Missouri Law Review

Volume 78
Issue 4 *Fall 2013*

Article 7

Fall 2013

Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from Miller v. Alabama

Mary Price

Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from *Miller v. Alabama*

Mary Price[*]

I. INTRODUCTION

When the decision in *Miller v. Alabama*[1] was announced, my colleagues and I at Families Against Mandatory Minimums (FAMM) cheered its ringing endorsement of proportionality and individualized sentencing. FAMM, after all, was formed in 1991 to champion sentencing discretion and work to eliminate laws and policies that require judges to impose pre-set minimum sentences. In its earliest days, FAMM found its unique voice by gathering, distilling, and telling the stories of individuals who received disproportionate sentences because of mandatory sentencing laws. Part of our job to this day, more than twenty-two years later, remains to tell anyone who will listen, and especially lawmakers, that a defendant facing sentencing deserves to be seen as more than the crime for which he or she was convicted. An essential part of our work is giving a voice to people who were, for all intents and purposes, silenced at sentencing.

In this Article, I make the case that, while the robust proportionality principles informing *Miller* and similar cases are unlikely to translate into the end of mandatory minimum sentencing by way of the Eighth Amendment (at least anytime soon), embracing sentencing proportionality is the key for lawmakers who are – or should be – addressing the unsustainable growth in the federal prison population as a distinct threat to public safety. Politicians who support mandatory minimums have been immune over the years to the many reasoned arguments about how unjust those sentences are and what costs they pose to families and communities. Mandatory minimum sentences have been touted as necessary to keep the public safe, and support for these sentences has been seen as politically expedient. Even empirical arguments demonstrating that getting rid of mandatory sentencing will not harm public safety have fallen on deaf ears. We grew a criminal justice system addicted to solving social and public safety problems with incarceration and we combined that system with a long-simmering distrust of the judiciary, thereby creating mandatory minimums that dominate the sentencing field, directly and indirectly, through their sentencing guideline proxies.

---

* Mary Price is the General Counsel of Families Against Mandatory Minimums (FAMM).

1. 132 S. Ct. 2455 (2012).

However, today federal lawmakers face a new challenge: the burgeoning prison population consumes an ever-growing portion of the budget of the Department of Justice (DOJ).[2] This threatens the budgets for the DOJ's other components, including those directly responsible for public safety, such as the FBI, and those that fund grants to state and local law enforcement. A number of states – including conservative states – for which the problem of over-incarceration surfaced with greater urgency over the last seven years initiated measures to stabilize their prison populations, if not reduce them.[3] Those states were laboratories for change and caught the attention of traditional supporters of harsh sentencing policies: conservative lawmakers and opinion leaders who are speaking out about mass incarceration, the influence of sentencing, and even mandatory minimums. Some of these conservative politicians and opinion leaders even made common cause with their liberal counterparts to take a look at over-criminalization, over-federalization, and even early release mechanisms.

In this Article, I draw a connection between mandatory minimum sentencing and the growth of the federal prison population; mandatory minimums have required and influenced unduly lengthy sentences that are neither individualized nor proportionate. Proportionate sentencing, on the other hand, results in lower sentences, not to mention bed and cost savings. While "back-end" reforms to encourage the earlier release of prisoners are commendable, front-end reforms that result in lower sentences are essential if we are to make a lasting impact on the size of the federal prison population. Sentencing policies that embrace proportionality are key to stabilizing and reducing overcrowding. Of course, proportionality as an end in itself is ideal, but those of us who advocate for change may have to settle for selling sentencing proportionality as an indispensable means to a necessary end.

II. MANDATORY MINIMUMS AND FEDERAL SENTENCING

Mandatory minimum sentencing is the antithesis of individualized sentencing. In its purest form, a mandatory minimum is set by legislators and triggered by a conviction for a qualifying crime, by the crime's "offense characteristics," or by reference to an underlying or prior offense.[4] In crimi-

2. *See* JULIE SAMUELS, ET AL., URBAN INST. JUSTICE POLICY CTR., STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM 2 (Nov. 2013), *available at* http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf

3. Ron French, *Shifting Prison Politics: How GOP Is Getting Smarter on Crime*, BRIDGE MAG. (Feb. 14, 2012), http://bridgemi.com/2012/02/politics-of-prisons-shifting/; *see also* The Pew Charitable Trusts, *States Cut Both Crime and Imprisonment* (Dec. 2013), http://www.pewstates.org/research/data-visualizations/states-cut-both-crime-and-imprisonment-85899528171.

4. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (Oct. 2011) [hereinafter

nal justice systems with determinate sentencing – which elevates certainty about the length of imprisonment over other considerations – the term is unrelieved by parole. There is also no so-called "second look" opportunity for courts to consider whether an imposed mandatory minimum sentence continues to serve the ends of justice following its imposition and the passage of time.[5] This commitment to finality is enshrined in 18 U.S.C. § 3582(c), which provides only a handful of opportunities – none of which are available to the court in the first instance[6] – to revisit a sentence once it is finalized.

The federal government's latest grand experiment with mandatory minimums[7] began in the mid-1980s and was prompted in part by a repudiation of the rehabilitative model of sentencing and the elevation of a model designed to ensure more certainty, fewer differences among and between sentences, and, in the words of the U.S. Sentencing Commission (Commission), "more appropriately punitive" sentences.[8] The mandatory minimums adopted (for drug offenses)[9] or increased (for gun offenses)[10] during this period were gen-

2011 MANDATORY MINIMUM REPORT], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

5. The purposes of punishment are set out at 18 U.S.C. § 3553(a)(2) (2006), and can be roughly summarized as just punishment, deterrence, incapacitation and rehabilitation.

6. The court may reduce an imposed sentence to grant "compassionate release" from prison for "extraordinary and compelling circumstances," but only upon motion by the Bureau of Prisons under 18 U.S.C. §3582(c)(1)(A)(i) (2006); reduce a sentence for substantial cooperation in the investigation or prosecution of others but only on motion by the government, pursuant to 18 U.S.C. § 3582(c)(1)(B) (2006), 18 U.S.C. § 3553(e) (2006), and FED. R. CRIM. P. 35; or reduce a sentence imposed under the federal Sentencing Guidelines, but only if the applicable sentencing guideline has subsequently been lowered by the U.S. Sentencing Commission *and* that lower sentence deemed "retroactive" by the Commission, under 18 U.S.C. § 3582(c)(2) (2006) and U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (2012).

7. For a discussion of the history of mandatory minimums, see 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 7-34. *See also* MOLLY M. GILL, FAMILIES AGAINST MANDATORY MINIMUMS, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS 7-17, *available at* http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf.

8. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (1991) [hereinafter 1991 MANDATORY MINIMUM REPORT], *available at* https://www.ncjrs.gov/pdffiles1/digitization/137910NCJRS.pdf.

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

10. For example, in 1984, Congress increased the one-year mandatory minimum for using or carrying a firearm while committing a felony adopted in 1970 to five years when used in connection with a crime of violence, Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-39 (amending 18 U.S.C. § 924 (c)), and amended it again in 1986 to enhance firearm mandatory minimums when associated

erated around drug-based street wars of the 1980s and remain, with two notable exceptions,[11] on the books and in the toolboxes of prosecutors to this day. Mandatory minimums have continued to grow over the years, both in number and in length; they now number more than 190.[12]

Judges are constrained to impose the mandatory minimum sentence when certain triggering conditions, such as drug type and quantity[13] or the use of a gun,[14] are met and, unless federal law has carved out an exception,[15] may not impose a lower sentence. Such a rigidly-structured system is inhospitable ground for considerations of proportionality – the notion that a punishment should fit the crime – and individualization, the notion that the punishment should fit the offender. Congress knew full well how to fashion a system that accounted for such things. We know that because, remarkably, just two years before Congress adopted the modern-era mandatory minimums, it passed the Sentencing Reform Act (SRA).[16] The SRA was a criminal justice system game changer; it abolished parole, ushered in determinate sentencing, and ended an era of uncabined judicial discretion.[17] It directed the creation of the Commission and charged it with promulgating sentencing guidelines.[18]

However, the SRA also produced the federal statute governing sentencing that establishes a roadmap for proportionate, individualized sentencing. Courts are directed by 18 U.S.C. § 3553(a) to undertake a series of considerations in determining the appropriate sentence for an offender, including evaluating individual features of the crime and characteristics of the offender. These considerations include the nature and seriousness of the offense, history and characteristics of the defendant, the sentences available under the law, and the need to avoid unwarranted sentencing disparity among

---

with drug trafficking offenses. Act of May 19, 1986, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456-45 (amending 18 U.S.C. § 924).

11. In 1994, Congress adopted the Safety Valve, permitting courts to waive mandatory minimum sentences for certain drug defendants who met a set of narrow criteria, *see* 18 U.S.C. § 3553(f) (2006), and in 2010, following years of criticism and efforts to eliminate the sentencing disparity between crack and powder cocaine, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (amending 21 U.S.C. 841 (b)(1) (2006)), raising the amount of crack cocaine necessary to trigger the five- and ten-year mandatory minimum sentences.

12. *See* 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at tbl.A-1. The drug and gun mandatory minimums, while not the only ones, are however the ones most frequently invoked. *Id.* at 73 fig.4-6.

13. *See* 21 U.S.C. § 841 (Supp. 2011).

14. *See* 18 U.S.C. § 924(c).

15. *See supra* note 11; *see also* 18 U.S.C. § 3553(e) (2006) (providing a waiver on the government's motion if the defendant has provided substantial assistance to the government).

16. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

17. *See id.*

18. *See* 28 U.S.C. § 994(a)(1).

similarly situated defendants.[19] The statute mandates that the sentence imposed at the end of that structured inquiry be "sufficient but not greater than necessary"[20] to comply with the purposes of punishment: just punishment, deterrence, incapacitation, and rehabilitation. In other words, the sentence must be proportionate.

