amendment by folding in judicial decision-making as determinative of a sentencing guidelines range. But as case law currently stands, there is no constitutional problem with this scheme because it applies only to *lower* a defendant's sentence below what would otherwise be prescribed by a mandatory minimum. According to *Booker*, the Sixth Amendment constraints apply to fact-finding "which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict." United States v. Booker, 543 U.S. 220, 244 (2005). The proposed safety valve has no effect on the maximum punishment and instead only allows a sentence *below* the mandatory minimum, an issue that animates none of the Court's recent doctrine.

333 Proposed Safety Valve, 18 U.S.C. § 3553(f)(3), *supra* note 277.

334 Nachmanoff Testimony, *supra* note 37, at 5 (recounting data from the U.S. Sentencing Commission).

typically provide extremely tough penalties, including specific weapons enhancements, making a light sentence unlikely for those who brandish or discharge firearms.[335] The proposal thus maintains significant incentives for defendants to cooperate with prosecutors and gain a government motion for a sentence below the guidelines. Moreover, the safety valve still provides the assurance of a sentencing floor in cases where a mandatory minimum would otherwise apply.[336]

B. *Authority for the Sentencing Commission to Decouple the Guidelines from the Mandatory Minimums*

The proposal to use 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 range for drug possession often turns out to be about the same sentence prescribed by a mandatory drug provision.[337] The underlying motivation is easy to understand: The Commission is a creature of the political branches,[338] and rather than cross swords with federal lawmakers, it has long relied upon (or felt bound by) congressional mandatory minimums as starting points for setting the guidelines.[339] This is not because the Commission necessarily agreed that a prescribed statutory sentence was appropriate;

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335 *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(2) (2010) (firearms enhancements to aggravated assault guideline); *see also id.* § 5K2.6 (authorizing upward departure for use or possession of a weapon or dangerous instrumentality in the commission of an offense). If the penalties for violent crimes are for some reason generally too low, the better approach—even from a purely crime control perspective—is to raise the sentencing guidelines for violent crimes rather than rely upon the happenstance of a mandatory minimum.

336 The guidelines also provide specific authorization for various departures in limited circumstances, such as diminished capacity, *see* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, or voluntary disclosure of the offense, *see id.* § 5K2.16. A sentence below the otherwise applicable guidelines range, due to one of these specifically identified departures, would likewise be a guidelines sentence.

337 *Compare* 21 U.S.C. § 841(b)(1)(B) (2006), *with* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7). The Commission sometimes sets its guidelines just slightly above a mandatory minimum sentence, apparently so that there can be no suggestion that it is encouraging judges to go below a statutory minimum. *See, e.g.*, Saltzburg Testimony, *supra* note 37, at 9.

338 *See generally* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1347 (2005).

339 *See, e.g.*, Beryl A. Howell, Comm'r, U.S. Sentencing Comm'n, Statement at Public Hearing Before the U.S. Sentencing Commission (July 9, 2009), at 138 (transcript available at http://www.ussc.gov/AGENDAS/20090709/Public_Hearing_Transcript.pdf) ("[G]enerally the Commission has opted to link guideline offense levels to the mandatory minimums . . . ."); Nachmanoff Testimony, *supra* note 37, at 5; *see also* Hatch, *supra* note 4, at 194-95; Kimbrough v. United States, 552 U.S. 85, 109-10 (2007) (arguing that the Commission did not use its empirical data and national experience in crafting the crack cocaine guidelines).

instead, it appears the Commission recognized that the statutory mandatory minimum will trump anything in the guidelines.[340]

Given that the severity of the guidelines is often tied to the severity of mandatory minimums, our suggested mechanism for identifying unjust punishment will sometimes be flawed. For instance, a drug dealer may be subject to a guidelines sentence at or above a mandatory term set by statute, despite the fact that the Commission might have set a lower sentencing range absent the skewing effect of the mandatory minimums. The guidelines as they exist today will never flag such a sentence as too severe.

