

Mandatory Minimums

Erik Luna*

Mandatory minimum sentencing laws eliminate judicial discretion to impose sentences below the statutory minimum. These laws, known as “mandatory minimums,” can produce punishment that is unjust in its disproportionality. Studies have also shown that mandatory minimums are unlikely to reduce future crime. As a practical matter, mandatory minimums transfer sentencing power from judges to prosecutors, who may place unfair pressures on defendants to plead guilty while also distorting the legal framework of separated powers. The laws tend to create sentencing disparities by treating similar offenders differently and different offenders the same. Because of their inflexible nature, mandatory minimums encourage manipulations of the system and even outright deceit. The laws have helped make the United States the most punitive nation in the Western world. For these and other reasons, mandatory minimums should be reformed.

INTRODUCTION

A mandatory minimum sentence requires that an individual convicted of a given offense be incarcerated for at least the minimum term set by statute. These so-called “mandatory minimums” have been the focus of recent calls for change in American criminal justice.¹ Reform efforts have been supported by practitioners, researchers, public interest groups, and prominent legal organizations such as the American Bar Association and the American Law Institute. Likewise, numerous judges have voiced dismay at the excessive punishment that courts are required to impose pursuant to mandatory minimums, including Justice Stephen Breyer, Justice Anthony Kennedy, and the late Chief Justice William Rehnquist.

* Amelia D. Lewis Professor of Constitutional & Criminal Law, Arizona State University Sandra Day O’Connor College of Law. This chapter draws upon a number of previous writings, including: Erik Luna, *Sentencing*, in OXFORD HANDBOOK ON CRIMINAL LAW (Markus Dubber & Tatjana Hoernle eds., 2014); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010); and Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005). Professor Luna wishes to thank Douglas Berman for his thoughtful comments, and Casey Ball and Madeline Mayer for excellent research assistance. The opinions expressed and any mistakes made in this chapter are the author’s alone.

1. For citations to those calling for reform, see Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1–4 (2010); and Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 65–66 (2009).

The most interesting and potentially influential opposition to mandatory minimums has come from government officials and political conservatives. At various times in their careers, the previous four presidents have all doubted the wisdom of long mandatory sentences. Current and former members of Congress, several attorneys general and other high-level law enforcement officials, and even a former “drug czar” have disputed the justice of mandatory minimums. In addition, conservative commentators and organizations (e.g., the American Conservative Union and Americans for Tax Reform) have called for the review of mandatory minimums. Some opinion polls even suggest that opposition is growing within the general public.²

Nonetheless, the reform or elimination of mandatory minimums may face long-standing political hurdles. Even during periods of low crime rates, the public has expressed fear of victimization and a belief that criminals were not receiving harsh enough punishment. Lawmakers have responded in kind with new crimes and stiffer penalties, including mandatory sentencing statutes. Conversely, reform proposals have carried a career-ending risk for politicians, who could be labeled “soft on crime” by allegedly providing the means for dangerous criminals to escape with lenient sentences. This political dynamic has stymied previous efforts to reform mandatory minimums. In fact, the laws remained 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.”³ Moreover, recent rumblings by the U.S. Department of Justice suggest a counter-movement is afoot in favor of federal mandatory minimums.⁴

So although there is reason for hope in some reforms to mandatory minimums, further change will require concerted, broad-based, and well-informed support. This chapter provides the basic background on mandatory minimum sentences and some of the principal arguments for their reform. The

2. For instance, one survey found that a majority of those polled opposed mandatory minimums for nonviolent offenses and stated that they would vote for a congressional candidate who supports ending such sentences. See FAMS, AGAINST MANDATORY MINIMUMS, OMNIBUS SURVEY (2008), <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>; see also Luna & Cassell, *supra* note 1, at 3 n.8.

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

4. See, e.g., Rebecca R. Ruiz, *Sessions to Toughen Rules on Prosecuting Drug Crimes*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/jeff-sessions-sentencing-criminal-justice.html?_r=0; Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.5be32846d997.

criticisms of mandatory minimums are long-standing and well-documented; they should be known to any policymaker with the ability to shape these laws.

I. BACKGROUND

Enacted by statute, mandatory minimums set the lower limits for sentencing particular offenses and particular offenders. If a defendant is convicted of a given crime, his offense meets some criterion, or he has a certain criminal history—typically measured by objective factors, such as the quantity of drugs possessed, the presence of a firearm, or the number of prior felony convictions—then he must be sentenced to at least the legislatively prescribed prison term. The sentencing judge has no discretion to impose a lesser term (though she may have the authority to dole out a longer sentence).

To be clear, this chapter is not concerned with every conceivable law that, in theory, might be classified as a mandatory minimum. After all, every sentencing statute that requires incarceration is, in some sense, a “mandatory minimum”—even if the underlying crime is a misdemeanor carrying a compulsory punishment of, say, one day in jail. This chapter focuses instead on felonies with mandatory terms usually measured in years of imprisonment. Admittedly, there is a certain pedigree to such sentencing schemes. Congress enacted the first batch of mandatory minimums in the late 18th century,⁵ and new mandatory minimums have been added over the ensuing two centuries, both in the federal and state systems. Until recent times, however, such laws were enacted only occasionally and did not target entire classes of crimes.⁶

The modern rise of mandatory sentencing can be traced to an increasing punitiveness in the American approach to criminal justice. For instance, scholars have argued that U.S. crime-control policy has been shaped by a series of “moral panics,” where intense outbursts of emotion impede rational deliberation, lead individuals to overestimate a perceived threat and to demonize a particular group, and thereby generate a public demand for swift and stern government action.⁷ Politicians have exploited citizen anxiety over crime and security, best exemplified by the declaration of a “war” on crime (or drugs or, most recently, terrorism), such that the United States now governs through crime.⁸ Moreover,

5. See U.S. SENT’G COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7–9 (2011) [hereinafter 2011 SPECIAL REPORT].

6. See U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (1991) [hereinafter 1991 SPECIAL REPORT].

7. See MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE ch. 4 (2004).

8. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

scholars agree that the media portrayal of crime increases the public's demand for punitive policies—which, in turn, provides an incentive for lawmakers to create new crimes and increase punishments in order to be seen as “tough on crime,” a time-tested way to win an election.

This understanding helps explain the rise and persistence of mandatory minimums. Their enactment often does not involve “any careful consideration” of the ultimate effects, Chief Justice Rehnquist once noted. Instead, mandatory minimums “are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”⁹ Consider, for instance, the enactment of 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968. The legislation was a response to public fear over street crime, civil unrest, and the murder 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.”¹⁰ Since then, Congress has amended the law several times and converted it into one of the nation's most draconian punishment statutes. Under § 924(c), possessing a firearm during a predicate crime, including any drug offense, carries a 5-year mandatory minimum sentence. Any additional violation results in a 25-year mandatory minimum sentence, where each violation must be served consecutively (i.e., one after the other).