Sadly, the promise of proportionality and parsimony was undermined by lawmakers suspicious of judges and judicial discretion – prompting Professor Kate Stith and Judge José Cabranes to name their history of the period *Fear of Judging*.[21] An amendment to the SRA, codified at § 3553(b), was interpreted[22] to ensure that the guidelines would be – for all intents and purposes – mandatory, barring an unusual factor not accounted for in the drafting of the guideline sufficient to warrant a "departure."[23] The tantalizing promise of proportionate sentences arrived at by weighing individual characteristics to determine culpability and features of the offense was abandoned in favor of a complex set of guidelines, many of which were in turn indexed to statutory mandatory minimums.[24]

III. HOPE FROM THE COURT?

A. Sixth Amendment Challenges

Individualized sentencing, proportionality, and parsimony were essentially stillborn and remained unused for the most part until the Supreme Court's decision in *United States v. Booker* over twenty years after the enactment of the SRA. Relying on the Sixth Amendment's guarantee of a jury trial, a 5-4 majority in *Booker* held that the sentencing guidelines were unconstitutional to the extent that they required judges to increase sentences above the top of a guideline range using facts not pled by the prosecution, admitted by the defendant, or proven beyond a reasonable doubt to the jury.[25]

However, the guidelines were salvaged – albeit as advice rather than as mandate – by a slightly different 5-4 majority, which excised two provisions in federal law: the aforementioned § 3553(b) and 18 U.S.C. § 3742(e), which appellate courts used to ensure that district court judges did not stray far from

19. 18 U.S.C. § 3553(a).

20. *Id.* This parsimony mandate was secured by the prescient intervention of Sen. Charles Mathias (D-MD). *See* 130 CONG. REC. 29,870 (1984); *see also* John Conyers Jr., *Unresolved Issues in the Federal Sentencing Reform Act*, 32 FED. B. NEWS & J. 68, 69 (1985) (attributing parsimony mandate to Sen. Mathias).

21. KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING 177 (1998).

22. *See* 18 U.S.C. § 3553(b). For a comprehensive review of the evolution of the guidelines into their all but mandatory state, see Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1641-57 (2012).

23. *See* § 3553(b).

24. *See infra* Part V.B.

25. United States v. Booker, 543 U.S. 220, 244 (2005).

the sentencing guidelines.[26] Doing so effectively transformed mandatory guidelines into advisory guidelines. The guideline structure and instructions remained essentially intact, save for their power over sentencing, which was altered to elevate judicial discretion. Subsequent decisions reinforced *Booker* and strengthened judicial discretion in sentencing.[27] The decision and its progeny breathed new life into the promise of proportionality in § 3553(a).

Consequently, there are two systems of determining punishment that exist in tension. One – defined by criminal statutes that provide for mandatory minimums – permits no individualization and accordingly often results in disproportionate sentences.[28] The other, which is defined by statutes that do not require mandatory minimums, requires an individualized inquiry. Where the law provides for a mandatory minimum sentence, the judge must impose it unless the defendant provided substantial assistance or is eligible for a waiver under the federal safety valve.[29] In cases where no mandatory minimum is implicated, the judge may impose the calculated guideline sentence or she may vary from the guideline sentence if it fails to survive the 18 U.S.C. § 3553(a) inquiry.

Booker's outcome and the transformation from mandatory to advisory guideline sentencing depended not on the Eighth Amendment's ban on cruel and unusual punishment but on the right to jury trial embodied in the Sixth Amendment.[30] While *Booker* elevated judicial discretion and individualized sentencing under the guidelines, those outcomes are only byproducts of the Court's principal mission: to secure the Sixth Amendment right to a jury. The Court was not principally concerned with proportionality or even individualization in *Booker* and its progeny.

The Sixth Amendment line of cases did recently reach a subset of mandatory minimums, altering how some are achieved. In *Alleyne v. United States*, decided in June 2013, the Supreme Court held that, because mandatory minimums increase the penalty for the crime, any fact that increases a mandatory minimum is an offense element and must be submitted to the jury and proven beyond a reasonable doubt.[31] The decision was a straightforward, but hard-fought extension of the so-called *Apprendi* rule. The *Apprendi* rule commands that any fact that increases the range of punishment to which a defendant is exposed is an element of the crime and must be presented to the

26. *Id.* at 245.

27. *See, e.g.*, Gall v. United States, 552 U.S. 38 (2007); *see also* Spears v. United States, 555 U.S. 261 (2009).

28. The problems of mandatory minimums are documented at length. *See generally* 1991 MANDATORY MINIMUM REPORT, *supra* note 8; 2011 MANDATORY MINIMUM REPORT, *supra* note 4; *Stories*, FAMILIES AGAINST MANDATORY MINIMUMS, http://famm.org/stories/ (last visited Nov. 13, 2013).

29. For a fuller discussion of the safety valve, see *infra* Part VI.

30. *Booker*, 543 U.S. at 267-68.

31. 133 S. Ct. 2151, 2155 (2013).

jury and proved beyond a reasonable doubt.[32] Until *Alleyne*, the Court had exempted mandatory minimums from the *Apprendi* rule.[33]

Sixth Amendment-based sentencing reforms have not extended to jury sentencing. While juries have a key role in finding the facts and assessing guilt, they have no direct role in sentencing and judges do not inform them of the sentencing implications of conviction; however, some federal judges have tested the waters of jury sentencing when faced with what they considered excessive mandatory minimums. In one famous example, Judge Jack Weinstein of the Eastern District of New York dismissed the jury's conviction of a man found to have received child pornography because the jury was not advised of the five-year sentence the conviction carried.[34] Judge Weinstein polled the jurors following the verdict and found that knowledge of the mandatory minimum would have changed some votes for conviction.[35] The ruling was overturned on appeal.[36] Judge Paul Cassell of the District of Utah, facing sentencing Weldon Angelos to a fifty-five year mandatory minimum sentence for possessing a gun on three occasions while selling small amounts of marijuana, polled the jurors before imposing a sentence.[37] He provided them with information about Angelos' limited criminal history, told them that there was no parole in the federal system, and asked them what would be the appropriate sentence.[38] None recommended a sentence anywhere near the fifty-five years Judge Cassell was forced to impose.[39] Judge James S. Gwin of the Northern District of Ohio enlisted other Midwest judges in an experiment, in which they surveyed jurors following twenty-two trials, asking what sentence the jurors would impose.[40] The suggested sentences were markedly different from those required by the Sentencing Guidelines and were also below the sentences that were enhanced by mandatory minimums.[41]

---

32. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

33. S*ee* Harris v. United States, 536 U.S. 545 (2002) (holding that jury fact-finding is not necessary when a fact is used to enhance a mandatory minimum within the range of punishment otherwise authorized by the jury), *overruled* by *Alleyne*, 133 S. Ct. 2151.

34. United States v. Polizzi, 549 F. Supp. 2d 308 (E.D.N.Y. 2008), *vacated and remanded sub nom.*; *see also* United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009).

35. Polouizzi, 564 F.3d. at 146; *see also* Colin Moynihan, *Judge Defies Prosecutors on Pornography Sentence*, N.Y. TIMES, Jan. 13, 2011, at A24, *available at* http://www.nytimes.com/2011/01/14/nyregion/14weinstein.html?_r=0.

36. Polouizzi, 564 F.3d. 142.

37. United States v. Angelos, 345 F. Supp. 2d 1227, 1230, 1242 (D. Utah 2004).

38. *Id.* at 1242.

39. *Id.* The jury's mean recommended sentence was eighteen years; the median was fifteen years. *Id.*

40. James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 174 (2010).

41. *Id.* at 188-89 (noting that the average juror recommended sentence was sixty-five months, while the average guideline minimum sentence was 138 months); *see*

Despite these forays into jury involvement in mandatory sentencing, there is little appetite to involve juries in deciding prison terms. Whatever potential the Sixth Amendment held for mandatory minimum reform appears to have been realized, at least for the time being.

B. Eighth Amendment Challenges

The Eighth Amendment is similarly limited, at least vis-à-vis mandatory sentencing overall. The decisions in *Miller v. Alabama* and *Graham v. Florida* before it are solidly grounded in the Eighth Amendment's ban on disproportionately severe punishment, and seemingly offering some hope that mandatory minimums may be assailable as failing to provide for mitigation to check unduly harsh sentences. *Graham* tantalizingly discusses culpability, not merely in light of the crime but also with respect to the defendant's characteristics.[42] *Miller* endorses the concept that punishment "should be graduated to both the offender and the offense."[43] In contrast, mandatory minimums rely most heavily on the crime and one or two facts about it, such as drug quantity, and only consider offender characteristics, such as criminal history, in aggravation.[44] And while a sentence may be appropriately severe in some cases, mandatory minimums ensure that they are applied in all cases, including those where the punishment will be disproportionately severe.[45] But, while the Eighth Amendment recognizes the right to be secure from excessive sanctions – a right that flows from the principle that punishment be "graduated and proportionate" to both the crime and the offender – it has not been interpreted to bar mandatory minimum penalties outright.[46] That said,

---

also id. at 196-200 tbl.3 (comparing guideline and statutory sentences with those settled on by jurors).

42. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

43. Miller v. Alabama, 132 S. Ct 2455, 2463 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)) (internal quotation marks omitted).

44. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (2006) (doubling 10 year mandatory minimum to 20 years for second offense); 18 U.S.C. § 924(c)(1)(C)(i) (2006) (providing for 25-year mandatory minimum for defendant's second or successive use of a gun in connection with a drug trafficking or crime of violence).

45. As Professor O'Hear points out, *Miller* evinces distrust, not of LWOP *per se* but of mandatory minimum sentences: "LWOP for juvenile killers . . . [would be] categorically acceptable[if] imposed on a discretionary basis [has become] unconstitutional solely where it is mandatory." Michael M O'Hear, *Not Just Kids Stuff?*, 78 MO. L. REV. 1087 (2013).

46. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (holding that a mandatory minimum sentence of life without parole for a drug offense involving 650 grams or more of cocaine or heroin by a first time offender does not violate the Eighth Amendment, because, while such a sentence may be cruel, it is not unusual and is not unconstitutional simply due to the fact that it is mandatory); *see also* Ewing v. California, 538 U.S. 11, 18, 30-31 (2003) (finding sentence of twenty-five years to life for stealing a set of golf clubs, when defendant had four prior convictions, did not violate

the Court has slowly carved proportionality into otherwise rigid legislative formulations in death penalty and certain juvenile cases. Those opinions contain provocative references that, absent the categorical limitations, would appear to embrace the concept that mandatory sentencing is constitutionally flawed because it prohibits the defendant from offering evidence in mitigation of sentence.

