

**Public Hearing Before the
United States Sentencing Commission**

**Mandatory Minimum Sentencing
Provisions Under Federal Law**

Testimony of

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Judge Sessions and fellow Members of the United States Sentencing Commission, thank you for giving me the opportunity to speak today on the subject of mandatory minimum sentencing provisions under federal law. My name is Erik Luna, and I am a law professor at Washington and Lee University School of Law and an adjunct scholar with the Cato Institute.¹ In my allotted time, I will briefly discuss some concerns about the rise and persistence of mandatory minimums in the federal criminal justice system.

1. THE CASE AGAINST FEDERAL MANDATORY MINIMUMS

The basic critique of mandatory minimum sentencing schemes is well known and becoming more widely accepted. To begin with, mandatory minimums do not serve the traditionally accepted goals of punishment. All theories of retribution (and some conceptions of rule utilitarianism) require that punishment be proportionate to the gravity of the offense, and any decent retributive theory demands an upper sentencing limit.² The notion of proportionality between crime and punishment expresses a common principle of justice, a limitation on government power that has been recognized throughout history and across cultures,³ and a precept “deeply rooted and frequently repeated in common-law jurisprudence.”⁴ Mandatory minimums 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, mandatory minimums are indifferent to proportionality concerns and can pierce retributive boundaries through obligatory punishment.

1. All opinions expressed and any errors herein are my own.

2. See generally ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005); see also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 52-54 (5th ed. 2009); JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 28 (6th ed. 2008).

3. See U.S. CONST. amend. VIII (banning “cruel and unusual punishments”); see also Universal Declaration of Human Rights, art. 1, G.A. Res. 217A, U.N. Doc. A/810, art. 5 (1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 7, 10, 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/RES/39/708 (1984). Mosaic Law and the Code of Hammurabi formulated the principle as an “eye for an eye,” commonly understood as requiring that punishment be commensurate to the offense. See *Exodus* 21:24, THE HOLY BIBLE 97 (C.I. Schofield ed., Oxford U. Press 1945); MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 121 (2d ed. 1997) (translating Hammurabi’s Laws). In the Classical Age, Aristotle opined that it was the judge’s duty to impose punishment equivalent to the crime, see THE NICOMACHEAN ETHICS 179-82 (J.A.K. Thomson trans., 1976); while the Roman statesman and author Cicero proclaimed the maxim that “the punishment should fit the offense.” See CICERO, *DE RE PUBLICA, DE LEGIBUS* 513 (Clinton Walker Keyes trans., 1928). “[T]here are certain duties that we owe even to those who have wronged us,” Cicero averred, “[f]or there is a limit to retribution and to punishment.” CICERO, *DE OFFICIIS* 35 (Walter Miller trans., 1938). See generally Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 844-47 (1969) (discussing historical limits on excessive punishment). Post-Enlightenment scholars promoted the concept of proportionality as well. For instance, Montesquieu wrote that “[a]ll punishment which is not derived from necessity is tyrannical.” MONTESQUIEU, *THE SPIRIT OF THE LAWS* 357 (Thomas Nugent trans., 1914) (1748). Liberty is protected “when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions [when] the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing.” *Id.* at 222. Likewise, the first modern penologists argued for proportionality between crime and penalty. See, e.g., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* ch. 6 (1764) (“Of the Proportion Between Crimes and Punishments”); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* ch. 14 (1789) (“Of the Proportion Between Punishments and Offences”). Blackstone also argued for proportionality in punishment and decried excessive penalties as violating “the dictates of conscience and humanity,” being ineffective at “preventing crimes and amending the manners of people,” and evincing “a bad symptom of the distemper of any state, or at least of its weak constitution.” 4 WILLIAM BLACKSTONE, *COMMENTARIES*, at *10-19. Proportionality was enshrined in the Magna Carta, the English Bill of Rights, and British jurisprudence. See *Solem v. Helm*, 463 U.S. 277, 284-85 (1983); *Trop v. Dulles*, 356 U.S. 86, 100 (1958); see also *Hodges v. Humkin*, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (“[I]mprisonment ought always to be according to the quality of the offence.”); RICHARD L. PERRY, *SOURCES OF OUR LIBERTIES* 236 (1959) (describing “the longstanding principle of English law that the punishment ... should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged”). The proportionality principle was carried over to America and codified in both colonial law and post-revolutionary state constitutions. See, e.g., RICHARD L. PERRY, *SOURCES OF OUR LIBERTIES* 107 (1959) (noting that the Maryland Charter of 1632 permitted punishment if “the Quality of the offense require[d] it”); PA. CONST. §38 (1776) (calling for punishments “proportionate to the crime”); S.C. CONST. §XL (1776) (similar).

4. *Solem*, 463 U.S. at 284-85. Admittedly, principles of proportionality and equality raise difficult issues in sentencing. In measuring the gravity of an offense for proportionality analysis, one might look to, *inter alia*, “the harm caused or threatened to the victim or society.” *Id.* at 288-93; see also *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). Although harm is a notoriously tricky idea, see, e.g., Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999); most agree that basic criminal harms involve acts or threats of physical violence and the non-consensual or fraudulent deprivation of other’s property. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, *INTUITIONS OF JUSTICE: IMPLICATIONS FOR CRIMINAL LAW AND JUSTICE POLICY* (2007).