Another example comes from the passage of the Anti-Drug Abuse Act of 1986, which created a regime of mandatory minimum sentences of 5 or 10 years' imprisonment based on the type and amount of drug involved.¹¹ Among other things, the legislation produced a 100:1 ratio of crack to powder cocaine penalties. For instance, trafficking 50 grams of crack cocaine (less than 2 ounces) and trafficking 5,000 grams of powder cocaine (approximately 11 pounds) resulted in the same 10-year mandatory minimum sentence. A driving force behind the law was the media frenzy and moral panic over crack cocaine following the overdose death of basketball star Len Bias.¹² The bill was pushed forward in a headlong, result-oriented surge, and enacted without hearings or input from experts. Some lawmakers conceded that the legislation attempted to appease an electorate that had become hysterical over an alleged epidemic of

9. William H. Rehnquist, *Luncheon Address (June 18, 1993)*, in U.S. SENT'G COMM'N, DRUGS AND VIOLENCE IN AMERICA 283, 287 (1993).

10. 114 CONG. REC. 22,231 (1968) (statement of Rep. Poff).

11. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

12. See Luna & Cassell, *supra* note 1, at 25–26.

crack cocaine, which was fed in part by inflammatory claims about the drug. At the height of the Bias incident, a *Washington Post* editorial gibed that in the prevailing *can-you-top-this* environment, “an amendment to execute pushers only after flogging and hacking them” might have been enacted by Congress.¹³ Ironically, it was later revealed that Bias died from ingesting powder cocaine, not crack.¹⁴ But by then, it didn’t matter. Indeed, Congress would create a 5-year mandatory minimum sentence for simple possession of 5 grams of crack cocaine, meaning that about a teaspoon of crack possessed for personal use would result in a half-decade term in federal prison.¹⁵ Congress was not alone, however, as many states would adopt laws codifying dramatic sentencing disparities between crack and powder cocaine.¹⁶

Still another example is provided by get-tough recidivist statutes, epitomized by the so-called “three strikes and you’re out” laws. Although the basic concept—increasing the punishment for repeat offenders—has existed for centuries in law, the ferocity of modern recidivist statutes is a relatively recent development. Under these laws, an offender must receive a life sentence or a multi-decade prison term if he has been convicted of a specified number of predicate felonies or “strikes.” Pursuant to California’s law, for instance, an offender with one prior serious or violent felony conviction must receive twice the sentence otherwise prescribed for his current felony conviction. As originally enacted, the law required a minimum sentence of 25 years to life for a felony conviction where the offender had at least two prior serious or violent felony convictions, even if the current felony was neither serious nor violent.¹⁷

In 1993, the underlying bill was stalled in committee and appeared unlikely to receive even a general legislative vote, until a single harrowing event captured the media’s attention and the public’s imagination: the kidnapping and murder of 12-year-old Polly Klaas.¹⁸ The story horrified not only the victim’s hometown of Petaluma, California, but also the entire country, receiving national news coverage and stimulating a surge in public fear of crime and violence, all in spite of declining crime rates. When the story broke that the killer had an extensive

13. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 *FED. B. NEWS & J.* 158, 159 n.30 (1993) (quoting editorial).

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

15. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

16. NICOLE D. PORTER & VALERIE WRIGHT, *THE SENTENCING PROJECT, CRACKED JUSTICE 2* (2011).

17. See CAL. PENAL CODE § 667 (West 1994) (codified legislation); CAL. PENAL CODE § 1170.12 (West 1994) (codified ballot initiative).

18. See Erik Luna, *Foreword: Three Strikes in a Nutshell*, 20 *T. JEFFERSON L. REV.* 1, 3–7 (1998) (describing background of three strikes law).

rap sheet, California lawmakers raced to revive the anti-recidivist proposal and expressed their adamant support for it. Many used the incident and the ensuing public fear to their political advantage, making “three strikes” the catchphrase of choice during the 1994 campaign. No politician dared oppose the law. One state senator confessed, “I don’t think we have any choice [but to pass it],” while another candidly admitted, “I’m going to vote for these turkeys because constituents want me to.”¹⁹ Other states have passed harsh criminal laws in similar contexts, where politicians see a vote against such laws as an act of political suicide. Some of these laws have created or toughened mandatory minimums in the wake of horrifying crimes against sympathetic victims. These statutes can be both well-intentioned and shortsighted, as lawmakers respond to shocking fact-patterns by enacting overly broad sentencing provisions without considering the ultimate consequences.

The last years of the 20th century did witness at least a few acts of moderation. In 1994, for instance, Congress created a so-called “safety valve” in recognition that, for some offenders “who most warrant proportionally lower sentences” and “are the least culpable” by definition, “mandatory minimums generally operate to block the sentence from reflecting mitigating factors.”²⁰ The safety valve allows federal judges to go below an otherwise applicable mandatory minimum sentence in low-level drug cases involving essentially nonviolent, first-time offenders who have disclosed all relevant information to the government.²¹ Although applicable only to certain drug crimes and criminals,²² the safety valve is commonly seen as a successful (albeit limited) means of preventing unjust punishments without hampering the general objectives of sentencing.

In the new millennium, there have been even more promising signs for those who oppose mandatory minimums. In August 2010, President Obama signed into law the Fair Sentencing Act, which reduced the sentencing disparity between crack and powder cocaine offenses.²³ In particular, the law eliminated the mandatory minimum for simple possession of crack cocaine—the first

19. *Id.* at 5 n.37.

20. H.R. REP. NO. 103-460 (1994). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (creating safety valve); U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 5C1.2 (2016) (incorporating safety valve into federal sentencing guidelines).

21. See 18 U.S.C. § 3553(f).

22. See, e.g., U.S. SENTENCING COMM’N, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.44 (2016) (safety valve employed in 13.7% of all drug cases where a mandatory minimum would have applied).

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

time a federal mandatory minimum had been repealed since the Nixon administration—and it reduced the crack/powder disparity, from 100:1 to 18:1, by upping the required amount of crack cocaine to trigger a mandatory sentence.²⁴ The law received broad bipartisan support, including the backing of conservative lawmakers and commentators, as well as prominent law enforcement organizations. At a policy level, the Justice Department issued memoranda instructing federal prosecutors that they need not always seek the harshest possible sentences;²⁵ that they should avoid excessive mandatory penalties for low-level, nonviolent drug offenses;²⁶ and that prosecutors should not use a recidivist enhancement to extract plea bargains.²⁷ In addition, President Obama commuted over 1,700 federal sentences—more than any president in U.S. history—with the vast majority of the commutations involving drug offenders, many of whom were imprisoned pursuant to mandatory minimums.²⁸

Changes to mandatory sentencing laws and policies have also occurred at the state level. Since the turn of the millennium, some two dozen American jurisdictions have enacted some kind of reform to their mandatory minimum laws.²⁹ In November 2012, for instance, California voters overwhelmingly adopted Proposition 36—the Three Strikes Reform Act—a ballot initiative that modified the most severe aspect of the state’s recidivist law. With a few exceptions, California’s three-strikes statute now requires a sentence of 25 years to life only when a defendant’s current conviction is for a serious or violent

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

25. See Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010).

26. See Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to the United States Attorneys & Assistant Attorney General for the Criminal Division, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

27. See Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to Department of Justice Attorneys, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014).