For example, in *Woodson v. North Carolina*, which struck down mandatory death for first-degree murder, the Court wrote that the statute offended the Constitution because:

> [The statute] accords no significance to relevant facets of the character and record of the individual offender or the circumstances [of the crime, and] exclude[ed] from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[47]

Miller catalogues a robust list of considerations that mandatory schemes, like the mandatory life without parole sentence, prohibit:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him . . . no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him . . . . [T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."[48]

The spirit animating *Woodson* and *Miller* echoes § 3553(a) inquiries into circumstances of the offense and offender. The force of Justice Sonia Sotomayor's endorsement of individualization and proportionality notwithstanding, and whether (or to what extent) the Court is willing to extend or shade the lines drawn in the death and juvenile cases in a way that undermines mandatory schemes for other groups of individuals and for other outcomes, the end of mandatory sentencing – assuming *Ewing* and *Harmelin*

---

the Eighth Amendment); Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming fifty-years to life sentence for stealing videotapes by a defendant with three prior convictions).

47. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

48. *Miller*, 132 S. Ct. at 2468.

hold – is likely not found in the courts.[49] As has been pointed out repeatedly by the Court, establishing the limits of sentencing is first a matter of legislative prerogative; absent a finding that the system violates the Constitution, it could be a long slog. Thus, "significant reform will come, if at all, by Congress."[50]

With a couple of notable exceptions, the harms caused by mandatory minimums, the injustices they impose, and their failure to achieve the outcomes they were adopted to meet have not swayed lawmakers enough to take the steps necessary to end or ameliorate mandatory sentencing or to embrace proportionality as described by Justice Sotomayor. Proportionality *qua* proportionality, even if a value in the abstract, is not a value shared by most federal lawmakers considering sentencing and mandatory minimums. And the ode to proportionality and individualized sentencing that is the *Miller* decision is unlikely to move federal lawmakers to go "soft on crime."

And yet, the need for proportionality in sentencing has never been greater. I believe the key to elevating proportionality to a value lawmakers will embrace will be found in one of the chief harms caused by the rise of mandatory minimums: the explosive growth of the federal prison population and the pressure it exerts on the DOJ's budget.

IV. GROWTH OF THE FEDERAL PRISON POPULATION[51]

One of the byproducts of mandatory minimum sentencing is the tremendous prison growth that has occurred during the last twenty-five years.[52] While budgets were expanding and money for prisons was not an issue, so

49. *See, e.g.*, O'Hear, *supra* note 45 (discussing how *Harmelin*, *Ewing*, *Graham* and *Miller* do not provide a comprehensive principle but notes how the juvenile cases "may provide a basis for relief for various specific categories of adult" LWOP offenders); *see also* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 28-29 (2010) ("In reality . . . the Supreme Court's jurisprudence in this area, described by some as an abandonment of the field, makes clear that judicial review will not provide much of a check on excessive punishment.").

50. Luna & Cassell, *supra* note 49, at 29.

51. In Parts IV, V and VI of this Article, I build on ideas I have presented elsewhere in other forms. Letter in Response to a Request for Pub. Comment from Julie Stewart, President & Mary Price, Vice President, Families Against Mandatory Minimums, to Judge Patti B. Saris 2 (July 15, 2013) [hereinafter Request for Public Comment], *available at* http://famm.org/wp-content/uploads/2013/07/FAMM-commission-comments-DR.pdf. In doing so, I have periodically adopted or closely paraphrased statements I have made before. In an effort to avoid burdening the text with unnecessary quotation marks, I have included footnotes noting where these similarities arise and also included references to the original source material for these propositions.

52. NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (2013) [hereinafter CRS Report], *available at* http://www.fas.org/sgp/crs/misc/R42937.pdf.

called "tough on crime" lawmakers found it expedient to pass criminal statutes with mandatory minimums. While some of these politicians genuinely believed that rigid sentences would deter criminals and keep our communities safer, it became too easy to score political points by seizing on the crime *du jour* to support adopting a new mandatory minimum. Mandatory minimums were "frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.'"[53] Other lawmakers describe a more principled, but evidence-light, process. For example, former Representative Dan Lungren, a republican from California, recently reflected on the dramatic escalation of the crack cocaine mandatory minimum by the House of Representatives in 1986: "We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it, but that's what we did, thinking we were doing the right thing at the time."[54]

While experts may disagree about whether mandatory minimums made us safer,[55] they have created other pressures that threaten public safety. Today, the costs of such policies are keenly felt as the need to maintain and increase prison spending eats into other budgets, including those allocated for law enforcement. The DOJ, long a proponent of mandatory sentencing, began to sound the alarm several years ago. In speeches and submissions to Congress and the Commission, the DOJ and its representatives highlighted the increasing share of the Department's budget dedicated to funding federal prisons.[56]

The Federal Bureau of Prisons (BOP) is currently operating at 36% above rated capacity.[57] The Inspector General of the DOJ (IG) bluntly rates

53. Luna & Cassell, *supra* note 49, at 24 (quoting William H. Rehnquist, Luncheon Address (June 18, 1993), *in* U.S. SENTENCING COMM'N, DRUGS AND VIOLENCE IN AMERICA 287 (1993)).

54. Congressional Record, 111th Cong. H 6202 (July 28, 2010), a*vailable at* http://thomas.loc.gov/cgi-bin/query/F?r111:7:./temp/~r111M9LunZ:e60208.

55. *See infra* text accompanying notes 71-72.

56. Request for Public Comment, *supra* note 51; *see also id.* at 2 n.2 (quoting Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Address at the National District Attorney's Association Summer Conference (July 23, 2012), *available at* http://www.justice. gov/criminal/pr/speeches/2012/crm-speech-120723.html ("[W]e must also recognize that a criminal justice system that spends disproportionately on prisons – at the expense of policing, prosecutions and recidivism-reducing programs – is unlikely to be maximizing public safety."); *see also* Michael E. Horowitz, Inspector General, *Top Management and Performance Challenges Facing the Department of Justice – 2013*, U.S. DEP'T JUST. (Dec. 11, 2013, reissued Dec. 23, 2013) (citing the opinion of the Deputy Attorney General that the increasing cost of the prison system is "unsustainable."), *available at* http://www.justice.gov/ oig/challenges/2013.htm#l.

57. Request for Public Comment, *supra* note 51 at 2 (citing *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before the Subcomm. on Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations*, 113th Cong. 4 (April 17, 2013) [hereinafter Samuels Statement] (statement of Charles E.

its outlook as "bleak: the BOP projects system-wide crowding to exceed 44% over rated capacity through 2018."[58] This problem has been long in the making. The number of federal prisoners has grown from roughly 25,000 in FY 1980 to nearly 219,000 in FY 2012.[59] Between FY 2000 and FY 2012, the annual per capita cost to incarcerate federal prisoners increased from $21,603 to $29,207.[60] The BOP's budget grew accordingly, from $3.668 billion to $6.641 billion.[61]

According to the IG, the budget pressures created by the bloated prison population are significant and can be traced in part to the increased numbers of prisoners entering the system:

> [T]he Department faces the challenge of addressing the growing cost of housing a continually growing and aging population of federal inmates and detainees. The federal prison system is consuming an ever-larger portion of the Department's budget, making safe and secure incarceration increasingly difficult to provide, and threatening to force significant budgetary and programmatic cuts to other DOJ components in the near future. In FY 2006, there were 192,584 inmates in BOP custody. As of October 2012, the BOP reported 218,730 inmates in BOP custody, an increase of more than 13 percent. Not surprisingly, these trends mirror the increased number of federal defendants sentenced each year, which rose from approximately 60,000 in FY 2001 to more than 86,000 in FY 2011, according to the U.S. Sentencing Commission.[62]

The IG anticipates that, absent a course change, the BOP's 25% share of the FY 2013 DOJ budget will grow to 28% by 2018.[63]

Notwithstanding these funding increases, overcrowding in the BOP continues and threatens the safety of prisoners and prison staff alike. The current

---

Samuels, Jr., Dir. of the Fed. Bureau of Prisons), *available at* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).

58. Horowitz, supra note 56.

59. CRS Report, *supra* note 52.

60. *Id.* at 15 tbl.1.

61. *Id.* at 12 fig.5.

62. Request for Public Comment, *supra* note 51, at 2-3 (quoting *Oversight of the Department of Justice: Hearing Before the Subcomm. on Commerce, Justice, Sci. and Related Agencies of the H. Comm. on Appropriations,* 113th Cong. 9 (March 14, 2013) [hereinafter Horowitz March Statement] (statement of Michael E. Horowitz, Inspector Gen., U.S. Dep't of Justice), *available at:* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf).

63. Horowitz, *supra* note 56.

inmate-to-staff ratio is five-to-one,[64] and BOP Director Charles Samuels recently testified about the dangers this situation poses.[65] So critical is the need for staff and the concern about the impact of across-the-board automatic spending cuts, that the Attorney General asked Congress to permit the DOJ authority to reprogram funds from other DOJ components to the BOP.[66] The request was approved and the DOJ reprogrammed $150 million to the BOP,[67] including approximately $90 million from the FBI.[68]

However, reprogramming is unsustainable. The IG warned Congress in early June 2013 that "continuing to spend more money each year to operate more federal prisons will require the Department to make cuts to other important areas of its operations."[69] The Urban Institute reported its assessment that "[i]n these fiscally lean times, funding the expanding BOP population crowds out other priorities, including federal investigators and prosecutors and support for state and local governments."[70] In other words, locking up criminals at current rates and sentences is threatening public safety. Conservatives, formerly supportive of mandatory sentencing and incarceration policies, have also begun to sound the alarm. Reflecting on his own prior assessment that "the social benefits approximately equaled the costs of incarceration," influential economist Steven D. Levitt told the *New York Times* in December 2012, "I think we should be shrinking the prison population by at least one-third."[71] David Keene, past president of the National Rifle Association, reflected in an op-ed supporting mandatory minimum reform that "spending too much on prisons skews state and federal budgetary priorities,

64. Horowitz March Statement, *supra* note 62, at 9.

65. Samuels Statement, *supra* note 57, at 4-5 ("[I]ncreases in both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are related to increases in the rate of serious inmate assaults. An increase of one in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates.").

