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U.S. SENTENCING COMMISSION TESTIMONY

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“Theories of Punishment and Mandatory Minimum Sentences”

Introduction

My name is David Muhlhausen. I am Senior Policy Analyst in the Center for Data Analysis at The Heritage Foundation. I thank Chairman William K. Sessions and the rest of the Commission for the opportunity to testify today. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.¹

The major points of my testimony are the following:

- Congress and the U.S. Sentencing Commission need to place a special emphasis on just deserts and proportionality when considering the use of mandatory minimum statutes;
- Some crimes are so heinous and inherently wrongful that legislatures have the moral responsibility to establish sentencing floors that do not involve probation or fines; and.
- Many mandatory minimum sentencing statutes are generally incompatible with the operation of the U.S. Sentencing Guidelines.

Justifications for Criminal Punishment

The U.S. Sentencing Commission, federal judges, and Congress should consider the purpose of the federal criminal justice system when considering mandatory minimum sentences. While Congress has the authority to establish mandatory minimum sentencing laws, the U.S. Sentencing Commission and Congress need to consider whether some of these laws conflict with the U.S. Sentencing Guidelines and the doctrine of just deserts.

In general, there are four justifications for criminal sanctions: deterrence, incapacitation, rehabilitation, and just deserts. Since the American Founding, the influence of the four justifications of criminal punishment has varied.² While closely aligned with utilitarianism, the deterrence and incapacitation models seek to reduce future crime. Deterrence seeks to make crime more costly, so less crime will occur. Incapacitation does not try to change behavior through raising costs; it simply removes the offender from society. The criminal behind prison bars cannot harm those of us on the outside. At its modern extreme, the rehabilitative model assumes crime is determined by social forces and not the decisions of criminals. The just deserts model asserts that punishments should be commensurate with the moral gravity of offenses.

Deterrence. General deterrence theory postulates that increasing the risk of apprehension and punishment in society deters members of society as a whole from committing crime. Specific deterrence targets the individual. Thus, punishment is intended to deter members of society from committing crime and the specific criminal from recidivating.

Cesare Beccaria proposed that the most effective way to administer punishment is to increase its certainty, swiftness, and severity.³ Making sanctions immediate, certain, and severe sends a message to society that the crime will not be tolerated. Individuals respond to deterring incentives.⁴

According to the deterrence model, criminals are no different from law-abiding people. Criminals “rationally maximize their own self-interest (utility) subject to constraints (prices, incomes) that they face in the marketplace and elsewhere.”⁵ Increasing the certainty, swiftness, and severity of punishment will result in the utilitarian goal of reduced crime. Under this utilitarian model, reducing crime is the most important factor in setting punishments.

Incapacitation. While based on utilitarianism-like deterrence, the incapacitation model does not require any assumptions about the criminal’s rationalism or “root causes” of the criminal’s behavior. Incarceration is beneficial because the physical restraint of incarceration prevents the commission of further crimes against society during the duration of the sentence. Under this model, reducing crime is the most important factor in setting punishments.

Rehabilitation. The rehabilitative model had its greatest effect on criminal justice policy during the 1960s and 1970s. The rehabilitative model assumes that society is the “root cause” of criminality.⁶ Under this model, crime is predominately a product of social factors. Consequently,

criminal behavior is determined by societal forces—such as poverty, racial discrimination, and lack of employment opportunities—so the object of criminal justice is to mitigate or eliminate those harmful forces. Because structural defects in society cause crime, criminals deserve rehabilitation, not punishment.

In recently years, supporters of the rehabilitation model have taken the utilitarian perspective that correctional treatment programs can successfully reduce crime, so lengthy incarceration sentences are not necessary for reducing crime.⁷ However, while rehabilitation is an important goal of criminal punishment, it cannot come at the expense of deterrence, incapacitation, and just deserts.

A criminal justice system that is overly reliant on the rehabilitative ideal will necessarily lead to wide disparities in sentences for similar offenses based on the perceived rehabilitative capacity of individual criminals. Accordingly, “two persons who have committed precisely the same crime under the precisely the same circumstances might receive very different sentences, thereby violating the offenders’ and our sense of justice.”⁸ Such an approach led to the indeterminate sentencing systems that federal and state governments had used being largely abandoned due to the widespread view that they were too lenient and unjust.