28. For a discussion of clemency and its reform, see Mark Osler, “Clemency,” in the present Volume.

29. See FAMS. AGAINST MANDATORY MINIMUMS, RECENT STATE-LEVEL REFORMS TO MANDATORY MINIMUM LAWS (2016), <http://famm.org/wp-content/uploads/2013/08/Recent-State-Reforms-June-2016.pdf>; *Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States*, PEW CHARITABLE TRUSTS (Jan. 22, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment>; RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014).

felony. The Three Strikes Reform Act also allows a court to reduce the term of imprisonment for an inmate sentenced under the prior regime but whose third strike was not a serious or violent felony.

These recent changes provide reason for hope among reformers. The political norm that favors more crimes and harsher punishments, including mandatory minimums, may turn out to be a mile wide but only an inch deep. In fact, we may be reaching a tipping point in criminal justice as evidenced by the growing ranks of reform advocates. As mentioned at the outset, however, it may still be possible to paint a legislator who votes to repeal mandatory minimums as being “soft on crime.” There may even be a counter-reform movement brewing among some law enforcement officials, epitomized by the Justice Department’s recent policy reversal that now requires federal prosecutors to pursue the most severe possible punishment, “including mandatory minimum sentences.”³⁰ Reform advocates need to be well-informed on the arguments for and against mandatory sentencing statutes, beginning with claims grounded in the philosophy of punishment.

II. PUNISHMENT THEORY

Generally speaking, theories of punishment can be separated into two philosophical camps: consequentialist (or teleological) theories and non-consequentialist (or deontological) theories. The approaches are distinguished by their focus and goals. Consequentialist theories are forward-looking, concerned with the future consequences of punishment. Nonconsequentialist theories are backward-looking, interested solely in past acts and mental states.

When it comes to mandatory minimums, discussion of these theories is not merely an academic exercise. Punishment philosophy informs the practice of sentencing, as codified in the penal law or administered by criminal justice actors, and the transition from theory to practice can produce troublesome consequences in the real world. Scholars have suggested that mandatory minimum sentences are part of “ominous trends in our penal practices,”³¹ stemming, at least in part, from politicians co-opting punishment theories to rationalize seemingly irrational punishment systems.

30. Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017).

31. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1839 (1999); see also Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999); Markus D. Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689 (1995).

A. RETRIBUTION

The best-known nonconsequentialist rationale for the criminal sanction, (deontological) retributivism, often conceives of punishment as “just deserts”—an offender deserves to be punished because of his moral blameworthiness. Under this theory, moral blameworthiness may be seen as a function of an offender’s subjective state of mind, the wrongful nature of his acts, and the harm he has caused. Retributivism thereby incorporates limiting principles on systems of criminal justice. Among other things, penalties must be based on the depravity of the offense and not merely the danger posed by the offender. Retributivism does not advocate disproportionate punishment based on a heightened risk of recidivism alone. More generally, all theories of retribution require that punishment be proportionate to the gravity of the offense, and any decent retributive theory demands an upper sentencing limit.³² Indeed, 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,³³ and a precept “deeply rooted and frequently repeated in common-law jurisprudence.”³⁴

Admittedly, the principle of proportionality raises difficult issues in sentencing. In measuring the gravity of an offense for proportionality analysis, one might look to, among other things, “the harm caused or threatened to the victim or society.”³⁵ Although harm is a notoriously thorny idea,³⁶ most agree that the basic criminal harms involve acts or threats of physical violence and non-consensual or fraudulent deprivations of others’ property.³⁷ The issue of proportionality might also be informed by comparative analysis, such as whether the sentence in a given case exceeds that for far more serious crimes and criminals.

According to proponents of mandatory minimums, those who are sentenced under these laws—purportedly, high-level offenders who perpetrate violent and serious crimes—can only be assured of receiving their just deserts through

32. See generally ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005).

33. See *Mandatory Minimum Sentencing Provisions Under Federal Law: Hearing Before the U.S. Sent’g Comm’n* 1 n.3 (2010) (statement of Erik Luna), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Luna.pdf.

34. *Solem v. Helm*, 463 U.S. 277, 284–85 (1983).

35. *Id.* at 288–93; see also *Rummel v. Estelle*, 445 U.S. 263, 275 (1980).

36. See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

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

long, compulsory sentences. Few retributivists would balk at a life sentence for a serial murderer, for instance, and most mandatory minimums imposed for serious crimes of violence (e.g., forcible rape) will fall within the rough boundaries of deserved punishment.³⁸ The problem is that mandatory minimum statutes can be grossly overinclusive. In enacting such statutes, lawmakers tend to imagine an exceptionally serious offense and set the mandatory minimum they consider fitting for a particularly egregious offender. But they do not take into consideration a far less serious crime or less culpable criminal who nonetheless might be sentenced under the law.³⁹ 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 unaffected by proportionality concerns and can pierce retributive boundaries with excessive punishment.

Consider, for instance, the problems that have arisen under certain recidivist laws, where an offender must receive a life sentence or a multi-decade prison term if he has been convicted of a specified number of predicate felonies. Such a lengthy sentence for sometimes trivial offenses—life imprisonment for a three-time nonviolent larcenist,⁴⁰ for instance, or a 25-year to life sentence for petty theft by a recidivist⁴¹—proves almost impossible to reconcile with traditional conceptions of retribution. The same is true of mandatory minimum sentences under 18 U.S.C. § 924(c). In very discrete situations, the crime's low predicates of any drug and a firearm, and the high penalties that ensue—a 5-year mandatory sentence for the first count and 25-year sentences for each subsequent count—might be justifiably employed against, say, a brutal drug lord or the occasional dictator who turns his country into a narco-state. But when applied to the vast majority of offenders, low-level drug dealers who neither threaten violence nor cause injury, the results can be grotesque. In one § 924(c) case, for instance, a defendant received a 55-year term of imprisonment for low-level marijuana distribution while possessing (but not brandishing or using) a firearm.⁴² This punishment exceeded the sentence for, among others, an aircraft hijacker, a second-degree murderer, a kidnapper, and a child rapist.

38. See, e.g., THE CONSTITUTION PROJECT, PRINCIPLES FOR DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT 26 (2010), <http://www.constitutionproject.org/pdf/34.pdf>.

39. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 92.

40. See *Rummel v. Estelle*, 445 U.S. 263 (1980).

41. See *Ewing v. California*, 538 U.S. 11 (2003) (25-year-to-life sentence for defendant convicted of stealing three golf clubs, worth \$399 apiece); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (same for theft of \$150 worth of videotapes).