66. *Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations*, 113th Con. 1 (June 6, 2013) (Statement of Eric H. Holder, Jr., Att'y Gen. of the U.S.), *available at* http://www. appropriations.senate.gov/ht-commerce.cfm?method=hearings.download&id=5c7116e8-9d3b-4e21-9b2d-86b157adb140.

67. *Id.*

68. *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Transcript of Testimony of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 6 (April 17, 2013) (on file with author).

69. Request for Public Comment, *supra* note 51, at 3 (quoting Horowitz June Statement, *supra* note 63, at 10).

70. SAMUELS, ET AL, *supra* note 2, at 14.

71. John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 12, 2012, at A1, *available at* http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0.

taking funds away from things that are proven to drive crime even lower, such as increasing police presence in high-violence areas and providing drug treatment to addicts."[72]

V. THE ROLE OF MANDATORY MINIMUMS IN THE FEDERAL PRISON OVERCROWDING CRISIS

The lengthening of prison sentences, spurred particularly by mandatory minimums, directly contributes to the increase in the federal prison population. A recent report by the Congressional Research Service (CRS) places the blame for prison overcrowding and the budget crisis squarely on decisions by Congress and the Commission.[73] The report identified four factors driving over-incarceration: (1) increased numbers of federal offenses subject to mandatory minimums; (2) the growth in mandatory minimums, which has in turn led to increased sentencing ranges and lengths under the federal Sentencing Guidelines; (3) the growing number of federal offenses; and (4) the elimination of parole.[74]

Similarly, the Urban Institute, in its recent study of the causes of overpopulation in the BOP, concluded that policies affecting the front end of the sentencing process have had the greatest impact:

> More than 90 percent of BOP inmates are sentenced offenders, mostly for federal crimes. The number and composition of offenders committed to federal prison result from the investigations pursued by law enforcement, cases accepted and charged by prosecutors, the dispositions of those cases, the proportion of convicted offenders that receive a term of imprisonment, and the imposed sentence . . . . It is the combination of the volume of admissions and sentence that drives the inmate population. The length of stay is largely determined by the sentence imposed (informed by the relevant statutory penalties and federal sentencing guidelines), and any subsequent sentence reductions that release inmates early. Currently, few options for early release exist, and most federal offenders sentenced to prison serve at least 87.5 percent of their term of imprisonment . . . .[75]

Mandatory minimums have played an important role in overall federal sentence length in three ways. First, mandatory minimums are lengthy and have grown over the years.[76] Second, sentencing guidelines for crimes

72. David Keene, *Prison-Sentence Reform*, NAT'L REV. ONLINE (May 24, 2013, 4:00 AM), *available at* http://www.nationalreview.com/article/349118/prison-sentence-reform-david-keene.

73. *See* CRS Report, *supra* note 52.

74. *Id.* at 7.

75. SAMUELS ET AL., *supra* note 2, at 9-10.

76. CRS Report, *supra* note 52, at 8.

that carry mandatory minimums anchor sentence ranges to the minimums, and guideline ranges increase according to sentencing factors set out in the guidelines.[77] Third, even for crimes for which there are no mandatory minimums, the longer sentences made necessary by such minimums nonetheless exert a gravitational pull, lifting up all guideline ranges in a parody of proportionality.[78]

A. Long and Longer Mandatory Minimums

According to the CRS Report,

> Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. . . . Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods. For example, the [U.S. Sentencing Commission or] USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more.[79]

Mandatory minimums have increased in number, length, and coverage. Between 1991 and 2011, the number of mandatory minimums doubled from 98 to 195.[80] They were added to more offenses, including child pornography crimes and aggravated identity theft, though drug and weapons offenses make up the greatest proportion of mandatory minimum bearing convictions.[81] In addition, not only are mandatory minimums increasing in number but prosecutors are securing convictions that carry longer minimums. In 1990, roughly half of defendants were convicted of a crime subject to a mandatory minimum penalty, and 34.4% of those defendants were convicted of a crime subject to a ten-year mandatory minimum.[82] By 2010, five-year convictions had fallen to 39.9% but ten-year convictions had grown to 40.7%;[83] defendants

77. *Id.*
78. *Id.*
79. *Id.*
80. 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 71-72.
81. *Id.* at 72-73. In fiscal year 2010, 77.2% of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a drug trafficking offense (down from 91.1% in 1991), and 11.9% (up from 4.5% in 1991) were convicted of a firearms offense. *Id.* at 73.
82. *Id.* at 75.
83. *Id.*

subject to mandatory minimums of greater than ten years increased as well, from 9.0% to 11.9%.[84]

The number of defendants sentenced to mandatory minimums has increased as well, from 6,681 in 1990 to 19,896 in 2010.[85] Over this period, people serving mandatory minimums accumulated in the federal system. On September 30, 2010, 75,579 (39%) of the 191,757 offenders in BOP custody were serving mandatory minimum sentences.[86] And the sentences they were serving were longer as well. In 2010, the average mandatory minimum sentence imposed was 139 months, in contrast to forty-eight months for all offenses.[87] Even at 2010 prices, the cost is staggering. If the cost of incarceration remained constant, we would pay $5,627,416,473.60 for the 19,896 people sentenced to mandatory minimums in 2010.[88]

B. Sentencing Guidelines Anchored to Mandatory Minimums

A little more than 60% of prisoners incarcerated in 2010 were not serving mandatory minimum sentences; they were serving sentences arrived at by using the federal Sentencing Guidelines.[89] The majority of the guidelines for offenses covered by mandatory minimums are anchored by mandatory minimums. And while the guidelines themselves are no longer mandatory, judges are obliged to first calculate the applicable sentencing guideline before moving to the 18 U.S.C. § 3553(a) inquiry.[90] In 2012, 84.5% of sentences fell within or above the guidelines, or only fell below them due to a government motion or a guidelines-sanctioned judicial departure.[91] In 2012, judges sen-

84. *Id.* at 76.

85. *Id.* at 76, fig.4.7.

86. Request for Public Comment, *supra* note 51, at 4 (citing 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 148).

87. *Id.* (citing 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 136).

88. This is based on the average cost of incarceration in federal prison in 2010 ($28,284.16 according to the Administrative Office of the Courts), the average length of the sentence of 11.58 years (reduced to approximately ten years for good time); see 18 U.S.C. § 3624(b)) for the 19,896 people sentenced to mandatory minimums that year. Ad. Office of the U.S. Courts, *Newly Available: Costs of Incarceration and Supervision in FY 2010*, THE THIRD BRANCH (June 23, 2011), *available at* http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx.

89. See 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 140.

90. Request for Public Comment, *supra* note 51, at 4 (citing Gall v. United States, 552 U. S. 38, 49 (2007)).

91. *Id.* at 5 (citing UNITED STATES SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.N (2013) [hereinafter 2012 SOURCEBOOK], *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm).

tenced within the applicable guidelines in over 82% of cases, indicating the guidelines' continuing influence over sentencing.[92]

Until 2009, drug trafficking convictions comprised the largest percentage of the federal criminal docket for a number of years.[93] The Commission, in drafting the drug guideline, chose to link it to the five- and ten-year mandatory minimum sentences set by the Anti-Drug Abuse Act of 1986.[94] The drafters set the corresponding starting points to hover slightly above the mandatory minimums.[95] For example, a drug quantity that triggers a mandatory minimum of five years is assigned a guideline offense level that begins with sixty-three months, and the drug quantity that triggers the ten-year mandatory minimum is set at 121 months for guideline purposes.[96] This was done to provide some assistance to prosecutors seeking incentives for plea negotiations.[97] The Commission then arranged drug quantities around those anchor points, spreading drug sentencing base offense levels across seventeen guideline ranges.[98] Because the mandatory minimums served as the floor – or more appropriately, the basement – for the corresponding sentencing guidelines, "all sentences for that crime, regardless of the circumstances of the crime or the offender, are arrayed above . . . ." them.[99] According to the Commission,

> no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.[100]

These choices were not only unprecedented; they were uncalled for. The Commission acknowledged that in crafting guidelines it has choices

92. *Id.*

93. 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 152; *see also* Request for Public Comment, *supra* note 51, at 9.

94. Request for Public Comment, *supra* note 51, at 9 (citing UNITED STATES SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING 49 (Nov. 2004) [hereinafter FIFTEEN YEAR REPORT], *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/index.cfm).

95. 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 53.

96. FIFTEEN YEAR REPORT, *supra* note 94, at 49.

97. *See id.* at 77.

98. *Id.* at 49.

99. *Mandatory Minimums: Hearing Before the U.S. Sentencing Comm'n*, 111th Cong. 8 (May 27, 2010) (Statement of James E. Felman, on behalf of the American Bar Association), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Felman_ABA.pdf.

100. Request for Public Comment, *supra* note 51, at 9 (quoting FIFTEEN YEAR REPORT, *supra* note 94, at 49).

when indexing them to mandatory minimums. It explained in 2009 that, when faced with drafting guidelines for an offense that includes a mandatory minimum, it has four choices. Its first choice is to set the base offense level – which is the starting point for determining the guideline sentencing range for the offense – so it exceeds the mandatory minimum. This is how the drug guidelines generally are handled, as discussed immediately above. Second, it is able to set the base offense level so that the mandatory minimum is contained within the corresponding guideline range. This is how crack cocaine was handled for a brief period; the mandatory minimum for crack cocaine was five years for an offense involving five grams, but the guideline assigned a corresponding base offense level of 24, with a guideline range of 51 to 63 months. Third, it can set the corresponding base offense level below the mandatory minimum and, if necessary, rely on specific enhancements to achieve a mandatory minimum sentence. Finally, it can set the base offense level without regard to the mandatory minimum.[101] The Commission has on occasion crafted or amended guidelines with corresponding mandatory minimums using all four methods,[102] but the drug guidelines – with a couple of notable exceptions[103] – include base offense levels higher than the otherwise applicable mandatory minimum. Practitioners and experts have urged the Commission to end the practice.[104]

---

101. *Id.* at 10 (citing U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 45-46 (Oct. 2009) [hereinafter CHILD PORNOGRAPHY HISTORY] *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf.