Just deserts. Under the just deserts (“retribution”) model, the commission of a crime is itself sufficient justification for punishment. Regardless of utilitarian benefits and root causes, the moral gravity of the offense validates punishment. The amount of punishment to be administered is guided by proportionality, with minor crimes receiving more lenient punishments and more serious crimes receiving harsher punishments. Thus, the level of punishment is determined by the seriousness of the crime. Even if punishment fails a utilitarian cost-benefit analysis, punishment is still morally justified. As political scientist James Q. Wilson explained:

The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault—these acts are destructive of the very possibility of society and affronts to the humanity of their victims. Parents do not instruct their children to be law abiding merely by pointing to the risks of being caught.⁹

The Rise of Determinate Sentencing

During the 1970s, indeterminate sentencing began to lose favor for several reasons.¹⁰ First, indeterminate sentencing allowed judges and parole boards to become too lenient in their handling of convicted criminals at the expense of public safety. Justifiably, the public becomes outraged when serious and violent offenders are initially treated leniently and then proceed to commit further heinous crimes.

Second, indeterminate sentencing allowed for the uneven application of criminal punishments for similar offenses and similar offenders.¹¹ A 1977 study of sentences meted out by Virginia state district court judges was influential in demonstrating the sentencing disparities.¹² In this study, 47 judges were given identical descriptions of five legal cases. While the judges tended to agree on the same verdicts for each case, they administered widely varying sentences. Similarly, a 1988 study of federal courts found that white collar offenders convicted of similar offenses received significantly different sentences in different courts.¹³

For different reasons, a general consensus formed that disparities in sentencing—whether the result of too much leniency for serious crimes or the uneven administration of sentences for similar cases—undermined equal treatment under the law. Wide discretion at sentencing time was perceived to undermine the rule of law.

Third, the medical model of rehabilitation, upon which indeterminate sentencing was largely based, did not work. Under the rehabilitation model, indeterminate sentencing granted judges and parole boards tremendous discretion in determining the nature and duration of sentences. The goal of tailoring treatment to the characteristics of offenders resulted in widely different sentences that generated a sense of unfairness by the general public.

These events led to the creation of the U.S. Sentencing Commission,¹⁴ the determinate sentencing system created by the U. S. Sentencing Guidelines, and the increased prevalence of mandatory minimum sentences set by statute.

Sentencing Guidelines. The concern over high crime rates and a failed rehabilitative model of corrections led the federal government to reform its correctional system. In 1984, the U.S. Congress passed the Comprehensive Crime Control Act.¹⁵ Included within the Comprehensive Crime Control Act was the Sentencing Reform Act. Primarily sponsored by Senators Edward M. Kennedy (D–MA.) and Strom Thurmond (R–NC), the Sentencing Reform Act made major changes to federal sentencing and parole policies by replacing indeterminate sentences with definite terms of imprisonment. Early releases through parole were abolished and replaced with “supervised release.” The determinate sentencing structure of the Sentencing Guidelines rejects the rehabilitative model’s notion that the rehabilitative capacity of offenders should determine sentence lengths.¹⁶

The wide and seemingly arbitrary indeterminate sentences of judges were replaced with determinate sentencing guidelines created by the U.S. Sentencing Commission. The new sentencing system took effect on November 1, 1987. Offenders sentenced for crimes committed on or after November 1, 1987, are administered under the determinate sentencing system and are not eligible for parole.¹⁷ Under the Sentencing Guidelines offenders sentenced to prison were required to serve at least 85 percent of their sentences with the possibility of early release based

on good behavior for the remaining 15 percent of the sentence.¹⁸ Before determinate sentencing, federal offenders only served, on average, 58 percent of their prison sentences.¹⁹

Appropriately, the Sentencing Guidelines target high-rate offenders with harsher penalties than offenders with less serious criminal histories. Under the goal of just deserts, the Sentencing Guidelines make a strong effort to ensure that the severity of punishment corresponds with the seriousness of the crime and the culpability of the offender. The ranges under the Sentencing Guidelines increase or decrease based on the “aggravating and mitigating factors that differentiate degrees of harm of different offenses and the varying culpability in each case.”²⁰

Under limited circumstances, judges may “depart” from the guidelines. If there are aggravating or mitigating factors that are not accounted for by the Sentencing Guidelines, sentencing judges can depart from the established minimum and maximum sentences. Such departures can be below the minimum or above the maximum sentence. Departures allow sentencing judges to tailor sentences when the actual sentencing ranges offered by the Sentencing Guidelines would not fulfill the purpose of the guidelines.²¹

Did the application of the Sentencing Guidelines increase incarceration lengths? From November 1987 to November 1992, the average time served in prison by federal felons increased more than twofold.²² A 1999 study examined the impact of the sentencing guidelines on inter-judge disparity in average length of prison sentences.²³ Prior to the implementation of the guidelines (1986–1987), the average expected difference in sentence lengths meted out by federal judges was 4.9 months (17 percent).²⁴ After the adoption of the guidelines (1988–1993), the average sentence length disparity fell to 3.9 months (11 percent).²⁵