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

In fact, the sentence was more than twice the federal sentence for a kingpin of a major drug-trafficking ring in which a death results, and more than four times the sentence for a marijuana dealer who shoots an innocent person during a drug transaction.⁴³

Given such cases, it is unsurprising that many judges, and even some prosecutors, believe that mandatory minimums are too severe and can result in disproportionate punishment.⁴⁴

B. CRIME PREVENTION

As mentioned above, consequentialist theories are forward-looking in their focus on the future consequences of punishment. The primary consequentialist theory—utilitarianism—imposes criminal penalties only to the extent that social benefits outweigh the costs of punishment. In particular, the imposition of criminal sanctions might: discourage the offender from committing future crimes (specific deterrence); dissuade others from committing future crimes (general deterrence); or disable the particular offender from committing future crimes (incapacitation).⁴⁵

According to their advocates, mandatory minimums both deter and incapacitate offenders. With respect to deterrence, mandatory minimum sentences are sometimes justified as sending an unmistakable message to criminals. Some offenses require certain minimum punishments, advocates claim. They argue that because of the wide diversity of views on the appropriate level of punishment for offenders, legislators—not judges—are in the best position to make sentencing determinations.⁴⁶ The certain, predictable, and harsh sentences forewarn offenders of the consequences of their behavior

43. See *id.* at 1244–46, 1258–59. In the interest of full disclosure, I served as appellate counsel in the *Angelos* case and assisted in efforts to achieve Mr. Angelos’s eventual release. See, e.g., Erik Luna & Mark Osler, *Mercy in the Age of Mandatory Minimums*, U.S. NEWS & WORLD REP. (Aug. 5, 2016), <https://www.usnews.com/opinion/articles/2016-08-05/president-obamas-clemency-initiative-doesnt-go-far-enough>.

44. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 93–94.

45. Another utilitarian goal is rehabilitation, that punishment can reform a particular offender against committing future crimes. See Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume. As far as I know, no plausible argument has been made that mandatory sentencing serves rehabilitation.

46. For a discussion on some of the arguments in defense of mandatory minimums, see EVAN BERNICK & PAUL J. LARKIN, JR., THE HERITAGE FOUNDATION, RECONSIDERING MANDATORY MINIMUM SENTENCES: THE ARGUMENTS FOR AND AGAINST POTENTIAL REFORMS 4 (2014).

upon apprehension and conviction.⁴⁷ Proponents contend that mandatory minimums also incapacitate the most incorrigible criminals and thereby prevent them from committing crime.⁴⁸

None of these claims receives robust empirical support, however, as most researchers have rejected crime-control arguments for mandatory sentencing laws. There is little evidence that lengthy prison terms serve specific deterrence. Rather, imprisonment either has no effect on an inmate's future offending or perhaps even increases recidivism.⁴⁹ This is hardly surprising given the absence of meaningful rehabilitative programs for inmates and, worse yet, the deplorable conditions of incarceration facilities.⁵⁰ It has often been argued that prisons serve as "colleges for criminals," where offenders are psychologically damaged by incarceration, for instance, or learn new anti-social skills from their criminally involved peers, and thus come out more likely to recidivate. They may also be at risk of reoffending because of imprisonment's social and economic consequences, such as the difficulties of obtaining gainful, lawful employment after release.⁵¹

As for general deterrence, research has largely failed to show that mandatory minimums decrease the commission of crime, and some studies suggest that such punishment schemes may even generate more serious crime.⁵² Regardless, any deterrence-based reduction in crime is far outweighed by the increased

47. See, e.g., Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002) (finding that California's three-strikes law prevented 8 murders, almost 4,000 aggravated assaults, over 10,000 robberies, and more than 384,000 burglaries in its first two years of operation). For a refutation of these findings, see, for example, Tonry, *Mostly Unintended Effects*, *supra* note 1, at 99–100.

48. Cf. Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551 (2009) (finding that, on average, "the social benefit of the crimes averted by incapacitation is slightly higher than the marginal cost to the state of imposing a 1-year sentence enhancement"). As discussed below, any incapacitative benefit from mandatory minimums is likely to be modest and outweighed by other considerations.

49. See Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115 (2009); Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Aug. 18, 2015) (working paper), <http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>.

50. See Sharon Dolovich, "Prison Conditions," in the present Volume.

51. See Gabriel J. Chin, "Collateral Consequences," in the present Volume; Susan Turner, "Reentry," in the present Volume.

52. See, e.g., Tomislav V. Kovandzic, John J. Sloan & Lynne M. Vieraitis, *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of "Three Strikes" in U.S. Cities (1980-1999)*, 1 CRIMINOLOGY & PUB. POL'Y 399 (2002); Thomas B. Marvell & Carlisle Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL. STUD. 89 (2001).

costs of incarceration from long mandatory sentences.⁵³ Again, this is not a surprising conclusion. If we assume that criminals act rationally—pursuant to an assessment of the advantages and disadvantages of criminality—the potential cost of committing a particular offense is not, as some politicians maintain, the allowable punishment under law. Instead, it is a mere fraction of the prescribed sanction, given that potential punishment must be discounted by the probability of apprehension and conviction for the given offense.⁵⁴ And given that most felony convictions already lead to incarceration, the enactment of mandatory minimums will have only a marginal impact on the certainty of imprisonment.⁵⁵

Besides, criminals are not likely to be well-informed, rational actors in the classic economic model. To begin with, people know very little about criminal justice, including sentencing schemes and severity, and thus are unlikely to be deterred by mandatory minimums.⁵⁶ Even assuming someone knows the relevant sentence for a prospective crime, a long mandatory term may be heavily discounted in the mind of a risk-taking offender, who places greater emphasis on immediate gains (e.g., stolen goods in hand) over deferred losses (e.g., punishment extending into the distant future).⁵⁷ This may be particularly true of those from deprived socioeconomic or familial backgrounds.⁵⁸ In addition, some offenders may commit crime in pursuit of intangible, nonquantifiable ends, such as respect, glory, or attention,⁵⁹ while other offenders are driven by

53. See NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 134–40, 154–55 (Jeremy Travis et al. eds., 2014); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 231 (2013); 2011 SPECIAL REPORT, *supra* note 5, at 98; JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 143–44 (1997); BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 11–16 (1994); Tonry, *Mostly Unintended Effects*, *supra* note 1, at 90–100. As discussed elsewhere, the most effective deterrent of crime is the certainty of punishment—the likelihood that an individual will be punished if they commit a crime—not the severity of the punishment itself. See Daniel S. Nagin, “Deterrence,” in the present Volume.

54. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 140; Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. REV. 1909, 1915–16 (1999).

55. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 133; see also *id.* at 140.

56. See Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 181–84 (2003); Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAV. 483 (2003).

57. See, e.g., A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999).

58. See Alfred Blumstein, *Prisons*, in CRIME 415 (James Q. Wilson & Joan Petersilia eds., 1994).

59. See, e.g., JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 80–110 (1988); Elijah Anderson, *The Code of the Streets*, ATL. MONTHLY, May 1994, at 81, 81–94.

“impulsive, irrational, or abnormal” desires.⁶⁰ These individuals are undeterred by the existence of mandatory minimums.