102. *Id.* (citing U.S SENTENCING GUIDELINES MANUAL § 2G2.2(a) (2012) (setting base offense levels for trafficking in child pornography below the mandatory minimum and including enhancements that can increase the sentence to or above it); *see also* CHILD PORNOGRAPHY HISTORY, *supra* note 101 at 46-49; U.S SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2012) (assessing a two-level enhancement when a gun is possessed by a defendant in connection with a drug trafficking offense, notwithstanding the five-year mandatory minimum sentence under 18 U.S.C. § 924(c) (2012) for a conviction of possessing a firearm in connection with a drug trafficking offense); U.S SENTENCING GUIDELINES MANUAL § 2D1.1(E) (2012) (assigning a weight for marijuana plants of 100 grams rather than the statutory assessment of 1000 grams per plant in 21 U.S.C. §. 841(b)(1)(A)(vii)); U.S SENTENCING GUIDELINES MANUAL § 2D1.1(G) (2012) (subtracting the weight of the carrier medium from the weight of LSD calculated under the guidelines and assigning each dose of LSD a uniform weight, in contrast to 21 U.S.C. §. 841(b)(1)(A)(v) which weighs the entire dose, including the carrier medium).

103. *See supra* note 102 (discussing the calculation of LSD carrier mediums and marijuana plants).

104. Request for Public Comment, *supra* note 51, at 10. The Request for Public Comment provides recent examples. *Id.* at 10 n.40 (Letter from Julie Stewart and Mary Price (FAMM) to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 15-16 (July 23, 2012), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20120815/FAMM_priorities_comment.pdf (urging across the board two-

Anchoring the guidelines in this fashion has had profound consequences. Today, nearly half of all federal prisoners are incarcerated for drug offenses – half of whom are first time offenders – and are serving sentences that, while falling, still averaged sixty-eight months in 2012.[105] The Urban Institute's recent study of the factors that have increased the BOP population found that "the growth in the BOP population from 1998 to 2010 confirmed that time served in prison, particularly for drug offenses, was the largest determinant of the growth in the population."[106] Time served for those offenders is inextricably linked to the mandatory minimum sentences on which the guidelines are based.

C. Faux Proportionality: Mandatory Minimums and Guidelines Associated with Them Encourage the Upward Ratchet in Guideline Sentences for Other Offenses

Several observers have noted that mandatory minimums and the guidelines linked to them have lifted – or been cited in support of lifting – other guideline-based sentences, including those not associated with mandatory minimums. The CRS recently found:

> While only offenders convicted for an offense carrying a mandatory minimum penalty are subject to those penalties, mandatory minimum penalties have, in effect, increased sentences for other offenders. The USSC has incorporated many mandatory minimum penalties into the sentencing guidelines, which means that penalties for other offense categories under the guidelines had to increase in order to keep a sense of proportionality.[107]

This sham proportionality has operated in only one direction, prompting the Judicial Conference's Criminal Law Committee to chide the Commission for

level reduction of drug base offense levels); JASMINE TYLER, DRUG POLICY ALLIANCE, PUBLIC COMMENTS SUBMITTED TO THE UNITED STATES SENTENCING COMMISSION REGARDING PROPOSED PRIORITIES FOR 2013 4-5 (July 31, 2012), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20120815/DPA_priorities_comment.pdf (arguing for a reduction of all drug sentencing guidelines by two levels); Letter from Marjorie E. Meyers to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 3-5 (Aug. 26, 2011), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/Defender-Priorites-Comments_2011-2012.pdf; Letter from Marc Mauer to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 1-2 (Aug. 22, 2011), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/SentencingProject_PubComm_2012_priorities.pdf.

105. SAMUELS ET AL., *supra* note 2, at 11 (citing U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig. E, table 14).

106. *Id.*

107. CRS Report, *supra* note 52, at 8.

addressing proportionality concerns by increasing penalties.[108] In a letter to the Commission, Judge Sim Lake, chair of the Criminal Law Committee, stated, "The Committee believes that the goal of proportionality should not become a one-way ratchet for increasing sentences. . . ."[109]

However, the Commission is not entirely to blame; Congress also played a role. For example, when the guidelines for certain economic crimes were reconsidered following the collapse of Enron and the enactment of the Sarbanes-Oxley Act, "the 'penalty gap' between fraud and drug cases was used to pressure the Commission to amend U.S. Sentencing Guideline § 2B1.1."[110] With Sarbanes-Oxley, Congress raised the statutory maximum for certain offenses and directed the Commission to respond quickly.[111] The Commission – with the assistance of practitioners, the judiciary, the DOJ, law professors, and probation officers – had just two years earlier capped a five-year process of study and drafting to produce the 2001 Economic Crime Package.[112] Nonetheless, it held hearings to consider additional amendments made necessary by Sarbanes-Oxley.[113] All witnesses, save the DOJ, opposed general increases, which the Commission was resistant to as well.[114] Senator Joseph Biden, Chairman of the Judiciary Committee's Subcommittee on Crime and Drugs, was not content to leave the Commission to its own devices.[115] His committee held several hearings, including one in the summer of 2002 entitled "Are We Really Getting Tough on White Collar Crime?"[116] Shortly before the Commission's April 2003 meeting to vote on whether and how much to amend the guidelines, Senator Biden "inserted into the Congressional Record a 'legislative history' of Title IX of Sarbanes-Oxley which suggested quite plainly that Senator Biden wanted an across-the-board guideline increase for economic crimes."[117] He wrote:

---

108. Request for Public Comment, *supra* note 51, at 5.

109. Letter from Hon. Sim Lake, Chair of the Judicial Conference Comm. on Criminal Law, to Members of the U.S. Sentencing Comm'n 3-4 (Mar. 8, 2004) (on file with the author).

110. Luna & Cassell, *supra* note 49, at 53 n.65.

111. Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 411 (2004).

112. *Id.* at 388-90.

113. *Id.* at 431.

114. *Id.*

115. *See id.*

116. *See Penalties for White Collar Crime Offenses: Are We Really Getting Tough on Crime?: Hearing on H.R. 3763 Before the Subcomm. on Crime and Drugs, S. Comm. on the Judiciary*, 107th Cong. 1-17 (2002), *reprinted in* 15 FED. SENTENCING REP. 234 (2003).

117. *Bowman*, *supra* note 111, at 431.

> Congress in particular is concerned about base offense levels which may be too low. The increased sentences, while mean[ing] to punish the most egregious offenders more severely, are also intended to raise sentences at the lower end of the sentencing guidelines. While Congress acknowledges that the Sentencing Commission's recent amendments are a step in the right direction, the Commission is again directed to consider closely the testimony adduced at the hearings by the Judiciary Subcommittee on Crime and Drugs respecting the ongoing "penalty gap" between white-collar and other offenses. To the extent that the "penalty gap" existed, in part, by virtue of higher sentences for narcotics offenses, for example, Congress responded by increasing sentences for certain white-collar offenses. Accordingly, we ask the Commission to consider the issues raised herein; determine if adjustments are warranted in light of the enhanced penalty provisions contained in this title; and make recommendations accordingly.[118]

This perversion of overall sentencing "proportionality" has had an impact. Sentence lengths for economic crime offenses have risen dramatically and particularly for high-end loss crimes, because – like the drug guidelines that Senator Biden asked the Commission to emulate, which are based on drug quantities – the fraud guideline is dominated by the loss table, which increases with the amount of loss or intended loss.[119] Sentences for serious fraud offenses increased from an average of eighty-nine months in 2004 to 123 months in 2011.[120]

This sentence escalation has attracted a lot of attention. One judge commented that "we now have an advisory guideline[] regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guideline calculation either calling for or approaching lifetime imprisonment."[121] Professor Frank Bowman, a former federal prosecutor, concluded that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and common sense."[122] The result is counterproductive as judges

---

118. *Id.* (citing 149 Cong. Rec. S5328 (daily ed. Apr. 11, 2003) (statement of Senator Joseph Biden)).

119. David Debold & Matthew Benjamin, *"Losing Ground" in Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141, 142 (2011).

120. *The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker*: *Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 5-6 (Testimony of James E. Felman on Behalf of the American Bar Association) (2011), *available at* http://judiciary.house.gov/hearings/pdf/Felman%2010112011.pdf.

121. U.S. v. Parris, 573 F.Supp.2d 744, 754 (E.D.N.Y. 2008).

122. Frank O. Bowman, *Sacrificial Felon: Life Sentences for Marquee White Collar Criminals Don't Make Sense*, AM. LAW., Jan 2007, at 63.

vote with their variances[123] from the guidelines and express themselves in scathing opinions calling the guidelines "patently absurd on their face,"[124] "a black stain on common sense,"[125] and, ultimately, "of no help."[126]

D. The Threat of New Mandatory Minimums or Mandatory Guidelines

In recent years, the DOJ and some members of Congress have suggested that Congress adopt new mandatory minimums in order to ensure that sentences – especially in the economic crime arena, where variances have increased – be stabilized. Testifying before the Commission about mandatory minimums in 2010, the DOJ acknowledged the "heavy price" extracted by mandatory minimums, decried the growth in the BOP, but then announced it was carefully considering asking Congress to impose new mandatory sentences for certain white collar offenses.[127] A few months later, the U.S. Attorney for the Southern District of New York, Preet Bharara, also endorsed the idea of so-called "modest mandatory minimums," stating that "there are not that many mandatory minimums in the white collar context. Perhaps there should be."[128] By September 2011, the DOJ reiterated its call for a review but appeared to have abandoned its concern that white collar sentencing practices require mandatory sentences, calling instead for specific enhancements in key areas.[129] Meanwhile, in early 2011, Senator Charles Grassley urged Congress to revisit the advisory nature of the sentencing guidelines, decrying variances in economic crime sentencing and raising the alarm:

---

123. The average minimum sentenced called for in the fraud guideline has more than doubled since 1996, and judges have responded by reducing fraud sentences on average 52.8% below the guideline minimum (the largest judge-led reductions for any guideline offense). *See* U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 67, 92 (2012) *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congress-ional_Testimony_ and_Reports/Booker_Reports/2012_Booker/index.cfm.

124. United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006).

125. *Parris*, 573 F. Supp. 2d at 754.

126. United States v. Watt, 707 F. Supp. 2d 149, 151 (D. Mass. 2010).

127. *Mandatory Minimums: Hearing Before the U.S. Sentencing Comm'n*, 111th Cong. 24, 26-27 (May 27, 2010) (Testimony of Sally Quillian Yates on behalf of the Department of Justice), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Hearing_Transcript.pdf.