The solution to this problem is to give the Commission license 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.[341]

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 the mandatory minimum sentencing statutes. While the Commission could perhaps do this on its own initiative, federal lawmakers could provide a firmer foundation for the undertaking. In particular, Congress should adopt legislation that invites the Commission to consider the mandatory minimum penalties provided by statute but not necessarily rig the guidelines to these penalties. One way of drafting such legislation would be to 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—

340 At times, the Commissioners have even encouraged Congress to reform certain troubling laws. *See supra* note 112 and accompanying text (noting the Commission's attempts to persuade lawmakers to eliminate the crack/powder sentencing differentials).

341 *See supra* note 11 and accompanying text.

> (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.

It is debatable whether the current law directing that the guidelines be "consistent with" all federal statutes necessarily requires the Commission to track every jot and jiggle of mandatory minimum sentences. As a practical matter, the guidelines today do not always track mandatory minimums.[342] Moreover, the Supreme Court has squarely held that the guidelines are not required to follow slavishly every contour of a mandatory minimum.[343] 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. Our proposed changes 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.

Some readers may wonder why Congress would want to invite the Commission to have its guidelines deviate from other statutes enacted by Congress. This straightforward inquiry has two straightforward answers. First, Congress itself appears to harbor doubts about the panoply of federal mandatory minimums, as demonstrated by the new crack cocaine law, the statements of some officials, and the order to the Commission to investigate and propose alternatives to these schemes. The simplest way to address those misgivings, we believe, is to empower the Commission to set generally applicable guidelines as it sees fit and then allow judges to depart downward from a demonstrably excessive mandatory sentence to the lower boundary set by the guidelines. Second, Congress will always retain the last word on federal sentencing policy. No guideline promulgated by the Commission can take effect until a six-month review period elapses, during which Congress is free to intervene.[344] Thus, if the Commission

342 *See, e.g.*, *supra* notes 259-263, 334 and accompanying text.

343 *See Kimbrough*, 552 U.S. at 106 (noting that various crack/powder cocaine sentencing guidelines do not follow the 100:1 ratio established in mandatory minimum sentences).

344 28 U.S.C. § 944(p) (2006). To be clear, Congress has rarely rejected proposed guidelines.

ventures too far down paths that Congress did not approve, lawmakers could block the changes from taking effect.

V. FURTHER REFORMS

The proposed reform does not involve any direct congressional repeal of a mandatory minimum sentence. Instead, it suggests small steps based on the idea of political minimalism, informed by principles of broad consensus, drawing upon readily available vehicles and materials, and operationalized in a manner that is narrowly tailored to prevent miscarriages of justice. The proposal is thereby limited to changes that could achieve wide agreement in Congress among both conservatives and liberals, Republicans and Democrats. And because the reform is consistent with commonly held values like proportionality, providing rhetorical cover for proponents, it has a better chance of survival in what has become an increasingly acrimonious legislative process.

Moreover, we hope that the adoption of a minimalist reform could prod other changes as well. As discussed above, the norm of harsh punishment has proven to be sticky. But prior resistance to change may belie its present fragility, with various indicators suggesting that sentencing reform may be welcome among the public as well as feasible to elected officials.[345] With the passage of the new crack cocaine law, it could be imagined that another relatively modest revision may further nudge lawmakers to a tipping point—which, when reached, might unleash a powerful transformation and stir other, possibly bigger reforms as more and more officials move toward a new norm of sentencing. Of course, something in the political atmosphere may still encourage the stock response to sentencing reform efforts, with opportunists ready to label proponents as soft on crime, anti-law enforcement, insufficiently attentive to crime victims, etc. But by crafting the next step pursuant to political minimalism, the potential blowback may be minimized as well.

Various other proposals have been contemplated by federal officials. Reform advocates have called for retroactive application of the crack cocaine law to those already serving federal sentences, for instance, and the law itself directs the Sentencing Commission to study the effectiveness of drug courts as an alternative to incarceration.[346] In concluding this Article, therefore, we wanted to mention a few other

345 *See, e.g.*, Beale, *Still Tough on Crime?*, *supra* note 95, at 422-23.