Mandatory minimum sentences are also unlikely to reduce crime by incapacitation,⁶¹ at least given the overbreadth of such laws and their failure to focus on those most likely to recidivate. Among other things, offenders typically age out of the criminal lifestyle, usually in their 30s,⁶² meaning that long mandatory sentences may require the continued incarceration of individuals who would not be engaged in crime. In such cases, the extra years of imprisonment will not incapacitate otherwise active criminals and thus will not result in reduced crime. Instead, prisons become geriatric facilities.⁶³ Although selective incapacitation—choosing offenders based on certain predictors of future criminality⁶⁴—may work in discrete circumstances, mandatory minimums sentences work as meat cleavers, not scalpels, and thus generate high levels of false positives (i.e., incapacitated offenders who would not otherwise be committing crimes). 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 may be quickly replaced by another, eliminating any crime-reduction benefit.⁶⁵ More generally, any incapacitation-based effect from mandatory minimums was likely achieved years ago, due to the diminishing marginal returns of locking more people up in an age of mass incarceration.⁶⁶

Based on the foregoing arguments and others, most scholars have rejected crime-control arguments for mandatory sentencing laws.⁶⁷ By virtually all measures, there is no reason to believe that mandatory minimums have any meaningful impact on crime rates.⁶⁸

60. JAMES Q. WILSON, THINKING ABOUT CRIME 118 (rev. ed. 1983); see also NAT'L RESEARCH COUNCIL, *supra* note 53, at 133–34; Kleiman, *supra* note 54, at 1917 (“Repeat offenders tend to be reckless and impulsive.”).

61. See generally Shawn D. Bushway, “Incapacitation,” in the present Volume.

62. See, e.g., David P. Farrington, *Developmental and Life-Course Criminology: Key Theoretical and Empirical Issues*, 41 CRIMINOLOGY 221 (2003).

63. For an interesting case study, see Michael Millemann et al., “Releasing Older Offenders,” in the present Volume.

64. See John Monahan, “Risk Assessment in Sentencing,” in the present Volume.

65. See, e.g., Tonry, *Mostly Unintended Effects*, *supra* note 1, at 102.

66. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 143; Bushway, *supra* note 61.

67. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 156.

68. See Tonry, *Mostly Unintended Effects*, *supra* note 1, at 100.

III. SENTENCING POWER

A. AGENCY COSTS AND PLEA BARGAINING

Despite the foregoing problems with mandatory minimums, the executive branch may have an interest in retaining or even expanding these laws. Perhaps the most perverse example comes from prison-guard unions, which have sponsored and lobbied for harsher sentencing laws.⁶⁹ By incarcerating more criminals for longer periods of time, mandatory minimums certainly serve the guards' professional interests in guaranteed employment. California's "three-strikes law sponsor is the correctional officers' union," Justice Kennedy emphasized, "and that is sick!"⁷⁰ Police and prosecutors also have an interest in get-tough policies, namely, the expansion of their power. The more crimes on the books and the harsher the punishments, the more power that police and prosecutors can exercise throughout the criminal process.⁷¹ For instance, harsh sentences bound by mandatory minimums provide the government enormous leverage to extract plea bargains and information from defendants, leading to more convictions and closed cases.

This is, indeed, the best argument in favor of mandatory minimums. The threat of long, obligatory sentences tends to encourage plea bargaining, which, if successful, averts the substantial costs associated with trial. In fact, over 90% of all prosecutions end by guilty plea,⁷² with mandatory minimum sentences helping to keep that figure extremely high. Moreover, the possibility of a long sentence provides a powerful incentive for members of a criminal group to provide information to law enforcement and to assist in the prosecution of other offenders. Low-level participants can avoid mandatory minimums by informing on bigger players, or so the argument goes, thereby allowing prosecutors to move up the chain of command. Certainly, many prosecutors believe that the threat of a long prison term is essential to securing cooperation, and this belief likely plays a very strong role in the tendency of prosecutors to advocate for new mandatory sentencing provisions and against the repeal or reform of existing mandatory minimums.

69. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 436 n.242 (1997).

70. Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California, U.S.*, L.A. TIMES, Feb. 4, 2010.

71. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

72. See, e.g., LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011).

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

To be clear, plea bargaining is not some unmitigated good. Several years ago, a federal judge declared that the U.S. Justice Department was “so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.”⁷³ When individuals demand their day in court or plea negotiations fail, “the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury.”⁷⁴ More recently, a report by Human Rights Watch documented how prosecutors threaten charges involving heavy mandatory minimums unless a defendant pleads guilty to charges that do not carry a mandatory sentence.⁷⁵

There is a genuine question as to the propriety of extracting information and guilty pleas through the threat of mandatory minimums.⁷⁶ Such practices impose a sort of “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. Moreover, the statistics seem to challenge any categorical assertions of government necessity.⁷⁷ In the federal system, in fact, the rate of

73. United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004).

74. *Id.* at 264.

75. See HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013); see also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U.L. REV. 63, 67–85 (2012).

76. See 2011 SPECIAL REPORT, *supra* note 5, at 99.

77. See *id.*; Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 826 (2017) (“The proportion of drug offenders convicted of an offense carrying a mandatory minimum penalty is now the lowest it has been since 1993. Yet despite the fears of some, defendants are pleading guilty at the same rates as they were before ... and cooperation rates have at least been stable, and may have even slightly increased.”).

cooperation in mandatory minimum cases is comparable to the average in all federal cases.⁷⁸ As it turns out, most recipients of federal drug minimums are couriers, mules, and street-level dealers, not kingpins or leaders in international drug cartels.⁷⁹ “Were there no mandatories, defendants now affected by them would remain subject to all the pressures that face every criminal defendant,” Professor Michael Tonry has noted. “They would simply no longer face out-of-the-ordinary—and therefore unfair—pressures resulting from the rigidity and excessive severity of mandatory minimum sentencing laws.”⁸⁰

B. SEPARATION OF POWERS

Mandatory sentencing laws are not only unfair—they distort the legal framework. In particular, mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors, who may pre-set punishment through creative investigative and charging practices.⁸¹ Undoubtedly, law enforcement is well-intentioned in many cases. But it would be a mistake 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, as mentioned earlier, the statutes themselves are not tailored to these criminals alone and instead act as grants of power to prosecutors to apply the laws as they see fit, even to minor participants in nonviolent offenses.

Expressing a view held by many jurists, Justice Kennedy described as “misguided” the “transfer of sentencing discretion” from judges to prosecutors, “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.⁸²

78. See Luna & Cassell, *supra* note 1, at 19 n.73.

79. See, e.g., U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 20–21, 85 (2007), http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter COCAINE AND FEDERAL SENTENCING].

80. Tonry, *Mostly Unintended Effects*, *supra* note 1, at 67 n.1.

81. See *infra* notes 102–03 and accompanying text.

82. Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

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. It has long been held that the prosecutor is more than an ordinary party, however, given the power he wields and the principal he represents (i.e., the citizenry). Still, prosecutors are influenced by the ordinary human motivations that may at times cause a loss of perspective—path dependence, career advancement, immodesty, and occasional vindictiveness⁸³—leading to the misapplication of mandatory minimums. In most cases, however, no external check prevents the imposition of an unjust mandatory term.