Commissioned by the U.S. Sentencing Commission, a 1997 study by Peter H. Rossi and Richard A. Berk compared the public’s views on punishment to the middle point of the sentence length ranges set by the Sentencing Guidelines.²⁶ This study revealed that the public’s views on incarceration sentence lengths were in substantial agreement with the sentence lengths recommended by the Sentencing Guidelines.²⁷

Further, while the public was in substantial agreement with the guidelines on most issues, according to Rossi and Berk, the public evidently did not fully agree with federal law’s emphasis on drug quantities and differential treatment of crack cocaine compared to powdered cocaine.²⁸ Alternatively, the public supported longer sentences for marijuana trafficking than were provided for by the Sentencing Guidelines.²⁹ The public thought the guidelines’ sentences were too harsh for environmental crimes, civil rights violations, and some bribery and extortion crimes.³⁰

However, former federal judge and current Professor of Law at the University of Utah Professor Paul G. Cassell provides two explanations for why the public’s view on prison sentences may be

harsher than the actual sentences imposed under the Sentencing Guidelines.³¹ First, Professors Rossi and Berk used the mid-point of the applicable Sentencing Guideline range, while the majority of judges administer sentences toward the bottom of the applicable range.³² Second, the methodology used by Professors Rossi and Berk does not account for the prevalence of downward departures. Professors Jawjeong Wu of the University of Nebraska at Omaha and Cassia Spohn of Arizona State University found that a considerable percentage of federal sentences include downward departures in U.S. District Courts.³³ From 1998 through 2000 in the District of Minnesota, the District of Nebraska, and the District of Southern Iowa, 41 percent of convicted defendants received downward departures; 28 percent and 13 percent of convicted defendants received reduced sentences through substantial assistance departures and regular downward departures, respectively.³⁴

An advisory role only. In *United States v. Booker* (2005), the U.S. Supreme Court struck down the requirement of the Sentencing Guidelines that federal district judges impose a sentence within the guidelines' range. Federal district judges must only consider the Sentencing Guidelines but can sentence outside of the recommended ranges. Hence, the Sentencing Guidelines have become advisory. The Supreme Court also gave federal appeals courts the power to review the reasonableness of criminal sentences.³⁵ The Court's decision, however, left mandatory minimum statutes alone.

Not only does *United States v. Booker* have the potential to eviscerate the determinate sentencing system created by the Sentencing Reform Act, but this decision may also be increasing disparities in the sentencing of similar offenders. A recent analysis of the impact of *United States v. Booker* on sentencing disparities by the U.S. Sentencing Commission found that the differences in sentence length for black and white male offenders have "increased steadily" since the Court's decision.³⁶

These results should be interpreted with caution, however, because the Sentencing Commission's data do not allow for any analysis to control for "the violence in an offender's criminal past, information about crimes not reflected in an offender's criminal history score as calculated under the sentencing guidelines, and information about an offender's employment record."³⁷ Further, "judges make decisions when sentencing offenders based on many legal and other legitimate considerations that are not or cannot be measured" by the Sentencing Commission.³⁸

Mandatory minimum statutes. Mandatory minimum laws establish minimum sentences for particular offenses that only allow judges to administer sentences at or above the legislated minimum sanction. Mandatory maximum and minimum sentences are two of the most stringent devices Congress can use to limit judicial discretion. Mandatory minimum sentences established by Congress date back to the first criminal statute of the federal government, the Crimes Act of

1790.³⁹ For example, the Act directed sentences of capital punishment when treason, murder, and piracy occurred under the federal government's jurisdiction.⁴⁰

Until 1831, the criminal laws governing Washington, D.C. depended on the part of town in which offenses occurred. Ordinary street crimes that occurred in the city were handled in federal court that applied Maryland or Virginia law based what part of the town the crimes occurred.⁴¹ This dual system of criminal laws led to disparities in sentencing. For example, a crime in Alexandria would call for death, while the very same crime committed in Georgetown would warrant only a fine and whipping.⁴² Recognizing this disparity, in 1831 Congress adopted a uniform criminal code for the District of Columbia.