Mandatory minimums may not fulfill consequentialist goals either, by failing to provide effective, efficient deterrence or meaningful incapacitation. 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 outweigh the benefits from violating the law and then apply this understanding to decision-making at the time of the crime. Most offenders neither perceive this balance of costs and benefits nor follow the rational actor model.⁵ In turn, incapacitation is only effective if: (1) the person imprisoned would otherwise commit crime, and (2) he is not replaced by others. Mandatory minimums prove problematic on both criteria. Offenders typically age out of the criminal lifestyle, with long obligatory sentences requiring the continued incarceration of individuals who would not be engaged in crime. Moreover, certain offenses subject to mandatory minimums can draw upon a large supply of potential participants; with drug organizations, for instance, an arrested dealer or courier is quickly replaced by another. It is not surprising, then, that most researchers reject crime-control arguments for mandatory sentencing laws.⁶

Mandatory minimums generate arbitrary outcomes as well.⁷ They can have a “cliff effect” by drawing seemingly trivial lines that carry huge consequences. One of the more notorious examples is provided by the compulsory 5-year sentence for the possession of 5.0 grams of cocaine base. Crack cocaine offenders face a steep cliff under this law, where someone caught with 4.9 grams receives a relatively short sentence – but add a fraction of a gram and a half-decade in federal prison necessarily follows, with the defendant falling off the “cliff.” Mandatory minimums can also have a “tariff effect,” where some basic fact triggers the same minimum sentence regardless of whether the defendant was, for instance, a low-level drug courier or instead a narcotics kingpin. Perversely, the tariff may be levied on the least culpable members in a criminal episode, given that those in leadership positions often have valuable information that is unavailable to low-level offenders (i.e., the type of material that can be used as a bargaining chip with prosecutors).⁸

This raises the more general question as to the propriety of extracting information and guilty pleas through the threat of mandatory minimums. 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.⁹ 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,

5. See, e.g., 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).

6. See, e.g., Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 90-100 (2009) [Tonry, *Mostly Unintended Effects*]; JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY? (1997); BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 11-16 (1994); U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

7. Mandatory minimums have also been criticized for their distortive impact on the federal sentencing guidelines. Justice Breyer, a former U.S. Sentencing Commissioner, has argued that mandatory minimums thwart the Commission in its fundamental duty: “the development, in part through research, of a rational, coherent set of punishments.” Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180 (1999); see also Hon. 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, 194 (1993). Among other things, mandatory minimums may preclude the Commission from calibrating sentences based on normatively or empirically relevant factors, such as the defendant's role or culpability in 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. What is more, mandatory minimums can distort sentences for an entire class of crimes. Given that the Commission seeks continuity and consistency among similar offenses, a mandatory minimum for one crime may generate a type of sentencing inflation, skewing punishment upwards for all related crimes.

8. Most recipients of drug mandatory minimums are couriers, mules, and street-level dealers, not kingpins or leaders in international drug cartels. See, e.g., U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 20-21, 85 (2007).

9. See, e.g., *United States v. Green*, 346 F. Supp. 2d 259 (D. Mass. 2004) (discussing use of mandatory guidelines to extract plea bargains); STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN COURTHOUSE 37-48, 83 (2005) (describing trial tax in state context); see also Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

each carrying its own mandatory sentence that can then be stacked, one on top of the other, to produce heavier punishment.¹⁰ This may be particularly troubling when law enforcement procures further crimes through its own actions, such as arranging a number of controlled drug buys in order to achieve a lengthy sentence.¹¹ 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.

Moreover, the mechanical nature of mandatory minimums can entangle all criminal justice actors in an oxymoronic process where facts are bargainable, from the amount of drugs to the existence of a gun. The participants will figuratively “swallow the gun” to avoid a factual record that would require a mandatory sentence.¹² To be sure, these machinations appear reasonable in difficult cases by evading excessive sentences demanded under the federal regime. But the end result is a legal subterfuge that can only undercut the legitimacy of the criminal justice system and its actors. The moral authority of law depends not merely on just outcomes but also justifiable procedures in reaching such results. “Our government is the potent, the omnipresent teacher,” Justice Louis Brandeis once warned, and “if the government becomes a lawbreaker, it breeds contempt for law.”¹³ It almost goes without saying that 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 of God’s eye perspective, but as best as humans can discern. This is not something that results from an outcome-based bargaining process and simply maintains a sufficient degree of *truthiness*, to use Stephen Colbert’s phrase. “Facts are like flint,” one federal judge noted several years ago, and “whether a defendant pleads or goes to trial, the facts should theoretically remain the same.”¹⁴

All of the above problems tend to generate different punishments among similarly situated offenders – a sadly ironic consequence, given that determinate sentencing in general and mandatory minimums in particular were intended to eliminate the perceived disparities under the previous federal sentencing system.¹⁵ 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.¹⁶ Equality in the Aristotelian sense requires decision-makers to treat like cases alike, and just as

10. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 723-24 (2005) [hereinafter Luna, *Overcriminalization*]; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) [hereinafter Stuntz, *Pathological Politics*].