By contrast, the judge functions as a neutral arbiter and dispassionate decision-maker in individual cases. The sentencing judge is the one neutral party 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. Indeed, trial court judges are in the best position to make the highly contextual, fact-laden decision about the proper punishment 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. And as Justice Kennedy mentioned, trial judges have the benefit of experience in reasoned, transparent discretion, making them the precise individuals who should decide the complicated, fact-specific issues of sentencing. But with mandatory minimums, judges are denied this authority as sentences inevitably follow from prosecutorial choices in charging.

But the shift in power is more than misguided—it implicates the separation-of-powers doctrine. Liberal society has long been concerned with arbitrary, oppressive authority 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 prevents any entity from exercising excessive authority and sets each body as a restraint on the others. Along these lines, the U.S. Constitution (and, indeed, every state government) employs a separation of powers among co-equal branches—the legislative, executive, and judicial—each having “mutual relations” in a series of checks and balances.⁸⁴

83. See, e.g., Luna & Cassell, *supra* note 1, at 26 n.115.

84. THE FEDERALIST No. 51 (James Madison).

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. An independent judiciary was meant to protect individuals from the prejudices and heedlessness of political actors and the public.⁸⁵ To check such abuses, the courts were historically entrusted with certain fundamental legal decisions, including dispositive criminal justice issues that demand evenhanded judgment. Among these quintessential judicial functions is the imposition of punishment on another human being. “Traditionally,” noted the U.S. Supreme Court in 1993, “sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.”⁸⁶ This eclectic approach attempted to accommodate the diverse rationales for punishment—from retributive principles of just deserts to consequential considerations of deterrence, rehabilitation, and incapacitation—thus allowing trial judges to craft a proper sentence based on an array of factors and legitimate conceptions of justice.

Indeed, the Supreme Court has described this judicial tradition as “uniform and constant,” where sentencing judges “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.”⁸⁷ As such, there is “wisdom, even the necessity, of sentencing procedures that take into account individual circumstances,”⁸⁸ drawing upon the judge’s familiarity with the case and face-to-face interaction with the defendant, the victim, and their families. By taking away this authority and giving it to the executive branch, mandatory minimums have undermined not only a fundamental check on law enforcement, but an important tradition in the American criminal justice system. On this point, there appears to be significant support across a broad spectrum of groups that mandatory minimums should be reformed to allow for individualized sentencing by judges.⁸⁹

85. See, e.g., THE FEDERALIST No. 78 (Alexander Hamilton).

86. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

87. *Koon v. United States*, 518 U.S. 81, 113 (1996).

88. *Id.* at 92.

89. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 95.

IV. DISPARITY AND ITS DISCONTENTS

A. DISPARITY AND PUNITIVENESS

Proponents of mandatory minimums often raise the problems with earlier sentencing systems, which were described as “lawless”⁹⁰ and a major source of public cynicism. As just mentioned, trial judges traditionally exercised discretion in determining sentences within broad statutory ranges. This discretion purportedly generated intolerable (even unconstitutional) disparities among defendants, with sentences turning on the temperament of a given judge or irrelevant factors such as race and class. Proponents argue that mandatory minimums help eliminate these inequalities by providing uniformity and fairness for defendants, certainty and predictability of outcomes, and a higher level of truth and integrity in sentencing.

Opponents of mandatory minimums sometimes challenge the image of vast disparity in punishment prior to the enactment of determinate sentencing.⁹¹ But even accepting the historical accuracy of the conventional narrative, mandatory minimums may have done little to eliminate punishment discrepancies among similarly situated defendants. Inconsistent application of mandatory minimums has only exacerbated disparities, opponents argue, expanding the sentencing differentials in analogous cases. Indeed, mandatory minimums tend to magnify disparity through their punitiveness. After all, differences in sentencing matter far more in systems where idiosyncratic judgments produce terms of imprisonment differing by years or even decades, as compared to systems where the eccentricities of decision-makers can only generate differentials of days or months.

In the United States, mandatory minimums are part of a punishment spree of unprecedented proportions. From the mid-1920s to the mid-1970s, the prison population ratio hovered around 100 inmates in state and federal prisons per 100,000 residents, with a low of 79 in 1925 to a high of 137 in 1939. With the U.S. declaring “wars” on crime, drugs, etc., over the past four decades, the rate quintupled to around 500 prison inmates per 100,000 people.⁹² A recent report found that “1% of adult males living in the United States were

90. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). For a discussion of the prior approach and subsequent reforms, see Douglas A. Berman, “Sentencing Guidelines,” in the present Volume.

91. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 106–12 (1998).

92. See BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE* tbl.6.28.2012, <http://www.albany.edu/sourcebook/pdf/t6282012.pdf>.

serving prison sentences of greater than 1 year.”⁹³ Since 1980, in fact, the federal prison population has increased tenfold, for instance, while the average federal sentence more than doubled, due in no small part to mandatory minimums.⁹⁴ Moreover, empirical work suggests that the U.S. punishment binge is the result of prosecutorial decision-making, particularly the willingness of prosecutors to file felony charges.⁹⁵ The United States has become the global incarceration leader with nearly 700 jail and prison inmates for every 100,000 inhabitants and a total custodial population of more than 2.2 million people, constituting almost a quarter of the world’s inmates.⁹⁶

All told, America is the single most punitive nation in the Western world. A statistical review of eight Western nations found that “the high U.S. imprisonment rate results primarily from much greater lengths of prison sentence by every punitiveness measure we were able to use—years of imprisonment per recorded crime or conviction, or average sentence length given a commitment—than are imposed in other countries.”⁹⁷ The U.S. imprisonment rate was also a function of the relatively high probability of imprisonment upon conviction. Comparisons of probable case outcomes further support the exceptional nature of U.S. sentencing. European nations certainly differ as to the likely punishment in standard cases, but those differences can pale in comparison to their collective divergence from U.S. sentences. The social consequences of America’s punitiveness are substantial, with some jurisdictions spending more on prison than higher education, and certain areas (especially poor, mostly minority communities) suffering utter devastation from the loss of people, resources, and respect for law.⁹⁸

93. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRISONERS IN 2015, at 8 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>. The report did have some good news, including a decrease in both the U.S. imprisonment rate and the total number of prisoners. See *id.* at 1, 8.

94. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.6.57, <http://www.albany.edu/sourcebook/pdf/t657.pdf>; PEW CHARITABLE TRUSTS, PRISON TIME SURGES FOR FEDERAL INMATES (2015), http://www.pewtrusts.org/~media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENT’G REP. 12 (1999).

95. See John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012) (working paper), <http://perma.cc/K5QG-LHCQPfaff>.

96. See ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (11th ed., 2016); see also Roy Walmsley, *Trends in World Prison Population*, in INTERNATIONAL STATISTICS ON CRIME AND JUSTICE 153 (Stefan Harrendorf et al. eds., 2010).

97. Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347, 348 (2006).

98. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008).