346 Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 9, 124 Stat. 2372, 2374-75 (to be codified at 28 U.S.C § 994).

changes to the federal system that could build upon successful minimalist reform and might attract bipartisan consensus.

One possibility would be to have juries participate in the determination of 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 and offering a direct means for citizen participation and community representation.[347] Moreover, it may provide a mechanism for identifying cases of unjust punishment and lend credibility to federal sentencing. Public support is a necessary component of a legitimate criminal justice system, but as mentioned, there are signs that the populous has grown disenchanted with mandatory minimums.[348]

We recognize that measuring public opinion can be a fickle and uncertain project. Some polls may not represent a fair cross-section of the relevant community, while the nature of questions asked and the level of factual detail provided can easily skew results. These objections may disappear, however, if the trial court presents a specific query to a jury that has heard all of the evidence in the case at hand. The issue is how long should this specific defendant be imprisoned, and the decision-maker is constitutionally required to be "a fair cross-section of the community."[349]

Again, the *Angelos* case provides an illustration of how to implement this reform. To reiterate, 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."[350] None of the jurors recommended a term close to the effective life-sentence required by the mandatory minimums—a fact the judge cited in suggesting that the mandatory sentence was unjust. Interestingly, the government objected to the entire endeavor. The protest, however, perhaps intimates uneasiness about the justice of mandatory sentences rather than the insight of juries. As recounted in the *Angelos* opinion:

> At oral argument, the court asked the government what it thought about the jurors' recommendations and whether it was appropriate to impose a sentence so much higher than what the jurors thought appropriate. The government's response was quite curious: "Judge, we don't know if that jury is a random representative sample of the citizens of the United States. . . ." Of course, the whole point of the elaborate jury selection procedures used in this case was to assure

347 *See, e.g.*, Erik Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839 (2008).

348 *See supra* note 8 and accompanying text.

349 Tennessee v. Lane, 541 U.S. 509, 523 (2004) (citing Taylor v. Louisiana, 419 U.S. 522, 530 (1975)).

350 United States v. Angelos, 345 F. Supp. 2d 1227, 1242 (D. Utah 2004).

> that the jury was, indeed, such a fair cross section of the population so that the verdict would be accepted with confidence. It is hard to understand why the government would be willing to accept the decision of the jury as to the guilt of the defendant but not as to the length of sentence that might be imposed.[351]

Judge James Gwin and other federal judges in the Midwest recently repeated the *Angelos* experiment in jury polling on a larger scale.[352] In twenty-two jury trials resulting in conviction, the district court gave the jurors information about the defendant's criminal history and asked them to recommend a term of imprisonment for the defendant.[353] In almost every case, the jury advised a prison term substantially lower than the sentencing guidelines. Moreover, in every case in which a sentencing judge added a mandatory minimum onto the guidelines sentence, the jury recommended a lower sentence than was otherwise called for.[354]

We foresee no serious objection to a judge receiving jury input when fixing punishment within a lawful range. Federal law specifically provides that a judge can receive almost unlimited information when determining a proper sentence.[355] In fact, the idea of jury sentencing has garnered (mostly) positive scholarly attention in recent years, largely due to the Supreme Court's budding Sixth Amendment jurisprudence.[356] During the half-year interregnum between *Blakely v. Washington*,[357] which struck down a state sentencing guidelines scheme, and its federal mirror-image in *Booker*, at least a few federal courts utilized jury sentencing pursuant to case-specific deliberation forms.[358] In addition, several states incorporate jurors in punishment

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351 *Id.*

352 Gwin, *supra* note 241.

353 *Id.* at 186-88 (describing survey scope and methods).

354 *See id.* at 196-200 tbl.3 (comparing guideline/statutory sentences with jury recommendations).

355 18 U.S.C. § 3661 (2006); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010) ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.").

356 *See, e.g.*, Betrall L. Ross II, *Reconciling the* Booker *Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725, 771-78 (2006); Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three State Study*, 57 VAND. L. REV. 885 (2004); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003); Adriaan Laani, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999).

357 542 U.S. 296 (2004).