11. See, e.g., *United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. 2005); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1253 (D. Utah 2004).

12. 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); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 FED. B. NEWS & J. 158, 161 (Mar./Apr. 1993).

13. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1154-65 (2000).

14. *Berthoff v. United States*, 140 F. Supp. 2d 50, 63 n.24 (D. Mass. 2001).

15. Some works have challenged the assumption that the previous federal sentencing regime was rife with disparity. See, e.g., DOUGLAS McDONALD & KENNETH CARLSON, U.S. DEP’T OF JUSTICE, BUREAU OF STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-90, at 24-26 (1993); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 105-42 (1998). Moreover, there is a lively empirical debate as to whether the guidelines have reduced sentencing differentials. Compare U.S. SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE ANALYSIS (Mar. 2010), 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); 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. 2010), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1577238.

16. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“all men are created equal . . . endowed by their creator with certain unalienable rights”); JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 2, § 6 (1689) (denominating people as “all equal and independent”); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198 (8th ed. 1915) (the rule of law means “equality before the law, or the equal subjection of all classes to the ordinary law of the land”); JOHN RAWLS, A THEORY OF JUSTICE 53, 220, 266 (rev. ed. 1999) (arguing that the predominant principle in a just society requires that “[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”); WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 5 (1990) (suggesting that moral equality establishes an “egalitarian plateau” for all modern political theories); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 209-10 (1960).

importantly, to treat dissimilar cases differently.¹⁷ It would thus be a violation of equality for disparate sentences to be given to relevantly similar offenders *and* for comparable sentences to be doled out to relevantly dissimilar offenders.¹⁸ Inconsistent application of mandatory minimums has exacerbated disparities in both ways – expanding the sentencing differentials between analogous cases and requiring the same base sentences in patently dissimilar cases.¹⁹ Particularly disturbing is the appearance, if not reality, of disparities along racial or ethnic lines.²⁰

The source of this problem is clear: 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. Undoubtedly, federal law enforcement is well-intentioned in many cases. But it would be naïve to assume that good faith will prevent the misuse of mandatory minimums. Serious and violent offenders may have served as the inspiration for mandatory minimums, but 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,²¹ even to minor participants in non-violent offenses. Expressing a view held by many jurists, Justice Anthony 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.²²

Prosecutors and judges occupy distinct but overlapping roles in the criminal justice system. The prosecutor is empowered with the discretion to instigate charges against a defendant, amass evidence of crime, and seek convictions as an adversary in the trial process. The U.S. Attorney is more than an ordinary party, however, given the power he wields and the principal he represents.²³ Moreover,

17. Cf. NICOMACHEAN ETHICS, *supra* note 3. Of course, one can debate whether particular facts or circumstances should be relevant for purposes of equality in punishment. But as evinced by many modern sentencing schemes, 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. Compare, e.g., 18 U.S.C. § 3553(a) (listing purposes of criminal sentences); with, e.g., AK. STAT. § 12.55.005 (same).

18. Defendants are not the only ones concerned about proportionality and equality in sentencing. When victims of actual violence notice that their assailant received a shorter term than imposed on a non-violent offender 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.” See *Angelos*, 345 F. Supp. 2d at 1251. Over the long haul, conscientious jurors might refuse to render guilty verdicts, not because they believe the defendant to be innocent or the allegations unproven, but out of fear that an unjust sentence will necessarily ensue. See *id.* at 1252.

19. See, e.g., U.S. GEN. ACCOUNTING OFFICE, FEDERAL DRUG OFFENSES, DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999-2001 (2003); 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); U.S. GEN. ACCOUNTING OFFICE, MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM? (Nov. 1993); 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, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED (1992); SPECIAL REPORT, *supra* note 6, at 47-52; VINCENT & HOFER, *supra* note 6.

20. See, e.g., U.S. SENTENCING COMMISSION, STATISTICAL OVERVIEW FOR “MANDATORY MINIMUMS AND UNINTENDED CONSEQUENCES,” HEARING BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY (2009), available at http://www.ussc.gov/MANMIN/man_min.pdf. Of course, there may be a correlation without causation – 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., Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 183-87 (2003).

21. See Stuntz, *Pathological Politics*, *supra* note 10, at 549.

22. Hon. Anthony M. Kennedy, “Speech at the American Bar Association Annual Meeting,” Aug. 9, 2003, available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

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.

United States v. Sidhom, 144 F. Supp. 2d 41, 41 (D. Mass. 2001).

23. 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).

prosecutors are influenced by ordinary human motivations that may at times cause a loss of perspective – career advancement, path dependence, immodesty, occasional vindictiveness, and so on²⁴ – leading to the misapplication of mandatory minimums. Under the current sentencing regime, no external check prevents the imposition of an unjust mandatory term.

In turn, the judiciary functions as an impartial decision-maker in individual cases. A sentencing judge is the one neutral actor in the courtroom who benefits from neither harsh punishment nor lenient treatment; he has no vested interest in the outcome of a case other than that justice be done. Trial court judges are also in the best position to make the highly contextual, fact-laden decisions about the proper punishments in particular cases. They are familiar with the environment in which offenses occur; they have been involved in every part of the court process; they have seen the evidence firsthand; and they have been in a position to evaluate the credibility of each witness and each argument. Moreover, as Justice Kennedy mentioned, trial judges have the benefit of experience in reasoned, transparent discretion, making them the precise entity that should decide the complicated, fact-specific issues of federal sentencing.²⁵ Judges are denied this power when mandatory sentences inevitably follow from prosecutorial choices in charging.