During the 1800s, the use of mandatory minimum sentences became increasingly rarer than it had been during America's Founding era.⁴³ Mandatory minimum sentences returned to prominence in 1956 when Congress passed the Narcotics Control Act, which created minimum incarceration sentences for certain drug trafficking charges.⁴⁴ However, Congress retreated somewhat from this approach with the enactment of the Comprehensive Drug Abuse Prevention and Control Act.⁴⁵

While the U.S Sentencing Commission was formulating the sentencing guidelines during the mid-1980s, Congress enacted a series of mandatory minimum sentences, especially for narcotics offenses.⁴⁶ Before the 1980s, mandatory minimum sentences were usually reserved for a limited number of serious crimes, such as first degree murder.⁴⁷ However, during the 1980s, Congress "significantly altered sentencing policy by focusing on drug trafficking and distribution offenses and by tying the minimum penalty to the *quantity* of drugs involved in the offense."⁴⁸ For example, two tiers of mandatory minimum sentences were established for first-time traffickers in powder and crack cocaine:

- A 5-year minimum prison sentence for individuals convicted of trafficking 5 grams of crack cocaine or 500 grams of powder cocaine, and
- A 10-year minimum prison sentence for individuals convicted of trafficking 50 grams of crack cocaine or 5,000 grams of powder cocaine.

The Anti-Drug Abuse Act of 1986 (ADAA) created five- and 10-year mandatory minimum sentences based on the weight of various types of drugs found in a defendant's possession.⁴⁹ The ADAA allows for judges to depart from the mandatory minimum sentences when defendants provide substantial assistance to prosecutors.

A 2007 Congressional Research Service report identified 240 federal mandatory minimum statutes requiring a minimum prison sentence, death sentence, or fine.⁵⁰ While drug trafficking

mandatory minimum statutes receive the most attention, most mandatory minimum statutes are for violent and other types of offenses.

According to the U.S. Sentencing Commission, there has been a substantial increase in time served by federal drug offenders following the implementation of the Sentencing Guidelines and the mandatory minimums established under the ADAA.⁵¹ The average prison sentence for federal drug traffickers in 1991 was over two and a half times longer than the average prison sentence in 1985.⁵² During the last half of the 1990s, the average sentences declined by 20 percent compared to earlier in the decade.⁵³ This declining trend resulted from an increased prevalence of less serious offenders and an increase in mitigating factors being considered in cases sentenced.⁵⁴

Avoiding mandatory minimums. There are two methods for judges to avoid imposing mandatory minimum sentences. First, offenders charged with certain mandatory minimum sentences can potentially receive lower sentences by offering “substantial assistance” to prosecutors.⁵⁵ When a defendant provides substantial assistance in the investigation or prosecution of a person who has committed an offense, prosecutors can file a motion for the cooperating defendant to receive a sentence below the statutory minimum.

Second, recognizing that mandatory minimum drug trafficking laws were resulting in low-level, non-violent, and first-time drug offenders receiving lengthy sentences,⁵⁶ Congress in 1994 created the “safety valve.”⁵⁷ Under this provision, the least culpable offenders in drug trafficking cases receive carefully prescribed reductions in incarceration sentences based on mitigating factors.

The 2007 Congressional Research Service report on mandatory minimum statutes identified the statutes that have “safety valves” available for unique cases that do not warrant harsh sentences.⁵⁸ A total of 11 safety valve provisions were identified for the 240 statutes. Ten of the safety valve provisions are for drug-related offenses, while the remaining safety valve provision is for failure to comply with the Packers and Stockyards Act of 1921.

100-to-1 Ratio. In recent years, the 100-to-1 powder-to-crack cocaine ratio established by the five- and 10-year mandatory minimum statutes has been the subject of much debate. In order to receive an equivalent five-year minimum sentence, one needs to possess 100 times as much powder cocaine as crack cocaine. Possessing five grams of crack cocaine triggers the five-year minimum sentence, while an offender would need to possess 500 grams of powdered cocaine to receive the same sentence length.

In fiscal year 2009, 16,052 (64.4 percent) of all the 24,918 offenders convicted of federal drug offenses received five- or 10-year mandatory minimum sentences.⁵⁹ A total of 6,033 offenders were sentenced for powdered cocaine offenses with 4,613 (76.5 percent) of these individuals receiving five- or 10-year mandatory minimum sentences.⁶⁰ A similar pattern occurred with

crack cocaine. A total of 5,684 offenders were sentenced for crack cocaine offenses with 4,566 (80.4 percent) of these individuals receiving five- or 10-year mandatory minimum sentences.⁶¹

For fiscal year 2009, the mean length of imprisonment for powder cocaine convictions is 86.7 months with a median of 63 months.⁶² The mean length of imprisonment for crack cocaine convictions is 114.8 months with a median of 96 months.⁶³