128. Proposed Amendments to the Federal Sentencing Guidelines, United States Sentencing Commission, 111th Cong. 60 (February 16, 2011) (Testimony of Preet Bharara), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Hearing_Transcript.pdf.

129. Letter from Lanny A. Breuer, Asst. Att'y Gen., U.S. Dep't of J. and Jonathan J. Wroblewski, Dir., Office of Policy & Legis., to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 6 (Sept. 2, 2011), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/USDOJ-Annual-Letter-2011.pdf.

> [C]riminal fraud will not be adequately deterred unless we revisit the Supreme Court's decision in *United States v. Booker*. . . . Now that the Guidelines have been held to be merely advisory, the disparity and unfairness in judicially imposed sentences that we sought to eliminate on a bipartisan basis are returning, especially in two areas: child pornography and fraud cases of the type we are discussing today. If potential fraudsters view the lenient sentences now being handed down as merely a cost of doing business, efforts to combat criminal fraud could be undermined.[130]

The Commission is very sensitive to signals from the DOJ and Congress and, to some extent, sees its role as ensuring that guideline sentences are appropriately severe so that they will secure approval from Congress, which can disapprove a guideline amendment. Congress has indicated its interest in severity either by directly amending the guidelines, as it did with the PROTECT Act of 2003,[131] or directing the Commission to do so.[132]

VI. PROPORTIONATE SENTENCES ARE SHORTER AND SAFER SENTENCES

Tackling over-incarceration could be a relatively straightforward task. Indeed, there have been a variety of proposals over the years to lessen the pressure on the federal prison population by designing mechanisms aimed at releasing some prisoners early.[133] However, these mechanisms have not gained traction. While such efforts to secure these so-called "back-end fixes" are commendable, unless we abate the flow of prisoners into the system at the

130. *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Sen. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary).

131. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub.L. 108–21, 117 Stat. 650 (codified as amended in scattered section of 18 U.S.C., 28 U.S.C., & 42 U.S.C.) Section 104 of the PROTECT Act included a directive to the Commission to amend the guidelines to include specified enhancements.

132. NATIONAL FEDERAL DEFENDER RESOURCE COUNSEL, CONGRESSIONAL DIRECTIVES TO THE SENTENCING COMMISSION, 1988 – 2013 1 (Nov. 2013), *available at* http://www.fd.org/docs/select-topics---sentencing/SRC-directives-Table-November-2011.pdf.

133. *See, e.g.*, The Second Chance Reauthorization Act of 2011, S. 1231, 112th Cong. § 4 (providing for increased *good time and earned good time credits*); *see also* The Literacy, Education and Rehabilitation Act, H.R. 3602, 109th Cong. (2005) (providing for credit toward completion of sentence for prisoners participating in programming); The Federal Prison Bureau Nonviolent Offender Relief Act of 2013, H.R. 62, 113th Cong. (providing for release after 50% of the sentence served for eligible prisoners).

front end and address the length of time they are sentenced to serve, we are simply bailing out the overflowing bathtub without turning off the tap.

However straightforward, tackling the over-incarceration problem will require a paradigm shift by lawmakers. Since the mid-1980s, our criminal justice approach has been to incarcerate our way to safety. Over the years, observers have criticized mandatory sentencing schemes as unjust, ineffective, harmful to communities and families, expensive, and rife with unintended consequences.[134] A number of experts have examined the impact that lowering prison terms and diverting some low-level prisoners away from incarceration might have on public safety. They found that shortening the length of time prisoners serve and the rate at which they are released does not bear on the likelihood of recidivism.[135] In other words, according to criminal justice experts we can shorten prison sentences without compromising public safety.[136] Today, however, we are at a new juncture; unless we reduce the number of people in prison, our addiction to incarceration could endanger public safety.[137]

Fortunately, "reducing mass incarceration is conceptually simple: We need to send fewer people to prison and for shorter lengths of time."[138] While lawmakers have some control over how many people are sent to prison, that control is rather indirect; it stems from the number and nature of the criminal laws Congress passes or repeals. On the other hand, Congress has a much more direct path to addressing mass incarceration: addressing the sentences called for when our laws are broken. Certainly Congress could reduce or even eliminate all mandatory minimum sentences and direct the Commission to amend the guidelines to make corresponding changes. Such dramatic legislation would undoubtedly result in lower sentences because judges would be able to use the advisory guideline system to fashion individualized, proportionate sentences.

We know that requiring proportionate sentences frequently leads to shorter sentences. Given the opportunity to fashion a sentence based not only on the offense and aggravating circumstances but also on an individual's characteristics and influences, judges tend to impose lower sentences. For example, consider the federal safety valve; champions of the five- and ten-year mandatory minimums for drug crimes intended that they be imposed on "major" and "serious" drug traffickers:

---

134. *See* 1991 MANDATORY MINIMUM REPORT, *supra* note 8, at 90-110 (summarizing views, litigation and resolutions); 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 90-104 (the same), Appendix J (summarizing testimony to Commission).

135. *See, e.g.*, Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 309-11 (2009).

136. *Id.*

137. *See, supra* notes 65-73 and accompanying text.

138. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 297 (2013).

> For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years . . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to jail – a minimum of 5 years for the first offense.[139]

Following the enactment of drug-related mandatory minimum sentences in the mid-1980s, it became apparent that the harsh, one-size-fits-all sentences for drug offenders reached well beyond the "major" and "serious" drug traffickers their champions cited. The Commission reported to Congress in 1991 that the mandatory minimums did a poor job of meeting the expectations that prompted them.[140] One particular criticism addressed the failure of the sentences to distinguish culpability or to guarantee proportional sentences:

> By requiring the same sentence for defendants who are markedly dissimilar in their level of participation in the offense and in objective indications of post-offense reform, these mandatory minimum provisions . . . short-circuit the guidelines' design of implementing sentences that seek to be proportional to the defendant's level of culpability and need for punishment.[141]

The release of the Commission's report prompted Congress to rethink the reach of drug-related mandatory minimums. While the Senate debated a harsh new crime bill to ensure life sentences for certain offenders, increase penalties for use of a firearm in commission of a drug trafficking crime, and implement other tough on crime measures, Republican Senator Orrin Hatch discussed amending the criminal code to ensure some flexibility in sentencing for first-time offenders:

> I have talked with judges all over this country, and they have all indicated to me, most all have indicated to me – and I do not know of any

139. U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 6-7 (2002) (quoting 132 CONG. REC. 27,193-94 (Sept. 30, 1986) (statement of Sen. Robert Byrd)) *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf; *see also id.* at 7 n.21 (citing 132 CONG. REC. 22, 993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

140. 1991 MANDATORY MINIMUM REPORT, *supra* note 8, at 33-34.

141. *Id.* at 28.

> objections – that they need more flexibility in some of these cases because the mandatory minimums are resulting in injustices. So this amendment will bring a greater measure of credibility to our criminal justice system. I can think of no issue more vital to our national interest than the control of drug abuse and violent crime. The Hatch amendment, which, of course, includes the Gramm amendments, will help restore credibility in our criminal justice system by ensuring that violent offenders and recidivists will face enhanced mandatory minimum sentences, by returning a measured degree of discretion to the courts in cases involving first-time, nonviolent drug offenders.[142]

Congress adopted a safety valve very similar to the one proposed by Senator Hatch in 1994. It applies in drug trafficking cases only and directs the court to waive the mandatory minimum sentence if the court finds the defendant meets certain statutory criteria.[143] At least 80,000 defendants have benefitted from this safety valve since its adoption.[144]

The safety valve directs judges to use the advisory guidelines to impose a sentence. As discussed in Part II above, sentencing under the advisory guidelines involves not only a calculation of the applicable guideline sentence, but also a comprehensive and individualized inquiry into the nature of the offense, the characteristics and history of the defendant, and the imposition of a sentence no greater than necessary. In other words, once freed from the grip of mandatory sentencing, judges are obliged to conduct an individualized inquiry, resulting in a sentence proportioned to both the offense and offender.

Such proportionality saves money and bed spaces. In 2010 alone, of the 15,257 people convicted of a drug offense carrying a mandatory minimum sentence, 5,539 received the safety valve.[145] That year, defendants who remained subject to the mandatory minimum and did not receive the benefit of the safety valve – or a substantial assistance motion by the

---

142. 139 Cong. Rec. S 15257, 1993 WL 455658 (Nov. 8, 1993) (statement of Senator Orrin Hatch) [hereinafter Hatch Statement].

143. 18 U.S.C. § 3553(f) (stating that the court may waive the mandatory minimum and sentence the defendant using the federal Sentencing Guidelines if it finds that the defendant has no or very limited criminal history; did not use or threaten violence or possess a firearm; that the offense did not result in death or serious bodily injury; that the defendant was not the organizer or leader and the defendant truthfully provided the government all information concerning the offense or related offenses).

144. FAMILIES AGAINST MANDATORY MINIMUMS, SAFETY VALVES IN A NUTSHELL 2 (July 7, 2012), *available at* http://www.famm.org/Repository/Files/FS%20Safety%20valves%20in%20a%20nutshell%206.27.12.pdf.

145. Request for Public Comment, *supra* note 51, at 7 (citing U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 113 tbl.44 (2010) [hereinafter 2010 SOURCEBOOK], *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table44.pdf).

prosecutor[146] – were sentenced to an average of 132 months.[147] In contrast, defendants who received safety valve relief received average sentences of forty-nine months,[148] an eighty-three month difference. What is unknowable from the available statistics is what sentence those 5,539 safety valve defendants would have received had they not been safety valve eligible. We can expect that they would have been sentenced to terms shorter than the 132 month average. This is because defendants eligible for the safety valve are less culpable than other defendants and, while they would have been subject to the mandatory minimum, their sentences would not have been enhanced for possession of weapons, significant criminal history, or for being a leader or organizer.[149] In other words, more culpable defendants are not eligible for the safety valve and are thus are more likely on average to receive higher sentences, enhanced even above the applicable mandatory minimum.