358 *See, e.g.*, Pamela Manson, *Sentencing Rules Face High Scrutiny in Wake of Ruling*, SALT LAKE TRIB., July 19, 2004, at A1 (describing jury sentencing practice of U.S. District Court Judge Dale Kimball).

decision-making to some extent or another, practices which presumably could offer a useful source of information and experiences.[359]

The limited proposal here would be to use a jury as an 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 mandatory prison terms of more than, say, ten years. In such 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 were less than the mandatory minimum, the judge would then be authorized (but not required) to impose a sentence below the mandatory term.

The proposal might limit the judge's discretion in such cases by, for instance, requiring that any sentence does not fall below the mean or median prison term recommended by the jury. Nonetheless, the approach would ensure that judges were not obligated to impose lengthy mandatory prison terms far in excess of what the public believes is fair. It is one thing to sentence someone to prison for decades when that is the type of punishment deemed appropriate by the general public, but it is another thing to do so when the affected community (as represented by a jury) supports a far shorter sentence. This proposal would help identify such extreme cases and permit judges to avoid miscarriages of justice.

Other reforms might go beyond the ambit of our safety valve proposal. For instance, federal lawmakers might reconsider the "stacking" of mandatory minimum sentences pursuant to 18 U.S.C. § 924(c). As illustrated by the *Angelos* case,[360] 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*,[361] which considered whether the increased penalties for "second or subsequent" convictions under § 924(c) allowed multiple stacked penalties when the convictions were all part of the same proceeding.

In essence, the issue was whether Congress intended § 924(c) to be a true recidivist statute or one that increased penalties for a single-episode offender. Most of the lower courts had not applied the additional punishment when the second conviction was just another §

359 *See, e.g.*, King & Noble, *supra* note 356.
360 *See supra* notes 259-263 and accompanying text.
361 508 U.S. 129 (1993).

924(c) count in an indictment.[362] But the Supreme Court construed the "plain meaning" of the statute far more broadly, holding that a "second or subsequent" conviction could arise from a single prosecution.[363] A dissenting opinion authored by Justice John Paul Stevens argued that Congress had intended the provision to apply "to defendants who, having once been convicted under § 924(c), failed to learn their lessons from the initial punishment and committed a repeat offense."[364]

This Article does not delve into the merits of the Court's jurisprudence on legislative intent and the conclusion it produced in *Deal* based on the ostensible plain meaning of the statute. Instead, our limited point here is that the Supreme Court's interpretation has produced a fearsome mandatory minimum statute that is not a true recidivist law. An offender can receive a lifetime's worth of punishment for just a few days of criminal activity. This stacking aspect cannot be justified on grounds that it is sending a message to recidivists who did not learn a lesson, given that a defendant will not have been convicted and imprisoned in the time between § 924(c) violations.[365] For these and other reasons, § 924(c) should be amended to be a true recidivist law, with Congress overturning *Deal* to make the statute conform to the interpretation of the dissenters. If an offender commits a firearms offense, goes to prison for five years, and then commits a second or subsequent offense after his release, he would be eligible for a lengthy prison term—but not until then.

Another possible reform would consider bringing back parole for prisoners serving extremely long prison terms, particularly where those terms resulted from mandatory minimum sentences.[366] Like our other proposals, this would not involve a direct attack on mandatory minimums. Instead, it would call for the re-energizing of the U.S. Parole Commission, which currently has the limited authority to review sentences for some prisoners—namely, those who committed their offenses before November 1, 1987.[367] After review, the Parole Commission has the power to grant or deny parole to these prisoners.

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362 *See, e.g.*, United States v. Chalan, 812 F.2d 1302, 1315-17 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

363 *Deal*, 508 U.S. at 132-34. In *Deal*, the defendant was convicted of committing six different bank robberies on six different dates, each time using a gun. He was sentenced to five years for the first § 924(c) charge, and twenty years for each of the other five § 924(c) charges, for a total of 105 years. *Id.* at 131.

364 *Id.* at 146-47 (Steven, J., dissenting).

365 *Cf. supra* note 101 and accompany text (quoting the congressional sponsor's rationale for § 924(c)).