Through their punitiveness, mandatory minimums have helped America achieve this ignominious status. For instance, criminal law experts in six European nations were queried as to the expected sentence for a first-time offender convicted of selling relatively small amounts of marijuana (8 ounces) and possessing (but not brandishing or using) firearms. The likely punishment in each country was as follows: a sentence of two to four years' imprisonment in England; a one-year sentence or probation in France; a five-year sentence or less in Germany; a fine of € 300-350 in the Netherlands; a three-and-a-half-year sentence or less in Poland; and a one-year sentence or less in Sweden.⁹⁹ By comparison, this fact-pattern generated a mandatory minimum sentence of 55 years' imprisonment in an actual federal case prosecuted under 18 U.S.C. § 924(c).¹⁰⁰ Moreover, such a harsh sentence would be at least a theoretical possibility in a few other American jurisdictions. At one point, the U.S. Department of Justice even suggested "some reforms of existing mandatory minimum sentencing statutes are needed ... to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population."¹⁰¹

B. DISPARITY AND UNIFORMITY

As discussed in the previous section, the source of disparity is manifest: Mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors,¹⁰² which has resulted in troubling punishment differentials among offenders with similar culpability. In truth, mandatory minimums are not mandatory at all, but instead discretionary sentencing laws susceptible to the haphazard and even perverse charging and plea bargaining decisions of prosecutors.¹⁰³ These often dispositive decisions are made in a largely opaque process with almost no external oversight.

99. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1496–1501 (2010).

100. See *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004). See also *supra* notes 42–43 and accompanying text (discussing case).

101. 2011 SPECIAL REPORT, *supra* note 5, at 94 (quoting testimony of U.S. Justice Department representative).

102. See *supra* notes 81–89 and accompanying text.

103. See Tonry, *Mostly Unintended Effects*, *supra* note 1, at 67–68; *Mandatory Minimum Sentencing Provisions Under Federal Law: Hearing Before the U.S. Sent'g Comm'n* 1 n.3 (2010) (statement of Stephen J. Schulhofer, Professor of Law, N.Y.U. Sch. of Law), http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Schulhofer.pdf.

A number of studies have confirmed that mandatory minimums tend to generate disparate sentences among similarly situated offenders.¹⁰⁴ For many commentators, however, the most troubling issue is the appearance, if not reality, of disparities along racial, ethnic, or class-based lines.¹⁰⁵ To be sure, there is an ongoing debate about correlation versus causation; in other words, whether the disproportionate impact of mandatory minimums on minorities might 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.¹⁰⁶

Inconsistent application of mandatory minimums has not only exacerbated disparities by expanding the sentencing differentials between analogous cases, it has generated inequality by requiring the same base sentences in patently dissimilar cases. In other words, mandatory minimums have not only fostered *undue disparity* in sentencing, they have created *undue uniformity* by demanding the same punishment for disparate crimes and criminals.¹⁰⁷ Equality in the classical sense requires decision-makers not only to treat like cases alike, but also to treat dissimilar cases differently. It would thus be a violation of equality for relevantly dissimilar offenders to receive analogous sentences, just as it would be for relevantly similar offenders to receive disparate sentences.

Mandatory minimums often violate the idea that different cases should be treated differently by accentuating certain quantifiable variables in fixing punishment. This offers the illusion of equality through the semblance of mathematical objectivity, while disregarding all other information about the defendant and his life. So although mandatory minimums provide equal punishment when certain objects are equal—the existence of a firearm, the quantity of drugs, the number of prior convictions, what have you—this grouping of defendants cannot ensure moral equality: the equal treatment of individuals whose crimes, backgrounds, and prospects are so analogous as to justify identical sentences and, conversely, the unequal (but judicious) treatment of individuals whose crimes, personal histories, and prospects are materially different. Mandatory minimums operate with a sort of *numerical* equality—not unlike the “majestic equality” of the criminal justice system

104. See, e.g., Luna & Cassell, *supra* note 1, at 18 n.70.

105. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 101–02; BRENNAN CTR. FOR JUST., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010).

106. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 101–02; Letter from Pat Nolan et al., to Hon. John A. Boehner, House Minority Leader (May 25, 2010), <http://www.famm.org/Repository/Files/BOEHNER%20LETTER.pdf>; Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 183–87 (2003).

107. 2011 SPECIAL REPORT, *supra* note 5, at 90.

described by Anatole France¹⁰⁸—offering equal punishment for those who are not equal.

Consider, for instance, the so-called “cliff” effect of mandatory minimums that draw seemingly trivial lines with huge consequences.¹⁰⁹ The most striking examples often involve illegal drugs, where offenders face steep cliffs at quantity cutoffs. Someone caught with, say, 0.9 grams of LSD might receive a relatively short sentence—but add on a fraction of a gram and a half-decade in federal prison necessarily follows, with the defendant falling off the metaphorical cliff.¹¹⁰ Likewise, mandatory minimums can 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.¹¹¹ Perversely, the tariff may be levied on the least culpable members in a criminal episode. Unlike those in leadership positions, low-level offenders often lack the type of valuable information that can be used as a bargaining chip with prosecutors.¹¹²

C. MANIPULATION AND ACCURACY

To obtain maximum leverage to extract pleas, law enforcement may engage in a process known as “count stacking” or “charge stacking.” For purposes of charging, the government divides up a single criminal episode into multiple crimes, each carrying its own mandatory sentence that then can be stacked, one on top of the other, to produce heavier punishment.¹¹³ This may be particularly troubling when the government procures further crimes through its own actions, as when law enforcement arranges a number of controlled drug buys in order to achieve a lengthy sentence. 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.

108. ANATOLE FRANCE, *THE RED LILY* 91 (1894), *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 550 (Justin Kaplan ed., 1992) (“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread.”).

109. See 2011 SPECIAL REPORT, *supra* note 5, at 91.

110. See 21 U.S.C. § 841(b)(1)(B)(v).

111. See, e.g., *United States v. Brigham*, 977 F.2d 317 (7th Cir. 1992).

112. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, 99; COCAINE AND FEDERAL SENTENCING, *supra* note 79, at 20–21, 85.

113. See, e.g., Luna & Cassell, *supra* note 1, at 14.

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 mandatory sentence.¹¹⁴ To be sure, these manipulations may appear reasonable in difficult cases by evading excessive sentences demanded under a mandatory minimum. Regardless of benign intent, however, the distortive effect of mandatory minimums on transparency and truth can only undercut the legitimacy of the criminal justice system and its actors. The moral authority of criminal law depends on the perception of both substantive and procedural justice, and a system that allows, if not requires, duplicity tends to breed contempt for the law.¹¹⁵ 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 omniscient perspective, but as best as humans can discern.

Due to its opaque nature, prosecutorial decision-making has proven almost impossible to fully understand and reform. Scholars and institutions like the U.S. Sentencing Commission have tried for decades to crack open this “black box” with limited success. Needless to say, mandatory sentencing schemes only aggravate the difficulties in evaluating and improving the prosecutorial function. Worse yet, mandatory minimums may undermine the principal benefit of transparency and truth in the criminal justice system: accurate outcomes. The accumulation of power by prosecutors through severe sentencing laws has resulted in a dramatic shift from trials to plea bargains and the near extinction of acquittals. As a result, some defendants who might have been acquitted at trial are now convicted by plea bargaining, which diminishes the chances of discovering the truth through the trial process and, in exceptional cases, may

114. 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).