But the shift in authority is more than misguided – it implicates the separation of powers doctrine. Liberal society has long been concerned with arbitrary, oppressive action stemming from the accumulation of too much power in too few hands. The Framers’ solution was 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.²⁶ Along these lines, the U.S. Constitution employs a pair of structural devices, the first being the separation of powers among co-equal branches – the legislative, executive, and judicial²⁷ – each having “mutual relations” in a series of checks and balances.²⁸

As a matter of history and experience, an autonomous court system under the guidance of impartial jurists is considered the most indispensable aspect of American constitutional democracy.²⁹ An

24. 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); 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); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 61-96 (2001); 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 & 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).

25. Moreover, the vast majority of Americans, both Democrats and Republicans, believe that courts are the proper bodies to make sentencing judgments. See *Families Against Mandatory Minimums Omnibus Survey* (Sept. 2008), available at <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf> [hereinafter *Omnibus Survey*]. The constitutional appointment process helps ensure the bona fides of federal judges. Nominees are vetted and selected by the President, and then put through a painstaking process in the Senate. See, e.g., *United States v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wash. 1990):

Regardless of which political party holds sway, the process for selecting federal judges is much the same. Nominees are hung out like fresh meat to be poked, prodded and examined in minute detail as to every aspect of their personal and professional lives. The first step is to gain the confidence of a nominating senator who will conduct such investigation as he deems appropriate. Then the FBI, Department of Justice, the American Bar Association, and the Judiciary Committee get into the act. Only after surviving scrutiny that far will the Senate consider granting its stamp of approval.

Those who are confirmed are provided constitutional protection of salary and tenure to guarantee an independent and impartial federal court system. See U.S. CONST. art. III, §1. The level of scrutiny placed on these nominees not only verifies their qualifications and temperament, but helps make the federal judiciary the most credible and competent government body in the nation.

26. See, e.g., MONTESQUIEU, *supra*, at bk. 11, ch. 6; THE FEDERALIST NO. 47 (James Madison).

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

28. THE FEDERALIST NO. 51, at 267 (Madison).

29. See, e.g., LEARNED HAND, THE SPIRIT OF LIBERTY 155, 164 (3d ed. 1974); Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284 (2004).

independent judiciary was meant to protect individuals from the prejudices and heedlessness of political actors and the public.³⁰ The courts were historically entrusted with certain fundamental legal decisions, including dispositive criminal justice issues that demanded evenhanded judgment, such as the imposition of punishment on another human being.³¹ “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”³² There is “wisdom, even the necessity, of sentencing procedures that take into account individual circumstances,”³³ drawing upon the judge’s familiarity with each case and “face-to-face contact with the defendants, their families, and their victims.”³⁴ By taking away this authority and giving it to the executive branch, mandatory minimums have undermined a fundamental check on law enforcement.

Federal mandatory minimums also affect the Constitution’s second structural device intended to prevent the problems associated with concentrated authority – the division of power between national and state governments. Grounded in the text and context of the Constitution,³⁵ federalism limits the powers of national government and prevents federal interference with the core internal affairs of the individual states.³⁶ Among the areas that the Framers sought to reserve to the states was “the ordinary administration of criminal and civil justice.”³⁷ The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism.³⁸ In fact, it was unthinkable to the Framers that the federal government would adopt a full-scale penal code, let alone displace or substantially interfere with the state criminal justice systems.³⁹ As Chief Justice John Marshall would later opine, Congress “has no general right to punish murder committed within any of the States,” and “it is clear that Congress cannot punish felonies generally.”⁴⁰ In more recent times, the Supreme Court has reiterated these limitations on federal involvement in local criminal justice matters, given that the “[s]tates possess primary authority for defining and enforcing the criminal law.”⁴¹ Constitutional concerns are thus raised whenever Congress effects “a significant change in the sensitive relation between federal and state criminal jurisdiction.”⁴²

Unfortunately, Congress has assumed such power over criminal matters, occasionally with a nod to an enumerated power, usually the regulation of interstate commerce. This does not mean, however, that politicians, courts, and commentators have been or should be oblivious to considerations of federalism.⁴³

30. See, e.g., THE FEDERALIST NO. 78, at 405-06 (Hamilton).

31. *Sidhom*, 144 F. Supp. 2d at 41 (“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.”).

32. See, e.g., *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.”

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.

United States v. Dyck, 287 F. Supp. 2d 1016, 1020 (D. N.D. 2003).

33. *Koon*, 518 U.S. at 92.

34. *Dyck*, 287 F. Supp. 2d at 1019.

35. Specifically, federalism was enshrined in the U.S. Constitution by enumerating the powers of the federal government, see U.S. CONST. art. 1, §8; and by declaring that all other powers were “reserved to the States respectively, or to the people.” U.S. CONST. amend X.

36. See, e.g., THE FEDERALIST NO. 45, at 292-93 (James Madison).

37. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton).