That said, the savings in bed space and money cannot help but be significant.[150] Assuming those 5,539 defendants saw their sentences reduced by only twelve months from the otherwise applicable mandatory minimum, the overall savings is 5,539 prison years.[151] Today, it costs the BOP on average $28,893.40 per year to incarcerate a federal prisoner.[152] The BOP estimates, however, that because many of the costs of housing prisoners are fixed costs related to maintain facilities, the average savings of decreasing a prison population by a single prisoner is $10,362.[153] Using that figure, the safety valve savings generated in 2010 would be at least $57,400,657. Unfortunately, the safety valve only applies to drug defendants and only to a subset of those who meet the narrow criteria.

Similarly, lowering mandatory minimums reduces time in prison. The enactment of the Fair Sentencing Act of 2010 (FSA)[154] affected both sentence length and the number of people subject to mandatory minimums for crack cocaine. The reform raised the triggering quantities for crack cocaine mandatory minimums from five grams to twenty-eight grams for the five-year mandatory minimum and from fifty grams to 280 grams for the ten-year penalty.[155] In 2012, the 3,388 defendants sentenced for crack cocaine received average sentences of ninety-seven months, which is fourteen months shorter

146. See 18 U.S.C. § 3553(e).

147. Request for Public Comment, *supra* note 51, at 7 (citing 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 161).

148. *Id*. (citing 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 161).

149. *Id*. (citing 2011 MANDATORY MINIMUM REPORT, *supra* note 4, at 137).

150. *Id.*

151. *Id.* at 8.

152. *Id*. (citing Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711-02 (Mar. 18, 2013)).

153. Samuels, et al. *supra* note 105 at 13.

154. Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

155. *Id*.

than the pre-FSA crack sentences.[156] Savings generated that year were $40,362,425.

Lowering crack cocaine sentences and raising the triggering quantities for the mandatory minimums has also had an impact on the number of people entering federal prison. In 2007, the Sentencing Commission reduced all crack cocaine guideline sentences by two levels and starting in 2008 the number of people prosecuted for crack cocaine offenses began to fall.[157] The FSA continued the trend, exerting what seems to have been a calming effect on crack cocaine prosecutions. While the number of people sentenced for all other drug offenses has risen since 2010,[158] the number of individuals prosecuted for crack cocaine offenses fell. While judges sentenced 4,742 defendants for crack cocaine offenses in FY 2010, by 2012 the number had fallen to 3,388.[159] That is a 31% drop in successful crack cocaine prosecutions and represents $14,031,502 that we will not spend incarcerating low level crack cocaine offenders this year alone. While there could have been a 30% drop in crack cocaine trafficking over those two years, it appears more likely that removing the incentive for prosecutors to go after such low-hanging fruit means they are redirected to more serious offenders, or at least to those drug offenders still generating lengthy sentences.

VII. WINNING OVER THE SKEPTICS: PROPORTIONALITY AND THE OLD TOUGH ON CRIME CROWD

Mandatory minimum reform will not succeed unless it is bipartisan. In these highly partisan times that sounds like a very tall order; however, both the safety valve adopted in 1994 and the FSA enjoyed bipartisan support. The FSA originated in the Senate and its original sponsors were Senator Dick Durbin, a Democrat from Illinois, and Republican Senator Jeff Sessions of Alabama. The bill passed in the Senate by unanimous consent and passed in

156. 2012 SOURCEBOOK, *supra* note 91, at fig. J, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureJ.pdf.

157 U.S. SENTENCING COMM'N, ANALYSIS OF DRUG TRAFFICKING OFFENDERS, Fig. 2 (Jan. 2014) *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20140109/Data-Presentation.pdf.

158. *Compare* 2010 SOURCEBOOK, *supra* note 145, at fig. J, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureJ.pdf, *with* 2012 SOURCEBOOK, *supra* note 91, at fig. J, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureJ.pdf.

159. *Compare* 2010 SOURCEBOOK, *supra* note 145, at fig. J, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureJ.pdf, *with* 2012 SOURCEBOOK, *supra* note 91, at fig. J, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureJ.pdf.

the House on a voice vote.[160] Senator Hatch was key to ensuring the introduction and passage of the safety valve in 1994. Admittedly, neither the FSA nor the safety valve was prompted by concerns about mass incarceration, if transcripts of sponsor statements and floor speeches are any indication of what motivated sponsors and supporters,[161] but both have had a profound impact on the ability of judges to assess more proportionate sentences.

Those who have been working for sentencing reform for many years have a lot to feel optimistic about in the present political climate due to new partners from an unexpected quarter. There is a vibrant conservative movement for criminal justice reform.[162] From the Heritage Foundation to the American Legislative Exchange Council, leaders of conservative thought and action are taking up criminal justice reform.[163] Conservative activist Eli Lehrer calls this development "the most important social reform movement on the right since the rise of the pro-life movement of the 1970s."[164]

The movement drew motivation from creative work in red states where prisons were bloated by years of tough-on-crime policies and where budgets were blasted by the financial crisis.[165] A number of those states have taken steps to cut spending on prisons.[166] The new movement spawned "a sea change in conservative thinking" among "political leaders with rock-solid conservative credentials."[167]

Republican lawmakers and governors who once favored long sentences to control crime in states such as Texas, Georgia, Ohio, Kentucky, South Carolina, and South Dakota are now leading a charge to "replace

160. *See* S. 1789, Bill Summary and Status, Major Congressional Actions, 111th Cong. (noting unanimous consent and the bi-partisan list of co-sponsors), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01789:@@@R.

161. *See* Hatch Statement, *supra* note 142 (remarks of Sen. Orrin Hatch introducing Safety Valve amendment); *see also* CONG. REC., 111th Cong. H 6202 (July 28, 2010), a*vailable at* http://thomas.loc.gov/cgi-bin/query/F?r111:7:./temp/~r111M9 LunZ:e60208 (statement of Rep. Dan Lungren who noted, "Certainly, one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue. When African Americans, low-level crack defendants, represent ten times the number of low-level white crack defendants, I don't think we can simply close our eyes.").

162. Request for Public Comment, *supra* note 51, at 5.

163. *Id.*

164. *Id.* (citing Neil King, Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus*, WALL STREET J., June 21, 2013, at A1, *available at* http://online.wsj.com/news/articles/SB10001424127887323836504578551902602217018).

165. King, *supra* note 164.

166. *Id.*

167. Eli Lehrer, *The Party of Prison Reform: Conservatives Lead the Way*, THE WKLY. STANDARD (March 18, 2013) http://staging.weeklystandard.com/print/articles/party-prison-reform_706676.html.

tough-on-crime dictums of the 1990s with a more forgiving and nuanced set of laws."[168] Over half of the nation's states have begun to overhaul their criminal justice systems and the majority of those states are Republican-led.[169] This movement is producing results; according to the DOJ, state prison populations continued the decline begun in 2010 after peaking in 2009 at 1.4 million.[170]

Born of concerns over the excessive cost of incarceration, this movement grafts traditional conservative principles and language onto a new approach to criminal justice. Richard Viguerie, perhaps best known as the father of conservative direct mail fundraising, identifies the prison population crisis as symptomatic of errant big government, long a target of traditional conservatives.[171] He argues that criminal justice spending ought to be subject to the same level of scrutiny as other government spending programs that conservatives like to decry.[172] Viguerie does not stop there; prisons, he says, harm families and prisoners – people who are deserving of compassion – while turning out prisoners who are more harmful to society for their stay.[173] He further states that three principles: "public safety, compassion and controlled government spending – lie at the core of conservative philosophy."[174]

Meanwhile, the conservative organization Right on Crime brings together the cream of the crop in an effort to rethink and reshape approaches to crime and punishment.[175] Right on Crime is the brainchild of the Texas Public Policy Foundation, a conservative think tank that led the successful effort to stem the increase in prison construction in Texas starting in 2007,[176] which many saw as the kick-off to state-led campaigns to stabilize or reduce incarceration rates.[177] Right on Crime's organizing principles are:

---

168. King, *supra* note 164.

169. *Id.*; *see also* FAMILIES AGAINST MANDATORY MINIMUMS, TURNING OFF THE SPIGOT: HOW SENTENCING SAFETY VALVES CAN HELP STATES PROTECT PUBLIC SAFETY AND SAVE MONEY 13-18 (2013), *available at* http://www.famm.org/Repository/Files/Turning%20Off%20the%20Spigot%20web%20final.pdf (cataloguing state safety valve statutes).

170. E. ANNE CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011 2 (2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf.

171. Richard A. Viguerie, *A Conservative Case for Prison Reform*, N.Y. TIMES, June 10, 2013, at A23, *available at* http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html.

172. *Id.*

173. *Id.*

174. *Id.*

175. King, *supra* note 164.

176. *See id.*

177. *See id.*; *see also* Viguerie, *supra* note 171.

> grounded in time-tested conservative truths – constitutionally limited government, transparency, individual liberty, personal responsibility, free enterprise, and the centrality of the family and community. All of these are critical to addressing today's criminal justice challenges. It is time to apply these principles to the task of delivering a better return on taxpayers' investments in public safety. Our security, prosperity, and freedom depend on it.[178]

The tough-on-crime narrative is giving way to a more thoughtful, responsible approach to crime and punishment. Mark Levin, policy director for Right on Crime, reflected recently that "[w]e don't say conservatives were wrong in the 1980s and 1990s when they said 'We need more prisons,' . . . . But as we expanded incarceration, we've swept in a lot of low-risk offenders and spent a lot of money."[179] As conservatives find their footing in this new arena, they are beginning to make common cause with traditional criminal justice and prison reform supporters. Noting this momentum, Michael Gerson, formerly of the Bush White House, welcomes the "odd, ideological coalition that favors reform."[180] It includes liberals, libertarians, and evangelicals, coming together to address what Gerson calls the "Hoover Dam of American social engineering: mass incarceration."[181]

This movement identifies with the growing sentiment to address the dual problems of over-federalization of crimes and over-criminalization of conduct. This concern reaches from the advocacy community to Capitol Hill. In the advocacy community, right-left coalitions such as the Heritage Foundation's Overcriminalization Working Group – which includes such heretofore odd bedfellows as the Federalist Society, the American Civil Liberties Union, FAMM, and the Cato Institute – meet monthly to share news and strategies to lessen the criminalization of conduct.[182] Meanwhile, on Capitol Hill a Republican-Democrat task force in the House of Representatives has held hearings to help the members sort out and grapple with the inordinate number of crimes on the books and the tens of thousands of criminalized regulatory of-

178. *Statement of Principles*, RIGHT ON CRIME, http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/ (last visited Nov. 9, 2013).