For all drug offenders convicted under mandatory minimum sentencing statutes, 35.1 percent received “safety valve” reduced sentences.⁶⁴ The percentage receiving safety valve reductions for powdered cocaine was 44.2 percent, while only 12.4 of crack cocaine offenders received safety valve reductions.⁶⁵

The case for mandatory minimum statutes. Setting aside for a moment the special circumstances presented by a strict guideline system, some mandatory minimum statutes can be justified based on the nature of the crime (such as inherently wrongfulness or depravity, harmfulness to victims, and dangerousness to society) and the proportionality of the minimum sentence to the nature of each crime. Mandatory minimum sentences can be supported for several reasons. First, mandatory minimum sentences that establish long incarceration or death sentences for very serious and violent crimes can be justified based solely on the doctrine of just deserts. While utilitarian principles of deterrence and incapacitation can add additional support, some crimes are so heinous that legislatures have a moral responsibility to establish sentencing floors that do not involve probation or fines. According to the Constitution Project’s Sentencing Initiative,

There is no constitutional rule or immutable principle of sound sentencing policy that requires that the bottom of every sentencing range be set at probation. Moreover, there are indisputably some offenses, such as forcible rape or premeditated murder, for which, by any standard, the minimum legally allowable punishment should include a term of imprisonment.⁶⁶

For example, Congress has mandated death or imprisonment for life for those convicted of first-degree murder of the President of the United States or a Member of Congress.⁶⁷ These harsh sentences are justified because they correspond to the gravity of the offenses, including their dangerousness to American society. Less serious offenses assigned harsh mandatory minimum statutes are harder to justify based on just deserts. As the Constitution Project has noted, “mandatory minimum sentences are blunt instruments ill-suited to offense types like economic crimes where the relative severity of particular offenses and relative culpability of individual offenders is hard to gauge.”⁶⁸

Second, appropriate mandatory minimums that establish long prison sentences support the criminal justice system’s goals of deterrence and incapacitation. Incentives matter; Raising the

costs of crime will deter a significant number of crimes and protect potential victims. Further, the incapacitation effect prevents offenders from committing crimes against those outside of prison.

Third, mandatory minimum sentences, *if fairly and even-handedly applied*, can potentially reduce disparities in sentences. If judges tend to impose sentences at the minimum required by the mandatory statutes, then similar offenders convicted of the same offense should receive the same sentences.

The inadvisability of many mandatory minimum statutes in the context of the U.S. Sentencing Guidelines. While Congress has the legitimate power to establish mandatory minimum sentences, there are several potential problems with these laws. First, many mandatory minimum sentences are inconsistent or in conflict with the Sentencing Guidelines.⁶⁹ “With tough guidelines in place,” according to Professor Cassell, “mandatory minimum sentences become largely redundant at best and harmful at worst.”⁷⁰ And as noted by the Constitution Project, “mandatory minimum sentences are generally incompatible with the operation of a guidelines system.”⁷¹

Second, mandatory minimum sentences often prevent downward departures in worthy cases. Some argue that the substantial assistance provision benefits high-level drug offenders more than it benefits low-level drug offenders because more deeply involved (and culpable) drug offenders have more information to trade with prosecutors.⁷² Without adequately designed safety valves, the “‘no escape’ feature of the mandatory minimums can lead to possible injustices in particular cases.”⁷³ Correctly, Congress attempted to remedy this situation for drug offenses with the passage of the Violent Crime Control and Law Enforcement Act of 1994.⁷⁴

While the enactment of the safety valve was an improvement, mandatory minimum statutes still present potential problems. Using three hypothetical scenarios, Professor Cassell considers the question, “What is the just dessert for an offender involved in potentially distributing a small amount of crack cocaine?”⁷⁵ In the first scenario, the five-year (60-month) mandatory minimum for five grams of crack cocaine can be potentially circumvented through the “safety valve” that allows for sentences below the mandatory minimum for non-violent, first-time drug offenders who provide assistance to prosecutors.⁷⁶ The hypothetical offender may receive a sentence as low as 30 months of incarceration.⁷⁷ With the accumulation of good time credits, a few months can be shaved off the 30-month sentence. In the second scenario, the hypothetical drug offender, if youthful and previously convicted of only minor offenses, might qualify for a federal boot camp.⁷⁸ With successful completion of the boot camp, the offender could be transferred to a community corrections facility within six months. Under the third scenario, the same offender might be eligible for an in-patient drug treatment program and, after the successful completion of 500 hours of treatment, qualify for a one-year reduction in his sentence.⁷⁹ Under these alternative

scenarios, the offender could serve much less than the five-year mandatory minimum prison sentence.