38. See U.S. CONST. art. 1, §8, cl. 6 (counterfeiting); U.S. CONST. art. 1, §8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations); U.S. CONST. art. 3, §3 (treason).

39. See, e.g., RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983).

40. *Cohens v. Virginia*, 19 U.S. 264, 426, 428 (1821).

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

42. *Id.*

43. At times, both liberals and conservatives have expressed such concerns about particular government policies. 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); Sanford H. Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1247 (1995) [hereinafter Kadish,

In the present context, mandatory minimums represent a federal encroachment on state prerogatives and the implementation of policies that may conflict with local choice. For instance, most drug and weapons crimes amenable to federal mandatory minimums are actually prosecuted in state courts pursuant to state laws carrying far lower sentences.⁴⁴ Yet it is hardly disputed that the possibility of severe punishment influences the choice of whether to bring a case in federal or state court. This raises the specter of abusive forum shopping where a federal prosecution is pursued not because the case raises a special national interest, but because it jacks up the potential punishment.

Federal mandatory minimums also impinge on another core benefit of federalism, namely, pluralistic decision-making and local choice.⁴⁵ In a diverse society like ours, citizens in different jurisdictions are likely to have distinct views on the substance and process of criminal justice. State and local decision-makers tend to be more attuned to such preferences, given their closeness to constituents and the greater opportunity of citizens to be involved in state and local government. Unencumbered by national dictates, states may even become laboratories of experimentation in criminal justice. In the oft-repeated words of Justice Brandeis, “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.”⁴⁶ Should individuals find unbearable the local or state approach to crime and punishment, federalism allows them to vote with their feet, so to speak, by moving to another county or state. Federal mandatory minimums can overwhelm such decision-making on issues of criminal justice, effectively and powerfully nullifying state and local judgments. For example, the federal government may effectively override a state’s decision that certain drug-related conduct should not be a crime in the first place or should be subject to far more lenient punishment.⁴⁷

2. FEDERAL MANDATORY MINIMUMS AND OVER-CRIMINALIZATION

As a conceptual matter, federal mandatory minimums can be viewed as a particularly troubling iteration of larger trends: over-criminalization and, more specifically, over-federalization. Over-criminalization refers to the constant 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.⁴⁸ The phenomenon is hardly new. In a 1967 critique of extending the criminal sanction, Sanford Kadish warned that “until these problems of over-criminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue.”⁴⁹ He was right. In the ensuing decades, lawmakers have relentlessly added to American penal codes, despite equally relentless criticisms by scholars and public interest groups.⁵⁰

Although much of this expansion has occurred at the state level,⁵¹ the most virulent form of over-criminalization – and certainly the most criticized⁵² – has occurred in the federal system. Congress has slowly but surely obtained a general police power to enact virtually any offense, adopting repetitive and

Overfederalization].

44. See, e.g., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbls. 5.17.2004, 5.38.2008, 5.44.2004, available at <http://www.albany.edu/sourcebook/>; Wallace, *supra* note 12; United States v. Snyder, 954 F.Supp. 19 (D. Mass. 1997).

45. See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987).

46. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

47. Consider, for instance, federal efforts to nullify California’s medical marijuana law and Oregon’s assisted suicide law. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Gonzalez v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

48. See generally Luna, *Overcriminalization*, *supra* note 10.

49. 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).

50. See, e.g., Luna, *Overcriminalization*, *supra* note 10, at 703–11, 712 nn.48-51.

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

52. See, e.g., ABA CRIMINAL JUSTICE SECTION, *THE FEDERALIZATION OF CRIMINAL LAW* 59–78 (1999) (providing bibliography).

overlapping statutes, criminalizing behavior that is already well-covered by state law,⁵³ creating a vast web of regulatory offenses,⁵⁴ and extending federal jurisdiction to all sorts of deception⁵⁵ or wrongdoing⁵⁶ virtually anywhere in the world.⁵⁷ At last count, there were about 4,500 federal crimes on the books,⁵⁸ with the largest portion instituted over the past four decades.⁵⁹

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.⁶⁰ Indeed, mandatory minimums constitute a species of over-criminalization and over-federalization.⁶¹ They are part of a punishment spree of unprecedented proportions that has helped make America the single most punitive Western nation and the world's imprisonment leader.⁶² Since 1980, the federal prison population has increased tenfold, for instance, while the average federal sentence has doubled and the average federal drug sentence has tripled, due in no small part to mandatory minimums.⁶³

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

53. One example is Congress's enactment of a federal “carjacking” statute. See 18 U.S.C. § 2119 (2000) (imposing federal criminal liability on those who take motor vehicles by force, violence, or intimidation); *Commonwealth v. Jones*, 267 Va. 284, 286 (2004) (detailing Virginia's common law definition of robbery, which prohibits the taking of any property of another by violence or intimidation); *Spencer v. Commonwealth*, 42 Va. App. 443, 448 (2004) (“carjacking is a species of robbery”).

54. 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*, 7 HERITAGE FOUND. LEGAL MEM. 1, 3–12 (2003).