179. Lehrer, *supra* note 167.

180. Michael Gerson, Op-Ed., *Mass Incarceration's Tragic Success*, WASH. POST, June 28, 2013, at A19, *available at* http://www.washingtonpost.com/opinions/michael-gerson-mass-incarcerations-tragic-success/2013/06/27/7eb62518-df5b-11e2-b2d4-ea6d8f477a01_story.html.

181. *Id.*

182. *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (June 14, 2012), *available at* http://www.heritage.org/research/testimony/2013/06/defining-the-problem-and-scope-of-overcriminalization-and-overfederalization (statement of John G. Malcolm, discussing, inter alia, the Heritage Foundation's Over-criminalization Working Group).

fenses.[183] The task force is housed in the House Judiciary Committee, which has the reputation of being among the most bitterly partisan committees on the Hill. The problem of harsh sentencing is inextricably linked with over-federalization and over-incarceration.[184] The link is simple: at the other end of every unnecessary federal criminal law is a federal criminal sentence, and most of those sentences result in incarceration. Only 7.1% of the 83,443 people sentenced for a federal crime in 2012 received a sentence of straight probation;[185] of the remainder, 87.2% were sentenced to prison only.[186]

Fortunately, nationally known conservatives are identifying mandatory minimums as a key criminal justice problem that the reform movement should embrace. David Keene, former president of the National Rifle Association, observed: "Federal mandatory minimum laws are especially problematic. Not only do they transfer power from independent courts to a political executive [prosecutors], they also perpetuate the harmful trend of federalizing criminal activity that can better be prosecuted at the state level."[187] Conservative commentator Eli J. Lehrer, leader of a free-market think tank and former Heritage Foundation fellow and speechwriter to Senator Bill Frist,[188] attributes the current low crime rate to incarceration policies. But in a recent piece, he sounded an alarm about the costs of these policies:

> Effective though mass incarceration is, however, the strategy is not without its costs. These costs can be measured in fiscal terms, in the failure of imprisonment to prevent certain repeat behavior, in the impact of incarceration on certain communities, and in the tension between high incarceration rates and democratic values.[189]

He advocates for sharply shortened but swiftly applied mandatory minimum sentences, combined with substance abuse treatment and compelled work in harsh, but humane, settings.[190]

The principle and practice of proportionate sentencing should inform any legislative reform in this area. Proportionality can be an essential tool to ensure that prisons and lengthy terms of incarceration are reserved for those

183. *See id.* (additional statements are available at http://judiciary.house.gov/hearings/113th/hear_06142013.html).

184. *See* Luna & Cassell, *supra* note 49, at 24.

185. 2012 SOURCEBOOK, *supra* note 91, at tbl. 12, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table12.pdf.

186. *Id.*

187. Keene, *supra* note 72.

188. *Eli Lehrer*, R STREET, http://www.rstreet.org/about/staff/eli-lehrer/.

189. Eli J. Lehrer, *Responsible Prison Reform*, NAT'L AFFAIRS (June 28, 2010), *available at* http://www.nationalaffairs.com/publications/detail/responsible-prison-reform.

190. *Id.*

offenders who deserve them. Proportionality also serves conservative values of restraint in public spending and in restricting liberty by selecting for shorter sentences people who do not need to serve longer ones by virtue of their culpability. Providing for proportionality can help ensure that prisons are not filled with people who do not need to be there, and that funds are reserved for catching, prosecuting, and incarcerating the people who do need to be there.

VIII. PROPORTIONALITY AND MANDATORY MINIMUM REFORM

While criminal justice reform swirls around the country, the federal prison system continues to grow and sentencing reform enjoys unprecedented bipartisan support. Such reform will become necessary if the public safety threats of federal over-incarceration are to be averted. Mandatory minimum sentencing must be part of the reform agenda and, short of repeal, helping judges bypass those sentences in favor of ones better tailored to culpability is a good start.

The Commission advocates for limited mandatory minimum reforms, including safety valves, in its most recent report to Congress on the subject. The recommendations include, among others: (1) expanding the current safety valve so that it covers a few more drug offenders, and expanding it to provide relief to low-level, non-violent offenders subject to mandatory minimums for other offenses; (2) lowering the mandatory sentence for two- and three-strike drug offenses; (3) lowering the twenty-five-year enhanced penalty for second and subsequent convictions for possession of a firearm in connection with a drug trafficking offense under 18 U.S.C. § 924(c), and ensuring that they are imposed only for prior convictions; and (4) giving judges discretion to avoid stacking § 924(c) sentences.[191]

In what is a sign-of-the-times development in right-left support for criminal justice reform, bipartisan bills have been introduced in the House of Representatives[192] and the Senate.[193] One such bill, the Justice Safety Valve Act of 2013, would enable the court to waive the mandatory minimum sentence if it did not meet the purposes of punishment outlined at 18 U.S.C. § 3553(a).[194] Senator Patrick Leahy of Vermont, one of the Senate's most liberal members and an ardent opponent of mandatory minimums, teamed up with Senator Rand Paul of Kentucky, one of the darlings of the Tea Party movement and also a strong opponent of mandatory sentencing. Together, they are working to transform sentencing and are the bill's chief Senate co-sponsors.[195]

191. Luna & Cassell, *supra* note 49, at 54, 80-81.

192. Justice Safety Valve Act of 2013, H.R. 1695 (2013).

193. Justice Safety Valve Act of 2013, S. 619 (2013).

194. *See* FAMILIES AGAINST MANDATORY MINIMUMS, THE PAUL-LEAHY "JUSTICE SAFETY VALVE ACT OF 2013" S. 619 3 (2013), *available at* http://famm.org/Repository/Files/Justice%20Safety%20Valve%20Act%20Primer%20S.%20619.pdf.

195. *See* Patrick Leahy & Rand Paul, Op-Ed, *Join Us to Do Away with Mandatory Minimums*, U.S. NEWS, Aug. 15, 2013, *available at* http://www.usnews.com/debate-

In an elegant symmetry, the liberal *New York Times* Editorial Board and conservative opinion leader George Will wrote in support of the bill. While the *New York Times* noted the bill's potential to eliminate one-size-fits-all sentencing,[196] Will pointed out that "Paul says mandatory minimum sentences, in the context of the proliferation of federal crimes, undermine federalism, the separation of powers and 'the bedrock principle that people should be treated as individuals.'"[197] Both commentaries correctly applaud the aim of the bill: to ensure that defendants are treated as individuals. Another bill, S. 1410 the Smarter Sentencing Act of 2013, would reduce many drug mandatory minimums, slightly expand the current safety valve, and make lower crack cocaine mandatory minimum sentences retroactive; the bill was introduced by another bipartisan pair of Senators, Mike Lee (R-UT) and Richard Durbin (D-IL).[198]

Congressional reformers gained an important new ally in mid-August when the Attorney General, Eric Holder, announced new charging policies designed to help ensure that mandatory minimum sentences for drug offenders would be reserved for violent and kingpin-level offenders.[199] The new policy is intended to change the DOJ's charging practices so that

> certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences. They now will be charged with offenses for which the accompanying sentences are better suited to their individual conduct, rather than excessive prison terms . . . .[200]

Holder concluded that promoting proportionate sentencing in this fashion would lead to "better . . . public safety, deterrence, and rehabilitation – while making our expenditures smarter and more productive."[201] Holder referred approvingly to the two bipartisan mandatory minimum reform bills then in

club/is-eric-holder-making-a-good-move-on-mandatory-minimums/rand-paul-and-patrick-leahy-congress-is-read-to-do-away-with-mandatory-minimums.

196. *Needed: A New Safety Valve*, N.Y. TIMES, at A20, June 23, 2013, *available at* http://www.nytimes.com/2013/06/24/opinion/needed-a-new-safety-valve.html?_r=0&hp=&adxnnl=1&adxnnlx=1372079871-z+f+tNeJYRdVFHVJUrqRyA.

197. George Will, *Seeking Sense on Sentencing*, CECILDAILY.COM (June 5, 2013, 4:00 AM) *available at* http://www.cecildaily.com/opinion/columns/article_864f11ee-cd82-11e2-9e27-0019bb2963f4.html.

198. Smarter Sentencing Act of 2013, S. 1410, 113th Congress (1st Sess. 2013) *available at* http://thomas.loc.gov/cgi-bin/query/z?c113:S.1410:.

199. *See* Eric Holder, *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates*, DEP'T OF JUSTICE (Aug. 12, 2013), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

200. *Id.*

201. *Id.*

play and pledged his support, and that of President Barack Obama, to advancing mandatory minimum reform.[202]

Shortly after Holder's speech, the chair of the Senate Judiciary Committee noticed a full committee hearing on the topic of mandatory minimum sentencing and, in a nod to the reform spirit sweeping conservative and Republican circles, called two Republicans to testify in support of reform.[203] Witnesses at the hearing clearly addressed the fiscal impact of sentencing, but also the human impact of sentences out of proportion to the offenses they punish. This wedding of practicality and proportionality bodes well for sentencing reform. The Smarter Sentencing Act passed the Senate Judiciary Committee with bi-partisan support on January 30, 2014.[204]

IX. CONCLUSION

Federal lawmakers should be, and increasingly appear to be, concerned about the threat to public safety of federal prison overcrowding, caused in part by mandatory minimum sentencing. They should also be concerned about the unfairness of disproportionate sentencing made necessary by mandatory minimums. Taking a page from the ringing endorsement of proportionality embodied in the Supreme Court's opinion in *Miller* and Congress's provision of individualized sentencing at 18 U.S.C. § 3553(a), and taking heart from the new bipartisan effort to address mass incarceration and its costs, Congress should take on the task of reforming mandatory minimum sentences. It appears more likely than ever that reform is precisely what many in Congress plan to do.

202. *Id.*

203. *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013), *available at* http://www.judiciary.senate.gov/hearings/hearing.cfm?id=d3ddc8eaa9b9f780d5af0a554e5fcf98.

204. Smarter Sentencing Act of 2013, S. 1410, 113th Congress (1st Sess. 2013), *available at* http://thomas.loc.gov/cgi-bin/query/z?c113:S.1410:.