While there is debate over the degree to which safety valves help low-level drug offenders escape mandatory minimum sentences, the President of the United States has the ultimate safety valve—his constitutional pardon power. From 1790 to 1850, federal judges were more active in seeking presidential pardons of offenders they sentenced than the judges of today.⁸⁰ Federal judges should be encouraged to reinstitute this practice for truly exceptional and meritorious cases. Their careful, prudent use of this practice would enable the presidency to reinvigorate its constitutional pardon power.

Third, drug mandatory minimum statutes impose harsh sentencing “cliffs” based on what are often small differences between cases.⁸¹ For example, the weight of the controlled substances involved in a case can have a dramatic effect on the sentencing outcome. An offender possessing 4.5 ounces of crack cocaine will likely receive a much lighter sentence than an individual caught with a mere 0.5 ounce more. Unlike the Sentencing Guidelines, mandatory minimum laws do not allow for graduated increases in sentence severity based on the gravity of the offense and the criminal history of the offender.⁸² These cliffs primarily occur with drug trafficking offenses. Sentencing cliffs for firearms possession during the commission of a felony are less problematic. For example, the offender who commits a felony while using a firearm is generally more dangerous and thus more culpable than a similar offender who commits the same felony without a firearm. How much more culpable is a drug offender who possesses a fraction of an ounce more of crack cocaine than another offender?

Fourth, the expectation of disproportionately harsh sentences based on mandatory minimum laws may lead to inconsistent application of the criminal law due to “differential prosecutorial charging and plea bargaining policies.”⁸³ This problem arises because mandatory minimum sentences are “charge-specific” and only apply when prosecutors, who often have a range of charging options, choose to charge offenses that carry mandatory minimum sentences.⁸⁴ Some argue persuasively that mandatory minimum statutes for low-level drug and firearms offenses thus provide prosecutors with too much power.⁸⁵

Fifth, many argue that the 100-to-1 powder-to-crack cocaine ratio is unfair. For example, the Constitution Project concluded that the “100-1 weight ratio upon which guideline and mandatory minimum sentences for powdered and crack cocaine are based is unjustifiable as a matter of policy.”⁸⁶ During the debate over the ADAA, Congress intended the mandatory minimum crack cocaine sentences to be targeted toward traffickers. While possession of five grams of crack cocaine triggers a five-year minimum sentence of incarceration,⁸⁷ the Drug Enforcement Administration estimates that a single crack cocaine user is likely to consume from 3.3 to 16.5 grams of crack cocaine per week.⁸⁸ Based on this estimate, one naturally has to ask how many

simple crack cocaine users are being captured by five-year mandatory minimum sentences originally intended for traffickers?

In response to criticisms of the 100-to-1 ratio, the U.S. Sentencing Commission has recommended that the 100-to-1 ratio be lowered significantly to a ratio of 20-to-1.⁸⁹ Thus, the threshold for the five-year minimum sentences would be raised to 25 grams of crack cocaine. The 20-to-1 ratio was originally proposed by the Reagan Administration in 1986, but rejected by Congress.⁹⁰ The Fair Sentencing Act of 2010 (S. 1789), recently passed by the U.S. Senate, would set the ratio at 18-to-1 and eliminate five-year mandatory minimum sentences for first-time crack cocaine offenders.

Recommendations

First, Congress and the U.S. Sentencing Commission need to place a special emphasis on just deserts and proportionality when considering the use of mandatory minimum statutes. Perhaps a few lessons can be learned from the American Founding. The view of punishment during the Founding era, according to Professor Ronald J. Pestritto of Hillsdale College, “was a complex synthesis of the various approaches, where concerns for public safety and the reform of offenders proceeded from an understanding that punishment—appropriately applied—is inherently just and deserved.”⁹¹ While some criticize this approach as playing into public outrage expressed for certain crimes, “public anger represents a moral judgment and condemnation that is most accurately characterized as moral indignation.”⁹² Moral indignation is an appropriate response to inherently wrongful conduct carried out intentionally with knowledge that the act is unlawful or otherwise wrongful. While the utilitarian goal of lower crime through deterrence and incapacitation is worthwhile, lawmakers need to place special emphasis on the moral gravity of offenses in determining the proportionality of punishment.