55. See 18 U.S.C. § 1001(a)(2) (2000) (criminalizing false statements made pursuant to “any matter” within any branch of the federal government); 18 U.S.C. § 1341 (2000) (proscribing various fraudulent transactions utilizing the Postal Service or private interstate mail carriers); 18 U.S.C. § 1343 (2000) (prohibiting similar fraudulent transactions over interstate wire, radio, and television signals); 18 U.S.C. § 1346 (2000) (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).

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

57. 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).

58. See JOHN S. BAKER, JR., *REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES* (2008), available at http://www.heritage.org/Research/LegalIssues/upload/Im_26.pdf.

59. See ABA CRIMINAL JUSTICE SECTION, *supra* note 52, at 7.

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

61. See, e.g., *Hearing on Over-Criminalization of Conduct/Over-Federalization of Criminal Law before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee*, 111 Cong., 1st Sess. 52-67 (2009) (testimony of Stephen A. Saltzburg on behalf of the American Bar Association).

62. 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*, in 33 CRIME & JUST. 1, 6 (Michael Tonry and David P. Farrington eds., 2006); Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, in 33 CRIME & JUST. 347 (Michael Tonry & David P. Farrington eds., 2006); SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard S. Frase eds., 2001); see also JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

63. See, e.g., Heather C. West & William J. Sabol, *Prisoners in 2007*, BUREAU OF JUST. STAT. BULL., Dec. 2008, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p07.pdf>; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 6.57; U.S. SENTENCING COMMISSION, *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).

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.⁶⁴

This account is supported by other scholars, as well as the reports of legal groups and former federal officials.⁶⁵ Sensationalistic news coverage tends to increase the public salience of crime, generating fear and attendant calls for action.⁶⁶ 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 moral outrage, and most importantly, gives politicians the “tough on crime” credentials that can fill campaign coffers and garner votes at election time.⁶⁷ As Professor Kadish mentioned, the process can be set off by a string of crimes or even a single traumatic episode 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 people to overestimate a perceived threat and to demonize a particular group, and generate a public demand for swift and stern government action.⁶⁸ Although any resulting legislation will almost certainly be touted for its instrumental benefits, the law will serve as a symbolic gesture for politicians and their constituents, expressing condemnation of the relevant act and actors.⁶⁹

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,”⁷⁰ there should be little doubt that American prosecutors see themselves as advocates in a sometimes brutally adversarial process.⁷¹ This role conception is exacerbated by prosecutorial incentive structures, where the success and career prospects of both lead and line prosecutors are typically measured by the rate of convictions and the aggregate amount of punishment.⁷² Naturally, over-criminalization serves this incentive structure. The more crimes on the books and the harsher the punishments, the more power law enforcement can exercise throughout the criminal process.⁷³ By raising the potential punishment through harsh sentencing

64. Kadish, *Overfederalization*, *supra* note 43, at 1248-49.

65. See, e.g., THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 1-12, 30-74 (2008); Rachel Brand, *Making It a Federal Case: An Inside View of the Pressures to Federalize Crime*, 30 HERITAGE FOUND. LEGAL MEM. 1 (2008); Edwin Meese III, *The Dangerous Federalization of Crime*, WALL ST. J., Feb. 22, 1999; ABA CRIMINAL JUSTICE SECTION, *supra* note 52, at 16-17. 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.

Meese, *supra*.

66. Sara Beale’s scholarship has been particularly enlightening on the influence of media (and other non-legal factors) on criminal justice policy. See 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; 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 Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71 (2009) [hereinafter Luna, *Public Imagination*]; 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).

67. See, e.g., Luna, *Overcriminalization*, *supra* note 10, at 719-24.

68. See, e.g., Luna, *Public Imagination*, *supra* note 66, 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).

69. See, e.g., Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 61-72 (2002); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 537-40 (2000); see generally JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1986) (discussing the symbolic politics underlying alcohol prohibition); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (analyzing symbolic politics in the abortion debate).

70. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2007).

71. See, e.g., KAGAN, *supra* note 24, at 61-96; 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).

72. See, e.g., *supra* note 24. Moreover, many young attorneys stay in a prosecutorial 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* note 24, at 208.

73. William Stuntz’s work has been especially insightful on these issues. See, e.g., Stuntz, *Pathological Politics*, *supra* note 10; William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); William J. Stuntz, *The Political*

schemes, for instance, or 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 potent criminal provisions against their opponents at trial. As one former Justice Department official recently said, “[I]t is not surprising that the federal agency charged with preventing, solving, and punishing federal crimes is not aggressively attempting to shrink the federal code.”⁷⁴

This understanding helps explain the rise and persistence of mandatory minimums. Chief Justice William Rehnquist noted that their enactment often does not involve “any careful consideration” of the ultimate effect. Instead, “[m]andatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”⁷⁵ In fact, federal lawmakers have explicitly used the phrase “tough on crime” in their support of mandatory minimums,⁷⁶ with some of the most notorious mandatory minimum 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.”⁷⁷ 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.⁷⁸

Another example comes from the passage of the Anti-Drug Abuse Act of 1986, the law that instituted the crack-powder cocaine sentencing differential and created the basic structure of federal mandatory minimums for drug trafficking.⁷⁹ The driving force behind these provisions was the cocaine overdose of basketball star Len Bias, which triggered a remarkable level of media attention and a moral panic about crack cocaine. Tellingly, the bill was enacted without hearings or input from the judiciary. “Much of the [standard] procedure was circumvented,” a House staff member recounted. “In essence, the careful, deliberate procedures of Congress were set aside in order to expedite passage of the bill.”⁸⁰ The legislation was a blatant attempt to appease an electorate that was distraught over the death of a gifted athlete and hysterical about an alleged epidemic of crack.⁸¹ A *Washington Post* editorial suggested that in the prevailing *can-you-top-this atmosphere*, “if someone offered an amendment to execute pushers only after flogging and hacking them, it probably would have passed.”⁸² Ironically, it was later determined that Bias died from ingesting powder cocaine, not crack.⁸³ But by then, it didn’t matter.