366 Such a provision might help deal with some of the issues of retroactive application of sentencing reforms.

367 This was the effective date of the sentencing guidelines. A full listing of the Parole Commission's various responsibilities is found on its website, http://www.justice.gov/uspc (last visited Aug. 31, 2010).

Congress could easily provide it broader authority to evaluate current prison sentences and consider whether it makes sense to continue to incarcerate long-serving inmates.

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.[368] 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—at least 15 years in prison, for example—the Parole Commission could investigate whether conditional release should be granted.[369]

It is also worth noting that federal law already contains a "compassionate release" provision, authorizing the Bureau of Prisons to make a motion to the district court for the release of a prisoner who is at least seventy years old and has served at least thirty years in prison, or for other "extraordinary and compelling reasons."[370] The Bureau of Prisons has interpreted this authority very narrowly, effectively limiting release to those with terminal illnesses or severely debilitating and irreversible conditions.[371] Perhaps Congress should expand this authority to include additional circumstances where the Bureau could use parole or other forms of discretionary release to discharge prisoners who have already served extensive sentences.[372]

The above suggestions go beyond a strictly delimited reform animated by political minimalism. But as mentioned, the success of a small step might inspire bigger moves. Moreover, the ideological diversity of those who have called for a reexamination of sentencing policy carries the possibility that the relevant norm entrepreneur could have unassailable law-and-order credentials. Like the adage that "only Nixon could go to China," maybe a well-respected, politically impervious legislator or other opinion leader could help rouse support for meaningful change in sentencing. Topics for discussion might include not only the uses and limits of mandatory minimums but also,

368 *See* S. REP. NO. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222-32.

369 *See* Miller, *Domination*, *supra* note 179, at 1268 n.201 (advancing a variant of this idea).

370 18 U.S.C. § 3582(c)(1) (2006).

371 *See* Williams v. Van Buren, 117 F. App'x 985, 986 (5th Cir. 2004).

372 Scholars have suggested various other reforms to mandatory minimums, short of explicit repeal, that deserve consideration by Congress. *See, e.g.*, Schulhofer Testimony, *supra* note 37, at 26-29 (discussing reforms to co-conspirator and accomplice liability and adjustments to guidelines ranges).

for instance: the proper allocation of sentencing power among the three branches of government; the ethical and practical issues raised by plea bargaining, either as an exception to adjudication or as the rule; the empirical and normative significance of criminal history and the efficacy of recidivist schemes; and the moral value of a defendant's post-crime *mea culpa*.[373]

CONCLUSION

Our proposal will not completely satisfy either side of the debate. Critics of mandatory minimums can argue that it simply trades a set of statutory mandatory minimums for a different set found in the sentencing guidelines. Defenders of mandatory minimums may contend that it shortens sentences for serious offenders, reducing the deterrent effect of the federal criminal code. To some extent, we may be guilty as charged on both fronts. At the same time, however, we agree with the political adage that the most dangerous place to be is in the middle of the road. Recognizing that Congress has historically been reluctant to repeal mandatory minimum sentences, we have tried to craft a proposal that proceeds from principles of consensus and focuses reform on the most extreme situations. As a result, we believe that this proposal might have some prospect of passage in Congress and could serve as a useful measure toward creating a fairer federal criminal justice system.

In fact, it might inspire further sentencing reforms in both federal and state sentencing law. The proposal offers a small but principled move for Congress and an invitation to keep moving forward. While our primary focus has been on the federal system, congressional action could instigate constructive developments in the state justice systems, which handle the bulk of crime and punishment in America. Given current misgivings about mandatory minimums generally, thoughtful reform in the federal system could be a catalyst for change across the nation. Wherever such discussion leads, however, and whether or not a tipping point is even reached, the proposed modification to the federal mandatory minimum scheme can at least help avoid the occasional injustice of excessive punishment without emasculating whatever benefit mandatory minimums provide to law enforcement. It would be, we believe, a step in the right direction.

373 *See, e.g.*, Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997) (discussing the relevance of a defendant's criminal history).