Second, Congress and the U.S. Sentencing Commission need to carefully monitor the impact of the U.S. Supreme Court’s 2005 decision in *United States v. Booker*. In order to evaluate the degree to which the federal judiciary holds criminals accountable, Congress and the public need to be aware of the trends in sentencing. To date, the best available evidence suggests that the public’s views on punishment are in substantial agreement with the Sentencing Guidelines.⁹³ However, this evidence was gathered almost 15 years ago. Thus, my final recommendation is for the Sentencing Commission to authorize another study of the public’s views on punishment and the Sentencing Guidelines. Such a study should also include a comparison of public views on the standards of just punishment with specific mandatory minimum sentencing statutes.

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¹Although all opinions expressed and any errors herein are my own, my Heritage colleagues Brian Walsh and Joseph Postell contributed much to this analysis.

²Ronald J. Pestritto, *Founding the Criminal Law: Punishment and Political Thought in the Origins of America*, (DeKalb: Northern Illinois University Press, 2000).

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⁵Paul H. Rubin, "The Economics of Crime" in *The Economics of Crime*, eds. Ralph Andreano and John J. Siefried. (New York: John Wiley and Sons, 1980, p. 13.

⁶J. Robert Lilly, Francis T. Cullen, and Richard A. Ball, *Criminological Theory: Context and Consequences*, 3rd edition (Thousand Oaks, cal.: Sage Publications, 2002).

⁷For an example, see the Justice Policy Institute, *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety*, May 2009, at http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf (May 19, 2010).

⁸James Q. Wilson, *Thinking About Crime*, Revised Edition (New York: Vintage Books, 1983), p. 163.

⁹*Ibid.*, p. 252.

¹⁰James M. Anderson, Jeffrey R. Kling, Kate Stith, "Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines." *Journal of Law and Economics*, Vol. 42, No. 1, (April 1999), pp. 271-307.

¹¹Marvin E. Frankel, "Lawlessness in Sentencing," *University of Cincinnati Law Review*, Vol. 41, No. 1 (1972), pp. 1–53 and Marvin E. Frankel, *Criminal Sentences: Law without Order* (New York: Hill and Wang, 1973).

¹²William Austin and Thomas A. Williams, "A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity," *The Journal of Criminal Law and Criminology* Vol. 68, No. 2 (June 1977), pp. 306–310.

¹³ Stanton Wheeler, Kenneth Mann, and Austin Sarat, *Sitting in Judgment: The Sentencing of White-Collar Criminals*, (New Haven, Connecticut: Yale University Press, 1988).

¹⁴From a constitutional perspective, the U.S. Sentencing Commission is a curious agency. Agencies themselves are not constitutionally problematic, as long as the power they exercise is executive in nature and agency decisions are subject to the control of the President, who is given the executive power in the U.S. Constitution. But the Sentencing Commission is something different. It is charged with promulgating national sentencing guidelines for judges to follow in sentencing. Establishing sentencing guidelines is not an executive function, nor is it purely a judicial function, since the penalty for violating the law should also be established by law, rather than left to the discretion of a judge. In essence, by creating the U.S. Sentencing Commission, Congress transferred its constitutional authority to set criminal sentences to the federal judiciary. The Sentencing Commission is merely another example of our modern administrative state, in which Congress delegates legislative power to politically-unaccountable agencies, where the powers of government are often combined, in violation of the separation of powers.

¹⁵For a historical review of the policy changes regarding sentencing and parole, see A. Keith Bottomley, "Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s," *Crime and Justice*, Vol. 12, (1990), pp. 319–374 and Joan Petersilia, "Parole and Prisoner Reentry in the United States," *Crime and Justice*, Vol. 26, Prisons (1999), pp. 479–529.

¹⁶Paul G. Cassell, "Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)," *Stanford Law Review*, Vol. 56, No. 5 (April 2004), pp. 1017–1048.

¹⁷U.S. Department of Justice, U.S. Parole Commission, *History of the Federal Parole System*, May 2003, p. 2, at <http://www.usdoj.gov/uspc/history.pdf> (July 14, 2008).

¹⁸Carol P. Getty, "Twenty Years of Federal Criminal Sentencing," *Journal of the Institute of Justice and International Studies*, Vol. 7 (2007), pp. 117–128.

¹⁹Paul J. Hofer, Charles Loeffler, Kevin Blackwell, and Patricia Valentino, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, (Washington, D.C.: U.S. Sentencing Commission, November 2004), p. 45.

²⁰*Ibid.*, p. 13.

²¹Paul J. Hofer and Mark Allenbaugh, "The Reasons Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines," *American Criminal Law Review*, Vol. 40, No. 1 (2003), pp. 19–85.

²²Hofer et al., *Fifteen Years of Guidelines Sentencing*, p. vi.