Constitution of Criminal Justice, 119 HARV. L. REV. 780 (2006).

74. Brand, *supra* note 65, at 1-2.

75. Hon. William H. Rehnquist, *Luncheon Address*, in U.S. SENTENCING COMMISSION, DRUGS AND VIOLENCE IN AMERICA 283, 287 (1993).

76. See, e.g., 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).

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

78. See Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 102, 82 Stat. 1213, 1223-24; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 1005, 98 Stat. 2028, 2138; Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 459 (1986); Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998); see also Angelos, 345 F. Supp. 2d at 1233-35 (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).

79. Pub. L. No. 99-570, 100 Stat. 3207 (1986). 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).

80. Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition, Politics and Reform*, 40 VILLANOVA L. REV. 383, 408 (1995).

81. See, e.g., Wallace, *supra* note 12, at 159 (quoting a lawmaker as saying, “I think it comes down to one young man not dying in vain.”).

82. *Id.* at 159 n.30.

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

3. THE PROSPECTS FOR REFORM

This general political dynamic has stymied efforts to reform mandatory minimums in Congress in the past. Even during periods of low crime, the public has expressed fear of victimization and a belief that criminals are not receiving harsh enough punishment. Lawmakers have responded in kind with new crimes and stiffer penalties, including mandatory sentences. Conversely, any reform efforts have carried the danger of being labeled “soft on crime.” As a result, no federal mandatory minimum has been repealed in the last forty years, with harsh sentencing provisions remaining politically popular well into the new millennium. As one U.S. Attorney noted in 2007, “[E]very Administration and each Congress on a bipartisan basis has ... supported mandatory minimum sentencing statutes for the most serious of offenses.”⁸⁴

There are, however, some promising signs. The need for reform has been recognized by practitioners, researchers, public interest groups, and prominent legal organizations like the American Bar Association and the American Law Institute.⁸⁵ Likewise, a litany of federal judges has voiced their dismay at the excessive punishment they are required to dole out,⁸⁶ including Chief Justice Rehnquist, Justice Kennedy, and Justice Stephen Breyer.⁸⁷ But the most interesting and potentially influential opposition to mandatory minimums has come from the political branches and conservative commentators. At various times in their careers, the past three Presidents have all doubted the wisdom of long mandatory sentences.⁸⁸ Likewise, federal lawmakers and even a former federal “Drug Czar” have disputed the justice of mandatory minimums.⁸⁹ In a much publicized case involving a long mandatory sentence, dozens of former federal prosecutors and high-ranking Justice Department officials (including former U.S. Attorneys General and a former Director of the F.B.I.) filed amici curiae briefs *in support of the defendant*.⁹⁰ After the punishment was upheld on appeal and certiorari was denied, a conservative federal lawmaker “question[ed] some severe mandatory 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

84. Richard B. Roper, *Mandatory Sentencing*, 19 FED. SENT’G REP. 351, 352 (2007).

85. See, e.g., Tonry, *Mostly Unintended Effects*, *supra* note 6, at 65-66.

86. See, e.g., *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 34-66 (2009) (statement of Judge Julie E. Carnes, Chair of the Criminal Law Committee of the U.S. Judicial Conference), available at http://judiciary.house.gov/hearings/printers/111th/111-48_51013.pdf; 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); Hon. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311 (2004); Hon. 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); Hon. Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001); MOLLY T. JOHNSON & SCOTT A. GILBERT, FEDERAL JUDICIAL CENTER, 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 90 (amici brief in opposition to mandatory minimum sentence signed by, *inter alia*, group of former federal judges); Erik Luna, *Drug Exceptionalism*, 47 VILLANOVA L. REV. 753, 799-802 nn.218-229 (2002) (providing citations to judicial criticisms of drug-related sentences).

87. See Breyer, *supra* note 7; Kennedy, *supra* note 22; Rehnquist, *supra* note 75, at 287; see also Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California, U.S.*, L.A. TIMES, Feb. 4, 2010.

88. See Remarks of Senator Barack Obama: Howard University Convocation, Sept. 28, 2007, 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 of President-elect George W. Bush); “Interview of the President by Rolling Stone Magazine,” Nov. 2, 2000 (comments of President William J. Clinton), available at <http://www.clintonfoundation.org/legacy/20700-president-interviewed-by-rolling-stone-magazine-a.htm>. Moreover, President George H.W. Bush expressed opposition to mandatory minimums in 1970 while serving in Congress. 116 Cong. Rec. H33314 (Sept. 23, 1970), reprinted in 3 FED. SENT’G REP. 108 (1990) (Rep. George H.W. Bush)

89. See, e.g., Rep. Bob Inglis, *Statement for Press Release – “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. 1-2 (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); Hatch, *supra* note 6, at 192-95.