115. See *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).

increase the possibility of wrongful convictions.¹¹⁶ In fact, recent cases have demonstrated how mandatory minimums can generate fabricated testimony and wrongful convictions.¹¹⁷

Mandatory minimums may even have a backlash effect, making community members less likely to report suspicious behavior and cooperate with law enforcement out of concern that their neighbors may receive draconian punishment.¹¹⁸ Likewise, when victims of actual violence notice that their assailants receive shorter terms than imposed on nonviolent offenders via mandatory minimums, the message received is that their pain and suffering is less important than abstract governmental objectives, like winning the “war on drugs.”¹¹⁹ Over the long haul, lay citizens may refuse to cooperate with prosecutors, and conscientious jurors may engage in nullification, not because they believe the defendant to be innocent or the allegations unproven, but out of fear that an unjust sentence will necessarily ensue.¹²⁰

RECOMMENDATIONS

Given the foregoing flaws and others in mandatory sentencing statutes, former U.S. District Court Judge John Martin offered this terse but accurate assessment of mandatory minimums: “They are cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea.”¹²¹ Here are a few potential reforms to mandatory minimums, roughly ranked from minimalist to maximalist in approach:

1. **Do no (new) harm.** Politicians should not create new mandatory minimum sentencing statutes or expand those currently on the books. Whatever one thinks of the current slate of mandatory minimums, no

116. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 150–54 (2005). Although Professor Wright’s study focused on the pre-Booker mandatory guidelines, his critique applies with equal force to statutory minimums. See also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 164–65, 180 (2014). Cf. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

117. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 97; see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

118. See 2011 SPECIAL REPORT, *supra* note 5, at 99; Schulhofer, *supra* note 103, at 16–18.

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

120. See *id.* at 1252.

121. Hon. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311, 317 (2004).

plausible case can be made that existing statutes are somehow insufficient for law enforcement purposes.

2. **Create court mechanisms to prevent a patently unjust application of mandatory minimums.** One much-discussed reform is the adoption of “safety valve” provisions that permit a judge to sentence a defendant below a mandatory minimum when certain criteria are met. A few states have such provisions to prevent injustices under their mandatory sentencing laws.¹²² As mentioned earlier,¹²³ the federal system also contains a safety valve, although the current version is rather limited and applicable only to certain drug crimes. It should be expanded to be more generally available to defendants who might otherwise receive an excessive prison sentence.¹²⁴ Among other things, a safety-valve provision could require that the sentencing court provide specific reasons for employing the provision in a given case, thereby creating a written record that can be examined by an appellate court. A more elaborate vehicle would have juries participate in the determination of whether a mandatory minimum sentence is excessive.¹²⁵ For instance, a trial judge could provide the defendant’s criminal history and other relevant information to the jury, which would then deliberate and recommend a sentence to the court. If that recommendation were less than the mandatory minimum, the judge could then be authorized (but not required) to impose a sentence below the mandatory term.
3. **Empower correctional or parole authorities to reconsider sentencing length.** Another possible reform would involve a post-incarceration mechanism to reconsider the length of prisoners serving long mandatory minimum sentences.¹²⁶ This could be done by empowering (or reviving) a parole commission to evaluate current prison sentences under mandatory minimums and consider whether it makes sense to continue to incarcerate long-serving inmates. A somewhat similar approach would be to enact or expand so-called “compassionate release” provisions that exist in several jurisdictions. The existing federal provision authorizes the U.S. Bureau of Prisons to make a motion to the district court for the release of a prisoner

122. See Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, THE STATE FACTOR, Mar. 2016, at 6-7, <https://www.alec.org/app/uploads/2016/03/2016-March-ALEC-CJR-State-Factor-Mandatory-Minimum-Sentencing-Reform-Saves-States-Money-and-Reduces-Crime-Rates.pdf>.

123. See *supra* notes 20–22 and accompanying text.

124. See Luna & Cassell, *supra* note 1, at 61–63.

125. See *id.* at 78–80.

126. See *id.* at 81–82; Tonry, *Mostly Unintended Effects*, *supra* note 1, at 105–06.

who is at least 70 years old and has served at least 30 years in prison, or for other “extraordinary and compelling reasons.”¹²⁷ The Bureau of Prisons has interpreted this authority very narrowly, however, effectively limiting release to those with terminal illnesses or severely debilitating and irreversible conditions. Congress could expand this authority to include additional circumstances where the bureau could use parole or other forms of discretionary release to discharge prisoners who have already served significant sentences pursuant to mandatory minimums.¹²⁸

4. **Limit the scope and impact of mandatory minimums.** The problematic cases involving mandatory minimums can be mitigated by narrowing their reach and effect. Obviously, the length of mandatory minimums could be reduced, with, for instance, a troubling 5-year minimum sentence scaled back to a 1-year mandatory term. Such reductions could be done discretely to particular statutes or across the board to all mandatory minimums. Alternatively, mandatory minimums could be converted into presumptive sentences, where judges have the authority to issue a lower sentence so long as they provide good reasons as to why the presumption should not apply in a given case.¹²⁹ Mandatory sentencing statutes could also be limited in scope to avoid their application in cases of less serious crimes or criminals. Multi-year mandatory minimums might be eliminated for nonviolent drug crimes, for instance, and offenses by juveniles and nonviolent property crimes might be removed as predicate offenses for recidivist statutes such as three-strikes laws. Another ready-made fix would be to preclude the “stacking” of mandatory minimum sentences, such as those pursuant to 18 U.S.C. § 924(c),¹³⁰ which can result in a lifetime’s worth of punishment for just a few days of criminal activity. Still other reforms could check the use of mandatory minimums against bit players in criminal schemes by, for example, constraining the application of conspiracy doctrine and accomplice liability as the basis for long mandatory sentences.¹³¹ Finally, mandatory minimums might be subject to temporal limits through so-called “sunset clauses,” where the statutes would automatically lapse after a certain time period unless lawmakers voted to extend the laws.¹³²

127. 18 U.S.C. § 3582(c)(1).

128. See Luna & Cassell, *supra* note 1, at 82.

129. See Tonry, *Mostly Unintended Effects*, *supra* note 1, at 103–04.

130. See Luna & Cassell, *supra* note 1, at 80–81.

131. See Schulhofer, *supra* note 103, at 26–27.

132. See Tonry, *Mostly Unintended Effects*, *supra* note 1, 104.

5. **Eliminate mandatory minimum sentences.** For many crimes, particularly those that do not involve violence, mandatory minimums could be eliminated. “In a sensible world of rational policy making, no mandatory penalty laws would be enacted. Those that exist would be repealed. That would be the simplest way to address the problems revealed by the literature,” Professor Tonry argued.¹³³ “That is not the world we live in,” he noted, but perhaps someday it will be. Until then, lesser reforms should be pursued.

133. *Id.* at 103.