²³Anderson et al., "Measuring Interjudge Sentencing Disparity,"

²⁴*Ibid.*, p. 294.

²⁵*Ibid.*, p. 294.

²⁶ Peter H. Rossi and Richard A. Berk, *Just Punishments: Federal Guidelines and Public Views Compared* (New York, Aldine De Gruyer, 1997).

²⁷*Ibid.*

²⁸*Ibid.*

²⁹*Ibid.*

³⁰*Ibid.*

³¹ Cassell, "Too Severe?," p. 1028.

³²See Frank O. Bowman, "Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines," *St. Louis University Law Journal*, Vol. 44 (2000), pp. 299–358.

³³ Jawjeong Wu and Cassia Spohn, "Interdistrict Disparity in Sentencing in Three U.S. District Courts," *Crime & Delinquency*, Vol. 56, No. 2 (April 2010), pp. 290–322.

³⁴*Ibid.*, Table1, p. 300. Figures based on the author's own calculations.

³⁵*United States v. Booker*, -- U.S. --, 125 S.Ct. 738, 752. For a discussion of *United States v. Booker*, see Paul Rosenzweig, "Sentencing in a Post-Booker World-It's Deja Vu All Over Again," testimony before the American Bar Association and United States Sentencing Commission, February 15, 2005, at

http://www.heritage.org/Research/Testimony/Sentencing-in-a-Post-Booker-World-Its-Deja-Vu-All-Over-Again#_ftnref4 (May 6, 2010).

³⁶United States Sentencing Commission, *Demographic Differences in Federal Practices: An Update of the Booker Report's Multivariate Regression Analysis* (Washington, D.C., March 2010), p. 2.

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³⁸*Ibid.*, p. 4.

³⁹Ronald J. Pestritto, *Founding the Criminal Law*, p. 119 and Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," *Law & History Review*, Vol. 4 (1986), pp. 223-265.

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⁴¹ George Lardner and Margaret Colgate Love, "Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850," *Federal Sentencing Reporter*, Vol. 16, No. 3 (February 2004), pp. 212-221.

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⁴³ Gary T. Lowenthal, "Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform," *California Law Review*, Vol. 81, No. 1 (January 1993), pp. 61-123.

⁴⁴ P.L. 84-728.

⁴⁵ P.L. 91-513. For discussion of 1970 repeal of drug trafficking mandatory minimum laws, see Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal*, (Washington, D.C.: Families Against Mandatory Minimums, undated) at http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf (May 9, 2010).

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⁴⁶Anderson et al., "Measuring Interjudge Sentencing Disparity."

⁴⁷Andrew J. Ashworth, "Sentencing Reform Structures" *Crime and Justice*, Vol. 16 (1992), pp. 181-241.

⁴⁸Orrin 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," *Wake Forest Law Review*, Vol. 28 (1993), pp. 192-193. Emphasis in the original text.

⁴⁹Hofer et al., *Fifteen Years of Guidelines Sentencing*, p. vii.

⁵⁰Heritage Foundation tabulations based on Charles Doyle, "Federal Mandatory Minimum Sentencing Statutes," Congressional Research Service *CRS Report for Congress*, December 27, 2007, pp. 26-33.

⁵¹Hofer et al., *Fifteen Years of Guidelines Sentencing*, p. vii.

⁵²*Ibid.*, p. vii.

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵18 U.S.C. §3553(e).

⁵⁶U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, (Washington, D.C., 1994).

⁵⁷18 U.S.C. §3553(f).

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⁵⁹U. S. Sentencing Commission, "Sourcebook of Federal Sentencing Statistics," Table 43, at

<http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm> (May 10, 2010).

⁶⁰*Ibid.*, Table 43, at <http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm> (May 10, 2010).

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⁶²*Ibid.*, Figure J.

⁶³*Ibid.*

⁶⁴Calculations based on U. S. Sentencing Commission, "Sourcebook of Federal Sentencing Statistics," Table 44, at <http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm> (May 10, 2010).

⁶⁵ Calculations based on U. S. Sentencing Commission, "Sourcebook of Federal Sentencing Statistics," Table 44, at <http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm> (May 10, 2010).

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- ⁶⁹ Cassell, “Too Severe?” and Lowenthal, “Mandatory Sentencing Laws.”
- ⁷⁰ Cassell, “Too Severe?” p. 1044.
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- ⁷⁵ Cassell, “Too Severe?” p. 1022.
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- ⁷⁸ *Ibid.*
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- ⁸⁵ Ian Weinstein, “Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentences,” *American Criminal Law Review*, Vol. 40 (2003), pp. 87–132.
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