90. See Brief Amici Curiae of 145 Individuals Including Former United States Attorneys General, et al., *Angelos v. United States*, No. 06-26 (U.S. Sup. Ct., Oct. 27, 2006), cert. denied, 549 U.S. 1077 (Dec. 4, 2006); *United States v. Angelos*, 433 F.3d 738, 738-39 (10th Cir. 2005) (listing amici curiae); *Angelos*, 345 F. Supp. 2d at 1256, 1256 n.136 (same). In the interest of full disclosure, I served as appellate counsel for Mr. Angelos. Erik Luna & Troy L. Booher, *Mandatory Minimums Sound Good But Are Unjust* (op-ed), DESERET MORNING NEWS, Dec. 21, 2006.

imposing unreasonably harsh sentences.”⁹¹ A few conservative commentators have spoken out against mandatory minimums as well.⁹² Most importantly, the support of the American public for mandatory minimums has waned in recent times.⁹³

Given changes in the Presidency and Congress, it is now appears that considerable interest exists in moving beyond a verbal critique of these laws to actually enacting statutory reforms. In fact, we may be approaching a sort of “tipping point” on mandatory minimums. Early indications include the formation of a Justice Department-led working group to examine federal sentencing and correction policy and to make recommendations for reform; the bipartisan support for Senator Jim Webb’s “National Criminal Justice Commission,” which would conduct a comprehensive review of the criminal justice system;⁹⁴ and the Senate’s passage of the Fair Sentencing Act of 2009, which would eliminate the mandatory minimum for simple crack possession and reduce the sentencing disparity between crack and powder cocaine.⁹⁵ Needless to say, Congress’s direction to this body to submit a comprehensive report on mandatory minimum sentencing seems to bode well for reform efforts.⁹⁶

My preference would be for federal lawmakers to eliminate mandatory minimums in one-fell swoop. But given the aforementioned reality that Congress has yet to repeal a contemporary mandatory minimum, I fully recognize that every journey must begin with a first step. In a forthcoming article co-authored with Judge Paul Cassell, we propose some reforms that are more minimalist in nature.⁹⁷ The first proposal contains two parts: (1) a legislative authorization for the U.S. Sentencing Commission to set guidelines ranges where it deems them to be appropriate, without automatically being required to peg guidelines to existing mandatory minimums; and (2) a broader and more detailed “safety valve” provision that would permit federal judges to depart downward whenever the guidelines provide for the possibility of a lower sentence than a mandatory minimum. We also offer several changes that could build upon initial reforms, such as the elimination of the stacking function of 18 U.S.C. § 924(c), converting it into a true recidivist statute, and a limited revival of the U.S. Parole Commission to review sentences for inmates serving extremely long prison terms. An updated draft of the article will be submitted to the U.S. Sentencing Commission in a few weeks, and, of course, we would be happy to discuss these proposals with the Commissioners at their convenience.

But whatever the vehicle, the federal scheme of mandatory minimums needs to be reformed. To sum up my views, let me borrow a line from former federal Judge John Martin.⁹⁸ Mandatory minimums are over-inclusive, they’re unfair, and they can even be draconian. They transfer sentencing power from neutral judges to partisans in the criminal process. They make for poor criminal justice policy and raise all sorts of constitutional problems. Other than that, they’re a great idea.

Again, thank you very much for the invitation to testify today.

91. Robert Gehrke, *Drug Deals Costly: 55 Years; U.S. Top Court Refuses to Hear Utah’s Appeal*, SALT LAKE TRIB., Dec. 5, 2006 (quoting Sen. Orrin Hatch).

92. See, e.g., Marc Levin, *What Conservatives Are Saying About Criminal Justice Reform*, TEXAS PUBLIC POLICY FOUNDATION: POLICY PERSPECTIVE, at 2, Jan. 2010 (quoting Ed Meese, former U.S. Attorney General and Senior Fellow at the Heritage Foundation), available at <http://www.texaspolicy.com/pdf/2010-01-PP02-conservativesaresaying-ml.pdf>; *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 66-70 (2009) (statement of Grover Norquist, President, Americans for Tax Reform), available at http://judiciary.house.gov/hearings/printers/111th/111-48_51013.pdf; *id.* at 117-19 (statement of David A. Keene, Chairman, American Conservative Union).

93. See, e.g., *Omnibus Survey*, *supra* note 26; Julian V. Roberts, *Public Opinion and Mandatory Sentences of Imprisonment: A Review of International Findings*, 20 CRIM. JUST. & BEHAV. 1 (2003); PETER D. HART RESEARCH ASSOCIATES, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM (Feb. 2002).

94. The National Criminal Justice Commission Act of 2009, S.714.

95. The Fair Sentencing Act of 2009, S. 1789.

96. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, 123 Stat. 2190, § 4713 (2009).

97. Paul Cassell & Erik Luna, *Mandatory Minimalism*, 32 CARDOZO L. REV. – (forthcoming Sept. 2010).

98. See Martin, *supra* note 86, at 317.